

**DIGEST OF MUNICIPAL LAW
PART I: CASE LAW 2010-2011**

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INTRODUCTION

The **DIGEST OF MUNICIPAL LAW, PART I: CASE LAW 2010-2011** is a joint publication of the North Carolina League of Municipalities and the North Carolina Association of Municipal Attorneys. Included primarily are summaries of cases of significance to municipalities decided by the North Carolina Supreme Court and North Carolina Court of Appeals, along with selected federal cases. The cases primarily include those reported in the July 2010 through June 2011 issues (Volume XXX) of **MUNICIPAL LAW NOTES**, the League's monthly publication for municipal attorneys. (Note: Pursuant to the North Carolina Rules of Appellate Procedure, a decision of the N.C. Court of Appeals which is reported without a published opinion may be cited under limited circumstances. See N.C. R. App. P. Rule 30(e)(3).¹ Unpublished opinions are not binding precedent in the Fourth Circuit. See Rules 32.1 & 36(b) of the Local Rules of the United States Court of Appeals for the Fourth Circuit.)

The Research Advisory Committee of the North Carolina Association of Municipal Attorneys recommended that the League of Municipalities prepare this single volume annual compilation of case law summaries for municipal attorneys and chief administrative officers. The forthcoming *Digest of Municipal Law, Part II: 2011 Legislation* will also be published as an electronic document posted to the League's website. Notification of its availability will be provided electronically. With these two publications, municipal attorneys and chief administrative officers will have at their disposal summaries of changes in the law affecting municipalities. Since both publications contain summaries only, should questions arise concerning their content, the reader is advised to consult the complete text of case law or legislation, or your municipal attorney when faced with a specific legal problem or issue. League staff attorneys are also available to answer general questions, (919) 715-4000.

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¹ Rule 30(e) provides as follows, "(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to whom the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g) ('Additional Authorities'). When citing an unpublished opinion, a party must indicate the opinion's unpublished status." N.C. R. App. P. Rule 30(e)(3).

ADMINISTRATIVE LAW

Administrative Law; CAMA; Permits; Jurisdiction; Exhaustion of Administrative Remedies

BARRIS V. TOWN OF LONG BEACH, ___ N.C. App. ___, 704 S.E.2d 285 (No. COA09-333, Brunswick– 12/21/10)

Where Town had submitted second application for a CAMA permit to construct a proposed site plan of development in area within appellees' easement, trial court erred by entering order upon appellees' motion (enjoining Town from developing the end of a public street, imposing a monetary sanction, and awarding attorney's fees) prior to the completion of the DENR administrative process.

FACTS: In this appeal, appellant-Town of Oak Island sought review of an October 2008 order enjoining it from developing the end of a public street, imposing a monetary sanction, and awarding attorney's fees. Appellees are residents of Oak Island and owners of a non-exclusive easement for purposes of ingress, egress, and regress: their property is located adjacent to and abuts the western boundary of West Yacht Drive and the northern right of way line of Oak Island Drive (the dead end of which the Town has attempted to regulate and develop). In May 2002, appellees asserted multiple causes of action against the Town (for its attempts to improve this area), including declaratory and injunctive relief and damages to appellees' easement rights. In November 2003, upon cross-motions for summary judgment, the trial court awarded partial summary judgment in appellees' favor in an order ("the first order") affirming appellees' easement rights and ordering the Town to remove the park-like area at the street's end. The Town subsequently removed the park as was required by the first order.

In February 2005, the Town filed a Coastal Area Management Act ("CAMA") permit application, which included the Town's proposed site plan of development ("first site plan") setting forth certain structures to be constructed within areas of appellees' easement. The following month, appellees filed an objection to the application, arguing *inter alia* that the first site plan was precluded by previous court orders and violated appellees' easement rights. In April 2005, the North Carolina Department of Environment and Natural Resources ("DENR") denied the Town's application for a CAMA permit for its first site plan.

Subsequently, the Town filed a motion seeking to *inter alia* modify the trial court's November 2003 order. In September 2005, the Town's motion was denied by the trial court. In November 2005, the parties conducted a jury trial on the question, "What amount is the plaintiff entitled to recover for the wrongful obstruction and interference with the plaintiff's right of access onto West Oak Island Drive?", and the jury returned a verdict of \$36,501.00. Following post-trial motions filed by both parties, the trial court in December 2005 entered the following rulings: (1) judgment against the Town in the amount of \$36,501.00 together with interest thereon from October 1, 1996 until fully paid; (2) denial of the Town's motions pursuant to G.S. 1A-1, Rule 50; and (3) taxing of costs and attorney's fees against the Town.

In August 2008, the Town again applied for a CAMA permit to construct a proposed site plan of development ("second site plan"). Appellees subsequently filed their objection to the permit application, contending that the second site plan was a replica of the Town's first site plan and accordingly was in violation of the previous orders and appellees' easement rights. In September 2008, appellees filed a motion to enforce prior orders of the court and a motion for sanctions, attorney's fees, costs, and/or expenses to further oppose the Town's second site plan. In October 2008, the trial court granted appellees' motion in an order: (1) rejecting the Town's

second site plan, (2) enjoining the Town from pursuing the second site plan, (3) imposing a monetary sanction on the Town in the amount of \$2,000.00, and (4) awarding appellees their attorney's fees and costs and expenses totaling \$10,468.58. (According to the order, “[d]efendant Town's position ... [was] barred by the principles of *res judicata*, collateral estoppel, judicial estoppel, and/or the law of the case doctrine[.]” The Town appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously reversed and remanded. Judge Jackson wrote the opinion, joined by Judge McGee and Judge Steelman.

The Court initially stated, “First, we note that the Town possesses certain authority with respect to regulation of the public streets. According to North Carolina General Statutes, section 160A-174(a), ‘A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens ...’ [G.S.] 160A-174(a) (2007). Furthermore, North Carolina General Statutes, section 160A-296(a) provides that ‘[a] city shall have general authority and control over all public streets[.]’ [G.S.] 160A-296(a) (2007). Finally, North Carolina General Statutes, section 160A-300 provides that ‘[a] city may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic upon the public streets, sidewalks, alleys, and bridges of the city. [G.S.] 160A-300 (2007).’ Further, appellees’ easement is non-exclusive. Although the Town cannot develop the street end as a park, it still retains its statutory authority to regulate the public right of way.”

The Town argued that the trial court erred by exercising jurisdiction over a permit issue properly governed by administrative law. The Court agreed. Upon observing that G.S. 113A-323(a) (2007) specifically addresses the manner in which a party may challenge a CAMA permit, the Court stated, “We agree that the trial court erred in applying *res judicata*, collateral estoppel, judicial estoppel, and law of the case doctrine, because it does not possess the expertise in determining whether or not the issues presented by the Town's second site plan were identical to those the trial court previously had examined. The statute specifically demonstrates a preference for administrative agencies that possess specific knowledge in their fields of expertise addressing these types of issues initially. Therefore, the trial court committed error in exercising authority over an issue that should have been examined first by DENR. Thus, appellees did not follow the proper protocol in challenging the Town's CAMA permit application and as a result, failed to exhaust their administrative remedies. Only after appellees comply with the statute's required steps and DENR conducts an investigation may this Court review the matter. Therefore, we hold that the trial court erred by reviewing the issue of the second site plan prior to the completion of the DENR administrative process.”

The Court also agreed with the Town's contention that the trial court erred in requiring sanctions from the Town. Noting that statutes that award attorney's fees to the prevailing party are in derogation of the common law and accordingly must be strictly construed, the Court stated, ‘The Town's second site plan does not constitute ‘other papers’ pursuant to [G.S. 1A-1, Rule 11(a) (2007)]. Moreover, because the Town's second site plan may or may not be materially different than its first site plan, depending on DENR's expert determination, this case arguably still contained a justiciable issue. Therefore, the trial court erred in sanctioning the Town, and we remand to the trial court for action consistent with this decision.... [W]e hold that this controversy first should be reviewed by DENR.’

Nota Bene (N.B.)
Other Decision of Note

Administrative Law; Governing Bodies; Appointments

FRANK V. SAVAGE, ___ N.C. App. ___, 695 S.E.2d 509 (No. COA09-1413, Yancey– 7/6/10) (holding that plaintiffs were entitled to a judicial determination of whether new Yancey County Board of Commissioners acted beyond its statutory authority when it invalidated their appointments to Department of Social Services Board of Directors; “Although [Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro] [334 N.C. 421, 432 S.E.2d 310, *reh'g denied*, 335 N.C. 182, 436 S.E.2d 369 (1993)] dealt with the authority of a town – rather than a county – Board of Commissioners, we believe the internal logic of that case is applicable to the circumstances before us. The result in Swansboro depended on the Board of Commissioner's power to dissolve an administrative board, the establishment of which was not required by law. *Id.* at 427, 432 S.E.2d at 313-14. The corollary to that principle is that when the establishment of the administrative board is required by law, the Board of Commissioners lacks the authority to abolish said board, in whole or in part. Moreover, [G.S.] 153A-76 specifically prohibits changing the composition or the manner of selecting the board of social services. Plaintiffs' complaint alleges that the new Board of Commissioners entertained a motion to revoke their appointments and appoint other persons in their places. Treating the allegations in Plaintiffs' complaint as true, we hold that Plaintiffs have stated a cognizable claim that the Board of Commissioners violated [G.S.] 108A-4 (establishing three year term for member of county board of social services) and [G.S.] 153A-76 (prohibiting abolishment of that board) when it revoked Plaintiff's appointments to the Yancey County DSS.”; also holding that plaintiffs were entitled to a judicial determination of whether the actions taken by the Board at the unannounced meeting were null and void due to noncompliance with G.S. 143-318.12(b) and G.S. 153A-40.)

ANNEXATION

Annexation; Annexation Report; Meaningful Extension of Services

GATES FOUR HOMEOWNERS ASSOC., INC. v. CITY OF FAYETTEVILLE, ___ N.C. App. ___, 702 S.E.2d 553 (No. COA10-60, Cumberland- 12/7/10) (*unpublished*), *reh'g denied*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA10-60, Cumberland- 1/19/11), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 49P11, 8/25/11)

In petitioners' challenge to annexation ordinance, trial court correctly granted summary judgment for City. Annexation report complied with requirements of G.S. 160A-47(3)(a).

FACTS: This appeal arises from the City's adoption of an ordinance in October 2008 annexing the Gates Four subdivision. (This was the second time that the City had included Gates Four in an annexation plan, as Gates Four had been excluded from the prior annexation by a settlement, which delayed annexation until 2008. *See* 170 N.C. App. 688, 613 S.E.2d 55, *disc. review denied*, 359 N.C. 851, 619 S.E.2d 407-08 (2005) (*Digest of Municipal Law 2005-2006*, p. 9). Gates Four, a private community with restricted access, constituted an unincorporated area almost completely surrounded by the City's borders.) In December 2008, the Gates Four Homeowners Association, along with the homeowners themselves, filed an action challenging the annexation. The trial court granted summary judgment for respondent-City. Petitioners appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. "[W]e hold that the trial court correctly concluded that the annexation report showed substantial compliance with the statutory requirements, that respondent's plan for the extension of police protection does provide a 'meaningful extension of services,' and that the trial court properly granted respondent's motion to strike those portions of the [petitioner] Molin Affidavit that were not based on personal knowledge. Therefore, the decision of the trial court is affirmed as to all parts, except the striking of the last sentence of Paragraph 8. We remand for the sole purpose of re-entering that sentence into the record." Judge Elmore wrote the opinion, joined by Judge Jackson and Judge Stephens.

The Court first addressed petitioners' contention that respondent failed to show *prima facie* compliance with G.S. 160A-47(3)(a). Citing In re Annexation Ordinance, 304 N.C. 549, 555, 284 S.E.2d 470, 474 (1981), the Court observed that a plan complies with the statute if it contains the following: "(1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services." In rejecting petitioners' argument, the Court stated, "[P]etitioners argue that respondent did not make an express statement demonstrating that respondent had committed itself to providing the same level of municipal services to the Gates Four area on a nondiscriminatory basis. Petitioners base their argument on the language in Section 3 of the annexation report, which states, 'the City of Fayetteville will be required to provide each major municipal service that the city performs within its corporate limits to the proposed annexation area ... on substantially the same basis and in the same manner as such services are provided within the Fayetteville corporate limits prior to annexation.' Petitioners are quite right that this language alone does not demonstrate that the City has committed itself to providing the same level of services to the Gates Four area on a nondiscriminatory basis. However, Section 1.6 of the annexation report states, 'The general municipal services plan delineated in Section 3 of this report describes the City of Fayetteville municipal services that *will be provided* to the potential annexation area.' (Emphasis added.) When read in conjunction, it becomes clear that Sections 1.6 and 3 set forth the municipal services that respon-

dent has committed to provide on a nondiscriminatory basis. We conclude that, when taken in combination, Sections 1.6 and 3 substantially comply with the requirements of [G.S.] 160A-47(3) by indicating and describing municipal services that will be provided to the annexed area on substantially the same basis and in the same manner as such services are provided within the rest of the municipality.”

Petitioners argued that the annexation report failed to show the level of services then available in the municipality, as well as the level of services to be provided in the annexation area. Noting prior cases holding that lists of services can satisfy the level of services requirements, Matheson v. City of Asheville, 102 N.C. App. 156, 166, 402 S.E.2d 140, 146 (1991) and Thrash v. City of Asheville, 95 N.C. App. 457, 469, 383 S.E.2d 657, 664 (1989), the Court held that the City’s annexation report was sufficient. “Respondent commits to providing City of Fayetteville municipal services to the Gates Four annexation area in Section 1.6; then, in Section 3, the report indicates that those municipal services must be provided on substantially the same basis and in the same manner as the services provided within the corporate limits. Section 3.1 then enumerates the specific police services that the City offers. In Matheson and Thrash, this Court concluded that lists of this type satisfy the level of services requirement that our Supreme Court laid down in In re Annexation Ordinance [*supra*]. Matheson, 102 N.C. App. at 166, 402 S.E.2d at 146; Thrash, 95 N.C. App. at 469, 383 S.E.2d at 664. Thus, respondent has shown substantial compliance with [G.S.] 160A-47(3) through the outline of police services that will be provided to the annexation area. After respondent demonstrated substantial compliance, the burden was on petitioner to show actual noncompliance by respondent. This they have not done.”

The Court rejected petitioners’ alternative argument contending that, even if the annexation report complied with G.S. 160A-47(3)(a), the plan for extension of police services for the Gates Four area was illusory and otherwise failed to comply with the statute in light of Fix v. City of Eden, 175 N.C. App. 1, 622 S.E.2d 647 (2005) (*Digest of Municipal Law 2005-2006*, p. 1). The Court stated, “In City of Eden, this Court affirmed a judgment finding an annexation ordinance null and void. *Id.* at 3, 622 S.E.2d at 649. There, the city’s annexation report stated that it was committed to providing ‘water ... services to the Indian Hills Area on substantially the same basis and in the same manner as such services are provided within the rest of the City prior to annexation.’ *Id.* at 7, 622 S.E.2d at 651. This Court found those statements to be illusory because the city would only be able to provide those services if it were able to successfully negotiate a series of agreements with Dan River Water, Inc., a federally protected water service provider. *Id.* at 9, 622 S.E.2d at 652. This Court upheld the trial court’s conclusion that the city could not simply assume that the water service provider would grant access to its infrastructure at the terms sought by the city. *Id.* We concluded that, ‘in the absence of an agreement or analysis in the report discussing the feasibility and costliness of providing water services if Dan River refuses to bargain with the City, the trial court properly concluded that the City’s statement regarding its commitment to provide water services is illusory.’ *Id.* Unlike City of Eden, the case at bar does not include any evidence of the kind of contingent or conditional prerequisites for the extension of services that this Court objected to in City of Eden. Here, the extension of police services does not require negotiation with an outside corporation, and no assumptions must be made regarding respondent’s ability to provide the services it has promised to provide. Therefore, the concerns present in City of Eden are simply not evident in this case, and we conclude that respondent’s proposed extension of services is not illusory.”

Petitioners argued that there were genuine issues of material fact as to whether the City’s annexation plan provided for a meaningful extension of municipal services to the annexed area. The Court stated that even when viewed in the light most favorable to petitioners, the record indicated that the City complied with the meaningful extension of services requirement set forth in Nolan v. Village of Marvin, 360 N.C. 256, 624 S.E.2d 305 (2006) (*Digest of Municipal Law 2005-2006*, p. 4), and accordingly the City was entitled to judgment as a matter of law. “The case at hand can be distinguished from Nolan because the City does provide extensive municipal ser-

vices of the types listed in [G.S.] 160A-47, and the annexation report states that the City will provide those services to the annexation area. This was not the case in Nolan; in that case, the municipality only offered administrative services to its residents, and only those administrative services were to be extended. Nolan at 258, 624 S.E.2d at 307. Here, upon annexation, respondent has promised to extend police protection (provided by the City itself), fire protection (provided by the City and through contracts with volunteer fire departments), as well as solid waste and recycling collection and disposal (provided by contracting with a solid waste collection firm) ‘on substantially the same basis and in the same manner as such services are provided within the Fayetteville corporate limits prior to annexation.’ Under Norwood [v. Village of Sugar Mountain], 193 N.C. App. 293, 667 S.E.2d 524 (2008), *disc. review denied*, 363 N.C. 582, 682 S.E.2d 386 (2009) (*Digest of Municipal Law 2009-2010*, p. 9)], when reviewing whether an extension of services is meaningful, we must only determine if the category of services to be extended are of the type required by statute. 193 N.C. App. at 312, 667 S.E.2d at 536. The categories of services which respondent promises to extend in the annexation report are the exact categories of services required by [G.S.] 160A-47(3)(a).” In concluding this section of its opinion, the Court emphasized, “Petitioners argue that there are genuine issues of material fact regarding the extension of services because respondent does not plan to add additional police personnel or equipment. As stated above, however, the law does not require a municipality to add employees or equipment in order to provide a meaningful extension of services. *Id.* Therefore, because petitioners only argue that summary judgment was inappropriate because respondent will not add police personnel or equipment, this argument fails.”

NOTE: Petitioners’ filed a petition for discretionary review in February 2011. The N.C. Supreme Court denied the petition for discretionary review on August 25, 2011.

Annexation; Extension of Sewer Services; Metes and Bounds Description; Land Bridge

ASHLEY V. CITY OF LEXINGTON, ___ N.C. App. ___, 704 S.E.2d 529 (No. COA10-314, Davidson- 1/4/11), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 54P11, 10/6/11)

Petitioners’ challenge to annexation ordinances, alleging *inter alia* insufficiency of City’s utilization of tax parcel identification numbers under G.S. 160A-49(e)(1) and inadequacy of sewer line extension policy, rejected.

FACTS: At issue in this consolidated appeal were three petitions filed in superior court in September 2008 seeking judicial review of annexation ordinances adopted by Respondent-City on July 21, 2008. Petitioners alleged *inter alia* inadequacies regarding the extension of sewer service. Respondent-City’s policy regarding requests for sewer extensions provided, “A. All requests for water and/or sewer extensions must be originated by petition of the applicants desiring service.... B. Although [Respondent-City] is dedicated to the concept of making such extensions, [Respondent-City] shall not be responsible for such extensions if funds are not available. [Respondent-City] shall be entitled to consider and implement one of the following options. 1. [Respondent] may deny the petition. 2. [Respondent-City] may negotiate with the petitioners and reach an agreement satisfactory to both parties.” (Other parts of the policy appear verbatim in the opinion.)

Respondent-City committed to building all secondary lines at Respondent-City's expense within five years of annexation for all three newly-annexed areas. While annexation residents were allowed to petition for accelerated sewer lines, Respondent had no funds budgeted for the costs of accelerated connection. In July 2008, Respondent-City had received “148 valid forms signed by property owners within the annexation areas requesting that residential sewer line ex-

tensions be accelerated to be made available within two years of the effective date of annexation[.]” Upon receiving the forms, the Public Works Division calculated connection costs and sent contracts to property owners: the executed contracts, along with 50% of the costs, were to be returned within 14 days. Having received none in return, Respondent-City did not schedule expedited sewer service connections for any property.

Upon cross-motions for summary judgment, the trial court entered orders in December 2009 granting: (1) petitioners' motion contending that the legal descriptions of the areas included in the ordinances were not sufficient metes and bounds descriptions; (2) petitioners' motion contending that the plan to extend sewer services to the areas was not sufficient; (3) Respondent-City's motion that the descriptions of the areas included in the resolution, the notices of the public meeting, and the public hearing were sufficient; (4) Respondent-City's motion contending that the maps in the report showing the present and proposed boundaries of Respondent-City and the annexation areas were sufficient; and (5) Respondent-City's motion contending that a land bridge satisfied statutory requirements. Respondent-City and petitioners appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed in part and reversed and remanded in part. “Having reviewed the record in this matter, we hold that summary judgment should have been granted in favor of Respondent on all issues brought forward on appeal.” Judge McGee wrote the opinion, joined by Judge Geer and Judge Stroud.

The Court first addressed petitioners' appeal. The Court initially observed *inter alia* that petitioners' arguments on appeal relied on petitioners' contention that “Respondent did not comply with statutory procedure and did not satisfy the requirements of [G.S.] 160A-47 (1), 160A-47(3)(b), and 160A-49 (a), (b) and (e)(1)” and that petitioners sought reversal of certain rulings in the trial court's orders as they would suffer “material injury in that they will be required to pay [Respondent] taxes and will be subject to [Respondent] regulations as a result of the involuntary annexation if it is not overturned.” Petitioners, citing Nolan v. Village of Marvin, 360 N.C. 256, 624 S.E.2d 305 (2006), contended that taxes and regulations alone were sufficient to demonstrate material prejudice. The Court disagreed. “In Nolan, our Supreme Court explained: ‘Those part-time administrative services, such as zoning and tax collection, simply fill needs created by the annexation itself, without conferring significant benefits on the annexed property owners and residents.’ Nolan, 360 N.C. at 262, 624 S.E.2d at 308-09. It was within this context, where the residents of the area to be annexed would be subjected to taxes without receiving any meaningful benefit, that our Supreme Court found the imposition of taxes to constitute material prejudice. We do not interpret Nolan to stand for the proposition that the imposition of taxes will always constitute material prejudice in any involuntary annexation. *See Nolan v. Town of Weddington*, 182 N.C. App. 486, 492, 642 S.E.2d 261, 265 (2007); [In re Annexation Ordinance], 303 N.C. [220] at 233, 278 S.E.2d [224] at 233 [(1981)]. Were we to so hold, the requirement that Petitioners demonstrate material prejudice would be rendered meaningless, as every annexation subjects those annexed to the taxes and regulations of the annexing municipality. The taxes the petitioners in Nolan would have been subjected to through annexation constituted material prejudice in that case because the petitioners would have received no material benefit in return. In the present case, Petitioners make no such argument, and we do not find Nolan controlling in this case. Because Petitioners advance no compelling argument that any procedural irregularities in the annexation process in this case will result in material prejudice, Petitioners fail to meet their burden on this issue. *City of Kannapolis v. City of Concord*, 326 N.C. [512] at 516, 391 S.E.2d [493] at 496 [(1990)].” The Court also rejected petitioners' argument that the size of the land bridge violated G.S. 160A-48(d), finding that petitioners' claim “appear[ed] to originate from selective readings of the report and the ordinances.”

The Court then turned to Respondent-City's appeal. Respondent-City first argued that the trial court erred in granting summary judgment in favor of petitioners' claim that the legal description of the annexation areas included in the ordinances were not sufficient metes and bounds descriptions. The Court agreed, holding that the descriptions provided in the ordinances were

sufficient to meet the requirement of G.S. 160A-49(e)(1). The Court rejected petitioners' contention that Blackwell v. City of Reidsville, 129 N.C. App. 759, 762-63, 502 S.E.2d 371, 374 (1998) was controlling on this issue. "In Blackwell, our Court held 'that the use of the tax maps, without incorporation by reference, was not a sufficient metes and bounds description.' *Id.* at 763, 502 S.E.2d at 374. In Blackwell, there was nothing to indicate that the tax identification numbers contained all the necessary information to identify the relevant tax maps, nor any lot's position on those maps. The Blackwell Court found that 'there [was] nothing in the descriptions or maps in the ordinance that identify [the] numbers in any way.' *Id.* at 762, 502 S.E.2d at 374. In the present case, Respondent presented uncontradicted evidence from two licensed surveyors that the tax parcel identification numbers included in the ordinances contained all the information needed to both accurately identify and place the lots and the annexation areas' boundaries on the relevant tax maps, and on the ground.... We hold that the information contained in the Davidson County tax parcel ID numbers specifically identified the location of those parcels on the tax maps and on the ground. The inclusion of these tax parcel ID numbers effectively incorporated the corresponding Davidson County tax maps. The purpose and function of the ID numbers is to locate the parcels on the appropriate maps and these ID numbers contain information from which anyone can locate the corresponding parcels on the appropriate maps." Noting that "the Blackwell Court did not conduct a prejudice analysis in reaching its decision," the Court observed that "appellate courts have repeatedly required a showing of prejudice even when the statutory requirements of [G.S.] 160A-49 have not been met." (Citations omitted.) The Court further observed that the trial court's orders granting summary judgment for petitioners on this issue included no suggestion that petitioners had suffered any material prejudice. In re Annexation Ordinance, 62 N.C. App. 588, 598, 303 S.E.2d 380, 385 (1983).

Respondent-City argued that the trial court erred in granting petitioners' motion for summary judgment as to the "sufficiency of Respondent's plan to extend sanitary sewer service to the Annexation Area[s] on an accelerated basis to those Petitioners who submitted requests[.]" The Court agreed, holding that Respondent-City's actions were consistent with its existing policy. "Pursuant to its existing policy, Respondent was not required to pay to extend sewer service to Petitioners. According to Respondent's policy, '[Respondent] shall be entitled to consider and implement one of the following options[:]' either (1), deny a petition outright, or (2), negotiate a mutually acceptable cost-sharing agreement with any petitioner. Though Respondent's mass mailing of the form agreement did not invite counteroffers, nothing in the relevant policy indicated that Respondent was required to consider any counteroffers. Respondent's offer to cover fifty percent of the costs of expedited extension of sewer service to any Petitioner appears to have been the best offer Respondent was willing to extend. There is no evidence that Petitioners tested this assumption by attempting to negotiate a better deal for themselves. However, even assuming Petitioners had made that attempt, the policy in effect allowed Respondent to reject any counteroffer that was not acceptable, just as that same policy allowed Petitioners to reject Respondent's offer should Petitioners not find it acceptable, and settle for free connection to Respondent's sewer system within five years rather than sharing the costs and insuring connection within two years. Further, there is nothing in Respondent's policy that would prevent a fourteen-day deadline requirement as part of an agreement Respondent could find acceptable."

NOTE: Petitioners filed a petition for discretionary review in February 2011. The N.C. Supreme Court denied the petition for discretionary review on October 6, 2011.

Nota Bene (N.B.)
Other Decisions of Note

Annexation; Financing of Extension of Services; Public Hearing

ROYAL PALMS MHP, LLC v. CITY OF WILMINGTON, ___ N.C. App. ___, 713 S.E.2d 793 (No. COA10-1259, New Hanover– 6/7/11) (*unpublished*), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 289P11, 7/12/11) (Court of Appeals affirms trial court’s entry of summary judgment for City in petitioners’ challenge to 2009 annexation ordinance; petition alleged that the City failed to substantially comply with G.S. 160A-47 as to setting forth the method by which the City planned to finance the extension of services to Monkey Junction for the fiscal year the annexation became effective and that the City failed to comply with G.S. 160A-49 by denying City residents and persons resident or owning property in the annexation area the opportunity to be heard at the public hearing; Court of Appeals holds, “Where annexation did not actually take place in 2010, petitioners’ argument that the City violated [G.S.] 160A-47 by failing to project cost for that year is moot. The accuracy of the City’s prediction of the system development charges [for connecting existing developed properties to the Cape Fear Pubic Utility Authority water and sewer system] and sales tax revenues associated with annexation is beyond the scope of our appellate review”; in holding that petitioners failed to meet their burden to present evidence that they were prejudiced by the alleged lack of opportunity to be heard at the public hearing, G.S 160A-49(d), upon observing that three individuals spoke in favor of annexation and twenty spoke in opposition, Court states that, “There is no evidence presented that the individuals allegedly denied an opportunity to speak at the public hearing in opposition to annexation would have offered anything beyond what was offered by the twenty individuals that did speak in opposition to annexation.”)

Annexation; Subdivisions; Utility Agreement and Annexation Petition; Voluntary Annexation

CUNNINGHAM v. CITY OF GREENSBORO, ___ N.C. App. ___, 711 S.E.2d 477 (No. COA10-584, Guilford– 5/17/11) (Court of Appeals affirms trial court’s nullification of voluntary annexations (of subdivisions) pursuant to developers’ Utility Agreement and Annexation Petition; while the agreements were signed by the developers who owned the property where each subdivision would be located and were recorded in the Register of Deeds office, the deeds to individual lots in each affected subdivision (including the lots subsequently sold to plaintiffs) made no reference to the existence of these agreements; “The agreements . . . purport to waive, on behalf of future property owners, any right to withdraw consent to annexation by Defendant, regardless of the point in time at which Defendant might seek to annex the subject properties and regardless of the conditions that might exist at that time.... Nothing in the literal language of [G.S.] 160A-31(a) sets any time limitation within which a petitioning landowner is entitled to withdraw his or her consent to a proposed voluntary annexation, and the imposition of such a limitation would be inconsistent with the policy justifications for allowing such withdrawals enunciated in Conover [v. Newton], 297 N.C. 506,

256 S.E.2d 216 (1979)]. Although Conover was decided in 1979, the General Assembly has not amended the relevant statutory provisions in the ensuing three decades in order to eliminate or set limitations upon the right of property owners to withdraw their consent to a voluntary annexation petition.... [W]e conclude that allowing Plaintiffs to exercise the right to withdraw their consent to the annexation petitions at the time at which they attempted to do so in this case does not violate either the language or the intent of [G.S.] 160A-31 or the other statutory provisions governing voluntary annexations.”; in addressing City’s G.S. 160A-314 argument, stating that, “Even if a municipality has the authority to condition the provision of water and sewer service upon the customer’s agreement to support annexation of the area served, the record contains no indication that Defendant did so at the time that it connected any individual customer residing in the affected developments to its water and sewer facilities.”)

CONSTITUTIONAL LAW

Constitutional Law; 42 U.S.C. § 1983; Attorney’s Fees; Prospective Relief; “Policy or Custom” Requirement

LOS ANGELES COUNTY V. HUMPHRIES, 562 U.S.____, 131 S.Ct. 447, 178 L.Ed.2d 460, 79 U.S.L.W. 4009 (No. 09-350, 11/30/10)

The holding of Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978), setting forth a “policy or custom” requirement, applies in 42 U.S.C. § 1983 claims against municipalities for prospective relief as well as to claims for monetary damages.

FACTS: Respondents in this appeal filed a 42 U.S.C. §1983 action against various state and local defendants seeking damages, an injunction, and a declaration that defendants had deprived them of their constitutional rights by failing to create a procedural mechanism whereby a person could contest inclusion on the Child Abuse Central Index under the California Child Abuse and Neglect Reporting Act. (Respondents had been accused of child abuse but were later exonerated.) While the district court granted summary judgment to all of defendants on the ground that California had not deprived respondents of a constitutionally protected “liberty” interest, the Ninth Circuit held that the Fourteenth Amendment required the State to provide those included on the list notice and “some kind of hearing.” 554 F.3d 1170, 1201 (2009). The Court also held that respondents, as prevailing parties, were entitled to approximately \$600,000 in attorney’s fees, 42 U.S.C. § 1988(b) (providing for payment of attorney’s fees to parties prevailing on §1983 claims), and that the County had to pay approximately \$60,000 of this amount. The County denied that it was liable and denied that it could be held responsible for attorney’s fees, arguing that, in respect to the County, plaintiffs were not prevailing parties. Specifically, the County pointed to Monell v. v. New York City Dept. of Social Servs.’s holding a municipal entity is liable under §1983 only if a municipal “policy or custom” caused a plaintiff to be deprived of a federal right, 436 U.S. 658, 694, and the County contended that it was state policy, not county policy, that brought about any deprivation here. The Ninth Circuit held that Monell’s “policy or custom” requirement applies only to claims for damages but not to claims for prospective relief. The County appealed.

HOLDING: In an opinion written by Justice Breyer, the U.S. Supreme Court unanimously reversed and remanded. “In Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978), this Court held that civil rights plaintiffs suing a municipal entity under 42 U.S.C. § 1983 must show that their injury was caused by a municipal policy or custom. The case before the Court in Monell directly involved monetary damages. The question presented is whether the ‘policy or custom’ requirement also applies when plaintiffs seek prospective relief, such as an injunction or a declaratory judgment. We conclude that it does so apply.”

The Court observed *inter alia* that Monell held that a local government could not be held liable under 42 U.S.C. § 1983 “solely because it employs a tortfeasor,” 436 U.S. at 691: rather, the local government could be held liable “when execution of a government’s policy or custom ... inflicts the injury.” *Id.* at 694. The Court here stated, “The [Monell] Court’s conclusion rested on ‘the language of § 1983, read against the background of the ... legislative history.’ *Id.*, at 691, 98 S.Ct. 2018. Section 1983’s causation language imposes liability on a “‘person who ... shall subject, or cause to be subjected, any person’” to a deprivation of federal rights. *Ibid.* (quoting 17 Stat. 13; emphasis deleted). That language, the Court observed, could not ‘be easily read to impose liability vicariously ... solely on the basis of the existence of an employer-employee relationship with a tortfeasor.’ 436 U.S., at 692. The statute’s legislative history, in particular the constitutional objections that had been raised to the Sherman amendment, supported this conclusion.

Id., at 692-94, and n. 57. For these reasons, the Court concluded that a municipality could be held liable under §1983 only for its own violations of federal law. *Id.*, at 694. The Court described what made a violation a municipality's *own* violation: 'Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.... [They can also be sued for] deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.' *Id.*, at 690-691 (footnote omitted). The Court has also included the terms 'usage' and 'practice' as customs for which liability is appropriate. See *ibid.* The length of this list of types of municipal action leads us here to use a shorthand term 'policy or custom,' but when we do so, we mean to refer to the entire list. See *id.*, at 694 (using the shorthand 'policy or custom'); see also, e.g., Fitzgerald v. Barnstable School Comm., 555 U.S. 246, ___ (2009) (slip op., at 10 (using the phrase 'custom, policy, or practice,' to describe municipal liability under §1983)."

