MUNICIPAL LAW NOTES

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Happy summer break munici“pals,”

This edition features a new section dedicated to smaller, finite issues presented in cases which do not focus on municipal operations as a subject matter, but that still may be of use to you in your practice. There seem to be quite a few land use and immunity cases working their way through the courts at the moment, which fits a general trend of the courts visiting different areas of the law in periodic spurts. So, where will the state courts go next? We would love to hear from you if you have thoughts on what area of municipal law is overdue for attention from our courts, or perhaps where you see that recent legislative changes could give rise to shifting interpretations during appeal. This will assist the League in identifying cases where we can intercede to ensure the statewide, pro-municipal viewpoint is represented in those discussions. We look forward to hearing from you!

Sincerely,

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Taxes

Court of Appeals sides with county assessor in removing property tax forbearance

*In re Trade Land Co., LLC, No. COA 24-884, 2025 N.C. App. LEXIS 328 * (2025)*. Get this: if you're a farmer out there working the soil, harvesting lumber, or raising hogs on land that you own, you can apply to have your land assessed based on its present use value ("PUV"). This results in a lower property tax burden than if the assessor used the land's fair market value, the value applied to most other land according to N.C.G.S. § 105-283. The difference between the two assessments can be deferred so long as the land continues to be used for that agricultural purpose; and only the preceding three years of deferred taxes are due if the use stops. N.C.G.S. § 105-277.4(c). But what if your family, long steeped in the agrarian spirit of our state, put all of its land in an LLC for any of the myriad reasons for doing so? Well, that is fine too, as long as farming or forestry is the primary business of the LLC. Enter Trade Land Co., LLC. This father-and-sons venture owned 47 parcels across Pitt County, 11 of which were qualified as tax-deferred by Pitt County's tax assessor between 2018 and 2021. Then, a new proverbial sheriff came to town.

In 2022, the county appointed a new tax assessor. The tax assessor took a closer look at the tax-deferred parcels when the LLC went to sell a portion of the land. He discovered that while the 11 parcels were indeed being used for acceptable purposes under the statute, the LLC owner itself was in the real estate business, not farming. This meant that the parcels did not qualify for assessment at their PUV because N.C.G.S. § 105-277.2(4)(b)(1) requires that, if the landowner is a business, that business be primarily engaged in the activities the statute was designed to relieve: agriculture, horticulture, and forestry. The county informed the LLC of its decision to end deferment of a portion of its property tax bill, which was followed shortly by an email from the tax assessor explaining the appeal process. A member of the LLC showed up at the December 12, 2022 meeting of the Pitt County Board of Equalization and Review to contest the tax assessor's findings. The Board affirmed the tax assessor's determination after hearing evidence from the LLC and the county. The next stop was the North Carolina Property Tax Commission, where the LLC argued that it had not been provided proper notice of the county's reassessment as provided under N.C.G.S. § 105-296(i), part of the larger procedural warren of the Machinery Act. The Commission held that the tax was valid and due because N.C.G.S. § 105-394 rendered any lack of notice an "immaterial irregularity." But even if lack of notice of the county's change in position was material to the ripeness of the underlying property tax determination, the Commission found that the LLC had been provided ample notice here.

The LLC appealed to the Court of Appeals, arguing again that the county failed to provide notice "prior to the first meeting of the board of equalization and review" as required by § 105-296(i) whenever a tax assessor changed the appraisal or assessment of a property. The

“immaterial irregularity” language of § 105-394 relied on by the state’s Property Tax Commission had been held unconstitutional by the North Carolina Supreme Court in Henderson Cnty v. Osteen, 292 N.C. 692 (1977), according to the LLC. These arguments found no harbor with the Court.

First, the Court reasoned that the notice requirements of § 105-296(i) did not even apply to situations where a PUV tax deferral had been revoked because this was neither a reappraisal or reassessment of the property. The county never changed its valuation of the property, nor did the county reassess the amount of taxes due. This was evident from the fact that the county had to appraise and assess the property to determine exactly how much of the tax should be deferred under the program in the first place. Said another way, the county had already appraised the property resulting in the true value of the property, and had already assessed the property at both that true value and its PUV to arrive at the difference that would be deferred until the land no longer qualified for a deferral. Instead of completing a reassessment, the county was ending the deferment of the taxes and making them due under a process that would not make sense to be tied to the “first meeting of the board” as contemplated by § 105-296(i). After all, the determination that a property no longer qualified for deferral of taxes under the PUV program could happen at any time of the year, not just during the octennial reappraisal or annual assessment process that occurs prior to the first meeting of the board of equalization and review.

