

**DIGEST OF MUNICIPAL LAW
PART I: CASE LAW 2014-2015**

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INTRODUCTION

The **DIGEST OF MUNICIPAL LAW, PART I: CASE LAW 2014-2015** 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. The cases include those reported in the July 2014 through June 2015 issues (Volume XXXIV) 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)

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 *Digest of Municipal Law, Part II: Legislation* will also be published as an electronic document posted to the League's website. 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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December, 2015

¹ Rule 30(e) provides as follows, “(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion,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 If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to whom the citation is offered.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).

CONSTITUTIONAL LAW

Constitutional Law; Ordinance Regulating High Impact Uses; Equal Protection; Clause Commerce Clause; Preemption; Landfill

PBK HOLDINGS, LLC V. COUNTY OF ROCKINGHAM, ___ N.C. App. ___, 756 S.E.2d 821 (No. COA13-865, Rockingham– 4/1/14), *disc. review denied, appeal dismissed*, 367 N.C. 788, 766 S.E.2d 658 (No. 143P14, 12/18/14) (In plaintiff’s declaratory judgment action challenging ordinances regulating high impact uses (defined as “those which by their nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic and/or other impacts upon the lands adjacent to them”), Court of Appeals holds that trial court properly rejected claims that certain provisions of ordinance exceeded the authority of the Board of Commissioners, that the ordinance violated the Equal Protection clauses of the state and federal constitutions, and that the ordinance violated the Commerce Clause. “Defendant asserts, and we agree, that the objective of protecting the health, safety, and environment of the community by mitigating the adverse impacts of high impact uses is a conceivable and legitimate government interest. The differences in requirements set out in the ordinance between regional and local landfills, with regional landfills being subject to more stringent regulation based on their projected higher impact to the surrounding area, are clearly rationally related to further defendant’s conceivable, legitimate interest.” (Opinion by Judge McCullough, with Chief Judge Martin and Judge Ervin concurring.) Plaintiff filed a petition for discretionary review in May 2014. The N.C. Supreme Court denied the petition on December 18, 2014.))

Constitutional Law; First Amendment; Government Speech; License Plates

BERGER V. ACLU OF NORTH CAROLINA, 576 U.S. ___, 135 S. Ct. 2886, 192 L. Ed. 2d 918, 83 U.S.L.W. 3927 (No. 14-35, 6/29/15) (U.S. Supreme Court issues an order stating, “The petition for a writ of certiorari is granted. The judgment is vacated [742 F.3d 563 (No. 13-1030, 2/11/14)], and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in

light of Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. ____ (2015).” In Walker (No. 14-144, 6/18/15), the U.S. Supreme Court in a 5-4 decision held that license plate specialty designs offered by the State constitute government speech, and thus the State of Texas was entitled to refuse a heritage group’s proposed design featuring a Confederate battle flag. “Our analysis in [Pleasant Grove City v.] Summum [555 U. S. 460, 467–468 (2009) (*Digest of Municipal Law 2008-09*, p. 8)] leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States.... [L]icense plates are not traditional public forums for private speech. And other features of the designs on Texas’s specialty license plates indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas, through its Board, selects each design featured on the State’s specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying ‘TEXAS’ as the issuer of the IDs.... With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers’ reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas’s specialty license plate designs ‘are meant to convey and have the effect of conveying a government message.’ Summum, 555 U.S., at 472. They ‘constitute government speech.’ *Ibid.*”)

Constitutional Law; First Amendment; Signs; Content-Based Regulations; Strict Scrutiny

REED V. TOWN OF GILBERT, 576 U.S. ____, 135 S. Ct. 2218, 192 L. Ed. 2d 236, 83 U.S.L.W. 4444 (No. 13-502, 6/18/15) (Defendant-Town had a comprehensive code prohibiting the display of outdoor signs without a permit. However, it exempted 23 categories of signs, including: (1) “Ideological Signs,” (those “communicating a message or ideas” that do not fit in any other Sign Code category), which may be up to 20 square feet and have no placement or time re-

strictions; (2) “Political Signs,” (those “designed to influence the outcome of an election”), which may be up to 32 square feet and may only be displayed during an election season, and; (3) “Temporary Directional Signs,” (those directing the public to a church or other “qualifying event”), which have even greater restrictions, as no more than 4 of the signs, limited to 6 square feet, may be on a single property at any time, and may be displayed no more than 12 hours before the “qualifying event” and only 1 hour afterwards.

Petitioners, a church and its pastor, whose Sunday church services were held at various temporary locations in and near the Town, posted signs early each Saturday with the Church name and the time and location of the next service and did not remove the signs until around midday Sunday. Having been cited both for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs, petitioners filed suit, claiming that the code abridged their freedom of speech. The Ninth Circuit (707 F.3d 1057) affirmed the district court’s denial of petitioner’s motion for a preliminary injunction, concluding that the code’s sign categories were content neutral and that the code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech. In an opinion written by Justice Thomas, the U.S. Supreme Court reversed and remanded, holding that the code’s provisions were content-based speech regulations of speech that did not survive strict scrutiny.

“Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an “absolutist” content-neutrality rule would render ‘virtually all distinctions in sign laws . . . subject to strict scrutiny,’ but that is not the case. Not ‘all distinctions’ are subject to strict scrutiny, only content-based ones are. Laws that are content neutral are instead subject to lesser scrutiny. The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign’s message: size, building materials, lighting, moving parts, and portability. And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects. We acknowledge that a city might

reasonably view the general regulation of signs as necessary because signs ‘take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.’ At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.” (Citations omitted.)

Constitutional Law; Signs; Exemptions; First Amendment

CENTRAL RADIO COMPANY INC. v. CITY OF NORFOLK, VIRGINIA, 776 F.3d 229 (4th Cir., Nos. 13-1996 & 13-1997– 1/13/15), *vacated and remanded*, ___ U.S. ___, 135 S. Ct. 2893, 192 L. Ed. 2d 919, 83 U.S.L.W. 3928 (No. 14-1201, 6/29/15) (Property owner challenged City’s citation for oversized sign and failure to obtain a sign compliance certificate for a banner protesting an eminent domain action, pointing to ordinance’s exceptions for certain flags and works of art from regulation. Divided panel of Fourth Circuit upholds district court’s grant of summary judgment in City’s favor, finding the ordinance to be a content-neutral restriction on speech that satisfies intermediate scrutiny. Content distinctions here are similar to those in Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013), and the majority rejects plaintiff’s attempt to distinguish that case, noting that “in determining the level of scrutiny, we are not concerned with the ‘precise’ or ‘optimal’ tailoring of exemptions to a sign ordinance, but the extent to which they bear a ‘reasonable’ relationship to legitimate legislative purposes.” As in Brown, exemption of certain sign categories does not convert the ordinance to a content-based restriction, when the exemptions have a reasonable relationship to the city’s asserted interests in aesthetics and traffic safety. Claims of selective enforcement and unconstitutional prior restraint also fail. (Opinion by Judge Keenan, with Judge Agee concurring. Judge Gregory dissenting.)) The U.S Supreme Court issued an or-

der on June 29, 2015 stating, “Petition for writ of certiorari granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of Reed v. Town of Gilbert, 576 U.S. ____ (2015).” Two other decisions vacated and remanded by the U.S. Supreme Court the same day in light of Reed v. Town of Gilbert were: Wagner v. City of Garfield Heights, 577 Fed. Appx. 488 (6th Cir. 2014) (*see* USSC No. 14-783) & Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014) (*see* USSC No. 14-428.)

EMINENT DOMAIN

Eminent Domain; Inverse Condemnation;
Transportation Corridor Official Map Act

KIRBY V. N.C. DEPARTMENT OF TRANSPORTATION, ___ N.C. App. ___, 769 S.E.2d 218 (No. COA14-184, Forsyth— 2/17/15), *petition for disc. review allowed, notice of appeal based upon substantial constitutional question dismissed*, ___ N.C. ___, 775 S.E.2d 829 (No. 56PA14-2, 8/21/15)

- **Holding**— When NCDOT recorded a beltway project map pursuant to the Transportation Corridor Official Map Act, resulting in restrictions on plaintiffs’ property, it was exercising the power of eminent domain, rather than the police power, and thus effected a taking for which compensation is due.
- **Key Excerpt**— The Court emphasized, ““What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest.”” (Emphasis in original; citation omitted). The Court of Appeals found the reasoning of a Florida case persuasive. *See Joint Ventures Inc. v. Department of Transportation*, 563 So. 2d 622, 625 (Fla. 1990)(striking down a similar Florida statute, as the circumstances showed the statutory scheme to be an attempt to acquire land by sidestepping the protections of eminent domain).

Here, the General Assembly stated that the purpose of the Map Act was to control the costs of acquiring rights-of-way for the state highway system. Although the Department of Transportation argued that corridor protection accomplishes more than saving taxpayer money by facilitating a less disruptive migration of residents and businesses and avoiding jeopardy to the proposed routes from increased development, the Court observed that there is no detriment to the public interest that the Act’s restrictions will prevent unless NCDOT needs to condemn plaintiffs’ properties for the beltway. Accordingly, the Act is a cost-controlling mechanism. The power exercised through the legislation is one with “a mind toward property acquisition;” the Map Act

empowers NCDOT with the right to exercise the state's power of eminent domain, requiring the payment of just compensation.