The Court held that the 'policy or custom' requirement also applies when plaintiffs seek prospective relief. The Court stated, "The language of §1983 read in light of Monell's understanding of the legislative history explains why claims for prospective relief, like claims for money damages, fall within the scope of the 'policy or custom' requirement. Nothing in the text of §1983 suggests that the causation requirement contained in the statute should change with the form of relief sought. In fact, the text suggests the opposite when it provides that a person who meets §1983's elements 'shall be liable ... in an action at law, suit in equity, or other proper proceeding for redress.' Thus, as Monell explicitly stated, '[l]ocal governing bodies ... can be sued directly under §1983 for monetary, *declaratory, or injunctive relief* where, as here, the action that is alleged to be unconstitutional implements or executes' a policy or custom. 436 U.S., at 690 (emphasis added). Monell went on to quote this Court's statement in a 1973 case, Kenosha v. Bruno, 412 U.S. 507, 513, to the effect that the Congress that enacted §1983 did not intend the "'generic word 'person' ... to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.'" 436 U.S., at 701, n. 66 (emphasis added). Monell added that '[n]othing we say today affects' this pre-Monell 'conclusion.' *Ibid.*" The Court emphasized that the logic set forth in Monell also weighed against any such relief-based bifurcation. "The Monell Court thought that Congress intended potential §1983 liability where a municipality's *own* violations were at issue but not where only the violations of *others* were at issue. The 'policy or custom' requirement rests upon that distinction and embodies it in law. To find the requirement inapplicable where prospective relief is at issue would undermine Monell's logic. For whether an action or omission is a municipality's 'own' has to do with the nature of the action or omission, not with the nature of the relief that is later sought in court." (Emphasis in original.)

Constitutional Law; Adequate Public Facilities; Education; School Impact Fees; Residential Development; Lack of Statutory Authority

UNION LAND OWNERS ASSOCIATION V. COUNTY OF UNION, 201 N.C. App. 374, 689 S.E.2d 504 (2009), *disc. review denied*, 364 N.C. 442, 703 S.E.2d 148 (2010)

Because the N.C. Constitution places the duty to fund public schools on the General Assembly and local governments and because the General Assembly has neither expressly nor impliedly authorized defendant-County to shift that duty using subdivision ordinances that impose fees or use similar devices upon developers of new construction, defendant-County's adoption of an Adequate Public Facilities Ordinance that includes a voluntary mitigation payment and similar measures was in excess of statutory authority.

FACTS: In 1998, 2000, and 2005, defendant-County unsuccessfully sought authority from the General Assembly to impose school impact fees upon developers. After the failure of the most recent attempt, defendant-County initiated plans for a subdivision development approval moratorium, allowing time for the drafting of an Adequate Public Facilities Ordinance ("APFO"). (The APFO provides a methodology for evaluating the impact of proposed residential developments on schools within unincorporated areas of the County, and the APFO methodology is intended to assist defendant-County in determining whether to issue or deny development permits.)

In October 2006, defendant-County amended the Land Use Ordinance by adopting the APFO and a resolution establishing a procedure for calculating the amount of a Voluntary Mitigation Payment ("VMP"). If it is projected that the impact would overburden the capacity of schools serving the development, the proposal is denied outright or approved subject to compliance with certain conditions intended to mitigate the impact on school capacity issues, including: (1) deferring approval for five years; (2) postponing development until school capacity becomes available; (3) scheduling the development to match the rate of school capacity growth; (4) redesigning the proposed development to reduce the impact on school capacity; (5) requesting minor plat approval so as to exempt the proposed development from APFO conditions; (6) offsetting any excess impact on school capacity resulting from the proposed development by providing a VMP to the County; (7) constructing school facilities to offset the proposed development's impact in excess of estimated school capacity; or (8) satisfying, with defendant's approval, other reasonable conditions offsetting the proposal's impact on the capacity of schools serving the proposed development.

Plaintiffs subsequently filed an action requesting that the trial court *inter alia*: (1) declare the APFO null and void as being unlawful and *ultra vires*; (2) order defendant to refund fully any and all fees paid by plaintiffs pursuant to the APFO, including, but not limited to, VMPs, with interest; and (3) enjoin defendant and defendant's agents from enforcing the APFO and from refusing to approve developments and other permits based upon the APFO.

Upon cross-motions for summary judgment, the trial court granted defendant-County's motion for summary judgment. Plaintiffs appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously reversed and remanded. Judge Jackson wrote the opinion, joined by Judge McGee and Judge Ervin.

Acknowledging "the existence of serious issues associated with overcrowding in the school system and with the provision of adequate educational facilities to address these issues and further recognize that those issues also affect the public welfare," the Court nonetheless found the holding in Durham Land Owners Ass'n v. County of Durham, 177 N.C. App. 629, 630 S.E.2d 200, *disc. review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006) (*Digest of Municipal Law 2005-06*, p. 15), determinative. "In Durham Land Owners, this Court held that Durham County could not shift the financial responsibility for funding school construction to new developments by using a school impact fee. *Id.* at 636-37, 630 S.E.2d at 205. Here, authors of the APFO and VMP clearly worked in good faith, using their best efforts to draft an ordinance that would operate

within defendant's statutorily-granted authority. However, as with the use of school impact fees in Durham Land Owners, defendant uses the APFO, which uses a VMP and other similar measures, to shift impermissibly a portion of the burden for funding school construction onto developers seeking approval for new developments. Defendant may not use the APFO to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly. Therefore, because our Constitution places the duty to fund public schools on the General Assembly and local governments and because the General Assembly has neither expressly nor impliedly authorized defendant to shift that duty using subdivision ordinances that impose fees or use similar devices upon developers of new construction, we hold that defendant's adoption of an APFO that includes a VMP and similar measures was in excess of its statutory authority. We reverse and remand to the trial court for entry of an order consistent with this opinion."

NOTE: Defendant-County filed a petition for discretionary review in January 2010. The N.C. Supreme Court denied the petition for discretionary review on October 7, 2010.

Constitutional Law; First Amendment; Picketing; Free Speech Clause; Defense to Tort Liability; Traditional Public Forum; Matter of Public Concern

SNYDER V. PHELPS, 562 U.S. ___, 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 (No. 09-751, 3/2/11)

In an 8-1 decision, U.S. Supreme Court affirms decision of Fourth Circuit in picketers' successful appeal from jury verdict awarding damages for intentional infliction of emotional distress arising from protest near soldier's funeral service, where picketing took place on public land adjacent to a public street approximately 1,000 feet from the church. The Free Speech Clause of the First Amendment serves as a defense to tort actions on the facts presented here. Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. Given that picketers' speech was at a public place on a matter of public concern, that speech is entitled to special protection under the First Amendment.

FACTS: Petitioner Snyder, the father of a soldier who tragically died in Iraq in the line of duty in March 2006, filed suit in federal court against respondents Westboro Baptist Church (based in Topeka, Kansas), Fred Phelps (Westboro's pastor), and other Westboro members for picketing at the funeral, alleging several Maryland tort law claims (including intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy). The picketers, notifying authorities in advance of their intent to picket at the time of the funeral, complied with police instructions in staging their demonstration. The picketing took place within a 10 by 25 foot plot of public land adjacent to a public street (behind a temporary fence), approximately 1,000 feet from the Catholic church where the funeral was held (with several buildings separating the picket site from the church). The picket signs reflected Westboro's view that the United States is overly tolerant of sin and that God kills soldiers as punishment. The funeral procession passed within 200 - 300 feet of the picket site, and petitioner Snyder testified that he could see the tops of the picket signs as he went to the funeral. (He did not see what was written on the signs until a news broadcast later that night.) The picketers displayed their signs for approximately one-half hour before the funeral began, singing hymns and reciting Bible verses. They did not enter church property, nor did they go to the cemetery.

Describing the severity of his emotional injuries, petitioner Snyder testified that he is unable to separate the thought of his dead son from his thoughts of the picketing, and that he often becomes tearful, angry, and physically ill on such occasions. Expert testimony was submitted re-

garding the impacts of petitioner Snyder's emotional anguish. Finding for petitioner Snyder, a jury rendered a verdict for \$2.9 million in compensatory damages and \$8 million in punitive damages. Upon Westboro's filing of several post-trial motions, the U.S. District Court, 533 F.Supp.2d 567, 597 (Md. 2008) remitted the punitive damages award to \$2.1 million, but left the jury verdict otherwise intact. Westboro's primary argument before the Fourth Circuit Court of Appeals was that the church was entitled to judgment as a matter of law because the First Amendment fully protected its speech. Reviewing the picket signs, the Fourth Circuit, 580 F.3d 206 (2009), concluded that Westboro was entitled to First Amendment protection because its statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric. The U.S. Supreme Court granted Snyder's petition for certiorari in March 2010.

HOLDING: In an 8-1 decision written by Chief Justice Roberts, the U.S. Supreme Court affirmed. "Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us.... Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with [decedent's] funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech. Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case." Justice Breyer filed a concurring opinion. Justice Alito dissented.

Citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50-51 (1988), the majority initially stated that the Free Speech Clause of the First Amendment can serve as a defense to state tort actions. As to the dissenting opinion, the majority observed in a footnote, "The dissent attempts to draw parallels between this case and hypothetical cases involving defamation or fighting words. But, as the court below noted, there is 'no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or 'fighting words' 580 F.3d, at 218, n. 12; see United States v. Stevens, 559 U.S. ___, ___ (2010) (slip op., at 5)." There was no yelling, profanity, or violence associated with the picketing.

The majority stated that the issue of whether the Free Speech Clause prohibits holding Westboro liable turns largely on whether its speech is of public or private concern, as determined by all the circumstances. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,' The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'" (Citations omitted.) Discerning whether speech is of public or private concern requires an examination of its "content, form, and context ... as revealed by the whole record." Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., 472 U.S. 749, 761 (1985) (quoting Connick v. Myers, 461 U.S. 138, 147-148 (1983)). Finding that the "overall thrust and dominant theme" of the demonstration spoke to broad public issues, the majority stated, "While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed, unlike the private speech in Dun & Bradstreet, to reach as broad a public audience as possible.... Its speech is 'fairly characterized as con-

stituting speech on a matter of public concern,' Connick, 461 U.S., at 146, and the funeral setting does not alter that conclusion.”

The majority, observing that Westboro picketed peacefully on matters of public concern at a public place adjacent to a public street, emphasized that the picketing occurred in a traditional public forum. Taking note of the dissent, the majority stated, “The dissent is wrong to suggest that the Court considers a public street ‘a free-fire zone in which otherwise actionable verbal attacks are shielded from liability.’ The fact that Westboro conducted its picketing adjacent to a public street does not insulate the speech from liability, but instead heightens concerns that what is at issue is an effort to communicate to the public the church’s views on matters of public concern. That is why our precedents so clearly recognize the special significance of this traditional public forum.”

In setting aside the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress, the majority stated, “The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said ‘God Bless America’ and ‘God Loves You,’ would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.... Such speech cannot be restricted simply because it is upsetting or arouses contempt.... The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was ‘outrageous.’ ‘Outrageousness,’ however, is a highly malleable standard with ‘an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.’ Hustler, 485 U.S., at 55. In a case such as this, a jury is ‘unlikely to be neutral with respect to the content of [the] speech,’ posing ‘a real danger of becoming an instrument for the suppression of ... “vehement, caustic, and sometimes unpleasan[t]” expression. Such a risk is unacceptable; ‘in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate “breathing space” to the freedoms protected by the First Amendment.’ What Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.” (Citations omitted.)

The majority rejected petitioner Snyder’s other argument, which contended that, assuming *arguendo* that Westboro’s speech was entitled to protection generally, it was not immunized from liability for the tort of intrusion upon seclusion because Snyder was a member of a captive audience at his son’s funeral. “As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see Rowan v. Post Office Dept., 397 U.S. 728, 736-738 (1970), and an ordinance prohibiting picketing ‘before or about’ any individual’s residence, Frisby, 487 U.S., at 484-485. Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here.”

CONCURRENCE: Justice Breyer filed a concurring opinion, extending the First Amendment analysis. “A State can sometimes regulate picketing, even picketing on matters of public concern. See Frisby v. Schultz, 487 U.S. 474 (1988). Moreover, suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A’s use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (‘fighting words’).”

Justice Breyer further noted the narrow scope of the majority opinion. “As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict. That review makes clear that Westboro's means of communicating its views consisted of picketing in a place where picketing was lawful and in compliance with all police directions. The picketing could not be seen or heard from the funeral ceremony itself. And Snyder testified that he saw no more than the tops of the picketers' signs as he drove to the funeral. To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm. Consequently, the First Amendment protects Westboro. As I read the Court's opinion, it holds no more.” (Citations omitted.)

DISSENT: Justice Alito dissented. Reviewing the evidence in the record, Justice Alito stated, “[I]t is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked [decedent] because (1) he was a Catholic and (2) he was a member of the United States military. Both [decedent] and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding [decedent's] purely private conduct does not.” Finding funerals to be “unique events” deserving special protection against vicious verbal assaults, Justice Alito stated, “At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. *See National Archives and Records Admin. v. Favish*, 541 U.S. 157, 168 (2004). Exploitation of a funeral for the purpose of attracting public attention ‘intrud[es] upon their ... grief,’ *ibid.*, and may permanently stain their memories of the final moments before a loved one is laid to rest. Allowing family members to have a few hours of peace without harassment does not undermine public debate. I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.”

Nota Bene (N.B.)
Other Decisions of Note

**Constitutional Law; Adequate Public School Facilities Ordinance;
Conditional Rezoning; Statute of Limitations; Due Process; Equal Protection;
42 U.S.C. § 1983 & § 1988; Attorneys' Fees**

AMWARD HOMES, INC. V. TOWN OF CARY, ___ N.C. App. ___, 698 S.E.2d 404 (No. COA09-923, Wake— 8/3/10), *petition for disc. review allowed*, 365 N.C. 210, 709 S.E.2d 597 (No. 390P10, 6/15/11) (affirming trial court's orders, Court of Appeals holds, “(1) the Town of Cary engaged in *ultra vires* acts by accepting the fees pursuant to the condition and the subdivision ordinance, (2) plaintiffs' causes of action are not barred by the statute of limitations, (3) plaintiffs are not estopped from bringing their claims against the Town, (4) the Town of Cary violated plaintiffs' rights to due process and equal protection under the North Carolina and United States Constitutions, and (5) the trial court did not abuse its discretion in awarding plaintiffs attorneys' fees and costs [pursuant to 42 U.S.C. § 1988(b)].”; dissenting opinion states, “Although I agree with the reasoning in the majority opinion, because I believe this appeal is interlocutory, I would vote to dismiss.... [T]his Court has emphasized that the trial court's certification of an appeal

pursuant to Rule 54(b) does not deprive this Court of its role in determining whether the appeal is properly before us or not.... Here, the Town of Cary has done no more than make the bare assertion that this matter has been ‘certified by the trial court for review in this Court pursuant to N.C. R. Civ. P. 54(b)’....”)

Constitutional Law; Adequate Public Facilities Ordinance; School Impact Fees; Statute of Limitations; Local Act

LANVALE PROPERTIES, LLC v. COUNTY OF CABARRUS, ___ N.C. App. ___, 699 S.E.2d 139 (Nos. COA09-1610, -1611 & -1621, Cabarrus– 9/7/10) (*unpublished*), *petition for disc. review allowed*, 365 N.C. 210, 709 S.E.2d 598-99 (No. 436-38PA10, 6/15/11) (Court of Appeals holds that trial court correctly entered summary judgment for plaintiffs in action challenging school impact fees; “Here, Cabarrus County’s arguments asserted in support of upholding its APFO [adequate public facilities ordinance] are identical to Union County’s contentions that this Court rejected in Union Land Owners Ass’n [v. County of Union], ___ N.C. App. ___, 689 S.E.2d 504 (2009) (*see p. 13 of this Digest*)]. As we are bound by Union Land Owners Ass’n, In re Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we conclude that Cabarrus County lacks the authority to adopt its APFO pursuant to its general zoning or subdivision powers. *See also Amward Homes, Inc. v. Town of Cary*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2010 N.C. App. LEXIS 1440, *27, 2010 WL 3001393, *10 (COA09-923) (Aug. 3, 2010) [(*see p. 17 of this Digest*)] (concluding, based on Union Land Owners Ass’n, that municipality’s collection of school impact fee under ‘Adequate Public School Facilities’ ordinance ‘illegally shifted the burden of paying for public education to the subdivision builder-plaintiffs in this case’); Durham Land Owners Ass’n v. County of Durham, 177 N.C. App. 629, 636-38, 630 S.E.2d 200, 205-06 (2006) (holding that county could not shift financial responsibility for funding school construction to new developments by using school impact fee) [(*see Digest of Municipal Law 2005-06*, p. 15)]”; citing Amward, also rejecting County’s statute of limitations arguments; rejecting County’s arguments pertaining to H.B. 224, ch. 39, § 5, 2004 N.C. Sess. Laws (“House Bill 224”) (providing, “Notwithstanding the provisions of Article 19 of Chapter 160A of the General Statutes, the County of Cabarrus or any municipality therein may enforce, within its jurisdiction, any provision of the school adequacy review performed under the Cabarrus County Subdivision Regulations, including approval of a method to address any inadequacy that may be identified as part of that review.”); Court of Appeals states, “The language of House Bill 224 is unambiguous: the County may ‘enforce’ its ‘school adequacy review’ provisions; it does not provide the County with the ‘authority’ to adopt a revenue-generating impact fee. We, therefore, do not look beyond the plain language of House Bill 224 to effectuate the Legislature’s intent.”; noting in a footnote that, “Nothing, however, prevents the County from requesting from the General Assembly the explicit authority to adopt an APFO with the procedures and conditions contemplated in the County’s current ordinance.”)

**Constitutional Law; Economic Incentives; Taxpayer Standing;
Sales and Use Tax Exemptions**

MUNGER V. STATE OF NORTH CAROLINA, 202 N.C. App. 404, 689 S.E.2d 230 (2010), *disc. review improv. allowed*, 365 N.C. 3, 705 S.E.2d 734 (2011) (*per curiam*) (Court of Appeals rejects plaintiffs' contention that they had standing in their capacity as taxpayers to challenge the sales and use tax exemptions granted to "eligible internet data centers" in the 2006 Current Operations Appropriations Act, 2006 N.C. Sess. Laws c. 66, as violative of the uniformity in taxation provisions of N.C. Const. art. V, §§ 2(1) & 2(2) and the "law of the land" clause of N.C. Const. art. I, § 19; "[W]e must determine whether Plaintiffs' status as individuals who pay North Carolina sales and use taxes makes them members of a "class which is prejudiced by the statute," [In re Appeal of] Barbour, 112 N.C. App. [368] at 373, 436 S.E.2d [169] at 173 [(1993)], entitled to challenge the sales and use tax exemption granted to eligible internet data centers. In our opinion, that question has already been answered in the negative by our decision in Blinson [v. State of North Carolina], 186 N.C. App. 328, 342, 651 S.E.2d 268, 277-78 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 355, 661 S.E.2d 241 (2008)].... The argument upon which Plaintiffs predicate their claim to have standing in this case does not differ materially from the argument utilized by the Blinson plaintiffs, which ... hinged solely upon the fact that they paid the taxes from which the affected computer manufacturers were exempt. Blinson, 186 N.C. App. at 334, 651 S.E.2d at 273. In this case, Plaintiffs have made essentially the same argument, which is that they pay sales and use tax, that the same sort of exemption available to eligible internet data centers is not available to them, and that the existence of the sales and use tax exemption for eligible internet data centers forces them to bear more of the burden of financing the activities of state government than would be the case in the absence of the exemption. The fact that the class at issue here (that of all sales and use taxpayers) is indistinguishable on any principled basis from the class at issue in Blinson (that of all persons paying the taxes from which the large computer manufacturers were exempt) necessitates a conclusion that the Plaintiffs lacked standing to assert the discrimination-based claims...." Plaintiffs appealed to the N.C. Supreme Court in March 2010. In October 2010, the N.C. Supreme Court granted plaintiffs' petition for discretionary review. Oral arguments occurred in January 2011. On February 4, 2011, the Supreme Court issued a *per curiam* opinion stating that discretionary review had been improvidently allowed.)

**Constitutional Law; Economic Incentives; Public Purpose Clause; Emoluments;
Standing**

HAUGH V. COUNTY OF DURHAM, ___ N.C. App. ___, 702 S.E.2d 814 (No. COA09-167, Durham— 12/7/10), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 17P11, 8/25/11) (Rejecting plaintiffs' challenge *inter alia* alleging that Durham's tax incentive for benefit of Nitronex Corporation violated the Public Purpose Clauses of the N.C. Constitution, Article V, sections 2(1) (power of taxation) & 2(7) (contracts), or otherwise offered an incentive for a wholly intrastate relocation undertaken five years prior to awarding the incentive; Court of Appeals states, "Plaintiffs appear to at-

tempt to distinguish the case *sub judice* from our holdings in Peacock [v. Shinn], 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000)] and Blinson [v. State], 186 N.C. App. 328, 651 S.E.2d 268 (2007)] and our Supreme Court's holding in Maready [v. City of Winston-Salem], 342 N.C. 708, 467 S.E.2d 615 (1996)] by framing this as a novel case of intrastate competition between adjacent counties and characterizing Durham's action as a reward for consummating a plan Nitronex already had conceived and to which it already had committed. We are not persuaded, and hold that [Nitronex C.E.O.'s] undisputed deposition testimony contradicts plaintiff's position and places the remaining issues squarely within the purview of holdings that we are not at liberty to revisit.... [N]otwithstanding the existence of a lease on a partially complete building in Durham, Nitronex's remaining in North Carolina was not a foregone conclusion. Rather, Nitronex's consideration was relocating to and outfitting a partially completed facility in Durham or moving to readily available facilities with readily available equipment in California." Plaintiffs filed a petition for discretionary review in January 2011. The N.C. Supreme Court denied the petition for discretionary review on August 25, 2011.)

Constitutional Law; Economic Incentives; Public Purpose Clause; Exclusive Emoluments Clause

SAINÉ V. STATE OF NORTH CAROLINA, ___ N.C. App. ___, 709 S.E.2d 379 (No. COA10-832, Wake- 4/5/11) (Court of Appeals holds that trial court correctly granted State's motion to dismiss plaintiffs' constitutional challenges to 5 session laws allocating funds from the One North Carolina Fund, 143B-437.70, *et seq.*, to Johnson and Wales University.)

Constitutional Law; Executive Order; Transfer of Funds; Highway Trust Fund

GOLDSTON V. STATE OF NORTH CAROLINA, 199 N.C. App. 618, 683 S.E.2d 237 (2009), *aff'd by an equally divided court*, 364 N.C. 416, 700 S.E.2d 223 (2010) (*per curiam*) (In a 2-1 decision issued in September 2009, majority of Court of Appeals holds that "while the Governor may 'escrow' the Highway Trust Fund monies to prevent a deficit, he or she may not transfer appropriated Highway Trust Fund monies without awaiting appropriate legislative authority from the General Assembly.... We hold that the Constitution of North Carolina article III, section 5 is a grant of authority to the Governor, which is limited to escrowing or reducing budgeted expenditures and does not create a power to transfer and spend funds appropriated for one purpose to another purpose without statutory authority. We further declare the transfer of \$80,000,000 from the Highway Trust Fund to the General Fund in fiscal year 2001-2002 by the Governor exceeded his constitutional authority under N.C. Const. art. III, § 5." The Court of Appeals denied the State's petition for rehearing on October 22, 2009. On appeal pursuant to G.S. 7A-30(2), N.C. Supreme Court issues 3-3 decision stating, "Justice Timmons-Goodson took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the

Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”)

Constitutional Law; First Amendment; Legislative Prayer

JOYNER V. FORSYTH COUNTY, 653 F.3d 341 (4th Cir. 2011), *petition for writ of cert. filed* ___ U.S. ___ (No. 11-546, 10/27/11) (In a 2-1 decision, Fourth Circuit upholds district court’s issuance of both a declaratory judgment that the Board of Commissioners’ “invocation Policy, as implemented, violates the Establishment Clause of the Constitution” and an injunction against the Board “continuing the Policy as it is now implemented.”; Majority observes, “The case law ... sets out clear boundaries.... [L]egislative prayer must strive to be nondenominational so long as that is reasonably possible — it should send a signal of welcome rather than exclusion. It should not reject the tenets of other faiths in favor of just one. Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. But legislative prayers that go further — prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith — transgress the boundaries of the Establishment Clause. Faith is as deeply important as it is deeply personal, and the government should not appear to suggest that some faiths have it wrong and others got it right. Taken together, the principles set forth by the Supreme Court in Marsh [463 U.S. 783 (1983)] and Allegheny [492 U.S. 573 (1989)] and by this circuit in Wynne [376 F.3d 292 (4th Cir. 2004)] and Simpson [404 F.3d 276 (4th Cir. 2005)] establish that the Board’s policy, as implemented, cannot withstand scrutiny.... Taken as a whole, it is clear that the prayers offered under the Board’s policy did not ‘evoke common and inclusive themes and forswear ... the forbidding character of sectarian invocations.’ Simpson, 404 F.3d at 287. Wynne and Simpson set forth the constitutional line, and these prayers crossed it.” Rejecting County’s arguments that its neutral policy should be upheld given that the sectarian nature of the prayer at issue was simply a function of the “religious demographics of the communities” within the County, majority states, “It is not enough to contend, as the dissent does, that the policy was ‘neutral and proactively inclusive,’ when the County was not in any way proactive in discouraging sectarian prayer in public settings. Unlike in Simpson, the Board’s policy did not require that invocations be ‘non-sectarian’ and avoid ‘advanc[ing] any one faith or belief.’ Simpson, 404 F.3d at 278. Moreover, while the Board’s policy itself states that it is ‘not intended ... to affiliate the Board with, nor express the Board’s preference for, any faith or religious denomination,’ the letter it sends to the religious leaders actually giving the prayers sends a different message. The letter merely instructs them that the prayer opportunity should ‘not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker.’ In other words, the letter focuses on only one part of the Marsh test — proselytizing — and contains virtually no language discouraging leaders from advancing their own faith. *See Wynne*, 376 F.3d at 300 (‘ “[P]roselytize” and “advance” have different meanings and denote different activities.’).... This is not to say that the Board must abandon the practice of legislative prayer. Nor do we wish to set forth some sort of template for an ideal legislative prayer policy. After all, as we recognized in

Simpson, ‘too much judicial fine-tuning of legislative prayer policies risks unwarranted interference in the internal operations of a coordinate branch.’ Simpson, 404 F.3d at 286–87. The bar for Forsyth County is hardly a high one.’’)

Constitutional Law; Second Amendment; Handgun Ban

MCDONALD V. CITY OF CHICAGO, 561 U.S. ____, 130 S.Ct. 3020, 177 L.Ed.2d 894, 78 U.S.L.W. 4844 (No. 08-1521, 6/28/10) (In a 5-4 decision, U.S. Supreme Court reverses June 2009 opinion of Seventh Circuit Court of Appeals which had upheld dismissal of challenges to municipal ordinances banning handguns; majority states “Two years ago, in District of Columbia v. Heller, 554 U.S. ----, [128 S.Ct. 2783, 171 L.Ed.2d 637] (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.’’)

EMINENT DOMAIN

Eminent Domain; Mall; Leasehold Interests; Government Offices; Scope of the Project Rule

MECKLENBURG COUNTY V. SIMPLY FASHION STORES, LTD. ___ N.C. App. ___ 704 S.E.2d 48 (No. COA09-1625, Mecklenburg— 12/21/10), *disc. review denied*, 365 N.C. 187, 707 S.E.2d 231 (No. 44P11, 4/7/11) (Where County, which had brought Freedom Mall property in 2004 and became successor-in-interest to leasehold agreements, filed suit in May 2008 to condemn defendant Simply Fashion’s leasehold interest following defendant’s rejection of early termination offer, N.C. Court of Appeals holds that trial court properly determined that Simply Fashion did not have a right to a second 5-year extension and that County had the right to exercise the termination clause; “Simply Fashion argues that, because the termination clause is not triggered except in the event that the ‘new owner’-here, the county-intends to use the space for a non-retail purpose and because the scope of the project rule prevents the condemnor’s future use of the property from affecting the amount of just compensation, the termination clause in section 4.01 cannot be considered in valuing the property here. We hold, as did the trial court, that the scope of the project rule applies to the current set of facts. Nonetheless, this rule operates to require that the property be valued as retail space rather than government office space, which is the use intended by the county. Simply Fashion’s attempt to extend the application of this rule to strike a provision from a contract-that it negotiated, to which it agreed, and which it signed-is beyond the parameters of the scope of the project rule. Accordingly, the county had the right to terminate the lease pursuant to section 4.01, and Simply Fashion’s arguments to the contrary are without merit.” Defendant filed a petition for discretionary review in January 2011. The N.C. Supreme Court denied the petition for discretionary review on April 7, 2011.)

LAND USE

Land Use; Adult Entertainment; Separation Requirement; Whole Record Test; Arbitrary and Capricious Standard

STB OF CHARLOTTE, INC. v. ZONING BD. OF ADJUST. FOR THE CITY OF CHARLOTTE, ___ N.C. App. ___, 713 S.E.2d 792 (No. COA10-1220, Mecklenburg– 6/7/11) (*unpublished*)

Trial court correctly upheld Board of Adjustment’s denial of request for variance from 1000-foot separation requirement.

FACTS: Petitioner STB of Charlotte, Inc. d/b/a Babydolls, operator of an adult entertainment establishment, appealed from the trial court’s order affirming the Zoning Board of Adjustment’s decision to deny its request for a zoning variance. Petitioner’s operation of the establishment was in violation of Zoning Ordinance § 12.518(b) (which provides, “Any structure in which an adult establishment, other than an adult bookstore or adult mini motion picture theater, is the principal or accessory use shall be separated by a distance of at least 1000 feet from any residential district, school, church, child care center, park or playground.”) Before granting a variance from the separation requirement, the Board of Adjustment must find that “thoroughfares, traffic circulation patterns, structures or other natural or man-made geographic or topographic features are likely to provide an adequate measure of protection for the protected zoning or use from any secondary effects of the adult establishment.” Zoning Ordinance § 12.518(g). The Board must also find that the variance complies with the general requirements listed in Zoning Ordinance § 5.108(1).

In December 2009, petitioner filed a request seeking a variance from the separation requirement. Upon a hearing the following month, the Board denied petitioner’s request, finding that the current use of the subject premises was a non-conforming use and failed to comply with the requirements set forth in § 12.518(g). The Board concluded that petitioner’s variance request “does not meet the general intent and spirit of the Zoning Ordinance and is not in harmony with the neighborhood.” Upon certiorari, the trial court issued an order in June 2010 affirming the Board’s decision. Petitioner appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge Beasley wrote the opinion, joined by Judge Calabria and Judge Steelman.

The Court initially observed that, “When a superior court grants certiorari to review the decision of a board of adjustment, the superior court sits as an appellate court, and not as a trier of facts.” Overton v. Camden Cty., 155 N.C. App. 391, 393, 574 S.E.2d 157, 159 (2002) (internal quotation marks omitted) and that, “The ‘whole record’ test does not allow the reviewing court to replace the Board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.” Northwest Property Group, LLC v. Town of Carrboro, ___ N.C. App. ___, ___, 687 S.E.2d 1, 6 (2009) (quoting Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)).

Petitioner argued that the trial court erroneously failed to determine that the Board’s decision was arbitrary and capricious. The Court disagreed. The Court determined that in applying the whole record test, the trial court appropriately determined that the Board’s decision was not made arbitrarily or capriciously. McDonald v. City of Concord, 188 N.C. App. 278, 285, 655 S.E.2d 455, 459-60 (2008) (“Decisions will be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment.”)

In affirming the trial court’s order, the Court stated, “[A]pplying the whole record test, it is apparent that the trial court appropriately determined that the decision of the board of adjustment

was not made arbitrarily or capriciously.... During the 26 January 2010 hearing, Respondent reviewed various forms of both documentary and testimonial evidence. Additionally, the board of adjustment received arguments from both Petitioner's and Respondent's counsel. Citing two prior instances in which the zoning board granted a variance under similar circumstances, Petitioner argues that the decision to grant a variance in some cases and not others is evidence of arbitrariness. While similar, each case cited by Petitioner is factually distinguishable from the case at bar. In each case cited by Respondent, the zoning board determined that 'certain natural features provid[ed] an adequate measure of protection for the protected uses from any secondary effects of the adult establishment.' In this case, no natural barrier separated Petitioner from at least two of the residential properties and Petitioner would require a rather significant variance. Petitioner also presented evidence that at least two of the neighboring residential property owners did not oppose the variance. However, Respondent countered and presented evidence that a number of surrounding property owners were opposed to the variance. After a review of the whole record, it is apparent that Respondents considered the unique facts and circumstances presented in this action before concluding that a variance was not appropriate. Though Petitioner presented some evidence to support its contention that its request for a variance should be granted, the mere existence of contrary evidence does not entitle the superior court to replace the judgment of the zoning board. Northwest Property Group, ___ N.C. App. at ___, 687 S.E.2d at 6."

Land Use; Billboards; Permit; DOT Project; Involuntary Relocation

MORRIS COMMS. CORP. V. CITY OF BESSEMER CITY ZONING BD. OF ADJUST., 365 N.C. 152, 712 S.E.2d 868 (2011)

In case involving relocation of billboard mandated by DOT project, N.C. Supreme Court reverses majority opinion of Court of Appeals, which had upheld Board of Adjustment's decision requiring the removal of petitioner's billboard due to lack of physical alteration of site within six months of issuance of sign permit. Undefined and ambiguous terms in an ordinance are given their ordinary meaning and significance, and the undefined term "work" has a broader meaning than mere visible evidence of construction. Billboard was not being moved to increase its visibility, and rule of construction that zoning ordinances are strictly construed in favor of the free use of real property is appropriately applied here.