While the Court did not discuss this part of that statute, § 105-296(j) lends further credence to divorcing a deferment decision from the notice requirements of the preceding subsection. Subsection (j) requires the assessor to conduct rolling reviews of properties levied on their PUV, and authorizes the assessor to demand certain information from a property’s owner. If a property owner fails to submit the requested information within sixty days, the property loses its PUV privilege and the deferred taxes become immediately due, just as § 105-277.4(c) instructs under the present facts. Do not pass Go, do not collect $200. As if that was not complicated enough, if the property owner produces the requested information within sixty days after the PUV status is revoked, then the assessor reapplies the PUV status. Do you want another layer of complexity? If a PUV status is reinstated because the property owner produces the requested information, any of the now twice-deferred taxes paid by the property owner in the interim must be refunded. It would not make sense to tie this on-again, off-again process to the first meeting of the board of equalization and review. The lesson here is, if your client’s staff notices that a tax deferred property has recently changed uses, do not hesitate to reach out to the tax assessor immediately. The assessor can conduct a review at any time, and your client may be due a mid-year cash infusion.

Second, even if the notice requirements of § 105-296(i) did apply to ending a deferral of taxes under a PUV program, the LLC’s cited NC Supreme Court case did not render § 105-394 categorically unconstitutional. Osteen was an as-applied challenge in a situation where zero

notice or opportunity to be heard was afforded the property owners. Here, the LLC was complaining of the timing of notice that all parties agree was accomplished through a letter from the county and the tax assessor's follow-up email.

As the final nail in the coffin, the Court of Appeals held that the LLC's constitutional rights were vindicated by the notice, hearing, and appeal process employed here. The LLC was given written notice of the county's decision and the reasoning behind it, accompanied by the choice of two (or more) hearing dates. Through one of its members, the LLC chose to attend the first and presented evidence contesting the county's change of position. The LLC appealed the Board's decision to the Property Tax Commission, and then to the Court of Appeals, offering different arguments at each stop. And all the time conceding that the LLC in fact did not engage in a qualifying business under the statute. The Court affirmed the Property Tax Commission.

To support this conclusion to the case, the opinion includes a momentary dive into a few statutory definitions included in the Machinery Act. The Court parses the meaning of appraisal—which refers to ascertaining the true value of a property, a process which takes place at least every eight years under N.C.G.S. § 105-286—from assessment—which describes the process of arriving at the tax value of the property. The latter may track closely with the former because the tax value is also the fair market value. That is unless another law operates to adjust the value, as was the case here where a deferral of the taxes due on the difference between the true value and PUV resulted in an assessment far below the appraised value of the property. Other statutes can result in additional differences between the two numbers, such as § 105-277(g) which artificially reduces the value of any solar-powered heating or cooling systems when valuing the property as a whole, thus reducing the tax value in relation to the market value. Under the PUV valuation statutes, the county appraises each property for both the true and reduced values. N.C.G.S. § 105-277.6(b). In reaching its conclusion, the opinion suggests that this results in two parallel assessments: one each of the PUV and market value of the property. Regardless, as N.C.G.S. § 105-277.4(c) makes clear, the taxes due on the difference are still legitimate taxes levied against the property, and are still considered a lien on the property notwithstanding their deferred status.

But what happens in the opposite of the case at bar, where a property owner applies for deferral but is initially denied by the county? The property owner can pay what they claim to be deferred taxes and still have potentially five years to demand a refund under N.C.G.S. § 105-381(a). If any one of the tribunals involved here then determines that the county was wrong, does state law provide for a refund to the taxpayer? In challenging the county's refusal to defer taxes under a PUV valuation, the property owner must assert a "valid defense" under § 105-381(a)(1): that the tax was imposed illegally or through clerical error, or was levied for an illegal purpose. Unless another statute specifically provides otherwise like in N.C.G.S. § 105-296(j) discussed above, these are the only instances where a property tax refund can be processed.