In determining when the taking occurred, the Court distinguished Browning v. N.C. State Highway Commission, 263 N.C. 130, 139 S.E.2d 227 (1964) (recording map showing proposed highways without compensation until future condemnations are undertaken does not constitute a taking of the land). Upon filing of the corridor map, affected owners are subject to restrictions on building permits, and the restrictive provisions of the Act do not independently or uniformly sunset at any time following the date of the filing of the map. Because the statutory restrictions are open-ended and potentially long-lasting in restraining the ability to improve, develop, or dispose of property, NCDOT exercised the power of eminent domain when it filed the maps. Reversing the trial court's ruling that the inverse condemnation claim was not yet ripe, the Court remanded for a determination of damages.

- **Synopsis**– Appeal by plaintiffs and cross-appeal by defendant from January 2013 order dismissing constitutional claim and June 2013 order granting defendant's motion for summary judgment. N.C. R. App. P. Rule 2.1 cases. Reversed and remanded. (Opinion by Chief Judge McGee, with Judge Bryant and Judge Stroud concurring.)

Eminent Domain; Pipeline; Easement;
Phased Development Plan; Vested Right;
Unity of Ownership

TOWN OF MIDLAND V. WAYNE, 368 N.C. 55, 773 S.E.2d 301 (No. 458PA13, 6/11/15)

- **Holding**– In condemnation action involving the existence of a vested right to develop a subdivision and the effect of that vested right on the questions of unity of ownership and damages, N.C. Supreme Court holds that: (1) the owners of the undeveloped portions of the subdivision have a vested right to complete the subdivision in accordance with the pre-approved plan, and (2) having a vested right to complete the subdivision means both owners of the remaining undeveloped property, the named defendant and the limited liability company, have interests affected by the condemnation of a portion of the subdivision,

satisfying the unity of ownership requirement. The measure of damages is the difference between the value of the property before the taking and the value immediately afterwards. The vested right enhances the value of the property before the taking but is not a separate element of damages.

- **Key Excerpt**— The Court initially held that the trial court’s findings of fact sufficiently supported the conclusion that the Town’s condemnation action interfered with defendant’s vested right to develop the future phases of the subdivision under the 1997 Customized Development Plan (for a multiphase, two hundred fifty acre residential subdivision). “Defendant’s approved, multiphase residential development plan—a preliminary planning followed by phased implementation—is consistent with the inherent nature of residential development. Defendant reasonably and in good faith relied on that plan because it has never lapsed in legal effect. As found by the trial court, defendant in good faith reliance made substantial expenditures of money, time, and labor based on the 1997 plan, thus supporting his common law vested right to develop the subdivision in accordance with the plan. The Town’s argument that the expenditures were directed primarily to the developed first two phases of Park Creek fails to recognize the unified nature of the 1997 plan and the benefit of the expenditures to the entire subdivision.”

The Court next stated that the vested right determination also informed its decision as to which parties were affected by the taking. The Court observed that there was unity of use as “Not only are the Wayne Tracts and LLC Tract part of the same subdivision, they are subject to the same vested right to be developed pursuant to the 1997 plan. Defendant and the LLC each have an identifiable interest in the lands of the other; the Wayne Tracts and the LLC Tract are indispensable parts of the unified project. Consequently, the easement area taken is ‘reasonably and substantially necessary to the enjoyment’ of both the Wayne Tracts and the LLC Tract. *Id.* The unity of use is controlling and being a part of a vested development plan is the strongest evidence of unity of use.” The Court held that it also agreed with defendant’s argument that the common law vested right to develop the contiguous parcels according to the 1997 plan helped to satisfy the unity of ownership required between the Wayne Tracts and LLC Tract. “Given the significance of the joint vested right to develop Park Creek,

we hold that the unity of ownership is satisfied here, where Wayne is the trustee of his revocable trust owning the Wayne Tracts and has the controlling interest in the LLC. The Court of Appeals and the trial court relied heavily on Martin to conclude that unity of ownership did not exist between defendant and the LLC. [See Board of Transportation v. Martin, 296 N.C. 20, 28, 249 S.E.2d 390, 396 (1978).] Each court believed Martin involved one tract owned by an individual and an adjacent tract owned by a corporation of which the individual was the sole shareholder. The facts and holding of Martin, however, are far more nuanced than that analysis implies. First, title to the adjacent property sought to be included in the condemnation in Martin was not titled in the corporation but in a distinct, unrelated entity, a bankruptcy trustee. Martin, 296 N.C. at 29-30, 249 S.E.2d at 396-97. Further, and most importantly, there was no unity of use; the adjacent parcel was not a part of an approved development project. Though the owner in Martin may have intended some future development of the undeveloped parcel in conjunction with the adjacent developed tract, unlike here, that site had not received an approved, unified development plan encompassing the entire property. *Id.* at 30, 249 S.E.2d at 397.”

The Court concluded its opinion by stating, “In sum, we hold that defendant and the LLC have a vested right to complete Park Creek pursuant to the 1997 plan. Since defendant and the LLC own contiguous properties which are subject to a vested, unified development plan adversely affected by the condemnation, and Wayne has a modicum of interest in both, unity of ownership exists. The Court of Appeals’ decision as to the lack of unity of ownership is reversed. Regarding the measure of damages, loss of a vested right is not a separate element of recovery but a quality of the property. The value of the property before the taking will reflect the enhancement resulting from the vested right as the value afterward will reflect the diminution or destruction of the right. As to this issue, the Court of Appeals’ decision is modified and affirmed.”

- **Synopsis**— Appeal by defendant from unanimous decision of the Court of Appeals, ___ N.C. App. ___, 748 S.E.2d 35 (2013), affirming in part and reversing in part trial court orders (entered in March 2012 and June 2012) and remanding for additional proceedings. Decision of the Court of Appeals modified and affirmed in part, reversed in part, and

remanded. (Opinion by Justice Newby. Justice Ervin did not participate in the consideration or decision of this case.)

Eminent Domain; Public Use or Benefit

TOWN OF MATTHEWS V. WRIGHT, ___ N.C. App. ___, 771 S.E.2d 328 (No. COA14-943, Mecklenburg- 4/21/15) (In Town's appeal from judgment dismissing its condemnation claim seeking to acquire road fronting defendant's home near a dead end in a subdivision, Court of Appeals affirms. (Prior litigation is found at Wright I, 177 N.C. App. 1, 627 S.E.2d 650 (2006) (*see Digest of Municipal Law 2005-06*, p. 84); Wright II, 194 N.C. App. 552, 669 S.E.2d 841 (2008) (*see Digest of Municipal Law 2008-09*, p. 70).) (Opinion by Judge Hunter, Jr., with Judge Bryant and Judge Stroud concurring.))

LAND USE

Land Use; Wireless Communication Facility; Fake Tree

FEHRENBACHER V. CITY OF DURHAM, ___ N.C. App. ___, 768 S.E.2d 186 (No. COA14-712, Durham– 2/3/15)

- **Holding**– Under Unified Development Ordinance’s (UDO’s) concealed wireless communications facility provisions, trial court did not err in affirming Board of Adjustment's decision to approve construction of a 120-foot-tall cell tower on church’s property, literally across a highway from petitioners-homeowners’ backyards. A 120-foot fake pine tree disguising a cell tower fits the city UDO’s definition of a concealed wireless communications facility (WCF).
- **Key Excerpt**– Neighbors objected to the Board of Adjustment’s approval of a 120-foot-tall cell tower disguised as a pine tree in a rural/residential zone. Defendant-City's Planning Department implemented its current wireless communications facility review and approval standards in 2004, seeking to balance the goals of "[p]rotect[ing] the unique natural beauty and rural character of the City and County while meeting the needs of its citizens to enjoy the benefits of wireless communication services." Durham UDO art. 5, § 3.3N-7. Accordingly, Section 16.3 of the UDO incentivizes the construction of concealed WCFs, which it defines as, “[a] [WCF], ancillary structure, or WCF equipment compound that is not readily identifiable as such, and is designed to be aesthetically compatible with existing and proposed uses on a site. A concealed facility may have a secondary function including, but not limited to the following: church steeple, windmill, bell tower, clock tower, cupola, light standard, flagpole with or without a flag, or tree. A non-concealed [WCF] is one that is readily identifiable such as a monopole or lattice tower.” *Id.* at art. 16, § 3. The trial court upheld the Board of Adjustment’s decision.

Affirming, the Court of Appeals found no evidence in the record to support the inference implicit in petitioners’ argument that a reasonable person’s typical reaction to the sight of an unusually tall pine tree is to conclude that it is a WCF. The Court observed that the plain language

of the UDO makes clear that the test is not whether or how quickly a person would notice this fake tree's true nature; rather, the test is whether the proposed monopine design serves a secondary function that helps camouflage the tower's function as a WCF.

As to the issue of aesthetics, the Court rejected petitioners' argument that SprintCom's proposed monopine tower was not aesthetically compatible with any existing or proposed uses on the Church property. "In support of this argument, Petitioners highlight Planning Director Medlin's testimony that the only current 'use' of the Church property is as a church, and they also emphasize that trees are not considered 'uses' under the UDO. However, this argument depends on the erroneous presumption that SprintCom's proposed monopine tower is readily identifiable as a WCF. Moreover, while Petitioners may be correct that natural trees are not considered 'uses' under the UDO, the second sentence of the definition of a concealed WCF provided in section 16.3 explicitly states that 'a concealed [WCF] may have a secondary function including, but not limited to . . . [a] tree.' Durham Unified Dev. Ordinance art. 16, § 3. When this Court inquired during oral arguments about the Church property's broader surroundings, the parties explained that the property is located in a developing, rural residential neighborhood, surrounded by houses and trees. In light of the evidence in the record that monopine towers generally resemble tall trees, we conclude that SprintCom's proposed monopine tower's secondary function as a tree is indeed aesthetically compatible with the Church property's existing use as a church in a developing rural residential neighborhood, surrounded by houses and trees. In other words, we believe that by focusing so narrowly on 'uses,' Petitioners' argument misses the proverbial forest for the literal monopine. Accordingly, we hold that the trial court did not err in affirming the Board of Adjustment's determination that SprintCom's proposed monopine tower qualifies as a concealed WCF as defined by UDO section 16.3."