FACTS: The facts of this case, involving relocation of a sign (originally constructed in 2000 in close proximity to the Gastonia Highway with a NAPA auto parts store located on the same parcel) to accommodate a 2005 North Carolina Department of Transportation project, are found at *Digest of Municipal Law 2009-2010*, p. 20. In March 2010, a divided panel of the N.C. Court of Appeals, ___ N.C. App. ___, 689 S.E.2d 880 (2010), upheld the trial court's order affirming the Board of Adjustment's (BOA's) decision requiring the removal of petitioner's billboard given the expiration of the sign permit issued in 2005 for the relocation. Finding the Board's interpretation of the undefined term "work" in the ordinance too narrow, the dissent stated that that the term "'work' does not necessarily mean that a physical alteration must occur at the site." *Id.* at ___, 689 S.E.2d at 887. (The ordinance at issue provided, "If the work described in any compliance or sign permit has not begun within six months from the date of issuance thereof, the permit shall expire. Upon beginning a project, work must be diligently continued until completion with some progress being apparent every three months. If such continuance or work is not shown, the permit will expire." City of Bessemer City, N.C., Ordinance § 155.207.) In April 2010, petitioner filed a notice of appeal based on the dissenting opinion. G.S. 7A-30(2).

HOLDING: In an opinion written by Justice Martin, the N.C. Supreme Court unanimously

reversed. (Justice Jackson did not participate in the consideration or decision of this case.)

The Court initially stated, “Reviewing courts apply *de novo* review to alleged errors of law, including challenges to a board of adjustment’s interpretation of a term in a municipal ordinance. See Capricorn Equity Corp. [v. Town of Chapel Hill Bd. of Adjust.], 334 N.C. [132] at 137, 431 S.E.2d [183] at 187 [(1993)]; see also Mann Media [Inc. v. Randolph Cnty. Planning Bd.], 356 N.C. [1] at 13, 565 S.E.2d [9] at 17 [(2002)] (citations omitted); In re Tadlock, 261 N.C. 120, 124-25, 134 S.E.2d 177, 180-81 (1964) (interpreting a city zoning ordinance as a question of law). *De novo* review applies here because Fairway alleges the BOA’s interpretation of the term ‘work’ constituted an error of law. See Mann Media, 356 N.C. at 13, 565 S.E.2d at 17.”

Fairway contended that the Court of Appeals erred in determining that the Board’s interpretation was entitled to deference under *de novo* review. The Court agreed. “Under *de novo* review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment’s conclusions of law. *Id.* (citation omitted). In Capricorn Equity Corporation, we noted that ‘the superior court, sitting as an appellate court, *could* freely substitute its judgment for that of [the Chapel Hill Board of Adjustment] and apply *de novo* review as *could* the Court of Appeals with respect to the judgment of the superior court.’ 334 N.C. at 137, 431 S.E.2d at 187 (emphases added) (citing N.C. Sav. & Loan League v. Credit Union Comm’n., 302 N.C. 458, 464-65, 276 S.E.2d 404, 409-10 (1981)). In other words, reviewing courts may ‘make independent assessments of the underlying merits’ of board of adjustment ordinance interpretations. 4 Patricia E. Salkin, *American Law of Zoning* § 42:41, at 42-180 & n.1 (5th ed. 2010) (citing, among other authority, Capricorn Equity Corp., 334 N.C. at 137, 431 S.E.2d at 187). This proposition emphasizes the obvious corollary that courts consider, but are not bound by, the interpretations of administrative agencies and boards. See, e.g., Wells v. Consol. Jud’l Ret. Sys. of N.C., 354 N.C. 313, 319-20, 553 S.E.2d 877, 881 (2001) (upholding long-standing agency interpretation); N.C. Sav. & Loan League, 302 N.C. at 465-66, 276 S.E.2d at 410 (finding agency interpretation ‘unpersuasive’).”

Turning to the ordinance at issue, the Court found the Board’s interpretation of the term “work” unpersuasive. The Court agreed with Fairway that that the term “work” has a broader meaning than mere visible evidence of construction. Noting that “[u]ndefined and ambiguous terms in an ordinance are given their ordinary meaning and significance,” the Court observed that “*Webster’s Dictionary* defines ‘work’ to include ‘sustained physical *or mental* effort to overcome obstacles and achieve an objective or result. *Merriam-Webster’s Collegiate Dictionary* 1363 (10th ed. 1999) (emphasis added). Applying this definition to the Bessemer City ordinance, the term ‘work’ has a broader meaning than mere visible evidence of construction. *Cf. Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969) (holding that landowners who incurred contractual obligations to construct a building and to purchase dry cleaning equipment acquired vested rights to carry on a nonconforming use, even though the contracts did ‘not result in any visible change in the condition of the land’).”

The Court observed that during the six month period following the issuance of the sign permit, Fairway communicated with DOT about removing the sign, started renegotiating the lease with Dixon (the property owner), and secured a Gaston County building permit. “One of the fundamental purposes of zoning boards of adjustment is to provide flexibility and ‘prevent ... practical difficulties and unnecessary hardships’ resulting from strict interpretations of zoning ordinances. See 2 James A. Webster, Jr., Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster’s Real Estate Law in North Carolina* § 18-19, at 874 (5th ed. 1999) [hereinafter *Webster’s*]; see also [G.S.] 160A-388(d) (2009). Thus, ‘[f]or the purpose of effecting a just result,’ boards of adjustment are empowered ‘to correct errors or abuse’ arising from ‘the zoning enforcement officer[’s]’ administration of an ordinance. *Webster’s* § 18-19, at 874. By affirming the Bessemer City zoning administrator’s narrow and restrictive interpretation of the term ‘work,’ the BOA failed to effectuate ‘a just result.’ The record raises an inference that the Bessemer City zoning administrator took advantage of the ambiguity in the sign ordinance and the uncertainty and com-

plexity of the road widening project to hasten the city's prospective ban on outdoor advertising. The administrator admitted during the BOA hearing that his interpretation of the term 'work' was entirely subjective. As he put it, '[T]his is my interpretation.' He also revealed that both the Bessemer City planning department and he had a 'general disagreement with billboards.' On several occasions during the hearing, the administrator referred to the sign in question as 'new,' even though he could not support this characterization with specific evidence. The zoning administrator was generally aware of the sign relocation project and the behind-the-scenes steps necessary to complete it.... During his testimony before the BOA, the administrator acknowledged that the sign had to be relocated *because of* the DOT's road widening project. The administrator discussed the relocation with a Fairway representative when she picked up the sign permit. Beginning in September 2005, the administrator participated in several meetings between DOT and Dixon about the road widening project. The zoning administrator also knew that the sign relocation and NAPA building renovation were linked." (Emphasis in original.)

In closing its opinion, the Court stated, "We acknowledge that requiring municipalities to investigate the validity of the numerous permits they have issued would be unduly burdensome. But our decision does not impose such a requirement because our holding is limited to the unusual facts of this case, involving the overly restrictive application of a vague ordinance to a sign relocation that was mandated by a DOT project. Fairway was not moving the sign to increase its visibility; the relocation was necessary to accommodate a DOT project. In sum, the rule of construction that zoning ordinances are strictly construed in favor of the free use of real property is appropriately applied here. To relocate its sign Fairway was required to work with three levels of government—one of which had a stated policy opposing outdoor advertising. Nevertheless, Fairway took multiple steps to lawfully relocate its sign within the six month period prescribed in the sign permit. Because respondent's interpretation of its sign ordinance constituted an error of law, we reverse."

Land Use; Conditional Use Permit; Amendment; Parking Deck; Hotel

FOUR SEASONS MGMT SERVICES, INC. v. TOWN OF WRIGHTSVILLE BEACH, ___ N.C. App. ___, 695 S.E.2d 456 (No. COA09-777, New Hanover— 7/6/10)

Trial court did not err by upholding the Board's order affirming the decisions of the zoning administrators to deny petitioner's request to construct a parking deck without seeking and obtaining an amendment to its conditional use permit.

FACTS: Petitioner Four Seasons Management Services, Inc., owner and operator of the Blockade Runner, appealed from an order upholding a decision by respondents Town of Wrightsville Beach and the Board of Adjustment denying petitioner's request to build a four-story parking deck at a hotel without seeking and obtaining an amendment to its conditional use permit. (The Blockade Runner is located in a "C-4" zoning district (allowing accessory uses as a matter of right and permitting the operation of hotels as a conditional use). While a hotel has been operated at the site of the Blockade Runner for over a century, the Blockade Runner is not in compliance with the zoning ordinance (adopted in 1972) in a number of respects, as it does not have the required number of off-street parking spaces and violates the applicable setback requirements on its south side. Petitioner applied for and obtained a conditional use permit authorizing the enclosing of a portion of the lobby area for use as a solarium in April 1984, obtained an amendment authorizing the construction of stairs associated with a health spa in January 1985, and obtained another amendment authorizing the construction of an open-air gazebo in June 1991.)

On April 25, 2006, petitioner sought authorization to “construct a one-story parking deck” over its existing parking area and also sought approval for variances relating to setbacks and parking requirements. On April 26, 2006, the Town's Development Code Administrator denied the request, stating “After conferring with the Town Attorney, it has been determined that construction of the parking deck requires an amendment to the Blockade Runner's existing conditional use permit. The Town of Wrightsville Beach Table of Uses lists hotels and motels as a conditional-use in the C-4, Commercial District. It has been the practice of the Town to require amendments to existing conditional-use permits for changes or additions to structures requiring a conditional-use permit. In addition, the Town does not agree with your classification of the parking deck as an accessory structure or accessory use.... In addition, as acknowledged in your application, the parking deck as proposed violates the requirements of § 155.047 regarding setbacks and § 155.060 regarding required parking. Furthermore, the proposed parking deck encroaches into the 20-ft. sight triangle required by § 155.014. It should be noted that the plans as proposed do not bring the parking lot into compliance with the Landscaping Ordinance as required by § 155.181(5).”

On May 5, 2006, petitioner appealed to the Board of Adjustment. On October 12, petitioner submitted revised plans, requesting authorization to build a four-story parking deck over its existing parking area. On October 19, the Town's Director of Planning and Parks denied the revised request, restating the Town's previously-enunciated position that petitioner could not “construct the parking deck without going through the conditional-use process”; reiterating the Town's disagreement with “classification of the parking deck as an accessory structure or accessory use”; and pointing out that the proposed parking deck violated the requirements for the number of parking spaces and did “not bring the parking lot into conformity with the Landscaping Ordinance as required by § 155.181(5).” The Director also noted that the proposed plans would not bring the parking lot into conformity with the requirements for fire sprinklers (§ 94.46 of the zoning ordinance). On October 25, petitioner supplemented its May 2006 appeal by appealing to the Board from the Director's October 19 decision.

On November 29, 2006, the Board of Adjustment conducted a hearing on petitioner's appeal, receiving testimony and considered the arguments of counsel. The Board of Adjustment voted not to reverse the decision of the Director of Planning and Parks. On December 29, 2006, petitioner filed a petition seeking the issuance of a writ of certiorari permitting review of the Board's decision in superior court. In March 2008, the trial court held a hearing, and in February 2009, the trial court entered an order affirming the Board's decision. Petitioner appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge Ervin wrote the opinion, with Chief Judge Martin and Judge Hunter concurring.

Petitioner argued that the trial court erred by upholding the Town's “administrative determinations which denied the Petitioner the right to construct a multistory parking deck upon its property[.]” The Court initially noted that the Town did not unequivocally “deny” petitioner the right to construct a parking deck, but rather denied petitioner's request to construct the proposed deck without seeking and obtaining an amendment to its existing conditional use permit. “As a result, the ultimate issue which we must resolve is the extent, if any, to which Petitioner was entitled under the zoning ordinance to construct the proposed parking deck without undergoing the conditional use permit process.”

In arguing that it was not required to seek and obtain an amendment to its conditional use permit as a prerequisite to constructing the parking deck, petitioner contended that: (1) it is entitled to engage in “accessory uses” of its property without obtaining prior authorization from the zoning administration and enforcement authorities; (2) parking is an “accessory use” under the zoning ordinance; (3) a parking deck is an “accessory structure” under the zoning ordinance since the use of such a structure is subordinate and incidental to the operation of a hotel; (4) one needs “accessory structures” in order to engage in “accessory uses”; and (5) for that reason, the right to engage in an “accessory use” on one's property without obtaining prior approval necessarily in-

cludes the right to construct an “accessory structure” in which to conduct the proposed “accessory use” without obtaining prior approval. Noting that petitioner attempted to equate an “accessory use” with an “accessory structure,” the Court rejected this line of reasoning, holding that neither the zoning ordinance nor the cases upon which petitioner relied supported its argument that accessory structures are permitted as a matter of right, regardless of the nature or size of the structure.

Examining the ordinance first, the Court stated, “The validity of Petitioner's argument hinges upon the assumption that ‘accessory structures’ are equivalent to ‘accessory uses.’ The term ‘use’ is defined in the zoning ordinance as ‘[t]he specific activity or function for which land, a building or a structure is designated, arranged, intended, or maintained.’... [A]n ‘accessory use’ is defined as a ‘use customarily incidental and subordinate to the principal use or building and located on the same lot with the principal use or building.’ Thus, the zoning ordinance clearly intends for the term ‘accessory use’ to refer to something that someone does. A ‘structure,’ on the other hand, is defined as ‘[a]nything constructed or erected, the use of which requires more or less permanent location on the ground, or attached to something having more or less permanent location on the ground.’ The zoning ordinance defines an ‘accessory structure’ as a ‘detached subordinate structure[s], the use of which is incidental to that of the principal structure and located on the same lot therewith.’ As a result, the definitional provisions of the zoning ordinance clearly indicate that an ‘accessory structure’ is a physical object. As a result, the relevant provisions of the zoning ordinance simply do not treat ‘accessory uses,’ which are activities, and ‘accessory structures,’ which are physical objects, as equivalent, so that the fact that ‘accessory uses’ are permitted as a matter of right in the zoning district in which the Blockade Runner is located does not establish that Petitioner is entitled to construct an ‘accessory structure’ on its property as a matter of right.” The Court also found readily distinguishable three cases cited by petitioner, Dobo v. Zoning Bd. of Adjust. of the City of Wilmington, 149 N.C. App. 701, 562 S.E.2d 108 (2002), *reversing per curiam*, 356 N.C. 656, 576 S.E.2d 324 (2003), Tucker v. Mecklenburg Cty. Zoning Bd. of Adjust., 148 N.C. App. 52, 557 S.E.2d 631 (2001) *aff'd in part, disc. review improvidently granted in part*, 356 N.C. 658, 576 S.E.2d 324 (2003), and Allen v. City of Burlington Bd. of Adjmt., 100 N.C. App. 615, 397 S.E.2d 657 (1990).

Petitioner argued that the trial court erred by upholding the Board's conclusion that its request to build a multi-story parking deck was properly denied because the proposed deck would constitute an expansion of a non-conforming use. The Court rejected petitioner's argument. The Court observed, “[Section] 155.009(C)(1) of the zoning ordinance provides, in pertinent part, that, ‘[e]xcept as specifically provided in this division (C), it shall be unlawful for any person to engage in any activity that causes an increase in the extent of nonconformity of a non-conforming situation....’ According to § 155.009(D), ‘[a] nonconforming use shall not be changed to any but a use listed as permitted in the regulations for the district in which the nonconforming use is located.’ In addition, § 155.005(B) ... provides that: ‘After May 15, 1972, land or structures, or the uses of land or structures which conform to [zoning] regulations ... may be continued. However, any structural alteration or change in use shall conform with the regulations specified in this chapter.’ Moreover, § 155.009(I) ... provides, in pertinent part, that ‘[a]ny non-conforming building or structure, or any building containing a non-conforming use, or any building or structure constituting a non-conforming situation which is voluntarily substantially improved may only be rebuilt or altered so as to bring the structure into complete conformity with this code.’ As a result, the relevant provisions of the zoning ordinance clearly contemplate that any modifications to a nonconforming use are impermissible unless they bring the nonconformity to an end.” (Citation omitted.) The Court determined that the proposed parking deck's construction would clearly result in the expansion of an existing nonconformity as that concept was defined in the zoning ordinance, noting *inter alia* that the deck would still not have the required number of spaces in violation of § 155.009(I).

Petitioner contended that, since the proposed parking deck would “mitigate” the extent of the existing nonconformity (by increasing the number of available parking spaces), the construction of the proposed parking deck could not, as a matter of law, constitute the expansion of a nonconformity. In rejecting this argument, the Court stated, “In essence, Petitioner contends that, as long as its proposed building tends to reduce the discrepancy between the required number of parking spaces and the number of parking spaces that is actually available, it has a right to build a ‘ten story building’ for parking without obtaining an amendment to its conditional use permit, and regardless of its effect on the surrounding neighborhood. The adoption of such an argument, aside from its inconsistency with the literal language of the zoning ordinance, would lead to absurd results....”

The Court specifically noted that petitioner also argued that, under § 155.009(2) of the zoning ordinance, “where a nonconforming situation exists, change may be permissible if it changes the activity only in degree rather than a change in the kind of activity.” The Court found this argument flawed as well. “The relevant provision actually states, however, that ‘[w]here a nonconforming situation exists, the equipment or process may be changed, if these or similar changes amount only to changes in degree of activity rather than changes in kind of activity and no other violations of other provisions of this chapter occur.’ Thus, under the zoning ordinance in effect in Wrightsville Beach, the mere fact that an alteration effects a change in degree rather than a change in kind does not suffice to take the proposed alteration out from under the prohibition against expanding a non-conforming use. In addition, we conclude that this provision of the zoning ordinance does not justify a finding that the proposed parking deck is not the impermissible expansion of a non-conforming use. Firstly, Petitioner does not assert that construction of the proposed parking deck would constitute a change in ‘equipment or process’ or explain how a provision addressing changes in ‘equipment or process’ applies to the construction of a parking deck. Secondly, in addition to ruling that construction of the proposed parking deck would constitute an improper expansion of a nonconforming use, the Board denied Petitioner's request on several additional grounds, such as the failure of the proposed parking deck to comply with landscaping and sprinkler requirements. As a result, the construction of the proposed parking deck is not permissible under § 155.009(2) of the zoning ordinance since the prerequisites for the application of the subsection simply do not exist.” The Court concluded that the trial court did not err in upholding the Board of Adjustment's determination that construction of the proposed parking deck would constitute an impermissible expansion of an existing nonconforming use.

Land Use; Interpretive Decision; Appeal; Jurisdiction

MEIER V. CITY OF CHARLOTTE, ___ N.C. App. ___, 698 S.E.2d 704 (No. COA09-1081, Mecklenburg— 8/17/10)

Boards of Adjustment do not have subject matter jurisdiction over appeals that have not been timely filed. Trial court erred by ruling: 1) that Board had subject matter jurisdiction to consider petitioner’s appeal filed more than 30 days after interpretive decision, and 2) that matter should be remanded for consideration of petitioner’s appeal on the merits.

FACTS: At issue in this appeal was whether a February 28, 2008, letter from the interim Zoning Administrator, Keith MacVean (written after on-site meetings and addressed to both a neighbor raising concerns about compliance with building height requirements and the developer (Dancy Properties, LLC) of a single family residence under construction next door) constituted a specific “order, requirement, decision or determination” triggering a 30-day period for appeals to the board of adjustment under the Charlotte Code. On May 23, 2008, petitioner sought appeal to

the Board of Adjustment. At the June 24 hearing, the parties were asked to address the timeliness of petitioner's appeal, and at the close of the proceedings, the Board adopted an order determining that the MacVean letter "constituted a decision regarding Code Section 9.205(1)," that petitioner's appeal was not filed within 30 days of the MacVean letter, and, accordingly, that the Board did not have jurisdiction to hear petitioner's appeal. (The Board did not reach petitioner's substantive challenges to the Planning Department's decision.) Upon certiorari, a hearing was held before the trial court, which determined that petitioner's appeal was timely filed, that the appeal should not have been dismissed, and that the Board was to hear petitioner's appeal on the merits within 60 days from the date of the order. Respondents appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously reversed. "Respondents argue that the trial court erred by determining that the Board of Adjustment had subject matter jurisdiction to hear Petitioner's appeal. In essence, Respondents argue that the MacVean letter was a specific 'order, requirement, decision or determination' as defined in Section 5.101(a) of the Charlotte Code and that, since Petitioner failed to appeal the Zoning Administrator's interpretation within thirty days of 7 March 2008, which is the latest date by which Petitioner's counsel should have received the MacVean letter, Petitioner lost the right to challenge the manner in which the Planning Department applied the City's zoning ordinance to the structure.... We agree." Judge Ervin wrote the opinion, joined by Judge Jackson and Judge Robert N. Hunter, Jr..

The Court initially stated, "According to well-established principles of North Carolina law, boards of adjustment do not have subject matter jurisdiction over appeals that have not been timely filed. Water Tower Office Assoc. v. Town of Cary Board of Adjustment, 131 N.C. App. 696, 698, 507 S.E.2d 589, 591 (1998). The extent to which a board of adjustment has jurisdiction to hear an appeal is a question of law. In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjustment of Raleigh, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002). In the event that a board of adjustment decision is alleged to rest on an error of law such as an absence of jurisdiction, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined. Whiteco Outdoor Adver. v. Johnston County Bd. of Adjustment, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999)."

The Court observed that § 3.501(12) of the Charlotte Code provides that "the Planning Director and the employees under his or her control" may "render interpretations of the provisions of [the Zoning Ordinance]" and that § 5.103 specifies that "[a] notice of appeal ... shall be properly filed by a person aggrieved with the decision of the Zoning Administrator ... within thirty (30) days of the decision." Petitioner argued that the MacVean letter was not a final determination from which an appeal could properly be taken. The Court disagreed. "By his own admission, Petitioner sought an interpretation of the Zoning Ordinance as applied to the structure under construction ... that addressed 'the noticeable height of the structure' and addressed 'whether the height of the structure complied with all applicable zoning ordinances regarding maximum height...'. The MacVean letter explicitly dealt with the issue of whether the structure complied with the height-related requirements contained in the Charlotte zoning ordinance by explaining the methodology utilized to determine the structure's compliance 'along the left side,' 'along the rear elevation,' and 'along the right side' before concluding that the 'construction [did] not violate the maximum height requirement of the R-5 district.' In essence, the MacVean letter amounted to an evaluation of the extent to which the structure as proposed and as described in the site plans and architectural plans submitted for review by the interim Zoning Administrator complied with the relevant provisions of the Charlotte zoning ordinance. The effect of the MacVean letter was to inform Dancy that, in the event that the structure was built as outlined in the site plans and architectural drawings, it would pass muster for zoning compliance purposes. As a result, Petitioner's contention that the determination set out in the MacVean letter was purely tentative in nature rests upon a misreading of the document in question. Contrary to Petitioner's contention that the MacVean letter was merely 'the view, opinion or belief of the administrative offi-

cial,' we conclude that it was a 'specific order, requirement, decision, or determination' referenced in Section 5.110(1) of the Charlotte Code."

In determining that the letter was couched in determinative (rather than advisory) terms, the Court observed *inter alia* that the letter: 1) explicitly provided that "[t]he Planning Department is providing the following interpretation of Section 9.205 Development Standards for Single Family Districts," and 2) stated, in no uncertain terms, that, notwithstanding that "some portions of the building exceed forty (40) feet in height, the zoning ordinance is not violated when the corresponding side and rear yards are increased accordingly" and that, "[s]ince the corresponding side and rear yards have been increased as required[,] your construction does not violate the maximum height requirement of the R-5 district." Regarding petitioner's reliance upon In re Soc'y for the Pres. of Historic Oakwood, *supra* (*Digest of Municipal Law 2002-2003*, p. 51), the Court found the advisory memorandum at issue there clearly distinguishable.

The Court also rejected petitioner's argument that the filing period had been tolled by follow-up e-mails (replying to petitioner's height review inquiries) sent by McVean's successor, Katrina Young, several weeks after McVean's letter of February 28. "Petitioner argues that he reasonably relied on the language of Ms. Young's 17 April 2008 e-mail to the effect that, '[o]nce the survey is presented and a determination is made[,] either party, if they disagree with the decision, may appeal that decision to the Board,' to mean that he could appeal any disputed issue to the Board of Adjustment after the 'sealed survey' had been received and reviewed by the Planning Department. Ms. Young's e-mail will not, however, bear the weight that Petitioner seeks to place on it. Instead, Ms. Young's e-mail simply states that Dancy 'has been made aware of what is required' in the MacVean letter and that, '[o]nce the survey is presented and a determination is made,' either party 'may appeal ... to the Board' 'if they disagree with the decision.' Taken in context, Ms. Young's e-mail clearly means that Dancy had been given an outline of what was expected in the MacVean letter, that the survey would reveal whether Dancy had complied with the interpretation of the relevant provisions of the zoning ordinance outlined in the MacVean letter, and that, in the event that either party disagreed with the Planning Department's determination of the extent to which the structure as actually built complied with the zoning regulations as interpreted in the MacVean letter, that issue was subject to appeal to the Board of Adjustment."

Land Use; Binding Interpretive Decision; Zoning

S.T. WOOTEN CORP. V. BD. OF ADJUST. OF THE TOWN OF ZEBULON, ___ N.C. App. ___, 711 S.E.2d 158 (No. COA10-515, Wake- 4/5/11)

Town Planning Director's 2001 letter, issued upon petitioner's request for zoning determination and setting forth that petitioner's proposed asphalt operation (at site where petitioner's concrete plant had operated for over twenty years) was a permitted use by right requiring only a general use permit, constituted a determination of binding force. Because no objection was made to that appealable decision in a timely manner, it was binding on the Town, and contrary 2009 interpretation regarding petitioner's need for a special use permit was accordingly of no effect.

FACTS: Petitioner, owner of a 63-acre parcel of land located within the Town's extraterritorial jurisdiction, has operated a concrete plant thereon since 1978. In 2001, petitioner's staff engineer requested a zoning determination letter as to whether petitioner's "Heavy Industrial" (IH) zoned property could be used as an asphalt plant. Michael Frangos, the Town's Planning Director & Land Use Administrator (LUA) at the time, responded by letter (dated August 22, 2001), confirming the Town's extraterritorial jurisdiction over the IH-zoned property and stating that an asphalt plant was a permitted use within the IH district. The letter stated, "In accordance

with § 152.129 [of the Town's Land Use Ordinance] Permitted Uses, *clay, stone, concrete and cement processing and sale* is a use permitted by right with only a General Use Permit issued by the Zoning Administrator. It is my interpretation, as such, that *asphalt plants* fall within this description or are similar enough to be grouped together and are therefore also permitted.” (Emphasis in original.) (The letter further stated that “prior to any construction a site plan must be reviewed by the Zebulon Technical Review Committee and construction plans must be submitted along with an application in pursuit of a building permit.”)

Approximately three months later, a representative of an engineering company wrote a letter to Mr. Frangos on petitioner’s behalf, requesting that the Town “provide a zoning consistency determination” to the Department of Environment and Natural Resources (NCDENR), Division of Air Quality. This written “Request for Zoning Consistency Determination” explained that petitioner was “planning to permit three hot mix asphalt (HMA) plants at [the] site” and sought, pursuant to statutory requirement, a determination that the proposed asphalt facility was consistent with the Town's zoning ordinance in effect. On December 3, 2001, Mr. Frangos: (1) confirmed by letter to NCDENR’s Regional Air Quality Supervisor that the property was zoned IH and that the proposed asphalt facility was permitted as of right, and (2) signed a “Zoning Consistency Determination” verifying that the proposed “Hot Mix Asphalt (HMA) Plant” was “consistent with applicable zoning and subdivision ordinances.”

In the years that followed, petitioner secured various state and local permits and made expenditures to improve the property for the use of the asphalt plant, including subdividing the property to separate the asphalt plant area from the concrete plant that had been in existence since 1978. Petitioner began using its property for the operation of an asphalt plant upon award of a paving contract by the N.C. Department of Transportation in April 2009: petitioner submitted to Wake County two commercial building permit applications (one for the portable asphalt plant itself and another for a portable office/lab trailer) and a mechanical permit application for electrical work involved in the setup of a portable asphalt plant. In May 2009, the Town’s Planning Department approved a zoning permit for a “Temporary Asphalt Plant,” specifying on the form that no change of use permit was required. A certificate of occupancy was issued in June 2009, and petitioner operated a portable or temporary asphalt plant on the property. In September 2009, petitioner informed Mark A. Hetrick, the Town's Planning Director at that time, of its intention to replace the portable plant with a permanent asphalt plant. On October 1, 2009, petitioner was notified by the Town’s counsel of the Planning Director’s (Mr. Hetrick's) determination that the “ultimate approval” of the proposed permanent site for an asphalt manufacturing plant was “still to be made by the Board of Commissioners by way of a Special Use Permit.” Petitioner appealed to the Board of Adjustment: in December 2009, the Board held a hearing on the matter and unanimously voted to affirm the Planning Director’s (Mr. Hetrick’s) interpretation. Upon certiorari, the superior court affirmed the Board's decision in March 2010. Petitioner appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously reversed and remanded. “The central issue presented in this appeal is whether a specific statement by the Town Planning Director—that, pursuant to the Town zoning code, the proposed asphalt operation is a permitted use by right requiring only a general use permit—is an order, decision, or determination of binding force. *See Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh (In re Appeal of Soc’y for Pres. of Historic Oakwood)*, 153 N.C. App. 737, 742–43, 571 S.E.2d 588, 591 (2002) [(see *Digest of Municipal Law 2002-2003*, p. 51)].... [W]e conclude that the 2001 statement of the Planning Director is a determination of binding force, and, because no objection was made to that appealable decision in a timely manner, it is binding on the Town. Therefore, we reverse and remand to the Board for further remand to the Town to allow Petitioner's operation of the asphalt plant consistent with the Town's original, binding zoning interpretation that such was a permitted use, eliminating the need for a special use permit.” Judge Beasley wrote the opinion, joined by Judge McGee and Judge Bryant.

The Court initially observed, “In addition to various specific duties, the Zebulon Ordinance authorizes the LUA to ‘[a]dvice applicants for development on the merits of proposed applications as well as procedures, rights and obligations under [the Zebulon Ordinance], ... [m]ake interpretations on the provisions [therein], and appeal to the Board of Adjustment whenever he or she is unable to make certain determinations.’ Zebulon Ordinance § 152.025(A)-(B).... The Zebulon Land Use Ordinance likewise provides that ‘[a]n appeal from any final order or decision of the Land Use Administrator may be taken to the Board of Adjustment by any person aggrieved.’ Zebulon Ordinance § 152.072(A)(1); *see also id.* § 152.024(A)(1) (‘The Board of Adjustment shall hear and decide ... [a]ppeals from any order, decision, requirement or interpretation made by the Land Use Administrator...’). Pursuant to the Zebulon Ordinance, ‘[a]n appeal made 30 days after the date of the decision or order appealed from will be considered invalid.’ *Id.* § 152.072(B). Our case law has made clear that for this thirty-day clock to be triggered, ‘the order, decision, or determination of the administrative official must have some binding force or effect for there to be a right of appeal under [G.S.] 160A–388(b).’ In re Historic Oakwood, 153 N.C. App. at 742–43, 571 S.E.2d at 591.”

Reviewing the parties’ arguments, the Court proceeded to find the case more closely aligned with Meier v. City of Charlotte, ___ N.C. App. ___, 698 S.E.2d 704 (2010) (*see* p. 30 of this *Digest*) rather than In re Historic Oakwood, as the Court determined that the 2001 interpretation was more like the decision at issue in Meier than the advisory response at issue in In re Historic Oakwood. The Court stated, “[In Meier], we held that the Administrator was exercising the authority delegated to him pursuant to the Charlotte zoning ordinance and thereby made a specific “order, requirement, decision, or determination within the meaning of ... the Charlotte Code[.]” as it was a determination made by an official with the authority to provide an interpretation of a specific provision of the zoning ordinance and allowed the property owner to complete the project without the risk that the structure would later be found to be out of compliance. *Id.* at —, 698 S.E.2d at 710. As such, the Zoning Administrator’s letter ‘was subject to appeal to the Board of Adjustment.’ *Id.* at —, 698 S.E.2d at 710. Here, Petitioner, the landowner, specifically requested that the Planning Director interpret the Zebulon Ordinance and determine whether an asphalt plant was a permitted use. Mr. Frangos, in his capacity as Planning Director, rendered his interpretation of the zoning ordinance—that the area was zoned for Heavy Industrial and an asphalt plant was a permitted use. On at least two occasions—in the letter of 22 August 2001 and in the letter of 3 December 2001—Mr. Frangos clearly interpreted the Zebulon Ordinance to allow asphalt plants as a permitted use. Subsequently, and in accord with the Planning Director’s interpretation, Petitioner made application for several permits necessary for the asphalt plant. While the record does not provide the circumstances that led to Petitioner’s request, the evidence indicates that Petitioner relied on Mr. Frangos’ letters as binding interpretations of the applicable zoning ordinance. Mr. Frangos, as the LUA/Planning Director, was expressly empowered by § 152.025(A)-(B) of the Zebulon Ordinance to provide formal interpretations of the zoning provisions therein, and such zoning interpretations by the LUA may be binding. Thus, unlike In re Historic Oakwood, where an advisory opinion was provided at the request of the [Deputy] City Attorney, Mr. Frangos exercised his explicit authority in providing a formal interpretation of the zoning ordinance to a landowner seeking such interpretation as it related specifically to its property.” The Court emphasized that petitioner had an interest in the outcome of the request for a zoning consistency determination, and the letter it received was a “clear exercise” of the administrator’s authority to evaluate and determine the extent to which a proposed use complied with the ordinance.

The Court rejected the Town’s argument that extraneous guidance set forth at the end of Frangos’ 2001 letter (wherein he reminded petitioner that site plans, construction plans, and building permit applications had to be submitted prior to any construction) rendered the interpretation advisory as no authorization was given for petitioner to actually operate the asphalt plant. “This Court readily disposed of a parallel argument in Meier, where the petitioner contended that treatment of the Zoning Administrator’s letter ‘as an “order, requirement, decision, or determina-

tion” for purposes of [appeal]’ was precluded by a reference therein ‘to the necessity for a “sealed survey indicating the distances from the structure to the property lines as well as the height of the structure” as a precondition for obtaining a certificate of occupancy.’ *Id.* at ___ n. 3, 698 S.E.2d at 710 n .3. We separated the interpretation of binding force from the superfluous advice contained within the same letter, as the ‘[p]etitioner’s argument overlook[ed] the difference between the purpose for which the interpretation set forth in the [Zoning Administrator’s] letter was provided and the reason that the “sealed survey” was required as a precondition for the issuance of a certificate of occupancy’ [*Id.*]... In the same vein, the fact that Mr. Frangos’ letter mentioned that a building permit would be needed before Petitioner could begin construction of an asphalt plant, as expressly required in the Zebulon Ordinance, does not convert his unequivocal, zoning interpretation into an advisory opinion. This guidance to an ‘applicant[] for development on the ... procedures, rights and obligations under the [ordinance],’ Zebulon Ordinance § 152.025(A), which the LUA was explicitly authorized to provide, contains no intimation ‘that the Planning Department reserved the right to alter the interpretation of the [applicable permitted use] provisions of the zoning ordinance as set out [above] in [Mr. Frangos’] letter following receipt of the [site plans, construction plans, and building permit application].’ Rather, Frangos, the LUA in 2001, made a lawful and binding determination that the asphalt plant was a permissible use and such use did not violate the Town of Zebulon Zoning Ordinance; his advice as to a different aspect of the ordinance did not make the preceding formal interpretation on a separate issue advisory; and there is nothing in the record to indicate a change to applicable provisions of the ordinance from 2001 to 2009.... Because that prior determination was lawful and not in violation of the ordinance, the Town should not now be allowed to enforce a new interpretation of the same ordinance by injunction or otherwise.”