When a taxpayer claims a general refund is due, our state courts differentiate between taxes imposed without authority, and thus illegally, from taxes imposed through an error in judgement. Redevelopment Comm. of High Point v. Guildford County, 274 N.C. 585, 589 (1968) (limited on other grounds by In re Univ. of N.C., 300 N.C. 563 (1980)). And any mistakes which a taxpayer claims resulted in an incorrect tax bill have to be just that: mistakes, and only those of a clerical nature to boot. Ammons v. Wake Cnty., 127 N.C. App. 426, 429-30 (1997). Therefore, a tax assessor that disqualifies a property from deferring a portion of an otherwise valid tax is not making a clerical mistake or levying an illegal tax, but is making an error of judgement. I do not believe a refund would be allowed.

Land Use and Zoning

State Supreme Court discusses when a permit application is considered complete for purposes of triggering our permit choice statutes

Ashe Cnty. v. Ashe Cnty. Plan. Bd., 387 N.C. 159 (2025). *Ashe County enacted a polluting* industries development ("PID") ordinance. The ordinance required a permit from the county's planning department to build an asphalt plant, and imposed a number of special conditions on its situs and operation. An asphalt company submitted a 158-page application for a PID permit from the county to begin nestling a new production plant next to an existing rock quarry. Initial reports looked good: the county's planning director reported to the site and opined that everything seemed to comply with the county's PID ordinance except for the lack of a state permit, which had been applied for but not granted yet. Then public backlash began to mount, focused on the adverse impacts an asphalt plant could have on surrounding pastoral properties. The county planning staff issued a report deeming the application incomplete for lack of a state permit, and called for a moratorium to further study the impacts of the plant. The county enacted a year-long moratorium, and repealed the PID ordinance before replacing it with a stricter high impact land use ordinance. The asphalt company received the state permit which it immediately forwarded to the county, along with a request that the planning director rule on the original application. The county's planning director finally denied the permit for a few reasons. Most relevant here, the planning director cited the plant's proximity to existing buildings and claimed that the application was incomplete upon submission due to the lack of a state permit.

The full NC Supreme Court agreed to reverse the planning director's decision here, but it was a journey to reach this decision to say the least. First, the county's planning board reversed the director's denial of the PID permit, finding that the application was substantially complete even without the permit, and that the planning director had misinterpreted the plant's proximity to existing structures. The county petitioned the local trial court for certiorari, but the trial court

upheld the planning board's command that the permit issue. The Court of Appeals agreed, holding that a letter from the planning director which had opined that the application complied with setback requirements was binding on the county and helped entitle the asphalt company to the permit. But then the NC Supreme Court reversed the Court of Appeals on that issue in a victory for all municipalities whose planners may exude too much positive energy in their emails to developers from time to time. The letter from the planning director was not binding said the state's highest Court, and remanded for the Court of Appeals to consider the remaining issues. The Court of Appeals then ends up reversing the board's reversal of the planning director's denial, holding that company's application was incomplete until it had obtained the state permit. Thus, the planning director would have been without the authority to approve the application when it was finally complete due to the moratorium in place. Now we are finally back before the Supreme Court on the asphalt company's appeal.

Two issues germane to municipal land use practice receive a thorough look from the Court. First, when is a developer's permit "submitted" for the purposes of entitling the developer to reap the benefits of our state's permit choice statute? What does a "complete" application look like if a moratorium intercedes submission and disposition of the application? This statutory scheme is housed in N.C.G.S. § 160D-108, which in turn implicates N.C.G.S. § 143-755. When a developer submits an application for a development permit, and the government changes the rules between the submission of the application and a decision by the reviewing authority, the developer gets to choose which set of rules—the original in effect at the time of submission or the revised rules—applies to the government's review of their application. For this purpose, an application only needs to be submitted by the developer. But in what state? Here the waters were muddied by the introduction of the moratorium. The moratoria statute ensures that developers do not lose the benefits of the permit choice statute simply because a moratorium delays the government's review of their application. Unlike the permit choice statute itself, however, the moratoria statute requires submission of a "complete" application prior to the effective date of a moratoria in order to carry over the benefits of permit choice. The county argued, and the Court of Appeals agreed, that an application is complete when it is sufficient for the county to issue the permit. As such, a complete application would be one where the iterative process that normally occurs between a permitting authority and developer has wrapped up and the permit is "simply awaiting issuance." Ashe Cnty., 387 N.C. at 174. The Supreme Court rejected this, holding that an application was complete when "accepted by the permitting authority as adequate to begin permit compliance review." Id. at 159. The Court recognized that Chapter 160D contemplates, and indeed local practice demands, a process bookended by submission of an application and issuance of a permit. The space between those two points is permeated by a back and forth of questions from the government and responses from the applicant, refining the application to a state of more patent compliance with local land use regulations. It would not make sense that the completeness requirement in the moratoria statute referred to an application so complete that only permit issuance remained; that definition would render meaningless the permit choice safe harbor in the moratoria statute.