- *Synopsis*— Petitioners' appeal from March 2014 order. Affirmed. (Opinion by Judge Stephens, with Judge Steelman and Judge Davis concurring.)

Land Use; Notice of Violation; Permits; Signs;
Nonconforming Use; Mistake

MYC KLEPPER/BRANDON KNOLLS L.L.C. v. BD. OF ADJUSTMENT FOR THE CITY OF ASHEVILLE, ___ N.C. App. ___, 767 S.E.2d 668 (No. COA14-539, Buncombe-12/31/14)

- ***Holding***– Board of Adjustment correctly upheld notice of violation based upon finding that newly constructed 2010 off-premise sign was larger than permitted by the ordinance and was constructed without a permit. Where ordinance provided that legal nonconforming signs may not be reestablished after discontinued use for more than one year and structure at issue was not in use for more than two years, any newly constructed sign was required to conform to the zoning ordinance.
- ***Key Excerpt***– Rejecting as immaterial petitioner’s arguments that the sign should have been allowed based on a 1992 variance for a sign located on the same property allegedly not subject to amortization rules, or alternatively because the City failed to notify petitioner or any prior owner of the sign of the "cap and replace" provisions adopted by the City in 2004, the Court stated, “Section 7-13-8(f)(5) provides that a legal nonconforming sign cannot be reestablished after its discontinued use for 60 days. As further explained in section 7-17-3(a), ‘[a] nonconforming use shall be deemed discontinued after a period of 365 consecutive days regardless of any substantial good faith efforts to re-establish the use. Thereafter, the structure or property associated with the use may be used only for conforming use.’ Thus, if a nonconforming sign that has been deemed legal by the granting of a variance or through a ‘cap and replace’ agreement is not used for 425 consecutive days, the sign loses the benefit of the variance or the ‘cap and replace’ agreement, and any new sign must comply with all ordinances. Here, it is undisputed that the prior sign was removed from the property in 2007 and that no sign existed on the property until the current sign was built in 2010. Because the sign was not in use during a period of more than 425 consecutive days, the new sign constructed in 2010 was required to conform with the ordinance. Accordingly, the Board correctly found that even ‘if the sign had been a non-conforming sign that could have continued in use after 1997, it still could not be reestablished after being removed for more than two years.’”

The Court also rejected petitioner’s claim that he should be allowed to reestablish the sign because a city official allegedly failed to inform him, during the time the previous sign was not in use and was being considered for replacement, that there was a time limit for reestablishing the sign. The Court stated, “It is well established . . . [that] ‘a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past.’ City of Raleigh v. Fisher, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950). This is because ‘[i]n enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State[,]’ and such power ‘cannot be bartered away by contract, or lost by any other mode.’ *Id.*” Citing Helms v. City of Charlotte, 255 N.C. 647, 652, 122 S.E.2d 817, 821 (1961) and Overton v. Camden Cnty., 155 N.C. App. 391, 398, 574 S.E.2d 157, 162 (2002), the Court held that representations by a city official cannot immunize a petitioner from violations of zoning ordinances.

- **Synopsis**– Appeal by petitioner from trial court’s January 2014 order affirming respondent’s decision. Affirmed. (Opinion by Judge Geer, with Judge Stroud and Judge Bell concurring.)

**Land Use: Unsafe Buildings;
Order Authorizing Demolition**

SIX AT 109, LCC v. TOWN OF HOLDEN BEACH, ___ N.C. App. ___, 767 S.E.2d 400 (No. COA14-388, Brunswick– 12/31/14)

- **Holding**– Trial court correctly affirmed Board of Commissioners’ order which affirmed inspector’s order condemning petitioner’s ocean-side motel as unsafe under G.S. 160A-426 and authorizing its demolition under G.S. 160A-429.
- **Key Excerpt**– The Court rejected petitioner’s contention that the Town did not have subject matter jurisdiction to condemn the ocean-side motel. “Petitioner contends that an examination of findings of fact 1, 7, 18, 19, 20, and 21, contained in Inspector Evan’s 12 March 2012 order, which mention ‘tidal action’ and ‘proximity to the Atlantic Ocean,’ indicate that the Town’s action was impermissibly premised on enforcing the public trust doctrine. We note that findings 1, 7, 19, and 21 con-

tained in Inspector Evans' order relate to structural defects in the building and petitioner's failure to establish that repairs would decrease the danger of further damage due to the proximity of the structure to the ocean. Finding of fact 18 relates to the accessibility of the structure to persons involved in unacceptable, unsafe, and illegal activities as documented by law enforcement officers. Based on these findings of fact, Inspector Evans ordered the demolition of the ocean-side structure. . . .

The Board of Commissioners' 7 September 2012 order to condemn the ocean-side structure was, like Inspector Evans' 12 March 2012 order, based on findings that the structure was a hazard and that it had been the site of criminal conduct and other activities which constituted a nuisance. Furthermore, the Commissioners found that the structure was likely to contribute to vagrancy, presented a threat of disease, and was a danger to children.

We note that neither Inspector Evans, in his 12 March 2012 order; the Board of Commissioners, in its 7 September 2012 order; nor the Superior Court, in its 3 July 2013 order, reference the structure's location within the public trust area as a basis for its condemnation.

Pursuant to North Carolina General Statutes, section 160A-426, a municipality has jurisdiction to condemn a structure if it is unsafe. See [G.S.] 160A-426 ('Every building that shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, shall be held to be unsafe....'), -432(b) ('[A] city may . . . cause the building or structure to be removed or demolished.'). The respective orders of Inspector Evans and the Board of Commissioners make clear that the ocean-side structure was condemned because it was determined to be unsafe. These orders were proper based on General Statutes, section 160A-205(a) ('A city may enforce any ordinance adopted pursuant to this section or any other provision of law upon the State's ocean beaches located within or adjacent to the city's jurisdictional boundaries to the same extent that a city may enforce ordinances within the city's jurisdictional boundaries.'). Accordingly, we overrule petitioner's argument to the effect that the Board's action was based on an impermissible premise."

- **Synopsis**– Appeal by petitioner from trial court’s July 2013 order affirming Board of Commissioners’ order. Affirmed. (Opinion by Judge Bryant, with Judge Elmore and Judge Ervin concurring.)

Land Use; Variance; Motion to Reconsider

OSBORNE V. TOWN OF NAGS HEAD, ___ N.C. App. ___, 760 S.E.2d 766 (No. COA13-1122, Dare– 7/15/14)

- **Holding:** Under G.S. 160A-388(e)(1), a four-fifth’s majority is required to grant a variance, but an ordinary majority is sufficient to conduct other business. Where three-fifths of the Board voted to deny a motion to reconsider, this constituted a sufficient vote to deny that motion.
- **Key Excerpt:** In vacating the trial court’s order and remanding to the trial court for further remand to the Board of Adjustment for entry of an order denying the Osbornes’ motion to reconsider, the Court stated, “The General Statutes provide that ‘[t]he concurring vote of four-fifths of the board shall be necessary *to grant a variance*. A majority of the members shall be required to decide *any other quasi-judicial matter* or to determine an appeal made in the nature of certiorari.’ [G.S.] 160A-388(e)(1) (2013) (emphasis added); *see also* Nags Head Town Code § 48-595 (2013). The language of the statute is quite clear; a four-fifths majority is required to grant a variance, but an ordinary majority is sufficient to conduct other business. In the instant case, three fifths of BOA voted to deny the motion to reconsider. Under both the North Carolina General Statutes and the Nags Head Town Code, this was a sufficient vote to deny the motion to reconsider.

The failure to deny a negative proposition is not the same as adopting a positive proposition. BOA was not voting on a motion to grant a variance, but rather on a motion to deny a motion to reconsider.

Because the chair of BOA mistakenly ruled that the motion to reconsider had passed, BOA was without authority to consider the merits of the motion. Boards of Adjustments, and other local government boards, perform vital services within our governmental structure. It is as important that they follow proper procedures as it is for city councils and boards of county commissioners. Procedures for the operation of

such boards are in place to ensure fair treatment for all persons who come before them for rulings. We cannot ignore the violation, in the instant case, of procedures set forth in [G.S.] 160A-388(e) and the Town Code of Nags Head.”

- **Synopsis:** Appeal by petitioners from April 2013 order affirming Board of Adjustment’s decision. Vacated and remanded. Opinion by Judge Steelman, joined by Judge Hunter (Robert C.) and Judge Bryant.