In concluding its opinion, the Court stated, “It is clear that a Town’s appeal of a decision of its LUA may be procedurally awkward. Is it plausible to believe that the LUA would issue an opinion and then advise the Town to challenge his own interpretation through an appeal to the Board of Adjustment? (Indeed, the Town’s counsel explained to the Board that ‘there really would not have been a reason for the [T]own to appeal it because the [T]own’s planning director at the time was the one issuing the opinion.’) Yet, awkward procedure notwithstanding, the statute [G.S. 160A–388(b)] provides for a right to appeal by the Town, and makes no exceptions to that right. Because no appeal was taken from the initial 2001 decision, the window for appealing the decision has long since closed, the matter deemed settled, and the 2001 interpretation became a binding zoning determination that Petitioner may operate an asphalt plant on the Property as a permitted use. Thus, neither did the Town have authority to render a contrary decision or collaterally attack the 2001 interpretation, nor did the Board of Adjustment have jurisdiction to review the issue. As such, we need not review Petitioner’s alternative contention that it had obtained common law vested rights to operate an asphalt plant without a special use permit. The judgment of the trial court should be reversed and remanded for further remand to the Board to reverse LUA Hetrick’s decision that Petitioners needed a special use permit to operate the asphalt plant and to allow the original permitted use for the IH-zoned Property.”

Land Use; Nonconforming Use; Asphalt Plant

APAC-ATLANTIC, INC. v. CITY OF SALISBURY, ___ N.C. App. ___, 709 S.E.2d 390 (No. COA10-591, Rowan- 4/5/11)

Trial court correctly entered order affirming Board of Adjustment’s decision to deny approval of petitioner's site plan for renovation of its asphalt plant.

FACTS: Petitioner operates a hot-mix asphalt plant on its property, which in March 2001 was re-zoned from Heavy Industrial (M-2) to General Business (B-6) (with a General Development-A Overlay): the re-zoning made petitioner's use as an asphalt plant a nonconforming use pursuant to § 4.02 of the then-applicable Zoning Ordinance. Approximately six years later, petitioner requested a zoning interpretation regarding modifications of its facility (including replacement of the bag house and materials silos). In a letter dated March 28, 2007, the Zoning Administrator interpreted Zoning Ordinance § 7.01 (governing non-conforming uses of property) and, based on the application of the ordinance to the information before him, allowed petitioner to “proceed with the design of the facility.” (Section 16.02 of the Zoning Ordinance provided that a permit for excavation, construction, or alteration shall not be valid until the zoning administrator has certified that the plans, specifications or intended use conform to the provisions of the Zoning Ordinance.)

In August 2007, petitioner submitted a site plan describing its proposed modifications. The Zoning Administrator subsequently denied petitioner's request for approval of the site plan. (Whereas the plant operates as an “old batch plant” which “mixes up one batch of hot mix at a time,” the proposed renovations involved replacing batch equipment with continuous equipment which would “maintain[] a continuous flow of asphalt throughout the operating period.”) In December 2007, the City enacted the Land Development Ordinance (“the LDO”), which, effective January 1, 2008, replaced the Zoning Ordinance. (Section 13.3(B) of the LDO provides that “[a] nonconforming use shall not be expanded, changed or enlarged.” Section 13.3(C) provides that “[a] nonconforming use may make necessary alterations to enhance the health, safety, and general welfare of the community by mitigating environmental impacts to air, ground, or water quality; however, these necessary alterations shall not expand or enlarge the nonconforming use.) In March 2008, petitioner requested review of the Zoning Administrator's decision, submitting the required application and fee. The following month, the Zoning Administrator informed petitioner that it would need to resubmit its site plan in order to be heard at the Board of Adjustment's May 2008 meeting. Upon resubmission of the site plan, the Zoning Administrator again denied approval of the site plan based on the same grounds. The Board heard petitioner's appeal at its May 2008 meeting and affirmed the Zoning Administrator's decision. The Board concluded that LDO §§ 13.3(B) & (C) precluded the modifications because they would “change” the nonconforming use in violation of § 13.3(B); were not “necessary” under § 13.3(C); and would “expand” or “enlarge” the non-conforming use in violation of § 13.3(C). Upon certiorari, the superior court affirmed the Board's decision. Petitioner appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Chief Judge Martin wrote the opinion, joined by Judge McGee and Judge Ervin.

Petitioner argued that the trial court erred in concluding that the Board correctly interpreted LDO § 13.3(C). The Court disagreed. Petitioner contended that the Board erred in concluding that the proposed modifications would expand or enlarge the nonconforming use by expanding the maximum operating capacity of the plant. (Testimony from the Board meeting indicated that the current permitted production capacity of the plant is 180 tons of asphalt per hour and that with the new equipment it would be 300 tons of asphalt per hour (an increase allowing the plant to run at capacity with shorter hours).) “Our Courts have consistently recognized that an increase in the scope, the scale, or the extent of a non-conforming use constitutes an enlargement of a non-

conforming use. See In re O'Neal, 243 N.C. 714, 723, 92 S.E.2d 189, 195 (1956); Malloy [v. Zoning Bd. of Adjust. of Asheville], 155 N.C. App. [628] at 632, 573 S.E.2d [760] at 763 [(2002)]; Huntington [Props., LLC v. Currituck County], 153 N.C. App. [218] at 227, 569 S.E.2d [695] at 702 [(2002)]; Kirkpatrick v. Village Council for Pinehurst, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000)... [T]he Board found that the new equipment would expand the plant's operating capacity. On appeal, petitioner does not dispute this finding. Petitioner only contends the Board's conclusion was erroneous because market demand, not operating capacity, controls the amount of asphalt the plant produces and there is no evidence that market demand would increase as a result of the proposed modifications. However, under our prior holdings, renovations resulting in the *capacity* for an expansion in the scope of the non-conforming use constituted an impermissible enlargement of a non-conforming use, Kirkpatrick, 138 N.C. App. at 87, 530 S.E.2d at 343, and the construction of a new building was permissible only where the new building would 'provide facilities for the operation of a nursing home on substantially the same scale,' O'Neal, 243 N.C. at 724, 92 S.E.2d at 196 (emphasis added). Here, at least one result of the proposed modifications would be an expanded capacity to produce asphalt. Therefore, in accordance with the rationale articulated in Kirkpatrick and O'Neal, an enlargement or expansion in the plant's maximum operating capacity constitutes an impermissible enlargement or expansion of the applicant's non-conforming use."

The Court determined that there was substantial evidence to support the Board's finding that the proposed modifications would "enlarge the commercial viability of the plant by reducing future operating costs." The Court held that the Board did not err by considering the commercial viability of the plant in concluding that the proposed modifications would expand or enlarge the nonconforming use.

Land Use; Rezoning; Consistency Statement; Planning Board; Correctional Facility

SAPP V. YADKIN COUNTY, ___ N.C. App. ___, 704 S.E.2d 909 (No. COA09-1725, Yadkin-2/1/11)

In action seeking declaratory judgment that rezoning of site for correctional facility was invalid, trial court did not err in entering summary judgment for defendant-County.

FACTS: The Yadkin County Board of Commissioners acquired a roughly 10-acre parcel of land ("Hoots Road site.") in 2004 and subsequently designated the site as the location for a new county jail in August 2008. The Yadkin County Administration (via the Interim County Manager) filed a Petition for Zoning Amendment, seeking to have the Hoots Road site rezoned from Highway Business to Manufacturing-Industrial One: Conditional. At their September 8, 2008 meeting, the County Planning Board recommended approval of the proposed rezoning to the Board of Commissioners. The following week, the Board of Commissioners received the Planning Board's recommendation, scheduling a public hearing on the proposed rezoning for October 20, 2008. Following the public hearing, the Board of Commissioners voted to approve the rezoning. Plaintiffs filed an action in December 2008 seeking *inter alia* a declaratory judgment that the rezoning of the Hoots Road site violated applicable zoning laws and ordinances. The trial court granted defendants' motion for summary judgment in July 2009. Plaintiffs appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge Stephens wrote the opinion, joined by Judge Robert C. Hunter and Judge Robert N. Hunter, Jr.

Plaintiffs argued that the Planning Board failed to include in its recommendation to the Board of Commissioners "a statement of zoning consistency," violating G.S. 153A-341 and the zoning ordinance. (The Ordinance provided that "[p]ursuant to [G.S.] 153A-341, the Planning Board shall include, in its written recommendation and report to the Board of County Commis-

sioners, comments on the consistency of the proposed change with the Land Use Plan” and that the Planning Board shall “transmit its recommendation and report ... to the Board of County Commissioners.”) In holding that plaintiffs' argument presented no genuine issue of material fact, the Court stated, “As evidence of this failure, plaintiffs presented an affidavit by Plaintiff Peggy Boose (‘Boose’), which states that on 2 October 2008, Boose obtained from the Planning Department a copy of the minutes of the Planning Board's 8 September 2008 meeting. Boose's affidavit further alleges that on 20 October 2008, Boose obtained another copy of the Planning Board's 8 September 2008 minutes from the County Manager of Yadkin County, which contained both a discussion of the policy guidelines and a ‘statement of zoning consistency,’ neither of which were in the minutes obtained by Boose on 2 October 2008. Plaintiffs cite this ‘discrepanc[y] in the Planning Board minutes’ as evidence of Defendants' violation of the applicable statutes and ordinances.... In compliance with the Ordinance, the Planning Board rendered its decision on the Petition at its 8 September 2008 meeting. Further, according to the Notice of Meeting for the 20 October 2008 meeting of the Board of Commissioners, the written recommendation by the Planning Board was received by the Board of Commissioners by at least 17 October 2008. Clearly, then, the Planning Board met the requirements of section 153A-341 by providing ‘a written recommendation to the board of county commissioners that addresses plan consistency,’ and met the requirements of the Ordinance by transmitting its recommendation and report to the Board of Commissioners. Based on the foregoing, we conclude the actions of the Planning Board did not violate section 153A-341 or the Ordinance. Although Plaintiffs' evidence presents an issue as to the contents of the minutes as filed with the Planning Department, there is nothing in the statutes or Ordinance requiring the Planning Board to file a ‘statement of zoning consistency’ with its minutes at the Planning Department office.”

Plaintiffs, citing the “undisputed reality that the Planning Board published two separate and wildly differing minutes of its September 8 meeting,” argued that the evidence sufficiently supported their allegation that the rezoning was “secretive and improper” such that a full hearing on the merits was required. In holding that plaintiffs' evidence did not raise a genuine issue of material fact regarding any secrecy or impropriety surrounding the Planning Board's recommendation, the Court stated, “The Ordinance requires that a proposed zoning amendment meet the policy guidelines set out in the Ordinance before the amendment can receive favorable recommendation. As discussed *supra*, the Planning Board must transmit its recommendation, along with a statement of zoning consistency, to the Board of Commissioners. Regardless of the contents of the minutes obtained by Boose at the Planning Department office, the recommendation received by the Board of Commissioners contained both a statement of consistency and a discussion indicating that the proposed amendment met the policy guidelines in the Ordinance. Further, the record indicates that at the 15 September 2008 meeting of the Board of Commissioners, 17 days before Boose obtained the first set of minutes, a member of the Planning Board informed the Board of Commissioners of the recommendation and read the statement of zoning consistency from the Planning Board. Accordingly, Plaintiffs' contention that a missing portion of the minutes at the Planning Department office indicates that the Planning Board failed to consider the policy guidelines and the amendment's consistency, or that the Planning Board added the missing portion surreptitiously after their initial meeting, is untenable.”

Land Use; Riparian Buffer Ordinances; Preemption

CARY CREEK LTD. PARTNERSHIP V. TOWN OF CARY, ___ N.C. App. ___, 690 S.E.2d 549 (No. COA09-799, Wake— 3/16/10), *disc. review denied*, ___ N.C. ___, 703 S.E.2d 441 (No. 172P10, 11/4/10)

Trial court correctly granted Town’s motion for summary judgment in plaintiff’s declaratory judgment action presenting preemption challenge to ordinances requiring riparian buffers.

FACTS: Plaintiff owns a tract of approximately 108 acres (“the site”), near the intersection of Highway 55 and Alston Avenue, that is within the Cape Fear River Basin and is traversed by a perennial stream and two intermittent streams which flow only during wet periods. Plaintiff sought to develop the site as a mixed commercial and residential center. The Town’s Land Development Ordinance includes a subchapter of stormwater management ordinances, which were designed for the “protection of riparian buffers, control of nitrogen export from development, control of peak stormwater runoff, and the use of best management practices.” Section 7.3.2 (entitled “Protecting Riparian Buffers”) required 100-foot riparian buffers on either side of “[a]ll perennial and intermittent streams” indicated on U.S.G.S. [United States Geological Survey] maps and 50-foot buffers adjacent to other surface waters indicated by the Soil Survey of Wake or Chatham County. Section 7.3.7 permits parties to seek a variance from the riparian buffer requirement from the Town Council. Plaintiff’s request for such a variance was denied by the Council in April 2007.

In May 2007, plaintiff sought a declaratory judgment that the ordinances requiring preservation of riparian buffers were invalid and unenforceable or, in the alternative, that the Town had to compensate plaintiff under principles of inverse condemnation. In November 2008, the trial court denied the Town’s motion to dismiss pursuant to G.S. 1A-1, Rules 12(b)(1) & 12(b)(6). Upon cross-motions for summary judgment and following a hearing, the trial court entered orders granting summary judgment in favor of the Town and denying summary judgment to plaintiff on both its declaratory judgment and inverse condemnation claims in January 2009. Plaintiff appealed, and the Town cross-appealed.

HOLDING: A panel of the N.C. Court of Appeals affirmed in part, reversed in part, and vacated in part. “[Plaintiff] raises two arguments on appeal, contending the trial court erred in granting summary judgment to the Town on [plaintiff’s] (I) declaratory judgment and (II) inverse condemnation claims. The Town cross-appeals on two issues, arguing that the trial court erred in its 14 November 2008 order denying the Town’s motion to dismiss [plaintiff’s] (III) declaratory judgment and (IV) inverse condemnation claims for lack of subject matter jurisdiction.... We affirm both the trial court’s denial of the Town’s motion to dismiss and its grant of summary judgment to the Town on [plaintiff’s] declaratory judgment action. We reverse the trial court’s denial of the Town’s motion to dismiss the inverse condemnation claim and vacate the grant of summary judgment to the Town on this claim.” Judge Bryant wrote the opinion, joined by Judge Robert C. Hunter. Judge Jackson concurred by separate opinion.

Plaintiff argued that the trial court erred in granting summary judgment to the Town on plaintiff’s declaratory judgment claim. The Court disagreed. Contending that the State’s regulation of riparian buffers preempted any attempt by the Town to implement more stringent regulations, plaintiff cited Granville Farms, Inc. v. County of Granville, 170 N.C. App. 109, 612 S.E.2d 156 (2005) and Hashemi v. Town of Cary, 173 N.C. App. 447, 618 S.E.2d 875 (2005) (unpublished). Distinguishing the former, the Court stated, “[Granville Farms] concerned the land application of biosolids and we noted that the relevant ‘statute, coupled with the permit requirements set forth in the applicable regulations, are so comprehensive in scope that they were intended to comprise a ‘complete and integrated regulatory scheme’ on a statewide basis, thus leaving no

room for further local regulation.’ *Id.* at 116, 612 S.E.2d at 161. In contrast, the State’s watershed management system both provides minimal protections which local governments must enforce, and explicitly permits local ordinances which are more protective than those minimal state-wide standards. North Carolina General Statute section 143-214.5, titled ‘Water supply watershed protection’, contains a policy statement which provides, in pertinent part: ‘This section provides for a *cooperative program of water supply watershed management and protection to be administered by local governments consistent with minimum statewide management requirements* established by the [Environmental Management] Commission. If a local government fails to adopt a water supply watershed protection program or does not adequately carry out its responsibility to enforce the minimum water supply watershed management requirements of its approved program, the Commission shall administer and enforce the minimum statewide requirements.’ [G.S.] 143-214.5(a) (2007) (emphasis added). This statute further specifies that local governments, such as the Town, may implement more restrictive local ordinances.... [G.S.] 143-214.5(d). Thus, the relevant statute specifically contemplates that local governments, such as the Town, will enact their own watershed protection ordinances and may enact more stringent provisions than the minimum requirements established by the Environmental Management Commission (‘EMC’). Further, despite contentions by [plaintiff] that the Town had not received approval from the EMC for its riparian buffer ordinances, [G.S.] 143-214.5(d) specifies that its approval requirements ‘shall not be construed to affect the validity of any local ordinance adopted for the protection of water supply watersheds prior to completion of the review of the ordinance by the Commission.’ *Id.*”

The Court further observed that in 2000, the Town sought an interbasin transfer certificate (“IBT”) to permit it to discharge drinking water obtained from Jordan Lake into the Neuse River Basin, and the EMC in 2001 issued an IBT, requiring the Town to adopt ordinances creating riparian buffers “similar to or more protective than the Neuse River buffer rule.” The Court stated, “This IBT mandate, along with the language of [G.S.] 143-214.5 and 143-214.23(a), indicates that watershed protection is not a ‘field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.’ Granville Farms, Inc., 170 N.C. App. at 111, 612 S.E.2d at 158. Rather, the statutes anticipate that local governments will enact ordinances more restrictive than those minimal standards established by our statutes. Thus, the trial court did not err in granting summary judgment to the Town and concluding that ‘the local laws challenged in this action are not in conflict with or preempted by general State law.’”

As to Hashemi, the Court initially observed that Hashemi was an unpublished opinion and that plaintiff had violated N.C. R. App. P. 30(e)(3). “[Plaintiff] fails to note that Hashemi was unpublished in its brief to this Court and did not serve this Court with a copy of the opinion as required. N.C. R. App. P. 30(e)(3). Where a party cites an unpublished opinion but fails to comply with the requirement that it ‘serve [] a copy thereof on all other parties in the case and on the court,’ we may decline to consider the unpublished case. State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, ___ N.C. App. ___, ___ n. 1, 670 S.E.2d 341, 346 n. 1 (2009) (quoting N.C. R. App. P. 30(e)(3)). Moreover, ‘[a]n unpublished decision of the North Carolina Court of Appeals is not controlling legal authority.’ N.C. R. App. P. 30(e)(3).”

The Court otherwise found plaintiff’s reliance on Hashemi misplaced. “That unpublished opinion required this Court to review the trial court’s grant of a Rule 12(b)(6) motion to dismiss, a ruling based solely on the pleadings. The only issue we addressed in Hashemi was whether the plaintiff had stated a claim. Here, in contrast, we review a grant of summary judgment based on an extensive record, running to eight volumes, and including the EMC/IBT requirement not present in Hashemi. Further, in Hashemi, we did not consider [G.S.] 143-214.5. Instead, we relied solely on [G.S.] 143-214.23(a), titled ‘Riparian Buffer Protection Program: Delegation of riparian buffer protection requirements to local governments,’ which provides, in pertinent part, that ‘units of local government may adopt ordinances and regulations necessary to establish and enforce the State’s riparian buffer protection requirements.’ [G.S.] 143-214.23(a) (2007). On the record of the

present case, wherein the trial court considered extensive evidence about [G.S.] 143-214.5 in connection with the requirement from the EMC that the Town adopt ordinances creating riparian buffers ‘similar to or more protective than the Neuse River buffer rule,’ we reach a different outcome. Any discussion in Hashemi which may appear to hold that the Town's riparian buffer ordinances were preempted by State law was *dictum* as that issue was not before this Court.”

Turning to the concurrence’s questioning of the validity of the ordinance given the absence of a map, G.S. 160A-387, the majority stated, “While acknowledging that [plaintiff] failed to make this argument at trial or on appeal, the concurrence nonetheless creates an argument not supported by the record in this case and contrary to our case law and Rules of Appellate Procedure.... The concurrence is correct that the record does not contain any information about the existence of a map as part of the zoning ordinance. However, the absence of a map in the record does not support statements in the concurrence that the ordinance is invalid because it ‘does not include an accompanying zoning map, which is controlled and maintained by the Town itself.’ Since [plaintiff] never raised this issue in the trial court or on appeal, the Town had no notice that it should include such a map, if it exists, in its pleadings or in the record on appeal. Further, as noted in Footnote 1, *supra*, ‘[t]he Town has since revised its ordinances, but the parties have stipulated that [plaintiff’s] development is subject to the previous ordinance scheme as discussed herein.’ Thus, the ordinance in the form considered here no longer exists.” (Citations omitted.)

As to the Town’s cross-appeal, the Court rejected the Town’s first argument that the superior court lacked subject matter jurisdiction over plaintiff’s declaratory judgment claim, observing that the ongoing status of plaintiff's certiorari proceeding did not deprive the superior court of subject matter jurisdiction in this declaratory judgment action. However, the Court agreed with the Town’s second argument that the superior court lacked subject matter jurisdiction over plaintiff's action seeking compensation under a theory of inverse condemnation because the matter was unripe. “[Plaintiff’s] inverse condemnation claim is based on the theory that *if* the riparian buffer ordinance is upheld as valid and enforceable in the instant case and *if* [plaintiff] does not prevail in its certiorari proceeding, a taking will have occurred. Because neither of these prerequisite events had occurred at the time [plaintiff] filed its claim, there had been no taking and there was no concrete controversy ripe for adjudication. See Messer v. Town of Chapel Hill, 125 N.C. App. 57, 61, 479 S.E.2d 221, 223, *vacated as moot*, 346 N.C. 259, 485 S.E.2d 269 (1997) (stating that ‘land-use challenges are not ripe for review until there has been a final decision about what uses of the property will be permitted’). We reverse the trial court's order denying the Town's motion to dismiss as to this claim. Further, because Cary Creek's inverse condemnation claim was not ripe and should have been dismissed, we also vacate the trial court's grant of summary judgment to the Town on this claim.” (Emphasis in original.)

CONCURRENCE: Judge Jackson concurred in a separate opinion. “I agree with the majority that we are bound to affirm the trial court's grant of summary judgment based upon the arguments presented to us. However, I write separately to note that the Town's ordinance is not in compliance with this Court's precedent that clearly requires a zoning ordinance to include an independent map controlled by the municipality.... Based upon the explicit holding of [Town of] Green Level [v. Alamance County, 184 N.C. App. 665, 672, 646 S.E.2d 851, 856 (2007)] and the mandates of the North Carolina General Statutes, the Town's ordinance is invalid because it does not include an accompanying zoning map, which is controlled and maintained by the Town itself. Nonetheless, it is not the province of this Court to construct arguments for the parties. Hyatt v. Town of Lake Lure, 191 N.C. App. 386, 389, 663 S.E.2d 320, 322 (2008) (‘It is not the role of this Court to create an avenue of appeal not properly asserted in plaintiff's brief.’) (citing Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). Accordingly, I am bound to affirm the trial court's grant of summary judgment to the Town.”

NOTE: The League filed an *amicus curiae* brief on behalf of the Town of Cary in this case.

Plaintiff filed a petition for discretionary review in April 2010. The N.C. Supreme Court denied the petition for discretionary review on November 4, 2010. In a related matter (COA10-

38), the Court of Appeals in October 2010 upheld the trial court's entry of summary judgment for the Town in plaintiff's challenge to the denial of a variance from the riparian buffer ordinance (see summary below).

Land Use; Riparian Buffer Ordinance; Variance; Scope of Review

CARY CREEK LTD. PARTNERSHIP V. TOWN OF CARY, ___ N.C. App. ___, 700 S.E.2d 80 (No. COA10-38, Wake- 10/5/10), *disc. review denied*, 365 N.C. 193, 707 S.E.2d 241 (No. 489P10, 4/7/11)

In plaintiff's challenge to denial of variance from riparian buffer ordinance, Court of Appeals holds that trial court correctly granted summary judgment for defendant-Town.

FACTS: Petitioner, owner of an approximately 108-acre tract of land, sought a variance from an ordinance establishing riparian buffers within which no development may occur. (In March 2010, the Court of Appeals issued an opinion in a related dispute, *see* ___ N.C. App. ___, 690 S.E.2d 549 (No. COA09-799, 3/16/10), *disc. review denied*, ___ N.C. ___ 703 S.E.2d 441 (No. 172P10, 11/4/10) (affirming trial court's grant of summary judgment to the Town of Cary in plaintiff's declaratory judgment action alleging that riparian buffer ordinance was preempted by State law) (*Digest of Municipal Law 2009-10*, p. 26)). In May 2007, the Council voted 4-1 to deny petitioner's variance request. The superior court affirmed in August 2009. Petitioner appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Chief Judge Martin wrote the opinion, joined by Judge Hunter and Judge Calabria.

Petitioner contended the superior court erred by making findings of fact that were unsupported by the evidence, and argued that those findings were not binding on the Court of Appeals. The Court found no prejudicial error. "We agree with petitioner that while sitting as an appellate court, the superior court was without authority to 'make additional findings.' Batch v. Town of Chapel Hill, 326 N.C. 1, 11, 387 S.E.2d 655, 662, *cert. denied*, 496 U.S. 931, 110 L.Ed.2d 651 (1990); *see also* Deffet Rentals, Inc. v. City of Burlington, 27 N.C. App. 361, 364, 219 S.E.2d 223, 226 (1975) ('It is not the function of the reviewing court ... to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board and whether the Board made sufficient findings of fact.'). But we have also recognized that 'a recitation of largely uncontroverted evidence' by a superior court in reviewing a local decision is not prejudicial error. Cannon v. Zoning Bd. of Adjust. of Wilmington, 65 N.C. App. 44, 47, 308 S.E.2d 735, 737 (1983). Although the superior court's order contains 38 findings, those findings recite the council's findings of fact and synthesize the evidence before the council. Therefore, the superior court's inclusion of such findings within its order was not prejudicial error. *See id.*"

The Court found that petitioner misapprehended the scope of appellate review. "Our review is limited to determining 'whether the trial court correctly applied the proper standard of review.' Wright [v. Town of Matthews], 177 N.C. App. [1] at 8, 627 S.E.2d [650] at 657 [(2006)]. '[T]he question is not whether the evidence before the superior court supported that court's order but whether the evidence before the town board was supportive of its action.' Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Thus, we decline to consider whether the superior court's findings are supported by competent evidence. We further note that after careful examination of petitioner's arguments on this issue, it appears petitioner's challenge to what is labeled as the superior court's Finding of Fact 34 is in substance a challenge to the council's procedure. In Finding 34, the superior court listed the findings contained in the proposed motion the council voted to adopt. Petitioner's argument is that '[n]o such motion was before the Council.' Thus, pe-

itioner appears to challenge the council's procedure, which requires *de novo* review. Turik v. Town of Surf City, 182 N.C. App. 427, 430, 642 S.E.2d 251, 253 (2007). However, even if we were to consider the substance of petitioner's argument, we note that we would nevertheless be precluded from reviewing it because petitioner failed to raise that issue in its petition for a writ of certiorari in the superior court, and we may only consider 'those grounds for reversal or modification argued by the petitioner before the superior court.' Amanini v. N.C. Dep't of Human Res., 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994) (internal quotation marks omitted). Accordingly, we do not address this argument on appeal."

Petitioner next argued that the "Town's denial of the variance from the riparian buffer requirement was not supported on the record by competent, material, and substantial evidence." The Court initially observed that under this argument heading, the body of petitioner's brief mainly discussed how petitioner "demonstrated that its proposed development would satisfy all of the factors" of a variance under § 7.3.7 of the Land Development Ordinance. The Court emphasized that petitioner again misapprehended the scope of review on appeal. "On several pages of its brief, petitioner urges this Court to review the record for evidence that its request for a variance should have been granted. We decline to do so. See [Nw. Prop. Group, LLC v. Town of Carrboro, ___ N.C. App. ___, ___, 687 S.E.2d 1, 6 (2009)] ('The whole record test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views[.]'). Although petitioner also states that '[n]o evidence was presented to support any conclusion other than granting the [a]pplication,' petitioner fails to challenge any of the council's findings as unsupported by competent evidence or to direct the Court to relevant pages in the record supporting this statement, and '[i]t is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein.' Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *supersedeas denied and disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005)." In closing its opinion, the Court determined that petitioner's contentions regarding the Council's alleged consideration of matters outside of the record and beyond the criteria of the ordinance were without merit.

NOTE: Petitioner filed a petition for discretionary review in November 2010. The N.C. Supreme Court denied the petition for discretionary review on April 7, 2011.

Land Use; Rodeo; Bona-Fide Farm Activities; Collateral Estoppel

MARSH V. UNION COUNTY BOARD OF ADJMT., ___ N.C. App. ___, 697 S.E.2d 526 (No. COA09-1353, Union- 7/6/10) (*unpublished*)

Petitioner was estopped from challenging the Board of Adjustment's authority to regulate rodeo-type activities taking place on 300-acre farm.

FACTS: Petitioner appealed the trial court's June 2009 order affirming the Board of Adjustment's decision to uphold the Land Use Administrator's notice of violation of petitioner's special use permit. Petitioner, the owner and operator of a 300-acre farm in Marshville, approached the County's land use administrator in the fall of 2006 to inquire into the regulations and requirements that would govern his holding rodeo-type events. The land use administrator reviewed the applicable ordinances, informing petitioner that he needed to apply for a special use permit. Upon application, the Board in May 2007 orally approved the grant of petitioner's permit. Nine conditions were placed upon the grant of the permit, including: "Limit number of rodeos to 4 per year" and "Conform to [North Carolina Department of Transportation] regulations and specific recommendations, including two road accesses to the special event rodeo area."

In September 2007, the land use administrator determined that two permit conditions had been violated (holding more than four events and not constructing a second road access), and sent

petitioner a notice of the violations in October 2007. Subsequently, the Board voted to revoke the permit upon the administrator's recommendation. On November 30, 2007, petitioner appealed the revocation, arguing that the land use administrator's original determination that the rodeo-type events necessitated a special use permit was legally incorrect (as petitioner instead asserted that such activities fell within the zoning exemption provided for *bona fide* farm activities). On April 16, 2008, the trial court affirmed the Board's revocation of the permit ("the 16 April order"), concluding "that there has been no error in law, deference being accorded ... to the Board's interpretation of its authority to regulate the proposed use at issue[.]" (The April 16 order was not appealed.)

From June 2007 through September 2008, petitioner held eight additional rodeo-type events on his property. The land use administrator issued notice of violations (because the latter four events were held either in violation of the number-of-events condition of the permit or after the permit had been revoked). Upon appeal, the Board upheld the violations in December 2008. On June 18, 2009, the trial court upheld decision of the Board of Adjustment, concluding that three alternative bases for its decision existed: (1) the rodeo-type events taking place on petitioner's farmland were non-farm activities, and therefore, were subject to regulation by the Board; (2) petitioner was estopped from challenging the Board's authority because he had applied for and received a special use permit; and (3) petitioner was estopped from challenging the Board's authority because he had failed to appeal three prior decisions — (a) the administrator's initial determination in the fall of 2006 that a special use permit was necessary, (b) the Board's issuance of the permit with conditions in 2007, and (c) the trial court's 16 April order determining that the Board had the authority to regulate the rodeo-type activities— each of which would bar petitioner's current appeal. Petitioner appealed the June 18 order.

HOLDING: A panel of the N.C. Court of Appeals Court unanimously affirmed. Judge Jackson wrote the opinion, with Judge Elmore and Judge Stroud concurring.

Petitioner argued that the trial court erred as a matter of law in finding that principles of estoppel prohibited him from challenging the Board's legal authority to regulate rodeo and rodeo-type events held on his farm. The Court disagreed. "Traditionally, under collateral estoppel 'a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.'" Mays v. Clanton, 169 N.C. App. 239, 241, 609 S.E.2d 453, 455 (2005) (quoting Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986)). When a party does not appeal the adverse determination, the judgment becomes final. Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986). In the case *sub judice*, petitioner appealed the Board's revocation of his special use permit, arguing, in part, that the trial court 'should rule that [the Board] has no legal authority to place land use restrictions on the [p]etitioner's family farm because said farm is exempt from their [sic] regulatory authority.' Petitioner, in his brief to the trial court, used all five pages of his argument section to support this contention with case law and argument. On 16 April 2008, the trial court affirmed the Board's revocation of petitioner's permit, concluding, in part, that 'having considered the arguments and contentions of counsel, ... upon *de novo* review of the record for errors in law, the court concludes that there has been no error in law, deference being accorded ... to the Board's interpretation of its authority to regulate the proposed use at issue [citations omitted][.]' Petitioner did not appeal this order. Therefore, petitioner cannot use his current appeal to mount a collateral attack upon the 16 April order."

The Court further observed that upon petitioner's appeal of his subsequent notice of violations, the trial court found, "The Board also contends that the [16 April order] has already determined that the Board had authority to regulate these types of activities when it affirmed the [d]ecision of the Board revoking [petitioner's] [s]pecial [u]se [p]ermit. The [trial c]ourt agrees with the Board's position. As another alternative basis for upholding the Board's [d]ecision, the [trial c]ourt concludes that [petitioner] is collaterally estopped ... by the prior [16 April order]."

Accordingly, the Court held that petitioner was estopped from asserting the Board's lack of regulatory authority here. The Court concluded its opinion by stating that since petitioner was estopped from challenging the Board's authority to regulate his rodeo-type activities, it was unnecessary to address his other argument asserting error in the trial court's finding that certain events which occurred were non-farm activities and thus subject to land use regulation.

Land Use; Sedimentation Pollution Control Act; Trout Waters; Buffers; Land-Disturbing Activity; Variance

HENSLEY V. N.C. DEPT. OF ENV'T & NATURAL RESOURCES, DIV. OF LAND RESOURCES, 364 N.C. 285, 698 S.E.2d 41 (2010)

In a 6-1 decision, N.C. Supreme Court holds that the requirements of G.S. 113A-57(1), providing that any "land-disturbing activity" within a trout waters buffer zone must be "temporary" and "minimal," refer to the effects of sedimentation resulting from the activity and not to the entire scope of the activity. Division of Land Resources correctly granted variance to developer seeking to build additional nine holes for golf course at residential community.