The Supreme Court does not stop there, acknowledging that Chapter 160D affords local governments the authority to determine for themselves whether an application is complete. Put another way, whatever criteria a local government establishes for a complete application, those criteria describe an application upon which the local government feels it can sufficiently commence review, not one that it would necessarily feel ready to act on. This highlights that the Court is not really defining a complete application, but announcing a bright line indication of completeness: when the local government accepts and begins review of the application. If information is missing from an application, the government can certainly make reasonable requests of an applicant to supplement. But this does not demote a complete application to an incomplete one, thus removing a developer's plans from the protection of our permit choice statute. That determination should be made when the file is submitted, not after discovering a dearth of detail or missing state permit. And if an application is approved in an identical state to its submission, that is by chance or thoroughness of the applicant, and not because a local government can equate a complete application to an application deserving of permit issuance. The Supreme Court compared the asphalt company's application against the PID ordinance, noting that the closest the ordinance came to requiring the issuance of all state permits was a prohibition against issuing a permit until all state permits were received. Having determined that completeness is established when the county started undertaking the review of the application, the county restricting itself from issuing a permit until all state permits were received had no bearing on whether the asphalt company's application was complete by the time the moratoria went into effect. With all other parts of the application present, the Supreme Court held that the application in this case was complete prior to the moratorium's effective date.

Your client probably wants to be in control of when an application is deemed complete and submitted, both to clearly define when an applicant receives the benefits of the permit choice statute and to stave off the ticking of any review clock until an application is in a position to cause the least strain on your planning department's resources. If that is the case, your client cannot rely simply on an application that requires an applicant to prove compliance with a development ordinance generally. Instead, the town should enact an ordinance which describes exactly what a complete application contains for each permit process, including the specific declarations and supporting documents needed from each applicant.

Turning to the second issue, what constitutes a commercial building when that term is left undefined by a development ordinance? The development ordinance at issue here imposed a setback requirement on the polluting operation of one thousand feet from any existing "commercial building." Commercial building was left undefined, of course. The County argued that the asphalt company's plans violated the setback requirement in relation to a mobile shed at an adjacent rock quarry and a barn on a nearby farm. Encountering an undefined term in the ordinance, the Supreme Court assigned each word its ordinary meaning. The Court instructed that any ambiguity in how the ordinary meaning applied in this context would be resolved in

favor of the asphalt company, in keeping with the tradition of strictly construing land use regulations in favor of the free use of land. Here, the Supreme Court adopted a definition of building which included an element of permanence, or fixture to the ground. While the mobile shed may have been used in the sale of stone at the nearby quarry, and thus arguably commercial in nature, it was not a building as contemplated by the PID ordinance. It could be moved with a forklift or loaded onto a sled and taken away. The barn was of no issue for another reason. While certainly a building, there was no indication in the record that the barn was used for commercial purposes. Sure, barns could be used commercially, as a wedding venue or perhaps a farmers' market. But the record here indicated the barn's owner used it to store hay and equipment, and affixed Keep Out and No Trespassing signs across its surface. Hardly a commercial enterprise.

Having held that the asphalt company's application was complete upon submission and benefitted from the permit choice statute, and having dispensed with the alleged incompatibility of the site plan itself, the Supreme Court remanded the case back down to the planning board with instructions to issue the permit to the asphalt company. This case provides handy definitions for both "building" and "commercial" in the event that your client's ordinances leave those terms undefined. Check if your council is comfortable with those definitions being applied to its own development ordinances and, if not, it's time to get a definition on the books. Or you may just find yourself having to dissuade the court from applying a definition in favor of the free use of real property to the chagrin of your own development ordinances.