Land Use; Zoning Amendment;
Statement of Consistency

ATKINSON V. CITY OF CHARLOTTE, ___ N.C. App. ___, 760 S.E.2d 395 (No. COA13-1226, Mecklenburg– 7/29/14)

- **Holding:** In neighboring property owner’s action to have amendment to text of zoning ordinance invalidated for consistency statement’s failure to comply with G.S. 160A-383, Court of Appeals reverses trial court’s order granting summary judgment in favor of the City and intervenors. (The consistency statement read, “STATEMENT OF CONSISTENCY This petition is found to be consistent with adopted policies and to be reasonable and in the public interest....”)
- **Key Excerpt:** The Court emphasized that in Wally v. City of Kannapolis, 365 N.C. 449, 722 S.E.2d 481 (2012) (see *Digest of Municipal Law 2011-12*, p. 19), the Supreme Court stated that G.S. 160A-383 “requires that defendant take two actions in this situation: first, adopt or reject the zoning amendment, and second, approve a proper statement. *Id.* The approved statement must *describe* whether the action is consistent with any controlling comprehensive plan and *explain* why the action is ‘reasonable and in the public interest.’” *Id.*, 365 N.C. at 452, 722 S.E.2d at 483 (emphasis added). In reversing the trial court’s order and remanding for the entry of summary judgment in favor of plaintiffs declaring the amendment to be void, the Court of Appeals stated, “[U]nder Wally, judicial review of whether a city has adequately adopted a consistency statement as defined by [G.S.] 160A-383 is limited to a court’s determination of whether a city adopted a consistency statement which contains, at a minimum, both a description of whether the zoning amendment is consistent with any controlling land use plan

and an explanation as to why the amendment is reasonable and in the public interest. Once it is determined that a proper statement, which includes a description and explanation, has been adopted, the content of the statement ‘is not subject to judicial review.’ [G.S.] 160A-383.

The Statement of Consistency adopted by the City Council ... cannot reasonably be said to include an ‘explanation’ as to why the amendment is reasonable and in the public interest under the plain meaning of that term. Instead, the statement merely tracks the language of [G.S.] 160A-383. While this statement attempts to more specifically address the requirements of [G.S.] 160A-383 than the more generalized statement that the Court rejected in Wally, it still suffers from the same fatal flaw: ‘The statement adopted by the City Council provides no ... explanation,’ as required by the statute. *Id.* at 454, 722 S.E.2d at 484. As a result, the City did not comply with [G.S.] 160A-383 when it failed to adopt a proper ‘statement’ as that term is defined by the statute and interpreted by Wally, and its purported ‘Consistency Statement’ does not fall within that statute’s protections against judicial review.”

- **Synopsis:** Appeal by plaintiffs from June 2013 order granting summary judgment in favor of defendant-City and intervenors. Reversed and remanded. Opinion by Judge Calabria, joined by Chief Judge Martin and Judge McGee.

**Land Use; Subdivision Performance Bonds;
Assignment; Standing; Statute of Limitations**

TOWN OF BLACK MOUNTAIN V. LEXON INS. CO., ___ N.C. App. ___, 768 S.E.2d 302 (No. COA14-740, Buncombe– 12/16/14), *disc. review denied*, 368 N.C. 249, 771 S.E.2d 307 (No. 28P15, 4/9/05)

- **Holding**– In action seeking to enforce a series of subdivision performance bonds, Court of Appeals holds that trial court properly entered summary judgment in plaintiffs' favor, rejecting defendants-sureties' arguments that: (1) neither the Town nor the County had standing to enforce the bonds; and (2) the statute of limitations for plaintiffs' claim had run.

- **Key Excerpt**– Determining that the assignment of the bonds from the County to the Town after annexation was sufficient to allow the Town to enforce the agreements against defendants, the Court held that the assignment conferred standing upon the Town to sue for the alleged breach of those agreements. “[W]e find nothing in the law or within the agreements themselves indicating that assignment of the bonds from the County to the Town was impermissible or without legal effect. *See North Carolina Bank & Trust Co. v. Williams*, 201 N.C. 464, 465-66, 160 S.E. 484, 485-86 (1931) (holding that an indemnity bond was freely assignable as a chose in action). Indeed, defendants ‘do not contest the general law that, absent contrary language or public policy, bonds can be assigned.’ Here, the bonds do not contain any language restricting their assignability, and we believe public policy favors assignability under these facts. It is uncontested that substantial infrastructure remains incomplete as a result of the developers’ financial troubles. If neither the Town nor the County are able to call the bonds, defendants would in effect receive a windfall by being released from their obligation to pay the sums owed under the bonds.”

Rejecting defendants’ argument that summary judgment for plaintiffs was improper because their cause of action was time-barred by the statute of limitations, the Court held that under the *Rowan Cnty. Bd. of Educ. v. United States Gypsum Co.* cases analyzing the doctrine *nullum tempus occurrit regi*, plaintiffs were not subject to the statutory time limitation in G.S. 1-52. “[T]he County entered into the bonds pursuant to section 153A-331, the same statute utilized by Polk County in *Derwort*. Section 153A-331 provides that counties are authorized to enact subdivision control ordinances for a variety of purposes consistent with their governmental police powers, such as: (1) ‘provid[ing] for the orderly growth and development of the county’; (2) ‘creat[ing] conditions that substantially promote public health, safety, and the general welfare’; and (3) ‘provid[ing] for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with county plans, policies and standards.’ *Id.* The statute goes on to allow counties to enter into bonds like those at issue in this case ‘[t]o assure compliance with these and other ordinance requirements[.]’ *Id.* Because the enabling statute allowing for the creation of the bonds between defendants and the County explicitly states that such bonds exist to ‘assure compliance’ with subdivision ordinance requirements, which this Court has characterized as ‘a duty owed to the general public, not a specific individual,’ *Derwort [v. Polk County]*, 129

N.C. App. [789] at 792, 501 S.E.2d [379] at 381 [(1998)], and the subdivision is open to the public, we conclude that plaintiffs are engaged in a governmental function by attempting to enforce the bonds against defendants.” (Citations omitted.)

The Court concluded its opinion by stating, “Even assuming that the County and the Town were engaged in a proprietary function sufficient to trigger the three-year time limitation in section 1-52, we would still find that summary judgment for plaintiffs is proper. Defendants argue that this cause of action accrued before 25 October 2009, three years before the complaint was filed on 25 October 2012, because by that time plaintiffs knew or should have known that the construction work would not be completed within a reasonable time. We disagree. The bonds themselves do not specify any particular date by which time the construction needed to be completed. Although there is evidence that the Town was concerned in mid-2009 by the relative lack of progress on the construction, as late as 18 December 2009, a principal in the development companies stated that they were ‘committed to finishing [the] communities without need of the bonds.’ Indeed, construction activity by the developers continued well into 2010. Therefore, because it is clear that the developers themselves had not yet given up on the project, we disagree with defendants’ contention that there is a genuine issue of fact regarding whether plaintiffs knew or should have known prior to 25 October 2009 that the project would not be completed within a reasonable time.”

- **Synopsis**– Appeal by defendants from trial court’s March 2014 order granting summary judgment for plaintiffs. Affirmed. (Opinion by Judge Hunter (Robert C.), with Chief Judge McGee and Judge Steelman concurring.) Defendants filed a petition for discretionary review in January 2015. The N.C. Supreme Court denied the petition on April 9, 2015.

Land Use; Zoning; Parking;
Substantive Due Process

PATMORE V. TOWN OF CHAPEL HILL, ___ N.C. App. ___, 757 S.E.2d 302 (No. COA13-1049, Orange- 4/1/14), *disc. rev. denied*, 367 N.C. 519, 758 S.E.2d 874 (No. 139P14, 6/11/14)

- ***Holding***– In plaintiffs’ challenge to zoning amendment limiting number of cars that can be parked on a residential lot in a neighborhood conservation district, trial court properly entered summary judgment for defendant-Town. “Where defendant enforced a zoning amendment by citing the owners of rental properties rather than their tenants because it was a more effective method of enforcement, their enforcement against property owners was rationally related to the purpose of the zoning restriction and did not violate plaintiffs’ right to substantive due process. [G.S.] 160A-301 governs a municipality’s authority to regulate parking in public vehicular areas, while the zoning amendment was a land use restriction intended to curb over-occupancy of rental properties by limiting the number of cars parked on a rental property. Because the zoning amendment and [G.S.] 160A-301 do not address the same subject, the principle of *expressio unius est exclusio alterius* does not apply. Lanvale Properties, LLC v. County of Cabarrus, 366 N.C. 142, 731 S.E.2d 800, *reh’g denied*, 366 N.C. 416, 733 S.E.2d 156 (2012), held that an [adequate public facilities] ordinance was not a zoning ordinance, and did not change the law governing the requirements for a valid zoning ordinance.” (Emphasis in original.)
- ***Key Excerpt***– In rejecting plaintiffs’ substantive due process claim, the Court stated, “[T]he zoning amendment was enacted to address the problem of over-occupancy of rental houses, and thereby reduce the problems associated with over-occupancy. Plaintiffs do not dispute that over-occupancy leads to other problems, or that decreasing the over-occupancy of rental properties is a valid goal of a zoning ordinance.... These affidavits, which were tendered by defendant’s employees with experience in enforcing zoning regulations, state that enforcement of the zoning amendment against property owners was more effective than trying to track down transient student tenants. We hold that the increased effectiveness of this enforcement mechanism is rationally related to the goal of decreasing over-occupancy in the NNC [Northside Neighborhood Conservation] district.”

In rejecting plaintiffs’ argument that the zoning amendment “[was] invalid as being unauthorized under [G.S] 160A-301,” the Court stated, “the zoning amendment was ‘drafted to help address the [NNC] neighborhood’s over-occupancy problem directly.’ Defendant’s planning department found that ‘the number of vehicles parked on a residential lot’ provided a ‘reasonable approximation of how many people are living at the property’ and determined that ‘[l]imiting the number of parked cars therefore helps limit over-occupancy’ without ‘trying to count and limit the number of occupants directly.’ We conclude that, although the parties have referred to the zoning amendment as a ‘parking’ regulation, the context establishes that the amendment was intended to regulate the ratio of bedrooms to tenants in rental properties in the NNC District by restricting the number of vehicles parked in the yard.