FACTS: Mountain Air Development Corporation, developer and owner of a residential community with several amenities in Burnsville, decided to build an additional nine holes on the golf course ("the Project"), which involved construction of fairways and cart paths over and adjacent to streams. As part of the Project involved encroachment into the buffer zone for Banks Creek (a stream classified as "trout waters" under 15A NCAC 2B .0304(a)), Mountain Air sought a trout buffer variance from the Division of Land Resources ("DLR") in August 2002. *See* G.S. 113A-57 (2009) ("No land-disturbing activity subject to this Article shall be undertaken except in accordance with the following mandatory requirements: (1) No land-disturbing activity during periods of construction or improvement to land shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity. Waters that have been classified as trout waters by the Environmental Management Commission shall have an undisturbed buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, whichever is greater. *Provided, however, that the Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal.* This subdivision shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.") (Emphasis added.)

In October 2003, after more than a year of extensive negotiations with the Division of Land Resources, Mountain Air obtained the required variance, which allowed Mountain Air to remove the tree canopy along 2763 feet of the stream, clear 160 feet of buffer vegetation, and temporarily enclose and relocate stream segments within the buffer before permanently enclosing 1868 feet of the stream in pipes. (The Project also required a Wetlands Permit from the U.S. Army Corps of Engineers, 33 U.S.C. § 1344, and a Water Quality Certification from the N.C. Division of Water Quality, 33 U.S.C. § 1341: Mountain Air had acquired both of these prior to issuance of the variance. Mountain Air obtained approval of an erosion control plan, G.S. 113A-54.1, shortly after issuance of the variance.)

In November 2003, petitioners filed a petition for a contested case hearing in the Office of Administrative Hearings, alleging that the activities allowed by the variance would have a "sig-

nificant and adverse impact” on petitioners “and on their families, the use and enjoyment of their property, and their economic interests primarily from pollution in Banks Creek and loss of fish habitat.” Mountain Air’s motion to intervene was allowed in January 2004. Following entry of the administrative law judge’s (ALJ’s) order, which granted partial summary judgment in favor of petitioners and partial summary judgment in favor of respondents, the parties moved for reconsideration and for certification to the Sedimentation Control Commission (“Commission”). In January 2007, the Commission reversed the ALJ’s decision to grant partial summary judgment to petitioners and affirmed the ALJ’s decision to grant summary judgment to respondents. Petitioners sought judicial review of the final agency decision in superior court, and Mountain Air agreed to limit activities within the buffer until a hearing on the petition’s merits. The superior court affirmed in July 2008, entering summary judgment for respondents. In November 2009, a divided panel of the Court of Appeals, ___ N.C. App. ___, 685 S.E.2d 570 (2009), reversed and remanded for entry of summary judgment in favor of petitioners. Respondents appealed on the basis of the dissent. G.S. 7A-30(2).

HOLDING: The N.C. Supreme Court reversed and remanded in a 6-1 decision. Justice Newby wrote the majority opinion, joined by Chief Justice Parker and Justices Martin, Edmunds, Brady, and Timmons-Goodson. “The Court of Appeals equated the phrase ‘said disturbance’ in section 113A-57(1) with the definition of ‘land-disturbing activity’ in section 113A-52(6) and failed to distinguish the use of the land from the sedimentation pollution that it might cause. In other words, the Court of Appeals held that whether land-disturbing activity along a trout waters buffer zone is ‘temporary’ and ‘minimal’ depends on the scope of the entire project rather than just the sedimentation effects of the project. We disagree.” Judge Hudson dissented.

Upon reviewing the Act’s preamble, G.S. 113A-51 (appearing verbatim in the opinion), the majority stated, “[T]he purpose of the Act is to minimize sedimentation resulting from land-disturbing activity and not simply to regulate the land-disturbing activity itself. Each sentence of the preamble refers to sedimentation and the steps that the State must take in order to control the effects of erosion and sedimentation. Given the Act’s overriding purpose of controlling sedimentation, we conclude that the ‘temporary’ and ‘minimal’ requirements of section 113A-57(1) refer to the sedimentation effects of the activity and not to the land use in general. In reaching its holding the Court of Appeals stated that under the Act, ‘subject to certain limited exceptions, mandatory trout waters buffer zones shall remain “undisturbed” in perpetuity, or until such time as the General Assembly decides to enact legislation to the contrary.’ Hensley, ___ N.C. App. at ___, 685 S.E.2d at 578. In light of the preamble, which demonstrates that the Act is an antisedimentation law and not an antidevelopment law, this viewpoint overstates the intent and effect of section 113A-57(1). Rather than prohibiting development that encroaches on trout waters buffers, section 113A-57(1) aims to ensure that such development is undertaken only in a manner that minimizes sedimentation. At the General Assembly’s mandate, the Commission applies its expertise and grants variances only for projects that take due care to keep sedimentation to a minimum.”

Turning to the definitions section (G.S. 113A-52) of the Act, the majority stated, “[T]he Court of Appeals’ analysis focused heavily on the word ‘may’ in the provision that defines land-disturbing activity as ‘any use of the land ... that *may* cause or contribute to sedimentation.’ [G.S.] 113A-52(6) (emphasis added). The majority held ‘as a matter of law’ that the periodic maintenance work that Mountain Air will likely wish to perform in the buffer zone along Banks Creek ‘*may* cause or contribute to sedimentation,’ and thus constitutes ongoing “land-disturbing activity.”’ Hensley, ___ N.C. App. at ___, 685 S.E.2d at 578. We find this reading of the definition of land-disturbing activity to be overly literal. Virtually any use of land *may* cause or contribute to sedimentation, so the Court of Appeals’ interpretation effectively reads the variance provisions of section 113A-57(1) out of the Act. Because those variance provisions were enacted concurrently with the increased protections for trout waters, Act of July 25, 1989, ch. 676, sec. 3, 1989 N.C. Sess. Laws 1867, 1870, we do not believe the General Assembly intended such a result. Rather,

we interpret section 113A-52(6) as a more general guide to DLR's discretionary decision whether to grant a variance under section 113A-57(1)." (Emphasis in original.)

Reviewing Mountain Air's variance proposal and the conditions of the variance, the majority determined that both the proposal and DLR's "particularly stringent" variance conditions (as described by the Section Chief of DLR's Land Quality Section) ensured that erosion and sedimentation were "minimal" during the period of construction along Banks Creek. The majority held that there was no genuine issue of material fact as to whether the Project violated G.S. 113A-57(1). "The primary source of evidence on the Project's factual compliance with section 113A-57(1) was Richard Preston Maas, who has a Ph.D. in Environmental Chemistry and extensive experience working to improve water quality. In his deposition testimony, Dr. Maas expressed his opinions that Mountain Air's activities along Banks Creek were 'very likely to cause excessive siltation' and that the sedimentation impact of the Project would be 'permanent and substantial.' However, Dr. Maas also admitted that he based his opinions solely on previous experience with activities along other trout waters. He stated that the piping of Banks Creek would increase the stream's velocity and cause increased sedimentation, yet admitted that he had never prepared or reviewed any velocity calculations specific to the Project. When asked for his opinion about sedimentation pollution that might occur after completion of construction, Dr. Maas stated, 'Well, I may develop an opinion about that, *if and when I visit the site*. But I don't have an opinion on that right now.' (Emphasis added.)"

The majority concluded that the testimony of Dr. Maas "was too general and speculative to create a genuine issue of material fact as to whether the Project's sedimentation effects were sufficiently 'temporary' or 'minimal.'" We further conclude that when the Court of Appeals stated that the Project '*may* cause or contribute to sedimentation,' the court engaged in fact-finding, which is not the role of the appellate courts. Godfrey v. Zoning Bd. of Adjust., 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986). Particularly given our interpretation of section 113A-52(6) as a basic definition of land-disturbing activity rather than a highly literal rule that serves to ban all such activity in trout waters buffer zones, we find insufficient evidence in the record to justify further fact-finding in this case." (Emphasis in original.) In the remainder of the opinion, the majority *inter alia* observed that the record reflected "that DLR's interpretation that section 113A-57(1) gives DLR authority to grant variances when the impact from sedimentation will be 'temporary' and 'minimal' has been consistently applied." See Rainey v. N.C. Dep't of Pub. Instruction, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007) (*per curiam*).

DISSENT: Judge Hudson dissented, concluding that majority opinion reached a result "contrary to both the letter and the spirit" of the Act and its trout water buffer provisions. Taking issue with the majority's assertion that the term "land-disturbing activity" in G.S. 113A-57(1) applies only to sedimentation and not to the activity itself, Judge Hudson stated that "the statutory language explicitly provides otherwise when it states: '(6) "Land-disturbing activity" means *any use of the land* by any person in residential, industrial, educational, institutional or commercial development, highway and road constructions and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.' [G.S.] 113A-52 (6) (2009) (emphasis added). The majority simply rewrites this legislative definition, which is not the role of this Court."

Judge Hudson closed her dissent by noting that the alterations would be neither temporary nor minimal. "I do not agree that the provisions of [G.S.] 113A-57(1) apply only to the period of construction and am of the opinion that the majority in the Court of Appeals interpreted this statute exactly as the General Assembly intended.... While criticizing the Court of Appeals majority for 'effectively read[ing] the variance provisions ... out of the Act,' the majority here instead reads the *trout water protection provisions* out of the Act. My reading of the statutes and the arguments here leads me to conclude that the General Assembly did indeed intend to restrict development within the twenty-five-foot trout water buffer, while providing ample opportunity for construction of all manner of edifices nearby, even allowing for the buffer area to be disturbed

during construction, as long as the disruption is temporary and minimal. Here the project will permanently destroy trees and canopy along the watercourse and will reroute and enclose in a pipe the watercourse itself.” (Emphasis in original.)

Land Use; Vested Rights; Expenditures Made Prior to Permit Issuance; Mootness

WILSON V. CITY OF MEBANE BD. OF ADJUST., ___ N.C. App. ___, 710 S.E.2d 403 (No. COA10-971, Alamance– 5/17/11), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 305P11, 7/22/11)

Where a permit is required, expenditures made prior to the issuance of a permit are not considered in common law vested rights analysis.

FACTS: This dispute arose out of the approval of a commercial development for a Walgreens store (“Walgreens Project”) adjacent to a residential neighborhood. Petitioner Wilson owns a residential property (a 1950’s four-bedroom house) which he purchased in 2005: he sought to have the lot rezoned from residential to commercial use that same year. His request was denied. Later the next year (late 2006), a commercial real estate development company, The Crown Companies, LLC (“Crown”) became interested in developing the area adjacent to petitioner Wilson’s property. (That area was 1.62 acres, comprised of three parcels. Two of Crown’s three parcels were zoned for business use, while the parcel adjacent to Wilson’s property was zoned for residential use.) Since 2002, the City had two separate ordinances in effect that applied to both the Crown and Wilson properties: the Landscape Standards Ordinance (LSO) (requiring a 50-foot vegetation buffer between commercial and residential uses) and the Mebane Zoning Ordinance (MZO). (An amendment to the LSO was adopted in 2003 that exempted developments of less than five (5) acres from the 50-foot buffer requirement).

As Crown began its planning for the Walgreens Project, Daniel Barnes, an engineer for and principal of Crown, had a series of discussions with the City’s Planning Administration. In December 2006, Barnes met with Montrina Hadley, the Planning Director, presenting Crown's initial plan for the Walgreens Project. From this first meeting, it was apparent to Barnes that Crown's plan for the site was in conflict with the LSO and the MZO in that: (1) it would be difficult to accommodate the 50-foot buffer on the perimeter of the Walgreens site for the benefit of adjacent residential lots, and (2) the site plan required that thirty percent (30%) of the building that would house the Walgreens store would sit on the easternmost parcel, which was zoned for residential use and bordered Wilson's property.

Subsequently, Crown continued to pursue the development of the Walgreens Project, including considering purchasing Wilson's property in order to accommodate a 50-foot buffer. Crown entered into a purchase agreement in April 2007 whereby it acquired the right to purchase Wilson's property. However, the following month Barnes concluded that purchasing Wilson's property was prohibitively expensive: Crown submitted a revised site plan to Hadley reflecting its decision not to acquire Wilson's land and requesting her opinion as to the possibility of acquiring a waiver from the 50-foot buffer requirement. Barnes also inquired as to whether Crown should seek rezoning of the residential-zoned parcel adjacent to petitioner Wilson's property (upon which 30% of the Walgreens building would sit). Upon discussing the issue with her staff, Hadley recommended that Crown apply to have the residential parcel rezoned and indicated that a waiver of the 50-foot buffer requirement would be granted. In December 2007, petitioner Wilson was informed that Crown would not exercise its option to purchase his property.

During 2008, Barnes submitted four versions of the site plan to Hadley's office (in January, May, June, and November). At the same time Crown was moving forward with its development plan, the City adopted a Unified Development Ordinance (UDO) in February 2008. (While the

majority of the LSO survived the consolidation, the LSO's five-acre exemption for the 50-foot buffer between incompatible land uses was not incorporated into the UDO. Additionally, UDO § 1-2(A) provides that any portion of an ordinance that relates to land use and is inconsistent with the UDO is repealed.) Crown had not yet received approval of its site plan nor received a building permit when the UDO was adopted on February 4, 2008. Three days after the adoption of the UDO (on February 7), the City's Planning Department Technical Review Committee ("TRC") reviewed Crown's January 2008 site plan (with the notes from this meeting indicating that the plan had not been approved), and the TRC met again in June 2008 to review the second revised plan (with the notes from this meeting also indicating that Crown's plans had not been approved).

On January 30, 2009, Hadley stated in an email to counsel for Wilson that the site plan and building plans were still under review and that no approvals or permits had been issued. Additional TRC meetings were held, and Crown received approval of its plans and a building permit on February 24, 2009. The following month, Wilson appealed the issuance of the Crown building permit, alleging that the ordinance controlling the Crown development project is the UDO (adopted more than one year before the building permit was issued) and that the buffer specified on the Crown site plan and approved by the Planning Administration was in violation of the UDO buffer requirements. (Alternatively, he argued that if the plan was controlled by the LSO, the plan violated the LSO as the approved buffer did not "preserve the spirit of the Ordinance," as required by § 2(d) of the LSO.) In May 2009, the Board of Adjustment concluded that Crown had acquired a common law vested right to proceed with the project pursuant to the LSO and MZO.

Upon certiorari, the trial court upheld the Board's decision in May 2010. The trial court found: "7. The review process for the Proposed Walgreens began in the first week of December 2006.... The site plan for the Walgreens Project was drawn on November 30, 2007 and the plan sealed on December 17, 2007. The first submittal [of the site plan] was made January 23, 2008, the second submittal was made May 19, 2008 and the fourth submitted on November 17, 2008. The final site plan was approved, the building permit application approved and fees paid on February 23, 2009.... 8. At all times during the review of the Proposed Walgreens, the City of Mebane applied the LSO to the project having taken the position that Crown had a vested right to proceed under the LSO rather than the UDO which was enacted on February 4, 2008. 9. Crown Development made substantial expenditures in good faith and in reliance upon valid governmental approvals and action." Petitioner Wilson appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously reversed. "We conclude the expenditures on the Walgreens Project made by Crown, prior to the enactment of the UDO [Unified Development Ordinance], were not made in reasonable reliance on and after the issuance of a valid building permit. Accordingly, Crown did not acquire a common law vested right to have its development plan evaluated under the LSO [Landscape Standards Ordinance] and the MZO [Mebane Zoning Ordinance]. The building permit issued by the City of Mebane was void *ab initio*." Judge Robert N. Hunter, Jr., wrote the opinion, joined by Judge Calabria and Judge Stroud.

Petitioner Wilson argued that the trial court erred in determining that Crown acquired a common law vested right to proceed with the project under the LSO and the MZO. The Court agreed, reviewing the four elements necessary to establish a common law vested right set forth in Browning-Ferris Indus. of S. Atl., Inc. v. Guilford County Bd. of Adjustment, 126 N.C. App. 168, 171-72, 484 S.E.2d 411, 414 (1997). The Court stated that the record demonstrated that "Crown's expenditures, made prior to the enactment of the UDO, were not made in reasonable reliance *on and after* the issuance of a valid building permit." (Emphasis in original.) The Court specifically observed that the trial court's judgment provided as follows: "The review process for the Proposed Walgreens began in the first week of December 2006.... The site plan for the Walgreens Project was drawn on November 30, 2007 and the plan sealed on December 17, 2007. The first submittal was made January 23, 2008, the second submittal was made May 19, 2008 and the fourth submitted on November 17, 2008. *The final site plan was approved, the building permit application approved and fees paid on February 23, 2009.*" (Emphasis added.) The Court further

observed that during the Board hearing, the City stipulated that the February 23, 2009 issuance of the building permit was the “final act establishing approval” of Crown’s site plan.

Determining that Crown failed to establish one of the elements necessary to acquire a common law vested right, the Court stated, “Assuming *arguendo* that Crown made ‘substantial expenditures’ prior to the adoption of the UDO, the City did not issue a permit for the Walgreens Project until more than one year *after* the enactment of the UDO on 4 February 2008. As our Supreme Court concluded in Warner v. W & O, Inc., expenditures made by the landowner prior to issuance of a permit were ‘manifestly not made in reliance on the permit thereafter issued.’ 263 N.C. 37, 41, 138 S.E.2d 782, 786 (1964); *see also* David W. Owens, *Land Use Law in North Carolina* 150 (2006) (‘expenditures made to secure government approval are not considered’ as expenditures made in reliance upon government approval).” (Emphasis in original.) The Court held that the building permit issued by the City was void *ab initio*. “The City issued a permit for Crown’s Walgreens Project based on the premise that the controlling ordinances were the LSO and the MZO. Because we have determined Crown did not acquire a common law vested right to proceed with its development plan under the LSO and the MZO, the permit was void *ab initio*. Additionally, any expenditures made by Crown after the issuance of the permit could not serve as a basis for a vested right. *See Mecklenburg County v. Westbery*, 32 N.C. App. 630, 635, 233 S.E.2d 658, 661 (1977) (‘[T]he permit must have been lawfully issued in order for the holder of the permit to acquire a vested right in the use.’).”

The Court also rejected respondents’ argument that Crown relied upon the City’s assurances that the 50-foot buffer requirement would be waived. “While we do not conclude the City’s assurances to Crown amounted to conditional approvals of the site plan, this Court rejected reliance on such actions in Browning-Ferris, 126 N.C. App. at 172, 484 S.E.2d at 415 (rejecting the plaintiffs’ argument that substantial expenditures in reliance on the pre-amended ordinance, a letter from the town’s planning director giving assurances of approval, or the planning department’s conditional approval of the site development plan gave rise to a common law vested right to proceed with construction in contravention of the then-enacted ordinance); MLC Auto., LLC v. Town of S. Pines, ___ N.C. App. ___, ___, 702 S.E.2d 68, 76 (2010) [*disc. review denied*, 365 N.C. 211, 710 S.E.2d 23 (No. 511P10, 6/15/11)] [(*see* p. 51 of this *Digest*)] (‘We need not specifically address what types of government approval, short of a permit, are sufficient for the common law vested right analysis because Browning-Ferris establishes that expenditures in reliance on letters such as these are not sufficient to give rise to a vested right.’)... [O]ur case law makes clear, where a permit is required, expenditures made prior to the issuance of a permit are not considered in the common law vested rights analysis.”

The Court rejected respondents’ argument that the appeal was moot because, before the filing of the appeal, the City adopted amendments to the UDO that would entitle Crown to the building permit that was issued. “A matter is rendered moot when ‘(1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.’ Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 20, 652 S.E.2d 284, 298 (2007) (citation and quotation marks omitted), *appeal dismissed, disc. review denied*, 362 N.C. 177, 658 S.E.2d 485 (2008)... [T]he permit issued under the requirements of LSO and the MZO for Crown’s development plan was void *ab initio*. There is no evidence in the record that Crown’s development plan was approved under the UDO. Thus, the City’s amendments to the UDO could not have eradicated the effects of the violation and Respondents’ argument is dismissed.”

Land Use; Vested Rights; Tortious Interference Claims

MLC AUTOMOTIVE, LLC v. TOWN OF SOUTHERN PINES, ___ N.C. App. ___, 702 S.E.2d 68 (No. COA09-433, Moore— 11/2/10), *disc. review denied*, 365 N.C. 211, 710 S.E.2d 23 (No. 511P10, 6/15/11)

A property owner does not acquire a vested right to develop land contrary to the provisions of a subsequently enacted zoning ordinance simply based on the purchase of the land in reliance on existing zoning. Letters from staff merely confirming the zoning designation of a particular property held insufficient to give rise to a common law vested right under Town of Hillsborough v. Smith, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969). Plaintiffs failed to demonstrate that expenditures for automobile park were in reliance upon governmental approval of their project.

FACTS: In 2000, plaintiffs became interested in developing an automobile park (consisting of multiple automobile dealerships at a single location) on a 21-acre tract of land. During the course of 2001 and after contracting to purchase the property, plaintiffs received two letters from the Town’s Code Enforcement Officer stating *inter alia* that the property was zoned General Business (GB). (The Town’s Unified Development Ordinance at the time provided that property in GB districts could be used for “Motor Vehicle and Boat Sales or Rental or Sales and Service” without a special or conditional use permit.) Plaintiffs closed on the property in January 2002 (paying approximately 1.5 million dollars for the property). In January 2005, plaintiffs entered into a letter of intent with American Suzuki Motor Corporation (“Suzuki”) wherein Suzuki would issue a dealership agreement to plaintiffs upon completion of the facility if certain conditions and timetables were met. (It was alleged that plaintiffs spent approximately one-half million dollars in preparations to develop the property between 2001 and 2005.)

In January 2005, a representative of plaintiffs met with the Town Planning Director to discuss plans for the auto park. The Planning Director explained that plaintiffs needed a zoning/building permit in order to proceed with the development of the property under the UDO and that there was a checklist of items that had to be completed before an application for a zoning/building permit could be submitted and reviewed. Plaintiffs filed an architectural compliance permit application in March 2005, and after hearing the presentation the following month, members of the Town Council expressed their disapproval in that the modern design did not fit with the Town’s more traditional look. Plaintiffs thereafter modified the plans, and members of the community voiced opposition to the plans at subsequent meetings. A zoning amendment petition supported by citizen signatures was submitted in July 2005 seeking to rezone the property to Office Services (OS), a classification that did not permit motor vehicle sales. In August 2005, the Town Planning Board recommended approval, concluding that OS zoning would serve as a buffer or transition to the adjacent neighborhoods, as the existing GB zoning was an “anomaly” because the tract was surrounded on three sides by residential neighborhoods, with forested conservation areas across the road from the tract. In October 2005, the Town Council voted unanimously to rezone the property to Office Services. The Suzuki letter of intent subsequently expired.

Plaintiffs filed both federal (in December 2005) and state (in October 2007) actions. The federal district court declined to rule on the state law issues (staying the federal claims pending resolution of the land use and zoning issues in state court), and in July 2008, the Fourth Circuit affirmed, 532 F.3d 269. In November 2008, the superior court granted summary judgment for defendants as to plaintiffs’ claims for tortious interference with contract and tortious interference with prospective economic advantage, but granted summary judgment for plaintiffs on the common law vested right claim. Both sides appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed in part and reversed and remanded in part. “We affirm the trial court’s grant of summary judgment to defendants on

the tort claims. Plaintiffs failed to present any evidence that defendants acted without justification in rezoning the property — an essential element of both tort claims. We, however, reverse the trial court's grant of summary judgment to plaintiffs on their claim of a common law vested right since plaintiffs did not make substantial expenditures in good faith reliance on government approval of their proposed automobile dealership project.” Judge Geer wrote the opinion, joined by Judge Robert C. Hunter and Judge Calabria.

Defendants appealed the trial court's grant of summary judgment for plaintiffs as to their claim that they had a vested right to develop the property as an auto park notwithstanding the rezoning of the property. Contending that existing zoning constituted sufficient governmental approval to give rise to a vested right, plaintiffs argued that since the property was zoned GB and an automobile dealership was a permitted use, they acquired a common law vested right to develop their automobile dealership when they expended sums in reliance on that zoning. Citing Town of Hillsborough v. Smith, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969), the Court rejected this contention.

The Court further rejected plaintiffs' argument that In re Campsites Unlimited Inc., 287 N.C. 493, 501, 215 S.E.2d 73, 78 (1975) (wherein the landowner purchased and began constructing a campsite development at a time when the county had *no* zoning ordinance at all applicable to rural areas) altered the rule set forth in Town of Hillsborough. “Defendants contend that Campsites only applies when a landowner makes expenditures in reliance on a complete lack of zoning, while plaintiffs contend that Campsites stands for the proposition that ‘reliance upon existing zoning is sufficient to create vested rights.’ In other words, plaintiffs ask us to conclude that Campsites overruled *sub silentio* the language in Town of Hillsborough holding that the purchase of property in reliance on existing zoning is insufficient to give rise to a vested right. We first note that Justice Lake authored both Town of Hillsborough and Campsites, and nothing in Campsites, which discusses the prior decision extensively, suggests any intent to limit the precedential effect of the Town of Hillsborough decision. Moreover, in Finch v. City of Durham, 325 N.C. 352, 366, 384 S.E.2d 8, 16 (1989), the Supreme Court described the holding in Campsites as follows: ‘We have held that when a property owner makes expenditures in the absence of zoning or under the authority of a building permit, subsequent changes in the zoning of the property may not prohibit the resulting nonconforming use.’ Here, there was no absence of zoning, and, therefore, Campsites does not apply.”

The Court turned to the issue of the form of government approval required by the common law vested right analysis. The Court initially observed that: (1) the Town's UDO (adopted in 1989) provided that “the use made of property may not be substantially changed ..., substantial clearing, grading or excavation may not be commenced and buildings or other substantial structures may not be constructed, erected, moved or substantially altered except in accordance with and pursuant to one of the following permits...” and the listed permits included a zoning permit, a grading permit, a special use permit, a conditional use permit, an erosion control permit, and, if applicable, an architectural compliance permit; (2) plaintiffs did not dispute that they were required under the UDO to obtain a zoning permit, a grading permit, an erosion permit, and an architectural compliance permit; and (3) plaintiffs did not obtain any of those permits prior to making their expenditures.

Citing Browning-Ferris Indus. of South Atlantic, Inc. v. Guilford County Bd. of Adjust., 126 N.C. App. 168, 484 S.E.2d 411 (1997) (wherein board of commissioners adopted an amendment to zoning ordinance providing that construction and operation of a transfer station would require a special use permit), the Court rejected plaintiffs' argument that the two 2001 letters from the Code Enforcement Officer were sufficient for purposes of the requirement. “We need not specifically address what types of government approval, short of a permit, are sufficient for the common law vested right analysis because Browning-Ferris establishes that expenditures in reliance on letters such as these are not sufficient to give rise to a vested right. ... The plaintiff [in Browning-Ferris] argued that it had a common law vested right to proceed with the transfer station with-

out a special use permit, as the ordinance had allowed prior to the amendment. This Court concluded that the plaintiff did not have a vested right to proceed with the transfer station consistent with the pre-amended ordinance, explaining: ‘In so holding we reject the arguments of [the plaintiff] that substantial expenditures in reliance on the pre-amended Ordinance, *the 13 June 1994 letter from [the planning director]* or the conditional approval of the site development plan gives rise to a vested right to construct and operate a transfer station.’ *Id.* at 172, 484 S.E.2d at 415 (emphasis added). We see no meaningful basis for distinguishing Browning-Ferris from this case. The letter from the Browning-Ferris planning director is virtually identical with the 30 November 2001 letter from the Code Enforcement Officer in this case — it merely confirmed that a particular use was a permitted use in the applicable zone, but also stressed that the project would have to meet other requirements set out in the zoning ordinance. We are bound by this Court’s holding in Browning-Ferris that substantial expenditures in reliance on the prior version of the ordinance and a letter of this nature are not sufficient to give rise to a vested right.”

The Court held that summary judgment was properly granted for defendants as to plaintiffs’ claims for tortious interference with contract and prospective economic advantage. The Court determined the none of the factors pertinent in plaintiffs’ cited case, Browning-Ferris Indus. of South Atlantic, Inc. v. Wake County, 905 F. Supp. 312 (E.D.N.C. 1995), existed here. “First, we have already concluded that plaintiffs did not have a vested right in their auto park project. In addition, defendants’ actions fell squarely within the Town’s jurisdiction to regulate land use within the Town. [G.S.] 160A-382(a) (2009)... Although plaintiffs argue that the evidence is undisputed that defendants’ purpose was to ‘unlawfully stop Leith,’ plaintiffs do not address the motive behind the desire to prevent the auto park. Defendants had the authority to amend the zoning ordinance. *See* [G.S.] 160A-385(a)(1) (2009)... This authority includes amendments to the zoning map. *Id.*... Because of this authority, it is not enough to show that defendants voted to rezone in order to bar plaintiffs’ project; plaintiffs must show that defendants’ reason for barring that project through rezoning was not a legitimate justification.... Plaintiffs have overlooked the critical distinction: Wake County, in Browning-Ferris, was acting in an area outside of its jurisdiction regarding an interest outside its authority, while the public interest in this case falls squarely within the authority and jurisdiction of defendants. The evidence in the record indicates that the public objections and defendants’ motive in stopping the auto park was a concern that such a project was not an appropriate use for that location since it was surrounded on three sides by residential districts and, on the fourth side, had a conservation area across the highway. The General Assembly has placed responsibility for addressing such a concern on defendants. *See* [G.S.] 160A-383 (2009)... Finally, the action taken by defendants directly related to the concern — they concluded that the use was not appropriate for the location and rezoned the location to make it a district more in character with the surrounding property. Thus, the rationale behind Browning-Ferris supports the grant of summary judgment in this case.... Here, defendants acted pursuant to their legislatively-granted zoning authority to remedy a public concern — that the current zoning of the property was not consistent with the character of the neighborhood — that was a concern the legislature has stressed should be considered by municipalities.”

In closing its opinion, the Court emphasized, “We note that plaintiffs are, in effect, seeking to obtain the equivalent of a vested right without meeting the requirements for either a common law or statutory vested right. If we were to hold, as plaintiffs urge, that defendants were not legally justified in changing the zoning for plaintiffs’ property after they knew about plaintiffs’ plans for an auto park, that precedent would mean that even if a municipality lawfully rezoned property — prior to any right vesting — it could still be held liable for substantial damages. We do not believe that a municipality acts without justification if it exercises its zoning authority, in accordance with statutory authority, to amend the zoning map in a manner that does not violate any vested rights.” (Citation omitted.)

NOTE: Plaintiffs filed a petition for discretionary review in December 2010. The N.C. Supreme Court denied the petition for discretionary review on June 15, 2011.

Land Use; Zoning; Pawn Shops

BECK V. CITY OF RALEIGH, ___ N.C. App. ___, 711 S.E.2d 208 (No. COA10-893, Wake-3/15/11) (*unpublished*)

In plaintiffs’ action alleging that zoning ordinance restricting location of pawn shops was arbitrary and capricious, trial court properly entered summary judgment for City.

FACTS: In 2006, the City Council commenced consideration of an ordinance to restrict pawn shops to certain locations: at the time, pawn shops were permitted in the Business, Thoroughfare, Industrial-1, Industrial-2, Buffer Commercial, Neighborhood Business, and Shopping Center zoning districts. In February 2009, the City Council enacted Raleigh Zoning Ordinance TC 17-08, which restricted pawn shops to the Business, Thoroughfare, Industrial-1, and Industrial-2 zoning districts. (Pawn shops already in existence were allowed to remain in their locations.) In May 2009, plaintiffs filed a complaint for declaratory judgment and a motion for preliminary injunction alleging *inter alia* that the Council’s enactment of TC 17-08 was arbitrary and capricious. In March 2010, the trial court granted the City’s motion for summary judgment. Plaintiffs appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. “[W]e hold that the undisputed facts establish that a plausible basis exists for enacting [Raleigh Zoning Ordinance] TC 17-08 and that the City Council did not use its legislative authority arbitrarily or capriciously.” Judge Robert C. Hunter wrote the opinion, joined by Judge Calabria and Judge Elmore.

In holding that the record demonstrated a plausible basis for the enactment of the ordinance, the Court observed that, “The City Council heard from those for and against the enactment of TC 17-08 over the course of 14 meetings that took place over two and one-half years. Evidence offered at the public hearings and minutes of the City Council and its committees document that the following considerations, among others, were before the City Council and formed the basis for its adoption of the zoning ordinance: (1) pawn shops in Raleigh have tended to locate in ‘fragile’ or ‘high risk’ areas close to residential neighborhoods and in shopping centers; (2) having numerous pawn shops in one area can decrease the character of a residential neighborhood and discourage people from buying houses that are located close to a pawn shop; (3) adjacent property values can be affected by pawn shops; (4) pawn shops draw in a criminal element since they are often utilized by thieves to obtain cash for stolen goods; (5) the location of pawn shops can affect location decisions by other businesses; (6) restricting pawn shops to zoning districts that are further away from neighborhoods will help address concerns about the impact of pawn shops on neighborhoods; and (7) other jurisdictions have passed similar zoning laws to remedy the same concerns.”

The Court found no merit in plaintiffs’ argument regarding exclusionary zoning. “North Carolina has not specifically recognized a cause of action for exclusionary zoning and plaintiffs have not persuaded us to do so here. Although exclusionary zoning has not arisen as a common law cause of action in North Carolina, this Court has addressed similar claims under the Equal Protection Clause. Brown v. Town of Davidson, 113 N.C. App. 553, 439 S.E.2d 206 (1994) (holding that a class of individuals was not denied equal protection under the law when the City Council denied its petition to rezone). Plaintiffs ... stated in their complaint that the ordinance is ‘unconstitutional’ but have not raised an equal protection argument.”