On Brief

Sovereign Immunity; Appeal Strategy – *Ayala v. Perry, 913 S.E.2d 271, 2025 N.C. App. LEXIS 127 * (2025)*. Plaintiffs who sued the county after a county employee secretly filmed the plaintiffs in a bathroom were dismissed from the Court of Appeals because their appellate submissions did not assert a proper basis for appellate review. The trial court had dismissed the county from the suit on sovereign immunity grounds, but allowed the suit against the employee to continue. The plaintiffs fatally asserted only that the trial court's order was a final judgment which, while true as against the county, did not carry with it the requisite certification from the trial court that the case was appropriate for immediate review. Nor did plaintiffs assert that the trial court's order impacted a substantial right—something they easily could have done by citing to a case like Green v. Kearney, 203 N.C. App. 260, 266 (2010) that holds a dismissal based on sovereign immunity implicates a substantial right. If your client must defend its governmental immunity before the Court of Appeals, look first to make sure your opponent has specifically asserted that the trial court's dismissal on immunity grounds affects a substantial right, or that the trial court certified its judgment for immediate review. If not, this case could be your quick ticket out of court.

Parks Department; Parent Bill of Rights – *Zhang v. Cary Academy, 914 S.E.2d 558, 2025 N.C. App. LEXIS 129 * (2025)*. The swan song of a particularly contentious divorce provides the soundtrack for this case. One parent sued a school after the school refused to kick their daughter out at the parent's unilateral request; the other parent wanted to keep the child there, it being their senior year and all. Both parents had signed an agreement allowing the child to enroll and participate fully. This case has potential application if you ever face the ire of a parent who desires to unilaterally withdraw their child from an afterschool or parks program operated by your client. The Court of Appeals held that the Parental Bill of Rights codified at N.C.G.S. § 114A-10 does not itself create a private cause of action. Add that to your bank of arguments for dismissal, and while you're at it, check to see if your client's parks department has an ironclad policy on how to engage with joint-custody households. Further, know that completion of a parks program, or in this case an educational course of study, moots a parent's argument for injunctive relief to cease participation. As the Court puts it: "the exact relief Plaintiff initially sought has been achieved outside of the judicial process." Id. at 561.

Employment; Termination of Career Employees – *Ayers v. Currituck Cnty. Dep't of Soc. Servs., 293 N.C. App. 184 (2024), aff'd per curiam without precedential value, 387 N.C. 184 (2025)*. The history of this case signals fresh uncertainty in our state's jurisprudence around just cause analysis when terminating public employees. This case drew a sharp dissent at the Court of Appeals. When it reached the state Supreme Court, a three-three split in the Justices—with one not participating—signaled additional disagreement about the outcome. The Court of Appeals' opinion examines the five-factor test set out in Wetherington v. N.C. Dep't Pub. Safety, 368 N.C. 583, 591 (2015) to conduct a de novo review of an administrative law judge's reinstatement of a county employee terminated for cause. This is a case about a county employee subject to the Human Resources Act, but many cities across the state have enacted their own personnel policies that include termination for cause language. While the opinion stands without precedential value, it still contains a succinct restatement of the law which may receive further scrutiny from the state's highest court in the future.

Public Official Immunity; Exercise of Discretion – Hwang v. Cairns, 915 S.E.2d 425, 2025 N.C. LEXIS 363 * (2025). The facts of this case offer a candid look at how at least one department at a state medical school likes to send off coworkers who are leaving for a different job. But besides an inside look at one wild going-away party, the NC Supreme Court addresses a claim of public official immunity from an employee who, while admittedly possessing great supervisory power and a position of high prestige, was not authorized to exercise the discretion contemplated by the analysis which determines whether a person is considered a public official. That discretion, says the Court, must be closely tied to the delegation of sovereign decision-making authority that flows from the state. So, pay close attention to where a position obtains its power. If statute creates the position, also look to statute for the bounds of the discretion of that position that may serve as the basis for public official immunity. If a position is not created by a statute, but instead by another body, does that body have both the

statutory authority to create the position and the separate statutory authority to further delegate the power of the sovereign to that position?