We hold that regulation of parking in public vehicular areas is fundamentally different from zoning restrictions on the number of cars that may be parked on a private lot by tenants of a house, and that there is no basis for assuming that our General Assembly intended legislation allowing a city to regulate parking in public vehicular areas to diminish a town’s authority to adopt land use zoning regulations that deal with population density or over-occupancy of rental homes. The fact that defendant chose to restrict the number of cars parked on a lawn as a rough proxy for the number of tenants does not transform this into a ‘parking’ ordinance within the meaning of [G.S] 160A-301. We hold that the doctrine of *expressio unius est exclusio alterius* is not applicable to the relationship between [G.S] 160A-301 and the zoning amendment.”

- **Synopsis**– Appeal by plaintiffs from June 2013 order granting defendant-Town’s motion for summary judgment. Affirmed. (Opinion by Judge Steelman, with Judge McGee and Judge Ervin concurring.) Plaintiffs filed a petition for discretionary review in May 2014. The North Carolina Supreme Court denied the petition on June 11, 2014.

Land Use; Permits; Medical Clinic; Permit Denial; Competent Evidence; Harmony

TEMPLETON PROPERTIES, L.P. v TOWN OF BOONE, ___ N.C. App. ___, 759 S.E.2d 311 (No. COA13-1274, Watagua– 6/3/14), *aff'd by an equally divided Court*, 368 N.C. 82, 772 S.E.2d 239 (No. 234PA14, 6/11/15) (*per curiam*) (Reversing trial court's order, Court of Appeals holds that the Board's denial of petitioner-Templeton's special use permit was supported by competent evidence and was proper under its harmony analysis. (Opinion by Judge Hunter, Jr. (Robert N.), with Judge Stroud and Judge Dillon concurring.) For prior appeals in this matter, *see* Templeton Properties, L.P. v. Town of Boone, 219 N.C. App. 266, 724 S.E.2d 604 (2012) (*see Digest of Municipal Law 2011-2012*, p. 29); Templeton Properties, L.P. v. Town of Boone, 198 N.C. App. 406, 681 S.E.2d 566 (No. COA08-1237, Watagua– 7/21/09) (*unpublished*) (*see Digest of Municipal Law 2009-2010*, p. 34). Petitioner filed a petition for discretionary review in July 2014. The North Carolina Supreme Court allowed the petition on December 18, 2014. On June 11, 2015, the Court issued a *per curiam* opinion stating “Justice Jackson 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. *See, e.g., Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); Goldston v. State, 364 N.C. 416, 700 S.E.2d 223 (2010).”))

Land Use; Spot Zoning; Dismissal; Common Owner Requirement

WALLY V. CITY OF KANNAPOLIS, ___ N.C. App. ___, 768 S.E.2d 200 (No. COA13-1425, Cabarrus– 12/31/14) (*unpublished*), *disc. review denied*, ___ N.C. ___, 776 S.E.2d 193 (No. 58P15, 8/21/15) (In plaintiffs' appeal from trial court order dismissing spot zoning claim, Court of Appeals affirms, rejecting plaintiffs' argument that the trial court should not have applied the common owner requirement. “Just as Musi was bound to follow Good Neighbors [of S. Davidson v. Town of Denton, 355 N.C. 254, 559 S.E.2d 768 (2002)], we are bound to follow Musi [v. Town of Shallotte, 200 N.C. App. 379, 684 S.E.2d 892 (2009)]. Plaintiffs acknowledge in

their brief that ‘the common owner rule’ as articulated in Musi ‘appear[s] to prohibit . . . the use of the spot zoning label when more than one tract owned by legally distinct owners is involved.’ Since the complaint in this case challenges as spot zoning the rezoning of two parcels owned by two legally distinct owners, Plaintiffs have failed, under Musi, to state a claim for spot zoning.” (Opinion by Chief Judge McGee, with Judge Stephens and Judge Ervin concurring.) Plaintiffs filed a petition for discretionary review in February 2015. The N.C. Supreme Court denied the petition on August 21, 2015.)

Land Use; Variance; Whole Record Test

OSBORNE V. TOWN OF NAGS HEAD, ___ N.C. App. ___, 763 S.E.2d 338 (No. COA13-1123, Dare— 7/15/14)(*unpublished*) (In petitioners’ appeal from order affirming Board of Adjustment’s denial of request for a variance, N.C. Court of Appeals affirms. “Pursuant to the whole record test, even in the presence of conflicting evidence and findings, we must affirm if there was substantial evidence supporting BOA’s findings. We hold that there was such evidence in the record, that this evidence supports the findings cited above, and that those findings in turn support BOA’s conclusion that the Osbornes are not subject to unnecessary hardship in their use of Lot 30. We hold that BOA did not err in denying the Osbornes’ request for a variance, and that the trial court did not err in its 16 April 2013 order affirming BOA.” (Opinion by Judge Steelman, with Judge Hunter (Robert C.) and Judge Bryant concurring.))

Land Use; Zoning, Nonconforming Use; Zoning Map; Burden of Proof

SHEARL V. TOWN OF HIGHLANDS, ___ N.C. App. ___, 762 S.E.2d 877 (No. COA14-113, Macon— 9/2/14) (In petitioner’s appeal from trial court order affirming Board of Adjustment’s decision concluding that petitioner was making commercial use of property located in a residential zone, Court of Appeals vacates and remands. “Petitioner contends that the Superior Court erred by determining that he had the burden of proving that his nonconforming use was grandfathered in under the terms of the zoning ordinance given that the Town . . . has lost an official zoning map crucial to his defense. Given the unique factual circumstances presented here, we hold that

Respondent bears the burden of proving that Petitioner's zoning violation dates back to Petitioner's purchase of the property. Because the burden was inappropriately placed on Petitioner, we vacate the superior court's order and remand this matter for a new hearing consistent with this opinion.” (Opinion by Judge Hunter, Jr. (Robert H.), joined by Judge Ervin and Judge Davis.)

LAW ENFORCEMENT

Law Enforcement; Fourth Amendment; Excessive Force; Public Official Immunity

LEDBETTER V. CITY OF DURHAM, ___ N.C. App. ___, 768 S.E.2d 200 (No. COA14-656, Durham— 12/31/14) (*unpublished*) (In plaintiff's action alleging claims for assault and battery and use of excessive force arising from being tackled to the ground by police during an open-air drug bust, Court of Appeals upholds the trial court's denial of the tackling officer's motion for summary judgment. Officer argued that the forecast of evidence showed the force used was reasonable under the circumstances and that he was entitled to public official and qualified immunity. The Court found a triable issue of fact as to whether his actions in taking control of and subduing plaintiff were objectively reasonable under the circumstances. Viewed in light most favorable to the plaintiff, evidence shows that officer acted with "a degree of recklessness great enough to be 'equivalent in spirit to actual intent' and that he did so wantonly and while exceeding the scope of his lawful authority to use force under the circumstances." (Citation omitted.) (Opinion by Judge Dillon, with Judge Hunter, Robert C., and Judge Davis concurring.))

Law Enforcement; Fourth Amendment; Search and Seizure; Curtilage; Multi-Unit Dwelling

STATE V. WILLIFORD, ___ N.C. App. ___, 767 S.E.2d 139 (No. COA14-50, Wake— 1/6/15), *disc. review denied*, 368 N.C. 251, 771 S.E.2d 303 (No. 69P15, 4/9/15) (After defendant's refusal to provide DNA to investigators in a murder case, an officer conducting surveillance in an unmarked vehicle retrieved a cigarette butt discarded by defendant in the parking lot directly adjacent to his four-unit apartment building. Court of Appeals finds that trial court properly denied motion to suppress DNA evidence obtained from the cigarette, holding as a matter of first impression that the parking lot of a multi-unit apartment building is outside the curtilage of the individual apartments and warrantless seizure of evidence discarded there does not violate constitutional rights. Court looked to the four factors for resolving curtilage questions established in United States v. Dunn, 480 U.S. 294 (1987) (proximity of area to the home, whether included within an enclosure surrounding the home, nature of uses to which put, and steps taken by resident to protect from observation by passers-by). Although the park-

ing lot was in close proximity to the four-unit apartment building, it was not enclosed and was used by both building residents and the general public, with no indications of restricted access or status as a private lot. Thus “the parking lot was not a location where defendant possessed ‘a reasonable and legitimate expectation of privacy that society is prepared to accept.’” (Opinion by Judge Calabria, with Judge Elmore and Judge Stephens concurring.) Defendant filed a petition for discretionary review in February 2015. The N.C. Supreme Court denied the petition on April 9, 2015.)

PERSONNEL

Personnel; Random Drug Testing; Suspension of License; Specific Performance

BENJAMIN V. CITY OF DURHAM & NCDOT, ___ N.C. App. ___, 756 S.E.2d 887 (No. COA13-909, Durham— 4/15/14) (*unpublished*), *disc. review denied*, ___ N.C. ___, 766 S.E.2d 609 (No. 137P14, 10/9/14) (In plaintiff's action arising from suspension of commercial driver's license (CDL) upon refusal to take random drug test, trial court correctly dismissed action for failure to plead each element of claim for specific performance. (Opinion by Judge Bryant, with Judge Stephens and Judge Dillon concurring.) Plaintiff filed a petition for discretionary review in June 2014. The N.C. Supreme Court denied the petition on October 9, 2014.)