Nota Bene (N.B.)
Other Decisions of Note

Land Use; Appellate Procedure; Insufficiency of Record on Appeal; Dismissal

CRLP DURHAM, LP V. DURHAM CITY/COUNTY BD. OF ADJUST., ___ N.C. App. ___, 706 S.E.2d 317 (No. COA10-120, Durham– 3/1/11), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 153P11, 10/6/11) (Court of Appeals dismisses petitioner’s appeal from interpretation of development plan and zoning code due to insufficiency of record, given that appellate courts cannot take judicial notice of ordinances, *see High Point Surplus Co. v. Pleasants*, 263 N.C. 587, 591, 139 S.E.2d 892, 895 (1965); Court of Appeals states, “From the record before us, we cannot, without engaging in speculation, determine whether the MZO [Merged Zoning Ordinance, 2000] or the UDO [Unified Development Ordinance, 2006] is the ‘applicable municipal ordinance’ as petitioner failed to include in the record on appeal any portion of the UDO containing language stating when or if the UDO ‘superseded’ the MZO or language from the UDO explaining its applicability to development plans approved under the MZO.” Petitioner filed a petition for discretionary review in April 2011. The N.C. Supreme Court denied the petition for discretionary review on October 6, 2011.)

Land Use; Historic Preservation Commission; Certificate of Appropriateness; Arbitrary Decision

SANCHEZ V. TOWN OF BEAUFORT, ___ N.C. App. ___, 710 S.E.2d 350 (No. COA10-750, Carteret– 5/3/11), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 227P11, 10/6/11) (affirming Board of Adjustment’s reversal of Beaufort Historic Preservation Commission’s (BHPC’s) decision which had denied Certificate of Appropriateness; Court of Appeals holds that BHPC’s decision to limit proposed one-and-one-half story structure to 24-feet in height “was not supported by the facts disclosed by the whole record and was made without the use of any determining principle”; Court of Appeals states, “While there was evidence presented before the BHPC that there were other one-and-one-half story structures in the historic district that ranged between twenty and twenty-two feet in height, there was also evidence presented that the residences closest to the Smith property ranged from twenty-six to thirty-five feet in height. [G.S.] 160A–400.9 does not permit the BHPC to ‘cherry pick’ certain properties located within the historic district in order to determine the congruity of proposed construction; instead, the BHPC must determine congruity contextually, based upon ‘the total physical environment of the Historic District.’... Since the twenty-four foot height requirement was established by each member of the BHPC without the use of any determining principle from the BHPC guidelines, it was clearly arbitrary.” (Citation omitted.) Petitioner filed a petition for discretionary review in June 2011. The N.C. Supreme Court denied the petition for discretionary review on October 6, 2011.)

Land Use; Non-Conforming Use; Shooting Range

LAND V. VILLAGE OF WESLEY CHAPEL, ___ N.C. App. ___, 697 S.E.2d 458 (No. COA09-1465, Union– 8/3/10) (In Village’s appeal, Court of Appeals upholds trial court’s determination that plaintiff’s use of property for private shooting range did not violate Union County Land Use Ordinance of 1988 (in place at time of plaintiff’s 1991 purchase of property in unincorporated area) and that plaintiff did not materially alter shooting range under Village’s 2000 Land Use Ordinance. (Village was incorporated in 1998.))

Land Use; Permit Applications; Re-submission Waiting Period; Conditional Use

CONOLEY V. TOWN OF WENDELL, ___ N.C. App. ___, 707 S.E.2d 264 (No. COA09-810, Wake– 1/4/11) (*unpublished*) (In action challenging propriety of Town’s consideration of a second rezoning petition (filed approximately four months after the first petition was filed, and approximately one and one-half months after its failure to obtain the required number of votes to pass), rejecting plaintiffs’ contention that consideration of the second petition violated a twelve month re-submission waiting period established by ordinance. “[W]e agree with the Town’s interpretation that the second petition was not ‘the same change previously involved’ in the first petition because the face of the second petition set forth three additional conditions, which were not contained on the face of the first petition when filed initially. Furthermore, the conditional use zone ultimately adopted contained a total of twelve enumerated restrictions and a decrease in the area of the land [the developer] sought to rezone. Because conditional use zoning necessarily envisions modifications and the adoption of restrictions, it presents something of a ‘moving target’ during the course of a proposal’s consideration and tailoring as the municipality seeks to employ conditional use zones to balance conflicting demands.”)

Land Use; Special Use Permits

JOBE V. TOWN OF HAW RIVER, ___ N.C. App. ___, 701 S.E.2d 403 (No. COA10-183, Alamance– 11/2/10) (*unpublished*) (In petitioners’ (neighboring property owners’) appeal, Court of Appeals reverses trial court and invalidates Council’s October 2008 decision to grant special use permit (for construction and operation of a construction and demolition debris recycling center and a concrete plant) as arbitrary and capricious given Council’s failure to adhere to several of its ordinance requirements for special use hearings.)

Land Use; Permits; Marina; Dry Stack Storage Structure; Intervention; Mootness

CAROLINA MARINA AND YACHT CLUB, LLC V. NEW HANOVER BD. OF COMM’RS, ___ N.C. App. ___, 699 S.E.2d 646 (No. COA10-77, New Hanover– 9/21/10), *disc. review denied*, 365 N.C. 89, 706 S.E.2d 253 (No. 457P10, 3/10/11) (Intervenor-neighboring property owner’s appeal dismissed as moot where County issued special use permit to petitioner pursuant to superior court order; citing Estates, Inc. v. Town of Chapel Hill,

130 N.C. App. 664, 504 S.E.2d 296 (1998), *disc. review denied*, 350 N.C. 93, 527 S.E.2d 664–65 (1999) (*see Digest of Municipal Law 1998-99*, p. 47). Intervenor filed a petition for discretionary review in October 2010. The N.C. Supreme Court denied the petition for discretionary review on March 10, 2011.)

Land Use; Permits; Open Space; Modification

WAKE FOREST GOLF & COUNTRY CLUB, INC. V. TOWN OF WAKE FOREST, ___ N.C. App. ___, 711 S.E.2d 816 (No. COA10-972, Wake– 6/21/11), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 303P11, 7/21/11) (Court of Appeals holds, “Where Wake Forest Golf & Country Club, Inc. (WFGCC) voluntarily designated its entire golf course as open space in its 1999 PUD [planned unit development] application and subsequently exercised the right to develop the property in accordance with the special use permit, the Wake Forest Board of Commissioners did not abuse its discretion when it refused to consider WFGCC’s 2009 application to reduce the area covered by the special use permit in order to selectively develop the remaining property for residential use. Where WFGCC had no right to demand that the Board of Commissioners consider its 2009 application, it was not entitled to the issuance of a writ of mandamus or to injunctive relief.”)

Land Use; Recombination of Lots; Subdivisions

BLUEJACK ENTERPRISES, LLC V. TOWN OF EDENTON, ___ N.C. App. ___ 706 S.E.2d 841 (No. COA10-171, Chowan– 12/21/10) (*unpublished*) (Trial court did not err in affirming Board of Adjustment’s decision denying petitioner’s appeal from a “new official determination” of the planning administrator regarding application of the exception for recombination of nonconforming lots.)

Land Use; Standing

MCDOWELL V. RANDOLPH COUNTY, ___ N.C. App. ___, 698 S.E.2d 202 (No. COA09-1113, Randolph– 7/20/10) (*unpublished*) (Court of Appeals dismisses action upon agreeing with argument brought forward in respondents’ cross-appeal that superior court erred in reversing Board of Adjustment’s determination that petitioners lacked standing; petitioners had initially appealed from Board of Adjustment’s denial of request to compel removal of recently erected structures at site of lumber company; zoning administrator had determined that alterations at issue did not violate non-conforming use provisions of County’s Unified Development Ordinance; Court of Appeals holds that there was insufficient evidence to establish that petitioners’ injury could be redressed by removal of the structures, as no witness testified that petitioners’ injury was directly traceable to structures at issue.)

Land Use; Steep Slope Ordinance; Viewshed Protection Ordinance; Standing; Statute of Limitations

TEMPLETON V. TOWN OF BOONE, ___ N.C. App. ___, 701 S.E.2d 709 (No. COA09-1332, Watauga– 11/16/10) (holding *inter alia* that trial court properly dismissed plaintiffs’ constitutional and statutory claims challenging Town’s adoption of Steep Slope Ordinance and Viewshed Protection Ordinance amendments; dissent states that “majority errs by considering the standing requirements for facial constitutional challenges in the same light as those required for as-applied constitutional claims.”)

Land Use; Variance; Halfway House; *Ex Parte* Communications

HARBOR BAPTIST CHURCH V. CITY OF CHARLOTTE, ___ N.C. App. ___, 698 S.E.2d 556 (No. COA10-3, Mecklenburg– 8/3/10) (*unpublished*) (holding that Zoning Board of Adjustment (ZBA) properly granted Center for Community Transitions (CCT’s) application requesting zoning variance of 58 feet for placement of halfway house; ordinance required buildings for jails and prisons (including halfway houses) to be at least 100 feet from “the nearest residentially zoned or residentially used property”; adjacent mobile home park was a non-conforming use in a I-2 (industrial use) zone; rejecting plaintiff’s arguments that trial court erred by: (1) failing to rule upon allegations of impermissible conflict arising from *ex parte communications* of one of the ZBA members, and (2) affirming decision given lack of competent evidence.)

Land Use; Zoning; Spot Zoning

WALLY V. CITY OF KANNAPOLIS, ___ N.C. App. ___, 709 S.E.2d 601 (No. COA09-1080, Cabarrus– 2/15/11) (*unpublished*), *petition for disc. review allowed*, ___ N.C. ___, ___ S.E.2d ___ (No. 111PA11, 8/25/11) (In nearby property owners’ appeal from zoning of newly annexed parcel of land as Campus Development-Conditional Zoning, Court of Appeals affirms entry of summary judgment for defendant-Town; rejecting plaintiffs’ spot zoning argument. Plaintiffs filed a petition for discretionary review in March 2011. The N.C. Supreme Court allowed the petition for discretionary review on August 25, 2011.)

LAW ENFORCEMENT

Law Enforcement; Torts; Gross Negligence; High Speed Pursuit

LUNSFORD V. RENN, ___ N.C. App. ___, 700 S.E.2d 94 (No. COA09-1592, Granville– 10/5/10), *disc. review denied*, 365 N.C. 193, 707 S.E.2d 244 (No. 480P10, 4/7/11)

Trial court correctly entered summary judgment for defendant-Town and officers in wrongful death action arising from high speed pursuit. Plaintiffs’ evidence failed to raise a genuine issue that officer acted with a reckless indifference to the safety of the public– the lowest threshold for wanton conduct. When drivers are handling their vehicles in a dangerous manner, they are a danger to the community whether being pursued by police or not.

FACTS: Plaintiffs, as administrators of their daughters’ estates, filed a wrongful death action against the Town of Franklinton and its law enforcement officers (Officer Dunlap and two of his superiors), as well as the estate of Guy C. Ayscue. At the time of Ayscue’s December 2007 mid-afternoon head-on collision with the vehicle that plaintiffs’ daughters were riding in, Ayscue had been attempting to evade arrest in his car, and Officer Dunlap, along with other law enforcement officers, pursued Ayscue in order to apprehend him. The record reflected that Ayscue had been driving in a dangerous manner for at least half an hour before he encountered Officer Dunlap. As to the pursuit itself, the Court observed, “Viewing the evidence in the light most favorable to plaintiffs, the record shows that, at times, the chase reached tremendous speeds in the midst of heavy traffic. Ayscue ran several cars off the road while being pursued, and the speeds reached during the chase were dangerous due to the many curves and hills encountered – particularly near the point of the collision. The chase lasted about fourteen minutes, and covered approximately 18.2 miles. Several portions of those miles included densely populated neighborhoods and commercial sectors of Franklinton and Creedmoor. Officer Dunlap, at some points during his pursuit, followed very close to Ayscue’s vehicle. Moreover, Officer Dunlap violated the Franklinton Police Department policy banning high speed pursuits of fleeing suspects, because, for most of the chase, the speed of the vehicles was more than twenty miles an hour over the posted speed limit. Officer Dunlap crossed the centerline on several occasions, and for at least several portions of the pursuit, Officer Dunlap followed very close to Ayscue’s vehicle.”

In June 2009, the trial court granted summary judgment as to all defendants except Ayscue’s estate and denied all of plaintiffs’ claims for gross negligence. (The only claim remaining for trial was plaintiffs’ claim against Ayscue’s estate for negligence.) Plaintiffs appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge Robert N. Hunter, Jr. wrote the opinion, with Judge McGee and Judge Stroud concurring.

The Court initially addressed the issue of jurisdiction, determining that the appeal was properly before the Court. “We note that this appeal is interlocutory given that plaintiffs’ cause of action against Ayscue’s estate is still pending in the trial court. ‘Generally, there is no immediate right to appeal from interlocutory orders and judgments.’ Goldston v. American Motors Corp., 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, where the trial court certifies an interlocutory order under N.C.R. Civ. P. 54(b) (2010), jurisdiction in this Court is proper. In this case, summary judgment was granted in favor of defendants, and the trial court certified the summary judgment order pursuant to N.C.R. Civ. P. 54(b) (2010). Since the only claim remaining is against Ayscue’s estate, it is apparent that the trial court’s order is ‘a final judgment as to one ... but fewer than all of ... [the] parties,’ and we agree that there is ‘no just reason for delay.’ N.C.R. Civ. P. 54(b).” (Citations omitted.)

Plaintiffs argued that the combination of high vehicle speeds, hilly road terrain, traffic concentration, population density, Officer Dunlap's close following distance, and duration of the chase created an issue for trial on the gross negligence claim. The Court disagreed. Citing Norris v. Zambito, 135 N.C. App. 288, 294-95, 520 S.E.2d 113, 117 (1999), the Court reviewed the factors relevant in an examination of whether the conduct of an officer engaged in pursuit of a fleeing suspect meets the gross negligence standard: (1) the reason for the pursuit at issue; (2) the probability of injury to the public as a result of the officer's decision to begin and continue pursuit; and (3) the officer's conduct during the pursuit. Regarding plaintiff's evidence, the Court stated, "In this appeal, plaintiffs have expounded in detail how the facts surrounding this tragedy support a question of gross negligence.... Even though this evidence ostensibly seems to satisfy many of the considerations this Court examines on appeal in these cases, it fails to raise a genuine issue that Officer Dunlap acted with a reckless indifference to the safety of the public – the lowest threshold for wanton conduct." In so holding, the Court observed that plaintiffs did not dispute that: 1) approximately thirty minutes before Officer Dunlap began his pursuit, a Franklinton resident called 911 due to Ayscue's erratic and dangerous driving within the corporate limits; 2) Ayscue's driving was a concern for a clerk at a convenience store, who took the time to alert Officer Dunlap as to Ayscue's reckless indifference to traffic; and 3) Ayscue was driving at high speeds, running red lights, swerving across the centerline, passing other vehicles in dangerous circumstances, rapidly accelerating and squealing his tires, and skidding in turns.

The Court determined that while plaintiffs' evidence was illustrative of the dangers existent during the pursuit, such did not establish that Officer Dunlap acted in a manner that was wanton or reckless. "Ayscue's behavior before being pursued underscores the reason we give great deference to a law enforcement officer's decision to initiate and maintain a pursuit of a suspect. Even plaintiffs' evidence supports the conclusion that, very early in the chase, Ayscue was driving in a very dangerous manner – as he had been for at least half an hour before Ayscue encountered Officer Dunlap. Officer Dunlap observed right away that Ayscue was a risk to himself and the public. Officer Dunlap knew that a white male was driving the car, but he did not discover the identity of the driver until Ayscue had already brought the chase to its tragic finale. In light of the entire record, even if Officer Dunlap had not initiated pursuit, it is not entirely improbable that the same result could have occurred.... Ayscue's culpability aside, the evidence offered by plaintiffs as to the above factors on gross negligence boils down to one primary contention: Officer Dunlap was reckless by continuing to pursue Ayscue when Ayscue drove in a dangerous manner. We decline to adopt this principle."

The Court emphasized, "When drivers are driving in a dangerous manner, they are a danger to the community whether being pursued by police or not. To hold that there is a genuine issue that Officer Dunlap was reckless in these circumstances would all but preclude an officer's ability to pursue a suspect driving recklessly and attempting to evade police, because for an officer to chase such an individual would open the officer to potential liability. Officer Dunlap was merely attempting to mitigate an already precarious situation by getting Ayscue off the road. Ayscue refused to comply. Without at least some evidence showing that Officer Dunlap was reckless in trying to get Ayscue to pull off the road, plaintiffs cannot show that Officer Dunlap's conduct was grossly negligent."

NOTE: Plaintiffs filed a petition for discretionary review in November 2010. The N.C. Supreme Court denied the petition for discretionary review on April 7, 2011.

Law Enforcement; Torts; Negligence; Wrongful Death; Domestic Violence; Discretionary Decision; Public Duty Doctrine

ESTATE OF HARRY KAY BURGESS V. HAMRICK, ___ N.C. App. ___, 698 S.E.2d 697 (No. COA09-1690, Cleveland- 8/3/10), *disc. review denied*, 364 N.C. 606, 703 S.E.2d 444 (No. 377P10, 11/4/10)

Trial court erred in denying defendants' motion for summary judgment in plaintiffs' negligence action arising from deputy sheriff's response to potential domestic violence situation. The public duty doctrine serves as a shield from liability where a law enforcement officer, acting to protect the general public, indirectly causes harm to an individual through discretionary acts.

FACTS: In October 2007, Cleveland County Sheriff's Deputy Paul Leigh responded to an alleged incident of domestic violence at a home. When he arrived in the driveway, he spoke with Frances Burgess ("plaintiff"), who stated that her husband, Harry Burgess ("Mr. Burgess"), was intoxicated and had hit her. (Plaintiff stated in her deposition, "I told [Deputy Leigh] that [Mr. Burgess] was drunk, highly drunk. I said, he's drunk, he's crazy, he's seeing things...") Plaintiff asked Deputy Leigh to arrest her husband: not seeing any evidence of physical violence perpetrated against plaintiff, Deputy Leigh responded that he could not do so, as there was no evidence that a crime had been committed. Plaintiff declined the offer to "swear out a warrant" against her husband but asked Deputy Leigh to come in to speak with him. Upon entering the living room and observing Mr. Burgess calmly sitting, Deputy Leigh engaged in a conversation with him. According to Deputy Leigh's deposition testimony, Mr. Burgess "spoke to [him] in a respectful manner about the situation," his "speech seemed fine," and he made no inconsistent responses to questions asked. (In her deposition, plaintiff claimed that there was a bottle of liquor in plain sight and that at one point Mr. Burgess fell down the garage stairs.)

According to Deputy Leigh, Mr. Burgess was told by plaintiff that he had to "go somewhere for the night." Upon Deputy Leigh's offering to give him a ride "to a motel or wherever he needed to go," Mr. Burgess replied that he did not have any nearby relatives and agreed to go to a motel. (While Deputy Leigh claimed that he told plaintiff that he was giving Mr. Burgess a ride to the Days Inn on Highway 74, plaintiff claimed in her deposition that she did not know where her husband was being taken, but assumed it was to jail or to a hospital due to his inebriated condition.) Upon arrival at the Days Inn (approximately three miles away), a motel clerk standing outside asked Deputy Leigh if he needed assistance, and Deputy Leigh replied "[t]hat Mr. Burgess was possibly going to get a room at the hotel." Mr. Burgess requested a ride back home, and Deputy Leigh responded, "I am not a taxi service." Mr. Burgess then asked to be let out of the back seat and exited the vehicle. Deputy Leigh drove away from the Days Inn and received a dispatch requesting his presence at another location shortly thereafter. Approximately two hours later, he was notified that Mr. Burgess had been hit by a vehicle while attempting to cross Highway 74. Mr. Burgess subsequently passed away. (A report indicated that Mr. Burgess' blood alcohol level was .37.)

In July 2009, plaintiff filed a complaint asserting a negligence cause of action as well as a claim for wrongful death on behalf of Mr. Burgess' estate. Upon cross-motions for summary judgment, the trial court issued an order in November 2009 denying the parties' motions. Defendants appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously reversed and remanded. "We hold that the public duty doctrine applies ... as a complete bar to plaintiffs' claims against defendants [Sheriff] Hamrick and [Deputy] Leigh in their official capacities. Furthermore, plaintiffs' claims against Deputy Leigh in his individual capacity are without merit. Consequently, the trial court erred in denying defendants' motion for summary judgment." Judge Robert C. Hunter

wrote the opinion, joined by Judge Geer and Judge Stephens.

The Court held that the public duty doctrine was applicable to shield defendants Hamrick and Leigh from liability in their official capacities. “Deputy Leigh was engaged in his role as a police officer protecting the general public when he arrived at the home of plaintiff and Mr. Burgess on 12 October 2007. Upon determining that there was no evidence that a crime had been committed, Deputy Leigh attempted to diffuse the situation between plaintiff and Mr. Burgess since plaintiff claimed that Mr. Burgess was drunk and had hit her. Plaintiff also asserted her desire for Mr. Burgess to spend the night elsewhere. Deputy Leigh, in his discretion, then offered to transport Mr. Burgess to a family member's home or a motel. Mr. Burgess opted to spend the night at a motel and Deputy Leigh took him to the nearby Days Inn. It is undisputed that Deputy Leigh left Mr. Burgess at the entrance of the Days Inn and did not observe him check in or accompany him to his room; however, plaintiff has failed to establish that a legal duty existed for Deputy Leigh to continue to supervise Mr. Burgess after escorting him to the Days Inn. Deputy Leigh made a discretionary decision, to leave Mr. Burgess at the front door to the Days Inn. Arguably, Mr. Burgess was indirectly harmed as a result of that decision. Nevertheless, the instant case presents the type of factual scenario that gives rise to application of the public duty doctrine.... [T]his Court recently held that the public duty doctrine serves to shield defendants from liability where ‘a police officer, acting to protect the general public, indirectly causes harm to an individual’ through his discretionary acts. *Id.* [Scott v. City of Charlotte, ___ N.C. App. ___], 691 S.E.2d [747] at 751 [(2010), *disc. review denied*, 364 N.C. 435, 702 S.E.2d 305 (No. 224P10, 10/7/10) (*see p. 64 of this Digest*)].”

The Court also held that neither of the exceptions to the public duty doctrine applied. As to the special relationship exception, the Court noted that Mr. Burgess was not a State's witness or informant, nor was he in custody. As to the special duty exception, the Court stated, “Before departing for the Days Inn, Mr. Burgess asked how they were going to proceed to the motel, and Deputy Leigh responded: ‘[Y]ou ride with me. I'll take care of you.’ This statement was not a specific promise of police protection; rather, these words constituted no more than ‘general words of comfort and assurance....’ Braswell v. Braswell, 330 N.C. [363] at 371, 410 S.E.2d [897] at 902 [(1991)]. Even assuming, *arguendo*, that Deputy Leigh's statement was a specific promise, the promise could not possibly be construed to mean that Deputy Leigh would ensure that no harm came to Mr. Burgess that entire evening. If the words were, in fact, a promise, then the promise was to transport Mr. Burgess to the Days Inn safely, a promise which was fulfilled.”

As to the action brought against Deputy Leigh in his individual capacity, the Court stated, “Upon review of the record, it is clear that Deputy Leigh's actions were not corrupt, malicious, or outside the course and scope of his authority. Deputy Leigh attempted to intervene and defuse a potential domestic violence situation by taking Mr. Burgess to a motel where he could spend the night. Deputy Leigh dropped Mr. Burgess off at the Days Inn as he agreed to do. Consequently, plaintiff's claims against Deputy Leigh in his individual capacity cannot stand....”

NOTE: Plaintiff filed a petition for discretionary review in September 2010. The N.C. Supreme Court denied the petition for discretionary review on November 4, 2010.

Nota Bene (N.B.)
Other Decisions of Note

Law Enforcement; Electronic Surveillance Act

WRIGHT V. TOWN OF ZEBULON, 202 N.C. App. 540, 688 S.E.2d 786, *cert. denied*, 364 N.C. 334, 701 S.E.2d 682 (2010) (Court of Appeals rejects plaintiff-former officer's argument that trial court erred in granting summary judgment because triable issues of fact existed regarding claim that defendants violated the North Carolina Electronic Surveillance Act, G.S. 15A-286 to -298 (2009), by willfully intercepting oral communications made by plaintiff in his patrol car during an integrity check conducted by the police department to determine whether he was "tipping off" drug dealers about confidential police information; concluding that summary judgment was proper, as forecast of evidence established that defendants did not act "willfully" in intercepting plaintiff's oral communications and that plaintiff here did not have a reasonable expectation of privacy as to oral communications made in patrol car. Plaintiff filed a petition for writ of certiorari in May 2010. The N.C. Supreme Court denied the petition for writ of certiorari on August 26, 2010.)

Law Enforcement; Incarceration; Habeas Corpus

OWENS-BEY V. COUNTY OF FORSYTH & CITY OF WINSTON-SALEM, ___ N.C. App. ___, 693 S.E.2d 281 (No. COA09-1307, Forsyth- 5/4/10) (*unpublished*), *cert. denied*, 364 N.C. 326, 700 S.E.2d 923 (No. 314P10, 8/26/10) (In plaintiff's appeal from trial court's grant of defendants' motion to dismiss, Court of Appeals affirms; rejecting plaintiff's arguments that trial court erred by *inter alia* denying his application for a writ of habeas corpus; "It appears to this Court that Plaintiff attempts to assert that he is unlawfully incarcerated by Defendants. However, Plaintiff failed to allege any transactions or occurrences of facts demonstrating that either Defendant is responsible for Plaintiff's incarceration. Indeed, our decision in [State v. Owens, 175 N.C. App. 248, 623 S.E.2d 89 [(2005) (*unpublished*) (finding no error in the judgment and commitment of the trial court arising from conviction for second degree murder and possession of firearm by convicted felon), *disc. review denied*, 360 N.C. 366, 630 S.E.2d 450 (2006)] reveals that Plaintiff was incarcerated by the State of North Carolina." Plaintiff filed a petition for writ of certiorari on July 29, 2010. The N.C. Supreme Court denied the petition for writ of certiorari on August 26, 2010.)

Law Enforcement; Torts; Gross Negligence; High Speed Pursuit

NIKOPOULOS V. HAIGLER, ___ N.C. App. ___, 711 S.E.2d 876 (No. COA10-616, Stanly- 4/19/11) (*unpublished*), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 199P11, 6/6/11) (In plaintiff's action for damages for personal injuries sustained during a motorcycle collision, trial court correctly granted motion for summary judgment in favor of police chief and City of Locust; "[W]e find that Chief Haigler's conduct was neither done with a wicked purpose, nor needlessly, so as to manifest a reckless indifference to the rights of others. Fowler [v. N.C. Dept. of Crime Control & Public Safety], 92 N.C. App. [733] at 736, 376 S.E.2d [11] at 13 [(1989)]. On the contrary, Chief Haigler had 'good reason to attempt to remove [Plaintiff]

from the road due to the immediate and significant potential danger to the public posed by his driving [at excessive speeds].’ Norris [v. Zambito], 135 N.C. App. [288] at 295, 520 S.E.2d [113] at 118 [(1999)]. Further, Chief Haigler’s alleged loss of control of his vehicle was ‘significantly less severe’ than those involved in either Bray [v. N.C. Dep’t of Crime Control & Pub. Safety], 151 N.C. App. 281, 564 S.E.2d 910 (2002)] or Eckard [v. Smith], 166 N.C. App. 312, 323, 603 S.E.2d 134, 141 (2004)]..... Here, Chief Haigler momentarily took his eyes off a fleeing suspect in order to observe the motorist he was passing, and, upon returning his attention to Plaintiff, found that Plaintiff had slowed down such that Chief Haigler was unable to avoid colliding with Plaintiff’s motorcycle. We hold that ‘[t]hese circumstances do not exemplify the degree of conscious or reckless indifference toward the safety of others necessary to establish gross negligence.’ Fowler, 92 N.C. App at 736, 376 S.E.2d at 13.”)

Law Enforcement; Torts; Negligence; Erratic Driver; Traffic Stop; Failure to Summon Medical Assistance; Public Duty Doctrine

SCOTT V. CITY OF CHARLOTTE, ___ N.C. App. ___, 691 S.E.2d 747 (No. COA09-893, Mecklenburg— 4/20/10), *disc. review denied*, 364 N.C. 435, 702 S.E.2d 305 (No. 224P10, 10/7/10) (Court of Appeals unanimously holds that trial court erred by denying City’s motion for summary judgment in plaintiff-administratrix’s action alleging negligence against police officers for leaving decedent in parking lot where morning traffic stop occurred for erratic driving; decedent had taken stroke-related medications earlier that morning, and officers had left him in nearby retail parking lot after contacting his wife by telephone to take him home; decedent subsequently died of a brain hemorrhage; plaintiff alleged that the officers’ failure to summon medical assistance upon seeing driver’s condition directly caused him harm, as he went two hours without medical attention that allegedly could have saved his life; “Though our courts have both expounded upon and narrowed the application of the public duty doctrine since 1991, Braswell [v. Braswell], 330 N.C. 363, 410 S.E.2d 897 (1991)] and its progeny have not wavered from the general principle that when a police officer, acting to protect the general public, indirectly causes harm to an individual, the municipality that employs him or her is protected from liability. This principle is grounded in the notion that an officer’s duty to protect the public requires the officer to make discretionary decisions on a regular basis, whether it be responding to an alleged threat by an abusive spouse or clearing the scene of a car accident.... At the time the officers pulled [decedent] over, they were engaged in their general law enforcement duty to protect the public from an erratic driver who they believed could be intoxicated. Upon speaking with [decedent], it was the officers’ belief that he was not intoxicated, but was impaired in some respect and could no longer operate his vehicle.... Based on the video transcript and the officers’ depositions, it is clear that the officers were aware that [decedent] was impaired and should not be allowed to drive. At that point the officers had to decide what was in the best interest of the general public and [decedent]. That decision was discretionary and was based on their personal observations at that time as well as their training as law enforcement officers. All three officers were in accord with the decision to leave [decedent] at the Pep Boys based on the circumstances. As a result of

this discretionary decision, medical assistance for [decedent] was delayed – assistance which could have saved his life. [Decedent's] death was, arguably, an indirect consequence of the officers' discretionary decision.... In sum, we hold that the public duty doctrine applies in this case where the police officers were providing police protection to the general public and made a discretionary decision that caused an indirect harm to [decedent]. Our holding in this case ‘recognizes the limited resources of law enforcement....’ Braswell, 330 N.C. at 370, 410 S.E.2d at 901. Defendant argued before the Court, and we agree, that imposing a duty on law enforcement officers to call for medical assistance every time they believe a person *may* have a medical ailment, even where the person declines assistance, would be unreasonable and against the purpose of the public duty doctrine. As defendant argues, the City would likely be forced to implement policies requiring officers to abandon all discretion in similar situations and call for medical services. We decline to impose such a legal duty in this case.” (Emphasis in original.) Plaintiff-administratrix filed a petition for discretionary review in May 2010. The N.C. Supreme Court denied the petition for discretionary review on October 7, 2010.)

Law Enforcement; Torts; Search Warrant; Residence

HENSLEY V. MCDOWELL COUNTY, ___ N.C. App. ___, 697 S.E.2d 524 (No. COA09-1319, McDowell– 7/6/10) (*unpublished*) (In case arising from 2004 incident in which officers from Sheriff’s Department assisted State Bureau of Investigation and Federal Bureau of Investigation in executing a federal search warrant at plaintiff’s residence, Court of Appeals holds that trial court did not err in dismissing plaintiff’s claims pursuant to G.S. 1A-1, Rule 12(b)(6); plaintiff filed complaint alleging misconduct arising out of the execution of warrant, with causes of action including: (1) invasion of privacy; (2) damage to personal property; (3) defamation; (4) intentional infliction of emotional distress and negligent infliction of emotional distress, and; (5) violation of freedom of speech.)

Law Enforcement; Workers’ Compensation; Mutual Aid Agreements

TAYLOR V. TOWN OF GARNER, ___ N.C. App. ___, 694 S.E.2d 206 (No. COA09-1522, Ind. Comm.— 6/1/10), *disc. review denied*, ___ N.C. ___, 705 S.E.2d 337 (No. 279P10, 11/4/10) (In defendants’ appeal, Court of Appeals affirms July 2009 opinion and award concluding that Town’s officer was working at N.C. State football game pursuant to Mutual Assistance Agreement and that Town was liable for his compensable injuries pursuant to G.S. 160A-288; stating that “[t]he enactment of [G.S.] 160A-288 serves dual purposes. First, it allows a police officer to temporarily provide assistance to another law enforcement agency and use his powers of arrest outside of his jurisdiction. A criminal defendant may challenge his arrest based upon the law enforcement agencies noncompliance with this statute and argue that the officer was not acting in the course of his official duties as a governmental officer at the time of the incident.... Second, the statute seeks to protect the officer's employment benefits, including his workers' compensation benefits. Our analysis focuses solely upon the later of these two purposes. Town of Garner urges this Court to adopt a very narrow reading of [G.S.] 160A-288 and hold

that the technical written request/approval and pay requirements of [G.S.] 160A-288 must be strictly complied with in order for the statute to be applicable for *personnel and administrative* purposes. We decline to do so.” (Citation omitted; emphasis in original.); holding that, “The Commission's unchallenged and binding findings of fact establish that the parties clearly intended for Officer Taylor to work as a mounted patrol officer with powers of arrest at N.C. State on 27 October 2007 pursuant to the Agreement and explicitly agreed that he would be paid directly by N.C. State. Because the Legislature clearly intended for law enforcement officers to be protected for purposes of workers' compensation benefits when acting in this capacity, we hold the parties substantially complied with the requirements of G.S. 160A-288(a) for personnel and administrative purposes. The Commission's unchallenged findings of fact support the Commission's conclusion of law that ... Officer Taylor was working pursuant to the Agreement and that Town of Garner is liable for his compensable injury pursuant to G.S. 160A-288.” Defendants filed a petition for discretionary review in July 2010. The N.C. Supreme Court denied the petition for discretionary review on November 4, 2010.)

MINIMUM HOUSING CODE

Minimum Housing Code; Demolition; Exhaustion of Administrative Remedies

AGAPION v. CITY OF GREENSBORO, ___ N.C. App. ___, 699 S.E.2d 140 (No. COA09-1664, Guilford– 9/7/10) (*unpublished*)

In action alleging unconstitutional taking without just compensation and due process violation arising from demolition, City’s motion for summary judgment properly granted.

FACTS: Plaintiff, the owner of properties located at 200, 204, 208, 210, 213, 215, 219, 223, and 225 Guerrant Street, received notice in December 2004 to repair or vacate and close the properties. On January 10, 2006, the Greensboro Minimum Housing Standards Commission entered an order to repair or demolish the properties by April 10, 2006. On January 29, 2006, an amended order was entered stating that plaintiff had to repair the properties before a certificate of occupancy could be issued for habitation.