Personnel; Workers' Compensation; Depression

JOHNSON V. CITY OF RALEIGH, ___ N.C. App. ___, 768 S.E.2d 201 (No. COA14-730, Industrial Commission— 12/31/14) (*unpublished*) (Plaintiff-public works employee sustained a compensable lower back injury on the job and later sought medical expenses for depression on the grounds that this condition was causally related to the injury. Physician's testimony that to a reasonable degree of medical certainty the depression was caused by back injury, back pain and consequent physical limitations was sufficient to support the Commission's finding of causation. Dismissing the argument that the conclusion was based solely on *post hoc ergo propter hoc*, the Court of Appeals determined that the physician's testimony made clear that her opinion was not based merely on temporal sequence, but also on evaluations, examinations, testing, and treatment experience. Court affirms the Industrial Commission's opinion and award. (Opinion by Judge Davis, with Judge Elmore and Judge Ervin concurring.))

Personnel; Wrongful Discharge; First Amendment; Pleadings

FELTMAN V. CITY OF WILSON, ___ N.C. App. ___, 767 S.E.2d 615 (No. COA14-585, Wilson— 12/31/14) (Plaintiff alleged that her termination was in retaliation for exercise of her First Amendment rights in speaking out against improper practices by her supervisor. Court reverses trial court's partial grant of defendants' motion to

dismiss and remands. Failure to affirmatively plead the “but for” standard to state a claim for violation of constitutional rights was not fatal. “Plaintiff’s allegations sufficiently alleged causation; she was not required to use the magic words, ‘but for.’” (Opinion by Judge Davis, with Judge Hunter, Robert C., and Judge Dillon concurring.)

Personnel; Wrongful Discharge; Public Policy

POPE V. CITY OF ALBEMARLE, ___ N.C. App. ___, 775 S.E.2d 36 (No. COA14-1140, Stanly– 6/2/15) (*unpublished*) (In plaintiff’s appeal from trial court’s order granting defendant-City’s motion for summary judgment, Court of Appeals affirms. Court rejects plaintiff’s contentions *inter alia* that trial court erred because there were genuine issues of material fact as to whether he was wrongfully discharged for reporting criminal behavior by a fellow police officer to law enforcement in violation of public policy. “Even if we were to assume, without deciding, that plaintiff’s complaint sufficiently alleged a specific North Carolina public policy that defendant violated, see *id.*, defendant met its burden of showing that there was no genuine issue of material fact as to whether plaintiff’s termination was based on grounds unrelated to plaintiff’s reports to law enforcement. Defendant sufficiently forecasted evidence that plaintiff was terminated not because he reported the illegal behavior but because he failed to do so within a reasonable time after he witnessed [the detective’s] criminal behavior in violation of several department policies. In response to plaintiff’s complaint, defendant offered undisputed evidence showing that even though plaintiff had witnessed [the detective] break the law in at least three instances, plaintiff had never reported this behavior nor reported [the detective’s] attempts to cover up his crimes. Although plaintiff’s complaint alleges, and plaintiff argues in this appeal, that he was terminated in retaliation for reporting criminal activity, the evidence provided by plaintiff in support of his wrongful termination claim overwhelmingly shows his complicity in those crimes and purposeful withholding of information concerning those crimes for a period of six years. In sum, even construing the evidence in a light most favorable to plaintiff, plaintiff knowingly and purposefully withheld information about [the detective’s] crimes for years and only reported these things once he believed he was at risk for losing his job. Thus, plaintiff’s claims of wrongful discharge amount to noth-

ing but unsupported speculation, and plaintiff has produced insufficient evidence to defeat defendant's motion for summary judgment." Affirmed. (Opinion by Judge Inman, with Judge Elmore and Judge Geer concurring.)

PROCEDURE

Procedure; Attorney's Fees;
Spot-Zoning; Recycling Center

ETHERIDGE V. COUNTY OF CURRITUCK, ___ N.C. App. ___, 762 S.E.2d 289 (No. COA13-834, Currituck– 8/5/14)

- ***Holding***– In plaintiffs’ action challenging rezoning, Court of Appeals affirms order entering summary judgment as to plaintiffs’ illegal spot zoning claim and denying their request for attorney’s fees under G.S. 6-21.7. “The trial court properly awarded summary judgment in favor of plaintiffs for their illegal spot zoning claim because there was no genuine issue of material fact as to whether the rezoning constituted illegal spot zoning. Pursuant to [G.S.] 6-21.7, if the trial court finds only that a local government acted outside the scope of its authority, the award of attorney’s fees is discretionary. However, if the trial court additionally finds that the local government’s action was an abuse of discretion, the award of attorney’s fees becomes mandatory. Since the court properly determined that the County did not abuse its discretion when it approved the illegal spot zoning of the property, it was not required to award attorney’s fees to plaintiffs.”
- ***Key Excerpt***– In rejecting plaintiffs’ argument that a finding of illegal spot zoning constituted an abuse of discretion as a matter of law requiring an automatic award of attorney’s fees under G.S. 6-21.7, the Court stated, “Pursuant to that statute, a ‘finding by the court that the city or county acted outside the scope of its legal authority,’ such as a finding that a local government engaged in illegal spot zoning, does not, in and of itself, trigger the mandatory award of attorney’s fees. [G.S.] 6-21.7. Instead, the trial court must *also* explicitly consider and ‘find[] that the city’s or county’s action was an abuse of its discretion’ in order to trigger the mandatory award of fees. *Id.* Plaintiffs’ proposed interpretation of the statute would collapse these two distinct required inquiries into one, essentially deleting a portion of the statute. Such an interpretation is impermissible because our Courts ‘have no power to add to or subtract from the language of the statute.’ ... Contrary to plaintiffs’ argu-

ment, the language of [G.S.] 6-21.7 clearly indicates that the General Assembly believed that a local government could erroneously act outside the scope of its legal authority but yet not be acting in a manner ‘so arbitrary that it could not have been the result of a reasoned decision.’ *Id.* Thus, we conclude that under the plain language of the statute, the trial court is always required to separately determine both (1) that a local government acted outside the scope of its legal authority; and (2) that the act in question constituted an abuse of discretion before the court is required to award attorney’s fees.” (Citations omitted; emphasis in original.)

The Court further rejected the argument set forth by plaintiffs that “the undisputed facts of the case *sub judice* are particularly egregious and further demonstrate the County’s abuse of discretion in approving the rezoning.” In holding that there was sufficient evidence for the trial court to decide that the rezoning was not an abuse of discretion and that there was also sufficient evidence for the trial court, in its discretion, to deny plaintiffs’ motion for attorney’s fees, the Court of Appeals stated, “[T]he evidence cited by plaintiffs was not the only information before the Board. [The rezoning applicant] explained the benefits that the recycling center would bring to the community and informed the Board how he expected the center would operate, including the steps he would take to limit the center’s impact on nearby landowners. In addition to [the rezoning applicant], three individuals spoke in favor of the rezoning at the public hearing. Two of these individuals specifically referenced prior uses of the property and suggested that the recycling center would not impact the area surrounding the property in a materially different manner than these prior uses. The third individual supported the rezoning because he felt there was a need for industry in Currituck County.”

“Based upon the information presented during the hearing, [a Commissioner] made the following motion in favor of the rezoning [*and statement accompanying motion appears verbatim in opinion*].... This statement is the only information on the record regarding the Board’s reasoning for the approval of the rezoning, which occurred shortly after [the Commissioner’s] motion was made. The motion demonstrates that the Board considered most of the *Chrismon* [*v. Guilford Cty.*, 322 N.C. 611, 370 S.E.2d 579 (1988)] reasonable-

ness factors prior to approving the rezoning. [The Commissioner] specifically cited his belief that the rezoning was consistent with the UDO [Unified Development Ordinance], noted benefits to the community such as economic growth and significant community support, and discussed how the newly zoned property would be consistent with surrounding property uses, including how the recycling center's impact would be mitigated through the special use permit process. While we have determined that [the Commissioner's] reasoning was insufficient to meet the County's legal burden of making 'a clear showing of a reasonable basis for the zoning,' *Good Neighbors* [of *S. Davidson v. Town of Denton*], 355 N.C. [254] at 258, 559 S.E.2d [768] at 771 [(2002)], we cannot conclude that the Board's reliance on the information cited by [the Commissioner] was so unreasonable that the legislative act of the rezoning 'could not have been the result of a reasoned decision.' *Bishop* [v. *Ingles Mkts.*], ___ N.C. App. at ___, 756 S.E.2d [115] at 121 [(2014)]. Accordingly, the trial court did not err by determining that the rezoning was not an abuse of discretion by the County."

- **Synopsis**– The case involved cross-appeals from an April 2013 order awarding summary judgment for plaintiffs as to the illegal spot zoning claim and requiring the parties to pay their own attorney's fees and costs. Affirmed. Opinion by Judge Calabria, with Judge Hunter (Robert C.) and Judge Geer concurring.

Procedure; Street Closing; Standing

COX V. TOWN OF ORIENTAL, ___ N.C. App. ___, 759 S.E.2d 388 (No. COA13-1222, Pamlico– 7/1/14)

- **Holding:** In plaintiff's appeal from dismissal of action challenging *inter alia* defendant-Town's decision to permanently close avenue, Court of Appeals affirms, holding that plaintiff lacked standing to contest defendant-Town's decision.
- **Key Excerpt:** "In his appeal from the Town's decision and action for a declaratory judgment, Plaintiff alleged that he 'is a member of the public[] and a taxpaying resident[] of the Town....' He also stated that he owns property in 'Block No. 13,' which is approximately

three blocks away from Avenue A, and asserted that he ‘is aggrieved’ by the Town's decision. Lastly, Plaintiff alleged that he is a ‘successor in interest to the dominant tract owner and offeror of dedication to public uses for use as rights of way all such land as is depicted as rights-of-way on the 1900 Town Map, including any subsequent modifications of such rights of ways[.]’ On appeal to this Court, Plaintiff argues that he is an aggrieved person due to his status as a ‘citizen and resident of the Town’ and ‘because he is a successor in interest to these public rights of way, which were designed and dedicated to provide access to the citizens of [the Town] to the public trust waters of the Neuse River, when the Town ... was laid out [in the year 1900].’ We are unpersuaded.

Plaintiff has provided no factual basis to support the argument that he is an aggrieved person.... His property is not adjacent to Avenue A or South Avenue and was not adjacent to those roads when the Town was designed in 1900. He has not alleged any personal injury and provides no reason to believe that his turn-of-the-last-century predecessor in interest had some special connection to Avenue A or South Avenue *distinct from the rest of the community*. Rather, he couches his arguments in terms of broad, public rights flowing from the Town's inception that have no bearing on our analysis here. Indeed, Plaintiff's entire argument is rooted in his status as a member of the Town's taxpaying populace. Such status is patently insufficient to support an appeal from, or action for declaratory judgment regarding, a town's order closing a street or alley under G.S. 160A-299.” (Emphasis in original; citation omitted.)

- **Synopsis:** Appeal by plaintiff from April 2013 orders. Affirmed. Opinion by Judge Stephens, with Judge Geer and Judge Ervin concurring.

Procedure; Certiorari Petition; Motion to Dismiss; Failure to Join Necessary Party; Motion to Amend; Land Use; Permits

PHILADELPHUS PRESBYTERIAN FOUND., INC., v. ROBESON COUNTY BD. OF ADJUSTMENT, ___ N.C. App. ___, 754 S.E.2d 258 (No. COA13-777, Robeson— 1/7/14) (*unpublished*), *disc. review denied*, 367 N.C. 504, 758 S.E.2d 873 (No. 45P14, 6/11/14) (In petitioners’ ap-

peal from an order dismissing their *certiorari* petition seeking review of County's issuance of conditional use permit to Buie Lake Plantation, LLC, for construction of sand mining and processing facility, Court of Appeals affirms. Court also rejects contention that the trial court erred by depriving petitioners of the ability to amend their petition to join the omitted necessary party. "[G]iven that Petitioners violated the relevant provisions of [G.S.] 160A-393(e) by failing to name Buie Lakes as a respondent, the trial court correctly dismissed their *certiorari* petition for lack of subject matter jurisdiction. N.C. Cent. Univ. v. Taylor, 122 N.C. App. 609, 612-13, 471 S.E.2d 115, 118 (1996) (stating that '[f]ailure to meet the pleading requirements for this extraordinary writ deprives the superior court of subject matter jurisdiction of the particular matter over which the moving party seeks review'), *aff'd*, 345 N.C. 630, 481 S.E.2d 83 (1997). . . . [G]iven that the trial court lacked jurisdiction over this case as a result of Petitioners' failure to join Buie Lakes as a party respondent, it also lacked the authority to allow them to amend their petition to cure this defect." (Opinion by Judge Ervin, joined by Judge Calabria and Judge Stephens.) Petitioners filed a petition for discretionary review in February 2014. The Supreme Court denied the petition on June 11, 2014.)

Procedure; Jurisdiction; Negligence; Minimum Housing Code

SIMMONS V. CITY OF GREENSBORO, ___ N.C. App. ___, 758 S.E.2d 706 (No. COA13-1065, Guilford— 4/1/14) (*unpublished*), *disc. review denied*, 367 N.C. 509, 758 S.E.2d 876 (No. 147P14, 6/11/14) (Superior court properly granted defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(1) in plaintiff's action filed under the Tort Claims Act, G.S. 143-291, seeking damages stemming from disposition of her property. In affirming, Court of Appeals states, "Here, neither the City of Greensboro nor [its] HCD [Housing and Community Development Department] is an agency of the State. Rather, under North Carolina law, a 'city' is 'a municipal corporation organized under the laws of this State.' [G.S.] 160A-1(2) (2013). Thus, the Tort Claims Act does not authorize claims against cities or departments thereof. Further, the Tort Claims Act does not grant jurisdiction to hear such claims in Superior Court. Subject matter jurisdiction of claims under the Tort Claims Act is 'within the exclusive and original jurisdiction of the Industrial Commission' and 'not within the jurisdic-

tion of the Superior Court.” (Citations omitted.) (Opinion by Judge Hunter, Jr. (Robert N.), with Chief Judge Martin and Judge Elmore concurring.) Plaintiff filed a petition for discretionary review in May 2014. The Supreme Court denied the petition on June 11, 2014.)

Procedure; Mediation; Sanctions; Annexation

ROANOKE COUNTRY CLUB, INC. v. TOWN OF WILLIAMSTON, ___ N.C. App. ___, 759 S.E.2d 711 (No. COA13-756, Martin–5/6/14)(*unpublished*), *disc. review denied*, ___ N.C. ___, 763 S.E.2d 389 (No. 194P14, 10/9/14) (In petitioners’ appeal, Court of Appeals unanimously affirms trial court’s: (1) judgment in respondent-Town’s favor, affirming annexation ordinance and rejecting challenges under G.S. 160A-49(c) (availability of report) and G.S. 160A-48(e) (boundaries); and (2) order awarding sanctions to respondent-Town due to petitioners’ failure to comply with the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions. (Opinion by Judge Calabria, with Judge Bryant and Judge Geer concurring.) Petitioners filed a petition for discretionary review in June 2014. The North Carolina Supreme Court denied the petition on October 9, 2014.)

PUBLIC CONTRACTS

Public Contracts; Consent Judgment;
Convention Center; Economic Development

WELLS V. CITY OF WILMINGTON, ___ N.C. App. ___, 774 S.E.2d 355 (No. COA14-1367, New Hanover– 6/16/15)

- ***Holding***– City did not violate a consent judgment entered into prohibiting the use of public funds to subsidize a privately owned hotel as part of a broader plan to construct a convention center complex.
- ***Key Excerpt***– The Court rejected plaintiff’s contention that the trial court erred in its conclusion of law that the consent judgment did not apply to the land for the hotel site. “First, as a general matter, it is well established in North Carolina that restrictions on the alienation or sale of real property ‘are strictly construed in favor of the free use of land whenever strict construction does not contradict the plain and obvious purpose of the contracting parties.’ Armstrong v. Ledges Homeowners Ass’n, 360 N.C. 547, 555, 633 S.E.2d 78, 85 (2006) (citations and emphasis omitted). Here, the Consent Judgment’s express terms do not restrict or even reference the land for the hotel site. Instead, the Consent Judgment’s plain language defines its scope as applying to ‘[a]ny plans . . . to construct a public Convention Center with adjacent parking facilities (“the Convention Center”) in conjunction with an adjoining privately owned hotel (“the Hotel”) (collectively “Convention Center Project”) within . . . Downtown Wilmington,’ and prohibits Wilmington from using ‘public funds of any nature . . . to acquire, build, equip, operate or otherwise underwrite or subsidize the Hotel or its operations[.]’ The omission of any reference to the land for the hotel site is unsurprising in light of the trial court’s unchallenged findings of fact that ‘the land for the hotel site was not discussed’ when the Consent Judgment was negotiated because ‘[t]he land was not part of the dispute in the prior lawsuit[.]’ Indeed, Wilmington had already purchased the land before Wells filed his original lawsuit, which was aimed at preventing Wilmington from spending room occupancy tax revenues to assist a private developer in constructing a hotel in conjunction with the Convention Center, and we construe the Consent Judgment’s plain language accordingly. Although Appellants urge this Court to expand the Consent Judgment’s scope beyond its express terms to cover the land for the hotel and all future proposed hotel-related transactions, our prior decisions demonstrate that when a consent judgment’s plain language is clear, we infer the parties’ intentions from its words rather than from additional

terms that one party subsequently seeks to add. *See, e.g., Handy Sanitary Dist. [v. Badin Shores Resort Owners Ass'n, Inc.]*, ___ N.C. App. at ___, 737 S.E.2d [795] at 798 [(2013)]; *see also Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (declining appellants' request to read 'something more' into a consent judgment's unambiguous terms because '[w]e are governed by the plain words of the consent judgment').” The Court determined that the trial court did not err in concluding that the sale of land was beyond the scope of the consent judgment. The Court also held that the trial court did not err in concluding that the purchase and development agreement did not violate the consent judgment because the City was not subsidizing or underwriting the hotel and that the trial court did not err in its conclusion that the City acted within its authority under G.S. 158-7.1(d).

- **Synopsis**– Appeal by plaintiff from June 2014 order denying motion in the cause. Affirmed. Opinion by Judge Stephens, with Judge Steelman and Judge McCullough concurring.