Plaintiff did not appeal the 2006 orders. On July 10, 2008, plaintiff filed an action alleging an unconstitutional taking without just compensation and a due process violation arising from demolition. Defendant-City’s motion for summary judgment was granted in October 2009. Plaintiff appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge Elmore wrote the opinion, joined by Judge Bryant and Judge Ervin.

Plaintiff argued that there was an insufficient factual record upon which to determine whether summary judgment should have been properly granted. The Court disagreed, finding plaintiff’s cited case, Capps v. City of Raleigh, 35 N.C. App. 290, 292, 241 S.E.2d 527, 528 (1978), inapposite. “Plaintiff’s sole statement as to what genuine issue of material fact existed that should have precluded the court from granting the summary judgment order is: ‘whether the residential units located at 211 and 217 Guerrant Street were lawfully included in the condemnation proceedings of 213 and 215 Guerrant Street.’ As is clear from plaintiff’s phrasing, however, this is a question of law, not a question of fact. As such, plaintiff has not proven that there existed a genuine issue of material fact, and this assignment of error is overruled.”

Citing Harrell v. City of Winston-Salem, 22 N.C. App. 386, 206 S.E.2d 802 (1974), the Court closed its opinion by stating that plaintiff’s action was an attempt to circumvent the prescribed statutory procedure for such appeals. *Id.* at 391-92, 206 S.E.2d at 806 (“G.S. 160A-446 delineates the administrative remedies which are available to a property owner who is aggrieved by an order of a public officer.... [T]he record on its face reveals that the plaintiffs have not followed the proper review procedure as set forth in G.S. 160A-446, but rather have attempted to circumvent the established procedure by filing the cause of action now being considered. Plaintiffs must exhaust the administrative remedies available to them, and they cannot be allowed to undermine the prescribed statutory procedure set forth in G.S. 160A-446.”).

PERSONNEL

Personnel; Law Enforcement Officer; Wrongful Termination; Public Policy Exception

MCQUEEN V. CITY OF HAMLET, ___ N.C. App. ___, 702 S.E.2d 555 (No. COA10-170, Richmond– 12/7/10) (*unpublished*) (affirming trial court’s order of dismissal, Court of Appeals unanimously holds that plaintiff’s complaint failed to properly allege with specificity a claim for wrongful termination in violation of public policy. “At bottom, the allegations set out in Plaintiff’s complaint allege an ongoing dispute between Plaintiff and Defendants over a number of work-related issues. Such disputes arise in any workplace from time to time. However, none of the allegations set out in Plaintiff’s complaint suffice to establish that his alleged ‘wrongful termination’ stemmed from or resulted in a violation of an established, clearly-identified North Carolina public policy. Thus, the allegations of Plaintiff’s complaint simply do not establish the existence of a valid claim for wrongful termination cognizable under North Carolina law.”)

Personnel; Racial Discrimination; Retaliation; Grievance Process

WALLS V. CITY OF WINSTON-SALEM, ___ N.C. App. ___, 711 S.E.2d 875 (No. COA10–1248, Forsyth– 4/19/11) (*unpublished*) (In action filed by plaintiff (an employee who began work with the City in the Parking Enforcement Department and subsequently received a requested transfer to the City Link Call Center) alleging that defendant had intentionally discriminated against her by terminating her employment based on her race in violation of 42 U.S.C. § 2000e–2(a) and that defendant had unlawfully retaliated against her in violation of 42 U.S.C. § 2000e–3(a), Court of Appeals affirms trial court’s order granting summary judgment for defendant and dismissing plaintiff’s claims. “Defendant forecast evidence tending to show that [the City Manager] decided to terminate Plaintiff’s employment based on his sincerely held belief, which he developed after ‘carefully evaluat[ing] the information ... presented ... as part of the grievance process, including the grievance hearing,’ that Plaintiff ‘had engaged in abusive and insubordinate behavior towards her superior ... [that] warranted the termination of her employment.’ Plaintiff forecast no evidence tending to support a contrary conclusion. Thus, the undisputed evidence in the record tends to show that Plaintiff’s employment was terminated due to the decision-maker’s honest belief that Plaintiff had engaged in such inappropriate conduct that her termination was warranted, a fact that constitutes an insurmountable obstacle to Plaintiff’s employment discrimination claim and fully justified the trial court’s decision to grant summary judgment in favor of Defendant.”)

Personnel; Retirement Benefits; Negligent Misrepresentation

WALKER V. TOWN OF STONEVILLE, ___ N.C. App. ___, 712 S.E.2d 239 (No. COA10-278, Rockingham– 4/19/11) (In retired police officer’s action against Town alleging *inter alia* negligent representation regarding effect of reemployment on retirement benefits, Court of Appeals holds that trial court

erred in setting aside the jury's verdict on plaintiff's negligent misrepresentation claim and in directing a verdict for defendant-Town on plaintiff's wrongful discharge claim; upon noting that the contested issue on appeal as to the negligent representation claim was whether plaintiff offered sufficient evidence of justifiable reliance, Court of Appeals determines that plaintiff presented sufficient evidence upon which a jury could conclude that his reliance upon the Town's advice was reasonable; "Plaintiff and the Town were not on equal footing. The Town, which was in a position of authority and was responsible for enrolling Plaintiff in LGERS if he qualified, possessed superior knowledge and experience with LGERS than Plaintiff and possessed superior access to printed and electronic material concerning LGERS than Plaintiff. Moreover, there was nothing in the Town's initial representation to Plaintiff, through [the Finance Officer], or the Town's subsequent representations to Plaintiff regarding his yearly salary, that would put a person of ordinary prudence upon inquiry. Plaintiff understood that the Town was cognizant of the facts and rules concerning his employment, and Plaintiff relied upon the Town's positive and unequivocal statements. There was absolutely nothing to arouse Plaintiff's suspicion or to induce him to believe that the Town did not know the truth.... [W]e conclude that the evidence was sufficient to show that Plaintiff could not have learned the true facts by exercise of reasonable diligence. As discussed *supra*, the Town possessed superior knowledge and experience with LGERS than Plaintiff, possessed superior access to printed and electronic material concerning LGERS than Plaintiff, and was advised by LGERS "to contact the LGERS when they are in doubt about a specific question or set of circumstances." Even in the Town's superior position, however, the Town did not determine *for 12 years* that Plaintiff's benefits were subject to termination if he worked more than 1,000 hours. Accordingly, it cannot reasonably be asserted that Plaintiff would have discovered that his retirement benefits were subject to termination if he worked more than 1,000 hours, had he made further reasonable inquiry into the matter. Given the Town's position of authority and its superior knowledge and experience with LGERS, Plaintiff had every reason to trust the Town's advice concerning the requirements of LGERS. Thus, by inquiring with proper Town officials, Plaintiff *did* exercise reasonable diligence in attempting to determine how he could return to work with the Town without jeopardizing his retirement benefits. Plaintiff was not required to distrust the Town's information and make a separate inquiry into the specifics of North Carolina's retirement statutes." (Emphasis in original.)

PROCEDURE

Procedure; Motion for Relief from Judgment; Notice of Appeal

Ji v. CITY OF RALEIGH, ___ N.C. App. ___, 699 S.E.2d 142 (No. COA09-1026, Wake— 9/7/10) (*unpublished*), *disc. review denied*, ___ N.C. ___, 705 S.E.2d 372 (No. 411P10, 12/15/10) (In plaintiff’s action alleging various claims arising from arrest, Court of Appeals holds that trial court properly denied plaintiff’s motion for relief from judgment pursuant to G.S. 1A-1, Rule 60; further holding that plaintiff’s direct attacks pertaining to trial court’s dismissal order would not be addressed given deficiencies in notice of appeal; citing Von Ramm v. Von Ramm, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (“Notice of appeal from [the] denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review”) and Wallis v. Cambron, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008) (“Motions entered pursuant to [G.S. 1A-1,] Rule 60 do not toll the time for filing a notice of appeal.”) Plaintiff filed a petition for discretionary review in September 2010. The N.C. Supreme Court denied the petition for discretionary review on December 15, 2010.)

Procedure; Settlement Agreement; Statute of Frauds

POWELL V. CITY OF NEWTON, 364 N.C. 562, 703 S.E.2d 723 (No. 482A09, 12/20/10), *reh’g denied*, 365 N.C. 90, 706 S.E.2d 241 (No. 482A09, 2/23/11) (In plaintiff’s appeal from decision of divided panel of N.C. Court of Appeals, ___ N.C. App. ___, 684 S.E.2d 55 (No. COA08-1262, Catawba — 10/20/09) (*see Digest of Municipal Law 2009-10*, p. 60), majority of N.C. Supreme Court, in affirming and modifying decision below, holds, “In this case we consider whether a settlement agreement reached between the parties in open court and orally ratified by those parties before the judge, but never memorialized by a signed writing, is unenforceable as a violation of the statute of frauds. [G.S.] 22-2 (2009). Because successful invocation of the statute of frauds would allow plaintiff to evade a contractual obligation that he freely entered in open court, subverting the finality of such agreements and undermining the judicial process, we conclude that even though the statute of frauds would otherwise require a signed writing, the doctrine of judicial estoppel prevents plaintiff from reneging on his agreement.” Plaintiff’s petition for rehearing was denied on February 23, 2011.)

PUBLIC CONTRACTS

Public Contracts; Anticipatory Breach; Wastewater Treatment; Rates

SOUTHEAST BRUNSWICK SANITARY DIST. V. CITY OF SOUTHPORT, ___ N.C.

App. ___, 708 S.E.2d 215 (No. COA09-1369, Brunswick— 2/1/11) (*unpublished*) (Court of Appeals affirms order granting summary judgment for defendant-City in plaintiff-Sanitary District’s breach of contract action arising from 2004 contract providing for a three-phase project that, when fully completed, would enable the District to meet all of the City’s wastewater treatment needs; in mid-2008, when District and City had not yet agreed to a new contract, City entered into an agreement with County to handle City’s present and future wastewater needs; “The District’s repeated threats—that if the City did not assent to a new agreement [by March 31], then the District would terminate the Contract—amounted to an anticipatory breach of the Contract. The City was, therefore, excused from its obligations under the Contract, and there was no material issue whether the City breached the Contract by negotiating with the County.”)

Public Contracts; Certificates of Participation

REESE V. MECKLENBURG COUNTY, ___ N.C. App. ___, 694 S.E.2d 453 (No.

COA09-499, Mecklenburg— 6/15/10), *disc. review denied*, 364 N.C. 326, 700 S.E.2d 924 (No. 309P10, 8/26/10) (In plaintiff’s appeal, affirming trial court’s orders entered in favor of defendants; rejecting *inter alia* plaintiff’s challenge to COPS Financing Resolution; "Plaintiff cites Robins v. Town of Hillsborough, 361 N.C. 193, 639 S.E.2d 421 (2007), for the proposition that ‘the failure of a local governmental unit to follow its own adopted procedures renders the actions of such unit void.’ Although the Supreme Court did state in Robins that ‘this Court has held town boards to their own rules of procedure,’ 361 N.C. at 198, 639 S.E.2d at 424, the record in this case provides no indication that the County debt management policies and procedures upon which Plaintiff relies are anything other than policy-based guidelines. Furthermore, although Plaintiff has alleged a series of reasons why he disagrees with the factual predicate upon which the County Commission based its decision to apply for approval of COPS financing, the ‘facts’ upon which he relies represent, at bottom, nothing more than a policy-based disagreement with the Board’s decision rather than a demonstration that the Board manifestly abused its discretion. Were we to allow Plaintiff to proceed to trial on the basis of allegations such as those set forth in his fourth claim for relief, we would have effectively eviscerated the rule providing that “‘a mere assertion of a grievance’ against a governmental entity is insufficient to state a claim for relief.’ Reese I, ___ N.C. App. at ___, 676 S.E.2d at 489 [(2009)].” Plaintiff filed a petition for discretionary review in July 2010. The N.C. Supreme Court denied the petition for discretionary review on August 26, 2010.)

Public Contracts; Economic Development; Property Disposition, Local Acts

REESE V. BROOKLYN VILLAGE, LLC & MECKLENBURG COUNTY, ___ N.C. App. ___, 707 S.E.2d 249 (No. COA09-1412, Mecklenburg– 3/1/11) (In appeal stemming from fifth of five lawsuits initiated by plaintiff between May 2007 and October 2008 against Mecklenburg County and various other entities regarding a plan to redevelop the City Center of Charlotte, Court of Appeals affirms trial court's order granting defendant-County's motion for judgment on the pleadings and granting defendant-Brooklyn Village, LLC's motion to dismiss; plaintiff had brought action pursuant to the N.C. Declaratory Judgment Act, G.S. 1-253 *et seq.*, seeking judgment: (1) declaring unlawful, nullifying, and setting aside the Brooklyn Village Contract, together with the Intent and Authorization Resolutions, and (2) declaring Session Law 2000-65, as re-enacted and amended by Session Laws 2001-102, 2003-49, 2005-158 & 2007-33, unconstitutional on its face and as applied by the County in the disposition of the property to Brooklyn Village.)

Public Contracts; Wastewater Treatment Plant

MCI CONSTRUCTORS, LLC V. CITY OF GREENSBORO, 610 F.3d 849 (4th Cir., 2010) (In appeal arising from litigation initially commenced by MCI Constructors regarding city's termination of contract for expansion and upgrade of wastewater treatment plant due to substantial construction delays, Fourth Circuit holds that the district court did not err in denying MCI and National Union's (surety's) motion to vacate arbitration awards in favor of City; Fourth Circuit rejects MCI and National Union's arguments that: (1) the district court erred in certifying the judgment as final under Federal Rule of Civil Procedure 54(b); (2) the district court should have vacated the awards because the liability award was obtained through undue means, the arbitration panel exceeded the scope of its powers to issue the damages award, and the damages award does not draw its essence from the parties' contract; and (3) the district court should have remanded the damages award because the award fails to specify whether it includes the contract balance, and because the arbitrators were required to issue a reasoned award; other decisions issued in this matter (preceding arbitration) appear at 125 Fed.Appx. 471 (4th Cir., 3/15/05) (*unpublished*) & 401 F.Supp.2d 504 (M.D.N.C., 11/25/05).)

PUBLIC ENTERPRISES

Public Enterprises; Negligence; Sewer; Grease Block-Up

MCCANN V. TOWN OF SPARTA, ___ N.C. App. ___, 698 S.E.2d 200 (No. COA10-192, Union-7/20/10) (*unpublished*), *disc. review denied*, 364 N.C. 604, 703 S.E.2d 448 (No. 331P10, 11/4/10)

A municipality is not an insurer of the condition of its sewerage system, and liability may only arise where the municipality has [actual] or constructive notice of the existence of an obstruction or defect and fails to act.

FACTS: On May 10, 2006, between 8:00 p.m. and 8:30 p.m., Mark Richardson, the tenant at 342 West Whitehead Street (residential property owned by plaintiff), contacted Ronnie Norris, the on-call employee with defendant-Town's maintenance division, to report that "sewage had backed up into the house." Upon arrival, Mr. Norris "observed [a] large amount of standing water on the floor of the residence." Upon "determin[ing] that the situation had existed for at least several days[] and that there was no emergency situation," Mr. Norris decided to return to the residence the next morning to address the matter.

Accordingly, the next morning Mr. Norris called Raymond Moxley, defendant-Town's maintenance division supervisor, who arrived at the residence and saw the standing water inside the house. Mr. Moxley "did not see any sewage or standing water anywhere outside of the house" and, based on his experience, suspected the problem was caused by "a blockage of some type in the branch line" that carries sewage southward from the property to the main sewage line at West Whitehead Street. Next, Mr. Moxley and Mr. Norris retrieved defendant-Town's Jet Vac sewer machine rodder (which uses pressurized water to dislodge blockages in the sewer line), spraying high pressurized water from the rodder northward into the branch line towards plaintiff's property. The water and sewage began "flowing freely through the branch line" shortly thereafter, causing Mr. Moxley to conclude that the blockage was "most likely a small amount of grease built up in the line," since larger blockages such as roots in the line or large amounts of grease "take much longer to clear." Upon clearance of the blockage, the Town Manager arranged for the sewage and water to be removed from plaintiff's property at defendant-Town's expense.

In April 2009, plaintiff filed a complaint *pro se* against several parties, seeking compensatory damages. Defendants moved to dismiss plaintiff's complaint, and on June 26, 2009, the trial court dismissed plaintiff's complaint with prejudice as to all defendants except defendant-Town. On September 10, defendant-Town filed a motion for summary judgment, providing three affidavits in support of its motion. On September 11, notwithstanding having participated in the previous motion hearing as well as a court-ordered mediated settlement conference, plaintiff sought to continue both the summary judgment hearing and the trial (set to begin on October 12) so that he could obtain counsel. His motion was denied, and on September 24, plaintiff requested reconsideration of his motion to continue. Because the matter had been calendared for trial since May 5, the trial court denied plaintiff's request. After hearing defendant-Town's motion for summary judgment on September 28, 2009, the trial court granted defendant-Town's motion and dismissed the complaint with prejudice. Plaintiff appealed.

HOLDING: A panel of the N.C. Court of Appeals Court unanimously affirmed. Chief Judge Martin wrote the opinion, with Judge Bryant and Judge Elmore concurring.

Plaintiff first argued that the trial court erred by denying his September 11 & 24 motions to continue. Citing N.C. R. App. P. 3(d) arising from deficiencies in the notice of appeal, the Court dismissed this aspect of the appeal. "Since, in his 9 October 2009 notice of appeal to this Court, entitled 'Notice of Appeal Order Granting Defendant's Motion for Summary Judgement,' plaintiff

only indicated that he sought to appeal from the trial court's 30 September 2009 order granting defendant-town's motion for summary judgment, we dismiss the portions of plaintiff's appeal arguing error with respect to the trial court's denial of plaintiff's motions to continue. In addition, in his brief, plaintiff mentions but provides no legal argument in support of his contention that his trespass claim against defendant-town was erroneously dismissed. Since it is not 'the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein,' see State v. Hill, 179 N.C. App. 1, 21, 632 S.E.2d 777, 789 (2006), this issue is deemed abandoned. See N.C. R. App. P. 28(a) ('Issues not presented and discussed in a party's brief are deemed abandoned.')

The Court held that the trial court correctly entered summary judgment for the City. The Court initially stated, "A municipal corporation which either constructs sewer lines or adopts sewer lines constructed by third persons becomes responsible for maintenance and liable for injuries resulting from lack of due care in upkeep. See Ward v. City of Charlotte, 48 N.C. App. 463, 467, 269 S.E.2d 663, 666, *disc. review denied*, 301 N.C. 531, 273 S.E.2d 463 (1980); 11 Eugene McQuillin, *The Law of Municipal Corporations* § 31.33 (3d ed. rev. vol. 2000). 'The duty of maintenance includes the duty of exercising a reasonable degree of watchfulness so as to keep the sewerage system free from obstruction.' Ward, 48 N.C. App. at 467, 269 S.E.2d at 666. 'However, a municipal corporation is not an insurer of the condition of its sewerage system, and liability may only arise where the municipality has [actual] or constructive notice of the existence of an obstruction or defect and fails to act.' *Id.*"

Turning to the facts presented here, the Court observed, "[A]ccording to the sworn affidavits from defendant-town's maintenance division employee Mr. Norris, maintenance supervisor Mr. Moxley, and town manager Mr. Edwards, plaintiff's tenant first notified defendant-town of the sewage backup into plaintiff's residential property on the evening of 10 May 2006. Prior to 10 May 2006, defendant-town had not received any complaints about sewage problems or blockages in the branch line or main line near 342 West Whitehead Street. Additionally, Mr. Moxley, who has served as defendant-town's maintenance supervisor since 1979, offered uncontradicted testimony that, while defendant-town's maintenance division employees 'can inspect the sewer lines for breaks or roots growing into the lines, [they] cannot inspect the lines for blockages.' Instead, the maintenance division is 'forced to rely on the notice of others to alert [it] to possible blockages.'" The Court held that plaintiff failed to forecast sufficient evidence to establish negligence, as plaintiff did not set forth specific facts establishing that defendant-Town had actual or constructive notice of the small grease blockage in the branch line south of plaintiff's residence sometime prior to the evening of May 10, 2006 and failed to act to remove the obstruction. "Although plaintiff concedes, 'I have no idea that the [defendant-] town knew af [sic] a Blockage before May 11, 2006,' and alleges in his complaint that his tenant Mr. Richardson only first discovered sewage in the West Whitehead Street residence '[o]n or about the 11 day of May[] 2006,' plaintiff insists that the sewage backup occurred sometime in April 2006 while Mr. Richardson 'was not a fulltime resident you might say.' Plaintiff further suggests that, 'since a sector of the [defendant-town's] Sewage was entering Plaintiff[s] House for two or three weeks[,] it looks like [defendant-town] would have noticed a shortage of Sewage at the Sewage Treatment Plant.' However, although defendant-town's maintenance employee Mr. Norris testified that he had 'determined that [the presence of water and sewage in plaintiff's residence] had existed for at least several days,' plaintiff offered no evidence to show that the blockage 'had been present for a sufficient period of time' so as to place defendant-town on constructive notice of the blockage, or to show that an inspection would have disclosed its presence. See Ward, 48 N.C. App. at 469, 269 S.E.2d at 667."

NOTE: Plaintiff filed a petition for discretionary review in August 2010. The N.C. Supreme Court denied the petition for discretionary review on November 4, 2010.

Public Enterprises; Public Water Supply; Inverse Condemnation; Riparian Rights

L&S WATER POWER, INC. v. PIEDMONT TRIAD REGIONAL WATER AUTHORITY, ___ N.C. App. ___, 712 S.E.2d 146 (No. COA10-1063, Guilford– 4/19/11), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 198P11, 5/24/11)

In plaintiffs-hydroelectric companies’ inverse condemnation action, trial court properly found that plaintiffs were entitled to be compensated for the loss of stream flow arising from Randleman Dam project.

FACTS: In August 1988, defendant-Piedmont Triad Water Authority petitioned the Environmental Management Commission (“EMC”) to utilize eminent domain to divert water from the Deep River basin to construct Randleman Lake. In February 1992, a certificate (“EMC certificate”) was issued, authorizing defendant to acquire land by eminent domain and divert by inter-basin transfer up to 30.5 million gallons of water per day from the Deep River Basin to the Haw and Yadkin River Basins. (The EMC Certificate reflects that the minimum average 7Q10 flow (lowest average flow for seven consecutive days during a ten-year period) in the Deep River at the Randleman Lake impoundment is slightly less than 10 cubic feet per second.)

Upon receiving a 404 Permit from the Department of the Army approximately nine years later, defendant built Randleman Dam and started filling Randleman Lake in order to develop a public water supply (“the Randleman project”). In May 2008, plaintiffs, downstream riparian owners operating hydroelectric power plants on the Deep River, filed a complaint for inverse condemnation, asserting that defendant decreased the rate of water flow in the Deep River and seeking compensation for the taking of their riparian rights. Upon defendant’s G.S. 40A-47 motion, the trial court determined that defendant had taken plaintiffs’ riparian rights, finding that: (1) defendant used its power of eminent domain to build the Randleman project, in furtherance of developing a public water supply; (2) the Randleman project has and will continue to reduce the rate of water flow in the Deep River; (3) plaintiffs’ ability to produce electricity has been negatively impacted by reduction of the natural stream flow of the Deep River; and (4) “The average annual flow of the Deep River prior to the construction of Randleman Dam ... was 163 cubic feet per second at or about the location of the Randleman Dam. The average annual flow in the Deep River is not now and never has been the flow known as the 7Q10....” Concluding that plaintiffs were entitled to be compensated for the loss of stream flow, the trial court held that that plaintiffs’ riparian rights can be valued by the loss of electricity capable of being produced as a result of reduction of stream flow. Defendant appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge McCullough wrote the opinion, joined by Judge Geer and Judge Stephens.

The Court rejected defendant’s argument that, pursuant to Dunlap v. Light Co., 212 N.C. 814, 195 S.E. 43 (1938), plaintiffs did not have a property interest in the natural flow of water and that a reduction in water flow is not a compensable taking. “In Dunlap, a private landowner sought compensation from the power company for its exercise of eminent domain over waters of the Yadkin River. *Id.* at 815-16, 195 S.E. at 44. In that case, the power company closed the flood gates of the dam at night, decreasing the amount of water in the stream’s channel, and opened those gates in the morning, which accelerated the flow of water. *Id.* at 821, 195 S.E. at 48. The Supreme Court upheld the judgment of nonsuit for plaintiff’s cause of action for taking his riparian rights. *Id.* at 822, 195 S.E. at 48. However, Dunlap does not stand for the proposition that a reduction of flow is not compensable. The Supreme Court affirmed the judgment of nonsuit because the plaintiff in Dunlap was unable to show that the defendant’s actions caused a permanent disturbance of the natural water flow. *Id.* at 821, 195 S.E. at 48. Plaintiffs’ cause of action in the present case is not analogous to Dunlap, as plaintiffs were able to present evidence at trial that

defendant's diversion of water has reduced and will continue to reduce the natural rate of flow in the Deep River.”

Defendant argued that the trial court incorrectly applied the common law doctrine of riparian rights by failing to take into account the EMC certificate or the impoundment statutes, G.S. 143-215.44 to -215.50. The Court disagreed. Observing that defendant contended that the impoundment statutes granted public authorities a “superior” right to withdraw excess water (such that the government is only obligated to compensate downstream riparian owners if its withdrawal of water exceeds the amount authorized in the EMC certificate), the Court stated, “We cannot find any authority to support defendant’s argument. Clearly, the impoundment statutes and the EMC certificate authorized defendant to exercise its power of eminent domain by diverting the water flow in the Deep River in order to develop a public water supply. The exercise of eminent domain in itself is a superior right over any private landowner. However, just because defendant is authorized to exercise its powers of eminent domain, it does not follow that defendant is relieved of the constitutional mandate to compensate those whose property is taken. Nothing in the impoundment statutes or the EMC certificate states that defendant is not obligated to pay just compensation. Furthermore, the impoundment statutes only grant defendant the right to withdraw ‘an excess volume of water’ which is defined as the ‘volume which may be withdrawn from an impoundment ... *without foreseeably reducing the rate of flow of a watercourse below that which would obtain in that watercourse if the impoundment did not exist.*’ [G.S.] 143-215.44(c) (emphasis added). In the present case, the trial court specifically found that the ‘filling of Randleman Lake and operation of Randleman Dam and Lake have and will reduce the rate of water flow in the Deep River below that which would obtain in the Deep River if [the Randleman project] did not exist.’ Therefore, the trial court properly applied the common law doctrine of riparian rights to determine that defendant had taken plaintiffs’ riparian rights and that plaintiffs were entitled to compensation from defendant for the taking.” The Court held that the trial court did not err by failing to use the 7Q10 in determining the average annual flow of the Deep River, given plaintiffs’ evidence setting forth a more accurate rate than the 7Q10. *See* G.S. 143-215.48.

Defendant contended that the trial court erred by concluding that plaintiffs had no administrative remedies to exhaust before bringing their inverse condemnation claim. The Court disagreed. “Defendant’s argument that any inverse condemnation claim is defined by the parameters and rights set out in the impoundment statutes and the EMC certificate is misplaced. The EMC Certificate only authorizes defendant the right to exercise eminent domain by diverting the waters and does not concern plaintiffs’ right to compensation. Plaintiffs are not required to intervene in defendant’s applications for the EMC certificate or 404 permit because they are not challenging defendant’s right to divert water from the Deep River or construct the Randleman Dam, but are asking to be compensated as a result of the reduction of water flow. A lack of subject matter jurisdiction for failure to exhaust administrative remedies ‘does not apply where the judicial remedy sought is not available under the administrative process.’ Hemric v. Groce, 154 N.C. App. 393, 399-400, 572 S.E.2d 254, 258 (2002). Even if plaintiffs did intervene in the permitting application, there is nothing that grants the Environmental Management Commission or the Department of the Army authority to award compensation as a result of defendant's taking. The issuance of a permit does not alter the rights of the property owners to seek just compensation. *See* [State of N.C. v. Hudson, 665 F. Supp. [428] at 447 (E.D.N.C. 1987) (concluding that if a riparian owner suffers injury by a diversion of the natural water flow the owner should address those rights in civil action for injunctive relief or damages). Plaintiffs are not challenging the EMC certificate or defendants’ right to exercise eminent domain, but are asking only to be compensated as a result of the diverted waters.”

Defendant argued that the trial court erred by determining that plaintiffs’ compensation should be calculated by valuing the loss of electricity capable of being produced by each plaintiff as a result of the reduction in natural stream flow. In closing its opinion, the Court, citing City of Statesville v. Cloaninger, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992), held that the capita-

lization of income approach used by the trial court was a reasonable method to calculate plaintiffs' compensation.

NOTE: The League, with assistance from the City of Raleigh, filed an *amicus curiae* brief on behalf of Piedmont Triad Regional Water Authority in this case.

Nota Bene (N.B.)
Other Decision of Note

Public Enterprises; Natural Gas Distribution System; Pipeline; Condemnation; Interlocal Agreements

TOWN OF MIDLAND V. MORRIS, ____ N.C. App. ____, 704 S.E.2d 329 (No. COA10-322, Cabarrus– 1/18/11), *disc. review denied*, 365 N.C. 198, 710 S.E.2d 1, 3 (No. 78P11, 4/7/11) (Court of Appeals affirms trial court's entry of summary judgment for Town of Midland in defendants-property owners' appeal challenging condemnation actions; Midland (located in Cabarrus County) performed condemnations pursuant to interlocal agreement with Town of Monroe (located in Union County), which needed to acquire the rights to property through which to run a pipeline along 42 miles between Monroe's natural gas distribution system and the direct connection on the Transcontinental Pipeline located in Iredell County; "Consistent with the broad mandates of sections 160A-4 and 160A-312, we find it manifest that Midland may acquire property by condemnation to establish a gas transmission and distribution system, even in the absence of a concrete, immediate plan to furnish gas services to its citizens. While we acknowledge the existence of the requirement that the public enterprise be established and conducted for the city and its citizens, we conclude that this requirement is satisfied by Midland's placement of a tap on the Pipeline and by Midland's acquisition of the right to low-cost natural gas. Further, although one spokesman for Midland professes a lack of any current plan to offer gas to its citizens, there is nothing in the record to indicate that Midland will never offer natural gas services to its citizens. In fact, Midland's contracted for right to install a tap on the Pipeline 'from which to operate and supply its own natural gas distribution utility for the benefit of Midland's utility customers' indicates just the opposite: that Midland will, eventually, furnish natural gas services to its citizens.... [W]e conclude that Midland's acquisition by condemnation of the property for the Pipeline is for use by the city such that section 160A-240.1 is satisfied." Defendants filed a petition for discretionary review in February 2011. The N.C. Supreme Court denied the petition for discretionary review on April 7, 2011.)

PUBLIC RECORDS/OPEN MEETINGS

Public Records Law; Trial Preparation Materials

WALLACE FARM, INC. v. CITY OF CHARLOTTE, ___ N.C. App. ___, 689 S.E.2d 922 (No. COA09-939, Mecklenburg— 3/16/10), *disc. review denied*, 364 N.C. 334, 701 S.E.2d 681 (No. 170P10, 8/26/10)

In plaintiff's action against City and City Manager to compel production of public records regarding complaints about plaintiff's property, trial court correctly entered order withholding 225 documents as trial preparation materials under G.S. 132-1.9.

FACTS: Plaintiff Wallace Farm, Inc., appealed from the superior court's memorandum and order, entered upon an *in camera* review, ruling that 225 documents were trial preparation materials and not subject to inspection by plaintiff. On September 30, 2008, the City's zoning inspectors, by authority of an administrative warrant, searched Wallace Farm following complaints of odor emanating from a composting facility and allegations that Wallace Farm had grown beyond the parameters established by 1999 zoning regulations. On October 15, 2008, plaintiff mailed to the Office of the Charlotte City Manager a request to examine all public records from 1998 through 2008 referring to plaintiff's property, including but not limited to complaints against and subsequent investigation of plaintiff's composting facility, meetings between city, state, and federal personnel regarding neighborhood development, and zoning code enforcement. Plaintiff sent a follow-up request on October 27.

On October 31, the Charlotte City Attorney's Office sent notice to plaintiff that the City Manager had relayed the public records request to the City Attorney's Office and the City Attorney's Office would comply with the request pursuant to the obligations of G.S. 132-1 *et seq.* Plaintiff filed a complaint on November 3 against the City and City Manager to compel production of the requested public records, and a hearing date was set for December 18. Defendants provided plaintiff with approximately 21,000 pages between November 24 and December 11. Approximately 500 pages were withheld on grounds that the City reasonably anticipated litigation and the materials "withheld from review contain mental impressions, conclusions, opinions, or legal theories of individuals in the City Attorney's Office concerning the potential litigation...." On January 6, 2009, upon *in camera* inspection, the superior court entered a memorandum and order in which it ruled that the 500 pages (comprising 225 documents) were trial preparation materials and therefore not public records subject to inspection by plaintiff. Plaintiff appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge Bryant wrote the opinion, joined by Judge Jackson and Judge Robert N. Hunter, Jr.

Plaintiff argued that the trial court erred by failing to allow plaintiff to inspect the public records because the records were not trial preparation materials and that failing to allow such inspection operated in opposition to the Public Records Act. The Court disagreed. The Court initially observed that the order would be reviewed under an abuse of discretion standard and further noted that exceptions and exemptions to the Public Records Act are subject to narrow construction. Turning to the statute at issue, the Court stated, "Under our General Statutes, section 132-1.9, 'a custodian may deny access to a public record that is also trial preparation material.' [G.S.] 132-1.9(b) (2007). Under our Rules of Civil Procedure '[a] court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.'" N.C. R. Civ. P. 26(b)(3) (2007). "[T]he party asserting work product privilege bears the burden of showing (1) that the material

consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent.’ Evans v. United Servs. Auto. Ass’n, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001) (citations and internal quotations omitted). ‘Although not a privilege, the exception is a qualified immunity and extends to all materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s consultant, surety, indemnitor, insurer, or agent. The protection is allowed not only for materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected, nor does the protection extend to facts known by any party.’ Boyce & Isley, PLLC v. Cooper, ___ N.C. App. ___, 673 S.E.2d 694, 702 (2009) (citations, quotations, and emphasis omitted).”

The Court held that the trial court did not abuse its discretion in concluding that the public records exception under G.S. 132-1.9 applied. “Here, in the 15 December 2008 letter from defendants to plaintiff, defendants contend the documents withheld ‘were prepared in anticipation of a legal proceeding yet to commence.’ Specifically, defendants ‘contend that if it takes any action against [Wallace Farm], be it via the City beginning enforcement proceedings for possible Zoning Ordinance violations, or the odor study results being submitted to any party, litigation is reasonably anticipated to follow.’ At the 18 December 2008 hearing to compel production of public records, defendants argued that the materials withheld ‘all related to the City’s research and the City’s taking a look at legal strategies related to possible zoning enforcement, not with respect to any of the claims that the plaintiff suggest they might pursue against the City with respect to the September 30, 2008 administrative inspection.’ Upon review, including *in camera* review of the withheld documents, we agree with the trial court’s ruling and hold the challenged documents contain mental impressions, conclusions, opinions, or legal theories of city attorneys or other agents of the City in reasonable anticipation of litigation.”

NOTE: Plaintiff filed a petition for discretionary review in April 2010. The N.C. Supreme Court denied the petition for discretionary review on August 26, 2010.

Nota Bene (N.B.)
Other Decision of Note

Open Meetings; Public Access to Meetings; Meeting Notice; Ticketing Procedure

GARLOCK V. WAKE COUNTY BD. OF EDUC., ___ N.C. App. ___, 712 S.E.2d 158 (No. COA10-1123, Wake- 4/19/11) (In plaintiffs’ action seeking relief under Open Meetings Law stemming from the exclusion of members of the public from March 23, 2010 meetings, Court of Appeals holds, “Intense public interest in actions under consideration by defendant Wake County Board of Education led to increased attendance by members of the public at Board meetings in early 2010, so that on 23 March 2010, the meeting rooms for the Committee of the Whole (COW) meeting and full Board meeting could not accommodate all who wished to attend.... We affirm the trial court’s order which found that on 23 March 2010, defendants violated the Open Meetings Law by their last-minute adoption of a ticketing policy and by exclusion of members of the public from the COW meeting, but we vacate the trial court’s conclusion as to defendants’ failure to accommodate a disabled person because the Open Meetings Law makes no distinction between access by disabled members of the public and access by non-disabled

members of the public. The trial court properly considered defendants' actions according to the standard of reasonableness of opportunity for public access to the meetings. In addition, the trial court properly exercised its discretion by declining to grant affirmative relief and dismissing the case"; As to ticketing procedure utilized by the Board, Court holds, "In our *de novo* review of the trial court's conclusion of law, we hold that the trial court properly found that the ticketing procedure was unreasonable in the manner in which it was used on 23 March 2010.... [N]otice of the location and time of the meeting is worthless if a person planning to attend a meeting is not also informed that a ticket will be required. Without notice of the ticketing requirement, a member of the public may show up at the announced time and location for the meeting, only to be denied admission for lack of a ticket. Thus, under [G.S.] 143-318.12, a public body's meeting notice must include any information reasonably necessary to give members of the public the opportunity to attend the meeting, if information beyond the time and location is necessary, as it was here. Thus, a ticketing procedure with proper advance notice may be reasonable, as also found by the trial court"; Also holding, "Defendants ... do not dispute that there was no seating available for members of the public for at least the portion of the COW meeting addressing the budget, as all seats were filled by staff members; only after some staff members left were members of the public permitted to enter. The parties also agree that there was media coverage of the entire COW meeting. Yet media coverage alone does not render a meeting open; a reasonable opportunity for access by members of the public must be made. The complete exclusion of members of the public from the COW meeting for a significant portion of the meeting is the most obvious violation of the Open Meetings Law in this case. The trial court found the Board's rationale of convenience of holding the COW meeting in a smaller room to be unreasonable under the circumstances, and we agree, particularly as there was a larger room immediately available *in the same building*, so that a last-minute change in the location of the COW meeting would not violate the statutory notice requirements as to the location of the meeting. *See* [G.S.] 143-318.12. The convenience of the members of the COW and staff was not a sufficient reason to deny public access." (Emphasis in original.)

STREETS

Streets; Obstructions; Negligence; Immunity; Public Duty Doctrine

BECKLES-PALOMARES V. LOGAN, 202 N.C. App. 235, 688 S.E.2d 758, *disc. review denied*, 364 N.C. 434, 702 S.E.2d 219 (2010)

In plaintiff-administratrix's action alleging negligence under G.S. 160A-296, trial court properly denied City's motion for summary judgment.

FACTS: Defendant-City appealed from an order denying its motion for summary judgment in this matter. In May 2006, decedent, a seven-year-old child, was riding his bicycle south on Freeman Street, down a slight grade and approaching a "T" intersection with Wells Street: the intersection has a stop sign requiring vehicles on Freeman Street to stop before entering Wells Street. (Defendant Moore owns property located on the northwest corner of the intersection, where there is a retaining wall, a bank, and evergreen ground cover. Defendants Flow 425 Silas Creek Parkway, LLC, and Flow Companies, Inc., own property on the south side of Wells Street and operate an automobile body repair business.)

Defendant Logan was driving his sport utility vehicle east on Wells Street toward the intersection with Freeman Street: Logan was driving left of the center of Wells Street. (At his deposition, defendant Logan claimed that he was driving down the center of the street because the vehicles belonging to the Flow defendants were parked "on down into the side of" Wells Street.) Decedent entered the intersection (turning right onto Wells Street, possibly without stopping) and was struck and killed by defendant Logan's vehicle. Defendant Logan, whose blood alcohol level was above the legal limit, pled guilty to involuntary manslaughter.

Plaintiff-administratrix filed an action against: defendant Logan for his alleged negligence in driving under the influence and on the wrong side of the road; defendant Moore for his alleged negligence in failing to keep his property free from vegetation that could obstruct views; the Flow defendants for their alleged negligence in parking cars in such a way as to obstruct the flow of traffic; and defendant-City for its alleged negligence in violating safety statutes and ordinances regulating the maintenance of streets, obstructions to vision and traffic, and parking regulations. All defendants (except defendant Moore, who did not file an answer) pled the affirmative defense of contributory negligence on decedent's part for failing to stop at the stop sign and on the part of plaintiff-administratrix for failing to supervise her minor child. Defendants Flow, Moore, and City moved for summary judgment, and plaintiff moved for summary judgment against all defendants with respect to their defenses of contributory negligence. Both plaintiff's motion for summary judgment and defendant-City's motion for summary judgment were denied. (Plaintiff submitted to voluntary dismissals with prejudice as to her claims against defendant Moore and the Flow defendants.) Defendant-City appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Chief Judge Martin wrote the opinion, joined by Judge Elmore and Judge Geer.

Defendant-City argued that it was entitled to summary judgment by virtue of application of the public duty doctrine, contending that the alleged negligent acts relied upon by plaintiff essentially involved either the City's failure to prevent criminal acts of others or to protect decedent from those acts. Rejecting this argument, the Court stated, "Our examination of the plaintiff's allegations with respect to the negligence of defendant City, however, reveals that plaintiff has asserted no claims based upon defendant City's negligent failure to prevent the criminal acts of Logan, Flow or Moore, or protect [decedent] from such acts." Examining plaintiff's complaint, the Court further observed, "Only one of these allegations, paragraph 19(c), implicates a negligent failure by defendant City to enforce its municipal code by failing to require defendant Moore

to remove or trim the vegetation on his property. The Winston-Salem Municipal Code Section 74-19 places the burden of removing vegetation on the owner, tenant or occupant of the lot bordering the street and if the owner, tenant, or occupant fails to remove the vegetation, the burden falls on the ‘assistant city manager/public works or his designee.’ Winston-Salem, N.C., Code of Ordinances § 74-19 (2006). Thus, the allegation does not allege a negligent failure on the part of a law enforcement agency exercising its general duty to protect the public and, under Lovelace [v. City of Shelby], 351 N.C. 458, 526 S.E.2d 652, *reh'g denied*, 352 N.C. 157, 544 S.E.2d 225 (2000)], the public duty doctrine does not apply to shield defendant City from liability for this claim. The remaining allegations of paragraph 19 of plaintiff’s complaint allege defendant City’s negligent failure to comply with its own municipal safety ordinances and various provisions of [G.S.] 160A-296(a) and the public duty doctrine is inapplicable to these allegations as well.”

The Court also rejected defendant-City’s contention as to governmental immunity. “[P]laintiff has alleged defendant City was negligent in violating [G.S.] 160A-296, which gives a municipality the authority to regulate the use of its streets and sidewalks and, in addition, imposes a positive duty upon the municipality to keep them in proper repair, in a reasonably safe condition, and free from unnecessary obstructions. [G.S.] 160A-296 (a)(1), (2), and (5) (2009); Stancill v. City of Washington, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976). The statute creates an exception to the doctrine that a municipality will have immunity from liability for negligence in the performance of a governmental function, Sisk v. City of Greensboro, 183 N.C. App. 657, 659, 645 S.E.2d 176, 179, *disc. reviews denied and dismissed*, 361 N.C. 569, 650 S.E.2d 812 (2007), and, by reason thereof, the doctrine of governmental immunity has no application to protect a city from liability for a negligent breach of the statutory duties so imposed. McDonald v. Village of Pinehurst, 91 N.C. App. 633, 635, 372 S.E.2d 733, 734 (1988).”

Defendant-City argued that there was no genuine issue of fact with respect to a negligent breach of any of the duties imposed upon it by G.S. 160A-296. Defendant-City contended that it was entitled to summary judgment as a matter of law since there were no genuine issues of fact as to (1) the existence of any obstruction, (2) it having any notice of a dangerous condition at the intersection, or (3) any obstruction being a proximate cause of the collision and decedent’s death. The Court determined that the trial court correctly denied defendant-City’s motion for summary judgment.

Defendant-City argued that plaintiff presented no evidence to create an issue of fact with respect to its breach of the statutory requirement to keep its streets and sidewalks clear of obstructions. Defendant-City contended that vegetation could not be considered an obstruction because it was “undisputed” that a driver traveling down Freeman Street and obeying traffic laws would have nothing obstructing his or her view of the traffic on Wells Street. The Court rejected this argument, stating “[P]laintiff’s expert witness, Sean Dennis, stated ‘that corner,’ which includes the retaining wall, the bushes, and the ground underneath, ‘presented a sight obstruction both for traffic ... on Wells looking to the right of Freeman [and] ... on Freeman looking to the right of Wells and same for traffic traveling east on Freeman looking left to look up Wells.’ In Cooper v. Town of Southern Pines, 58 N.C. App. 170, 293 S.E.2d 235 (1982), this Court defined an obstruction as ‘anything, including vegetation, which renders the public passageway less convenient or safe for use.’ *Id.* at 174, 293 S.E.2d at 237. Plaintiff’s expert stated that the vegetation was an obstruction and defendant Logan in his deposition stated that the position of the parked cars caused him to drive down the center of the road. Under the Cooper definition, both the vegetation and parked cars could constitute obstructions which might violate the requirements of [G.S.] 160A-296.”

The Court determined that there were genuine issues of material fact as to whether or not defendant-City had actual or implied notice of the obstructions. The Court stated, “First, plaintiff argues that defendant City had actual notice of the vegetation because it had planted the vegetation in the 1970s. Plaintiff also directs us to a curb usage study performed by defendant City’s Traffic Engineering Division in 1987 which indicated that parking on both sides of Wells Street

obstructed the travel lanes to a point such that emergency vehicles would not be able to use the road. Moreover, plaintiff also claims that if defendant City did not have actual notice, the evidence gives rise to an inference that it had implied notice based on the length of time the alleged obstructions had been present. *See Fitzgerald v. Concord*, 140 N.C. 110, 113, 52 S.E. 309, 310 (1905) (holding ‘when observable defects in a highway have existed for a time so long that they ought to have been observed, notice of them is implied, and is imputed to those whose duty it is to repair them’).”

Defendant-City also argued that it was entitled to summary judgment because there was no genuine issue of fact that the alleged obstructions were a proximate cause of decedent's death and that such a conclusion would, at most, be purely speculative. The Court disagreed. “In defendant Logan's deposition, he stated that he was driving down the center of Wells Street because of the cars parked illegally in the street. Sean Dennis, plaintiff's expert witness, testified in his deposition that the position of defendant Logan's vehicle, left of the center of the street, was a contributing factor to the accident. With regard to the vegetation, defendant Logan stated that he could only see the top of [decedent's] helmet over the bushes and that by the time he saw [decedent] it was only a split second before he was in front of the vehicle. He also stated, ‘If [the shrubbery] wasn't there, you know, maybe I could of seen him before he got— got through the stop sign or whatever.’ Sean Dennis also testified that the vegetation would have been a sight obstruction for both [decedent] and defendant Logan.” The Court also concluded that a genuine issue of fact existed “as to whether it was reasonably foreseeable that obstructions to defendant Logan's and [decedent's] vision, as well as obstructions necessitating a driver to drive in other than the intended travel lane, could cause a traffic accident of some sort.”

Defendant-City, pointing to conclusions set forth in the Traffic Fatality Accident Reconstruction created by the Police Department, argued that defendant Logan's criminal acts (driving while under the influence and on the wrong side of the road) were intervening causes severing the causal chain between its negligence and the accident. The Court determined that a genuine issue of material fact existed here. “[D]efendant Logan testified at his deposition, ‘They [sic] was nothing I could do to avoiding [sic] that accident. If I would of not [sic] any alcohol in me, that accident would of still happened.... In other words, there is no way that it was not going to happen, alcohol-related or not.’ He also testified that he did not think the alcohol slowed his reflexes or reaction time. From the evidence, there is a genuine issue of fact as to what a reasonable person would have done under the circumstances. *Federal Paper Bd. Co. v. Kamyrr, Inc.*, 101 N.C. App. 329, 333, 399 S.E.2d 411, 414 (‘Summary judgment may not be used to resolve factual disputes which are material to the disposition of the action.’), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 510 (1991). If a reasonable and sober person would have moved left of center to avoid the parked cars and could not have stopped in time to avoid the accident, then Mr. Logan's actions in driving while intoxicated and driving left of center would not be an intervening cause. *See id.* (holding that with regard to intervening causes, except when reasonable minds could not differ, ‘the question should be left for the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act’).”

NOTE: Defendant-City filed a petition for discretionary review in March 2010. The N.C. Supreme Court denied the petition for discretionary review on October 7, 2010.

Streets; Torts; Utility Pole; Encroachment Agreement; State-Maintained Highway; Contributory Negligence

KENNEDY V. POLUMBO, ___ N.C. App. ___, 704 S.E.2d 916 (Nos. COA10-586 & COA10-389, Cumberland – 2/1/11), *disc. review denied*, ___ N.C. ___, ___ S.E. 2d ___ (No. 110P11, 8/25/11)

Municipalities do not generally owe any duty to individuals injured on roads that are part of the state highway system. The existence of a contract between a city and the N.C. Department of Transportation (NCDOT) for the maintenance of a street within the state highway system does not automatically shift liability for injury from NCDOT to the City; such liability must arise expressly out of contract.

FACTS: Plaintiffs are co-administrators of the Estate of Emily Elizabeth May, who died tragically in May 2007 from injuries sustained when the car in which she was a passenger struck a utility pole located upon a concrete median on N.C. Highway 24. The driver of that car (who registered alcohol concentrations of .18 and .17 on breathalyzer tests) entered a guilty plea to the following: felony death by motor vehicle; reckless driving to endanger; driving after consuming alcohol while under the age of 21, and; driving while impaired. Plaintiffs-administrators filed an action alleging that Ms. May's death was proximately caused by separate acts of negligence on the part of Danielle Polumbo (the driver), Carolina Hospitality of Florida, Inc., d/b/a Carolina Hospitality, Inc. (the operator of a nightclub where Ms. Polumbo and Ms. May had been patrons prior to the accident); Brandi Reaves (a bartender at that establishment); ACS State and Local Solutions, Inc. (the owner and operator of a red-light camera which was mounted on the utility pole and fell onto the car as a result of the collision); and the City of Fayetteville. In their complaint, plaintiffs alleged that the City breached its “duty to exercise ordinary care to maintain its streets and public ways in a reasonably safe condition for all who use them in a proper manner” and that the City, pursuant to a 1999 contract with ACS, agreed “to perform certain acts under the Safelight Program for the City of Fayetteville.”

By separate orders in November 2009, the trial court granted summary judgment in favor of ACS and in favor of the City of Fayetteville. Plaintiffs appealed from both judgments, and the appeals were consolidated. (Only plaintiffs' claims against defendants ACS and the City were at issue in this appeal.)

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Chief Judge Martin wrote the opinion, joined by Judge McGee and Judge Ervin.

Initially, the Court denied defendants' motions *inter alia* to dismiss the appeals as interlocutory, stating, “In the present case, the order granting summary judgment to ACS and the City terminates plaintiffs' action as to those defendants. However, plaintiffs' claims against the remaining defendants, including Ms. Polumbo, Ms. Reaves, and Carolina Hospitality, are still pending and some of the same factual defenses, including the contributory negligence of Ms. May, would apply to those defendants as apply to the present defendants. Thus, there is the possibility of inconsistent verdicts should we dismiss the present appeals and require plaintiffs to proceed to a final judgment against all defendants before considering their appeals from ACS and the City's granted summary judgment motions. See Estate of Harvey v. Kore-Kut, Inc., 180 N.C. App. 195, 198-99, 636 S.E.2d 210, 212 (2006). Under these circumstances, a determination of the underlying substantive appeal will, in our view, promote finality rather than fragmentation.”

Turning to the merits of the appeal, plaintiffs argued that the trial court committed reversible error because there were genuine issues of material fact which precluded judgment as a matter of law for the City. The Court disagreed. The Court initially observed that the City contended that the trial court's order was correct for a number of reasons: 1) the City had no duty, contractual or otherwise, to maintain N.C. Highway 24 in a safe condition for the benefit of plaintiffs' decedent (rather the duty belonged to the N.C. Department of Transportation (NCDOT)); 2) even if another

party along with NCDOT could be negligent, it would not be the City, as it was ACS's predecessor (Lockheed Martin) who was responsible for the installation and maintenance of the red-light camera and plaintiffs did not in their complaint allege any theory of *respondeat superior*; (3) it was not negligence as a matter of law for the camera to be installed on the raised median; (4) governmental immunity, and; (5) plaintiffs' decedent, Ms. May, was contributorily negligent as a matter of law.

The Court stated that “the City owed plaintiffs no affirmative duty to keep N.C. 24 in a safe condition for plaintiffs' decedent, Ms. May.... [Plaintiffs'] legal allegation, the wording of which is apparently drawn from [G.S.] 160A-296(a)(2), is inapplicable to the present case as N.C. 24 is not the City's street or public way. All parties agree that N.C. 24, Bragg Boulevard, is a state highway. Municipalities do not generally owe any duty to individuals injured on roads that are part of the state highway system. [G.S.] 160A-297 (2009); *see also Jiggetts v. City of Gastonia*, 128 N.C. App. 410, 413, 497 S.E.2d 287, 290 (1998); *Colombo v. Dorrity*, 115 N.C. App. 81, 85, 443 S.E.2d 752, 755 (1994) (‘[A] municipality is not liable for accidents which occur on a street which is part of the State highway system and under the control of the NCDOT.’).”

Pointing to an encroachment agreement, plaintiffs argued that the third party beneficiary exception was applicable. The Court disagreed. “The paragraph identified by plaintiffs falls short of what is required in order to shift responsibility for N.C. 24 from the NCDOT to the City. The Encroachment Agreement does not assign the City the same duties over N.C. 24 as the City has for its own streets and highways under [G.S.] 160A-296(a)(2): namely, ‘(1) [t]he duty to keep the public streets, sidewalks, alleys, and bridges in proper repair’ and ‘(2) [t]he duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions.’ Finally, even had the Encroachment Agreement's requirement that the City maintain the red-light camera ‘in such [a] safe and proper condition that it [would] not interfere with or endanger travel upon said highway’ been sufficient to transfer the liability for N.C. 24 from the NCDOT to the City, plaintiffs' decedent Ms. May was not a third-party beneficiary of the Encroachment Agreement. In order for plaintiffs to sue on a third-party beneficiary theory, they must show that the contract which creates the failed duty was ‘entered into for [their] direct, *and not incidental*, benefit.’ *Jiggetts*, 128 N.C. App. at 415-16, 497 S.E.2d at 291 (emphasis added) (internal quotation marks omitted).” The Court emphasized that the purpose of the Encroachment Agreement was not to transfer the liability for injuries to the traveling public from NCDOT to the City. The Court observed that “the City's contractual duties created by the Encroachment Agreement benefited the NCDOT, in that the Agreement assured that the NCDOT's duties to maintain N.C. 24 were not made more onerous by the installation of the red-light camera. In addition to the City's obligation to assure that the red-light camera did not interfere with or endanger travel upon N.C. 24, the City was also required to reimburse the NCDOT for any costs incurred for repair or maintenance to N.C. 24 because of the installation or existence of the red-light camera. The Encroachment Agreement also required the City to indemnify the NCDOT for any damage or claim for damage that the NCDOT may incur because of the red-light camera, to restore all area disturbed during the installation of the red-light camera, to pay for any necessary inspections, and to follow various other regulations, including solicitation and nondiscrimination requirements. In exchange, the NCDOT permitted the City to install the red light camera in order that the City's traffic ordinances could be more effectively enforced.”

The Court added that even had decedent been a third party beneficiary of the encroachment agreement, the City did not breach its duty under that agreement to “install and maintain the encroaching facility in such a safe and proper condition that it will not interfere with or endanger travel upon said highway.” The Court stated, “Plaintiffs argue ... that a new distinction should be drawn because the red-light camera ... was an obstruction ‘on a traffic island within a highway itself and around which traffic may reasonably be expected to flow on a fairly constant basis.’ No North Carolina caselaw draws the distinction urged upon us by plaintiffs based upon where outside the proper portion of the roadway the obstruction is located. This State's courts have only

drawn a distinction based upon whether the plaintiff was properly using the portion of the highway designated and intended for vehicular travel. We hold ... that, as a matter of law, the installation of the red-light camera mounted upon the utility pole did ‘not interfere with or endanger travel upon said highway.’ It was only by Ms. Polumbo improperly leaving the highway and driving her vehicle onto the concrete median area, that the collision occurred. The City did not, therefore, breach its duty under the Encroachment Agreement.”

The Court stated that the contributory negligence, as a matter of law, of plaintiffs' decedent Ms. May constituted at least one other basis upon which to affirm the grant of summary judgment to the City and ACS. Coleman v. Hines, 133 N.C. App. 147, 149, 515 S.E.2d 57, 59, *disc. review denied*, 350 N.C. 826, 539 S.E.2d 281 (1999). “Plaintiffs overlook ... allegations in their complaint that, shortly prior to the accident, employees of defendant Carolina Hospitality continued to serve alcoholic beverages to Ms. Polumbo ‘after they became aware, or should have been aware in the exercise of reasonable care’ that she was intoxicated. They allege that one of those employees, Ms. Reaves, served Ms. Polumbo ‘numerous single shot glassfuls of liquor.’ They allege in fact that Ms. Polumbo consumed such ‘a large quantity of alcoholic beverages’ that she was ‘extremely intoxicated,’ ‘her mental and physical faculties were appreciably impaired,’ and her blood alcohol content was over two times the legal limit.... Plaintiffs' own complaint, considered in the light most favorable to it, leads to the inescapable conclusion that Ms. May knew or should have known that Ms. Polumbo was ‘appreciably impaired’ and, therefore, was intoxicated to a degree that she was incapable of safely operating her vehicle. If Ms. Polumbo's condition was so impaired as to have been obvious to a reasonable person in the position of defendant Ms. Reaves, the server employed by Carolina Hospitality, it was at least as obvious to Ms. May, who had spent the entire evening with Ms. Polumbo. Yet Ms. May still placed herself in a position of extreme known danger by voluntarily riding with Ms. Polumbo and, thus, Ms. May was contributorily negligent as a matter of law.” The Court concluded this section of its opinion by stating, “We hold, therefore, that, by voluntarily riding and continuing to ride with Ms. Polumbo under such circumstances and conditions as would have compelled an ordinarily prudent man in the exercise of ordinary care for his own safety to not ride with the ‘appreciably impaired’ Ms. Polumbo, Ms. May committed an act of contributory negligence which proximately contributed to her injuries and death as a matter of law, and which bars any recovery from ACS or the City for her death.”

NOTE: Plaintiff filed a petition for discretionary review in March 2011. The N.C. Supreme Court denied the petition for discretionary review on August 25, 2011.

TORTS

Torts; Immunity; Parks; Rental for Private Parties

ESTATE OF WILLIAMS V. PASQUOTANK COUNTY PARKS & RECREATION DEPT. & PASQUOTANK COUNTY, ___ N.C. App. ___, 711 S.E.2d 450 (No. COA10-491, Pasquotank– 5/3/11), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 231P11, 6/7/11)

Trial court properly denied County’s motion for summary judgment based on governmental immunity in negligence action filed by estate of drowning victim at area of park rented out for use by private parties.

FACTS: The estate of Mr. Williams filed an action for negligence against defendants after Mr. Williams drowned in the “Swimming Hole,” part of the area rented out for use by private parties at Fun Junktion, a public park. In the answer, defendants alleged the defenses of immunity and contributory negligence. Defendants’ motion for limited summary judgment stated that “[t]he basis of this Motion is that the allegations of the Complaint relate to the performance of governmental functions....” From the trial court’s denial of defendants’ motion in November 2009, defendants appealed.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge Stroud wrote the opinion, joined by Judge Bryant and Judge Beasley.

Defendants argued that because Fun Junktion is a public park and because operating parks is a governmental function, plaintiff’s claim was barred by governmental immunity. G.S. 160A-351 (“[T]he creation, establishment, and operation of parks and recreation programs is a proper governmental function....”). The Court reviewed the framework for its analysis. “[W]hen considering whether a municipality has engaged in a governmental or a proprietary function, prior cases have considered: (1) ‘whether an undertaking is one *traditionally* provided by the local governmental units[;]’ Willett v. Chatham Cty. Bd. of Educ., 176 N.C. App. 268, 270, 625 S.E.2d 900, 902 (2006)] (emphasis added), (2) ‘[i]f the undertaking of the municipality is one in which *only* a governmental agency could engage’ or if ‘any corporation, individual, or group of individuals could do the same thing[;]’ Britt [v. Wilmington], 236 N.C. [446] at 451, 73 S.E.2d [289] at 293 [(1952)] (emphasis added), (3) whether the county charged ‘a substantial fee[;]’ Willett, 176 N.C. App. at 270, 625 S.E.2d at 902, and (4) if a fee was charged, whether a profit was made. *See id.* Not all of these factors must be present for a function to be proprietary, but the second of these considerations is the most important. *See Evans [v. Housing Auth. of City of Raleigh]*, 359 N.C. [50] at 54, 602 S.E.2d [668] at 671 [(2004)] (*see Digest of Municipal Law 2004-2005*, p. 68)] (‘We have provided various tests for determining into which category a particular activity falls, but have consistently recognized one guiding principle: Generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and private when any corporation, individual, or group of individuals could do the same thing.’ (quotation marks and brackets omitted)).”

The Court concluded that defendants were involved in a proprietary function in the operation of the party facilities at Fun Junktion. “As to the first factor, whether the activity is one traditionally provided by local governments, Willett, 176 N.C. App. at 270, 625 S.E.2d at 902, certainly public parks are a function traditionally provided by the government. *See Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235 (‘Certain activities are clearly governmental such as ... public parks[.]’), *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). As to the second factor, it is equally clear that not all parks are operated by governmental units. ‘[A]ny corporation, individual, or group of individuals could’ operate similar recreational facilities which may be rented for

private use. Britt, 236 N.C. at 451, 73 S.E.2d at 293. While defendant appears to argue that all activities provided within a public park are governmental functions pursuant to [G.S.] 160A-351, our Supreme Court has previously determined municipalities may perform proprietary functions within public parks. *See, e.g., Glenn v. Raleigh*, 246 N.C. 469, 98 S.E.2d 913 (1957) (determining that a public park did not have governmental immunity from a rock thrown from a mower which hit the plaintiff on the head while he was sitting at a table in the public park). Thus, a public park may include activities which are governmental and protected by governmental immunity as well as proprietary functions which are not. As to the third and fourth factors, defendant charged \$75.00 for the use of Fun Junktion for a private party but did not make a profit from the rental fees for Fun Junktion. Defendant states in its brief that '[f]or the fiscal year 1 July 2006 through 30 June 2007, Pasquotank County spent \$160,384 operating Fun Junktion and received only \$2,052 in revenues from its operation ..., a ratio of revenue to expenditures of 1.3%.' Thus, defendant was involved in a traditional government function that could be performed by private entities and did so for a substantial fee although it did not make a profit. In weighing the application of the factors to this case, we are mindful that the second factor is the most important, as the 'guiding principle' is '[i]t is proprietary and private when any corporation, individual, or group of individuals could do the same thing.' Evans, 359 N.C. at 54, 602 S.E.2d at 671."

Torts; Negligence; Contributory Negligence; Open and Obvious Condition; Sewer Manhole

WADDELL V. METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, ___ N.C. App. ___, 699 S.E.2d 469 (No. 09-620-2, Buncombe- 9/7/10)

Where evidence presented at summary judgment hearing established that decedent was contributorily negligent in sledding down a hill and colliding with an open and obvious above-ground sewer manhole, trial court did not err in granting summary judgment for defendants.

FACTS: In November 2004, Timothy and Jill Waddell purchased a home. Approximately two months later, Ms. Waddell went outside with her children to play after a 3-inch snowfall, using an inner tube to slide down a 100 to 150 foot hill. Ms. Waddell's inner tube rotated, resulting in her travelling backwards down the hill. She collided with an elevated sewer manhole and suffered injuries resulting in her death. Plaintiffs filed an action alleging negligence and gross negligence against numerous defendants and seeking monetary damages. Plaintiffs alleged *inter alia* that defendant-Metropolitan Sewerage District of Buncombe County ("MSD") was negligent in the design and approval of the sewer, in failing to maintain its sewer easement in a safe condition, and in failing to warn of and conceal the manhole that protruded two and a half feet above the ground. Plaintiffs appealed from the trial court's grant of summary judgment for defendants in October 2008.

HOLDING: A panel of the N.C. Court of Appeals unanimously affirmed. Judge Steelman wrote the opinion, with Judge Elmore and Judge Hunter, Jr. concurring.

Plaintiffs argued that MSD was negligent by failing to maintain the premises in a safe condition and to warn the Waddells of the hazard created by the manhole. Rejecting these arguments, the Court held that MSD had no duty to warn decedent of an open and obvious danger as to which she had equal knowledge prior to the injury. "[P]lenary evidence in the record established that the elevated manhole was an open and obvious condition. The manhole was approximately one and a half feet above ground on the uphill side and two and a half feet above the ground on the downhill side. The manhole was four feet in diameter. The Waddells had lived at the residence for approximately two months. Mr. Waddell testified that the manhole was visible from

his back porch. The manhole was not surrounded or obscured by any trees or bushes. On the day of the accident it had snowed about three inches. Mr. Waddell testified that on the day of the accident, as he stood on the edge of his backyard, his wife and the manhole were clearly visible.”

The Court concluded its opinion by stating that even if MSD had breached a duty to warn, plaintiffs' claim would be precluded by decedent's contributory negligence. “The facts in the case of Grimsley v. Scott, 213 N.C. 110, 195 S.E. 83 (1938), are virtually identical to those in the instant case. In Grimsley, the plaintiff was sitting on a sled with her young daughter in front of her, going down a steep incline, on slick ice. *Id.* at 112, 195 S.E. at 84. The defendant's vehicle was parked on a street 50 to 100 feet away and could be seen by the plaintiff. *Id.* There was a large street light over the street. *Id.* The plaintiff had a clear passageway on the street of 20 feet. The plaintiff went down the street at a rapid speed, hit the rear end of the defendant's car, and was injured. *Id.* Our Supreme Court held that the plaintiff's claims against the defendant were barred by contributory negligence. *Id.* at 113, 195 S.E. at 85. In the instant case ... the manhole was an open and obvious condition in [decedent's] backyard. The manhole was stationary, positioned at the bottom of a 100-150 foot hill, and was clearly visible from the Waddells' back porch. The manhole was approximately one and a half feet above ground on the uphill side and two and a half feet above the ground on the downhill side. The manhole was four feet in diameter. Further, [decedent] disregarded the warning written on the inner tube and chose to sled down the hill. [Decedent] knew that the manhole was at the bottom of the hill and that the inner tube was impossible to steer once it was in motion. As a result of her decision to sled down the hill, [decedent] ran into the stationary manhole and subsequently died from her injuries.”

Nota Bene (N.B.)

Other Decisions of Note

Torts; Immunity; Governmental Function; 911 Call Center

WRIGHT V. GASTON COUNTY, ___ N.C. App. ___, 698 S.E.2d 83 (No. COA09-792, Gaston- 7/20/10) (in action alleging claim for wrongful death arising from 911 calls for medical assistance, Court of Appeals holds *inter alia* that trial court properly granted County's motion for summary judgment on the basis of governmental immunity; “Gaston County does not operate the 911 call center for profit. All of the funds from the Emergency Telephone System Funds are ‘permitted by G.S. 62A-8 solely for the lease, purchase, or maintenance of emergency telephone equipment, including necessary computer hardware, software and database provisioning, addressing, and nonrecurring costs of establishing a 911 system, and the rates associated with the service supplier's 911 service and other service supplier charges.’ ... The 911 call center was established to provide for ‘the health and welfare of its citizens’ and is a governmental function regardless of the fee charged in order to defray operating costs”; citing McIver v. Smith, 134 N.C. App. 583, 585-87, 518 S.E.2d 522, 524-25 (1999), *disc. review improvidently allowed*, 351 N.C. 344, 525 S.E.2d 173 (2000) (ambulance services) (*see Digest of Municipal Law 1999-2000*, p. 95).)

Torts; Immunity

ESTATE OF WHITE V. STOKES COUNTY DSS, ___ N. C. App. ___, 699 S.E.2d 686 (No. COA09-1567, Stokes– 10/5/10) (*unpublished*) (In action alleging that negligent placement of children resulted in their running away from home and deaths in nearby river, Court of Appeals holds that trial court properly granted summary judgment for defendants on basis of governmental immunity; stating that, “Our Court has held that the ‘[s]ervices provided by local Departments of Social Services are governmental functions to which governmental immunity applies.’ Whitaker v. Clark, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 31 (1993) [*Digest of Municipal Law 1992-93*, p. 44].”)

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