Public Contracts; Breach of Contract; Specific Performance; Indefiniteness

CHARLOTTE MOTOR SPEEDWAY, LLC v. COUNTY OF CABARRUS, ___ N.C. App. ___, 748 S.E.2d 171 (2013), *disc. review improv. allowed*, 367 N.C. 533, 766 S.E.2d 340 (No. 503PA13, 12/19/14) (*per curiam*) (In appeal from unanimous opinion of Court of Appeals affirming dismissal of amended complaint against County, Supreme Court determines that discretionary review was improvidently allowed. Plaintiffs primarily contended that they asserted a valid claim for breach of contract in connection with an agreement between the parties concerning the continued presence of the Charlotte Motor Speedway in Cabarrus County and the construction of an adjacent racing facility. Citing Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974), Court of Appeals holds that silence of defendant-County's letter at issue on several key terms rendered it void for indefiniteness and that the trial court correctly granted County's motion to dismiss as to plaintiffs' contract claims. Court of Appeals notes that the letter was silent as to any specific obligation on the part of plaintiffs and was unclear as to precisely when defendant-County would be required to expend the funds at issue. Plaintiffs' tort claims properly dismissed. (Opinion by Judge Davis, with Chief Judge McGee and Judge Geer concurring.))

Public Contracts; Equitable Claims; Governmental Immunity

AGI ASSOCIATES LLC v. CITY OF HICKORY, 773 F.3d 576 (4th Cir., No. 13-2097– 12/11/14) (In hiring an aviation company to manage services at its airport, defendant-City acted in a proprietary, rather than governmental, capacity and accordingly does not have immunity from aviation company’s equitable claims. Fourth Circuit upholds trial court’s denial of motion to dismiss claims for unjust enrichment and disgorgement of rents. “Just as a private corporation would ordinarily be subject to liability for disgorgement of profits and unjust enrichment claims, so too should a municipality when it acts proprietarily. . . . [A] municipality may not hide behind the veil of its governmental status and seek a special protection from liability not afforded to its peers engaging in similar proprietary activities.” (Citation omitted.) (Opinion by Senior Circuit Judge Davis, joined by Chief Judge Traxler and Judge Diaz.))

PUBLIC ENTERPRISES

Public Enterprises; Water & Sewer;
Unjust Enrichment

CRUMP V. CITY OF HICKORY, ___ N.C. App. ___, 772 S.E.2d 873 (No. COA14-569, Ca-tawba- 4/21/15) (*unpublished*)

- ***Holding***– In plaintiffs’ appeal from trial court's order granting summary judgment in favor of City and denying their cross-motion for summary judgment, Court of Appeals affirms. At issue was plaintiffs' payment of a \$292,500.00 facility charge to City for the purpose of reserving "sanitary sewer capacity allocation" for 117 lots of a residential subdivision called River Oaks Landings.
- ***Key Excerpt***– “Here, the evidence of record demonstrates that (1) Plaintiffs paid the City the facility charge as a result of the desire of River Oaks Landings, LLC that River Oaks have sewer service rather than septic service; (2) Plaintiffs incorporated the cost of the facility charge into the purchase price of River Oaks by "rais[ing] the price" to \$9.7 million after the River Oaks plan had been revised to include sewer service from the City; (3) after River Oaks Landings, LLC defaulted and declared bankruptcy, Bank of Granite acquired ownership of River Oaks and the recorded plat for the development was amended to reflect Bank of Granite's intent to use individual lot septic tanks for sewage treatment and municipal or community water service; (4) after purchasing River Oaks, Progreso opted to remove any infrastructure that had been installed for the purpose of facilitating the use of the City's sewer service; and (5) the service capacity of the WWTP that was reserved by the payment of the facility charge remains available for River Oaks' use if its owners choose to utilize the City's water and sewer services and construct the accompanying infrastructure necessary to connect to the City's system. Indeed, in his deposition, Mr. Greer testified as to the reason why River Oaks was not presently using the City's sewage treatment service, stating that the City would have ‘gladly serviced those lots’ and that ‘the only thing that's a limiting factor on use of the treatment plant was that the developer did not complete construction of the infrastructure.’

Thus, it is clear that (1) the City reserved the wastewater service capacity for the 117 lots requested by Plaintiffs, and; (2) the fact that River Oaks is not currently receiving the City's sewage treatment service is due to the decisions of its owners to pursue an alternative method of wastewater treatment rather than a result of any unwillingness by the City to provide sewer service. As this Court has previously explained, '[t]he doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received *under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated.*' Collins v. Davis, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (emphasis added), *aff'd per curiam*, 312 N.C. 324, 321 S.E.2d 892 (1984). Given that the City did in fact allocate sanitary sewer capacity for the 117 lots and that the owners of River Oaks have voluntarily chosen not to utilize that service capacity, the City's retention of the facility charge paid by Plaintiffs is not an injustice that the doctrine of unjust enrichment was designed to remedy."

- **Synopsis**– Plaintiffs appealed from trial court's December 2013 order granting summary judgment in defendant-City's favor and denying their cross-motion for summary judgment. Affirmed. (Opinion by Judge Davis, joined by Judge Elmore and Judge McCullough.)

PUBLIC RECORDS ACT

Public Records Act; Settlements;
Lawsuit Commenced by Public Entity

JACKSON V. CHARLOTTE MECKLENBURG HOSPITAL AUTH., ___ N.C. App. ___, 768 S.E.2d 23 (No. COA13-1338, Mecklenburg– 12/31/14)

- **Holding**– Settlement documents in an action brought by an entity covered by the Public Records Act are public records. Trial court erred in granting defendant-hospital authority’s motion to dismiss action seeking a copy of confidential settlement agreement with a bank.
- **Key Excerpt**– The Court of Appeals noted that the plain language of G.S. 132-1.3 contains only two specific statutory exemptions to the Public Records Act pertaining to settlement documents— for settlements in medical malpractice actions against hospital facilities, and for settlements of certain actions against state agencies when sealed by a court order. Because the statute did not contain a specific exception for settlement agreements arising out of litigation commenced by an entity subject to the Public Records Act, plaintiff was entitled to obtain a copy of the agreement at issue.

The Court rejected defendant-hospital authority’s argument contending that by specifically stating public records “shall include” settlements in cases instituted *against* state agencies, the General Assembly necessarily intended to exclude from public records settlements in cases instituted *by* state agencies: “This contention – implying an exemption – cannot be reconciled with the Supreme Court’s mandate that a document is a public record in the absence of a ‘specific statutory exemption.’” (Citations omitted.) The Court instead noted that “shall include” is used in G.S. 132-1.3 as a term of enlargement, rather than one of limitation, and should not be construed as indicating that *only* settlements in actions brought against an agency are public records. The Court further opined that defendant-hospital authority’s construction of G.S. 132-1.3 would lead to results that are inconsistent with other statutes, notably G.S. 132-1.1(a) (communications by legal counsel to public agency) and G.S. 143-318.11(a)(3) (provision addressing settlement of claims).

The Court noted that enactment of G.S. 114-2.4A in 2014 (requiring settlements in which a state agency receives more than \$75,000 to be available to the public at the Legislative Library) provides further evidence of legislative intent to make documents in actions instituted by a state agency public records. With regard to defendant-hospital authority's policy arguments, the Court cited News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 481, 412 S.E.2d 7, 16 (1992) to reiterate that "it is not our role to expand upon the General Assembly's specific statements in the Public Records Act."

- *Synopsis*– Appeal by plaintiff from July 2013 order granting defendants' motion to dismiss. Reversed. (Opinion by Judge Geer, with Judge Stephens and Judge Ervin concurring.)

Public Records Act; Custodian; State Employee Emails

CLINE V. HOKE, ___ N.C. App. ___, 766 S.E.2d 861 (No. COA14-428, Wake– 12/16/14) (In suit under the Public Records Act to gain access to emails of employees in the Administrative Office of the Courts, plaintiff named the assistant AOC director as defendant. Court observes that G.S. 132-2 provides that the public official in charge of an office having public records shall be the custodian thereof. Accordingly, plaintiff failed to pursue the action against the designated custodian of AOC's public records, and Court holds that motion to dismiss was properly granted. Court addresses State's contention that the emails of employees were not in the custody of AOC, rejecting the notion that emails are the responsibility of a multitude of individual custodians: "each individual state employee who creates a public record is not automatically the custodian thereof." (Opinion by Chief Judge McGee, with Judge Geer and Judge Stroud concurring.))

TORTS

Torts; Negligence; Motor Vehicles;
Investigation; Public Duty Doctrine

INMAN V. CITY OF WHITEVILLE, ___ N.C. App. ___, 763 S.E.2d 332 (No. COA14-94, Columbus– 9/16/14)

- **Holding**– In plaintiff’s action alleging officers’ negligence in investigation of incident in which plaintiff’s motor vehicle was “run off the road” by another motorist, Court of Appeals affirms order dismissing plaintiff’s complaint based upon public duty doctrine. “The duty to investigate motor vehicle accidents and to prepare accident reports is a general law enforcement duty owed to the public as a whole.”
- **Key Excerpt**– The Court stated, “Our Supreme Court has made clear that with regard to local governments, the public duty doctrine only extends to actions taken in the exercise of their general duty to protect the public. Lovelace v. City of Shelby, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000) (‘While this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public’s general protection, we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public.’ (internal citations omitted)); *see also* Wood v. Guilford Cty., 355 N.C. 161, 169, 558 S.E.2d 490, 496 (2002) (explaining that public duty doctrine ‘retains limited vitality, as applied to local government, within the context of government’s duty to protect the public generally, which is necessarily limited by the resources of the local community’ (internal citations, quotation marks, and brackets omitted)). The public duty doctrine ‘acknowledges the limited resources of law enforcement and works against judicial imposition of an overwhelming burden of liability.’ Little v. Atkinson, 136 N.C. App. 430, 432, 524 S.E.2d 378, 380, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).”

“This Court has applied the public duty doctrine to limit the liability of municipalities and their law enforcement agencies in circumstances beyond the ‘classic example of . . . a negligence claim alleging a law enforcement agency's failure to protect a person from a third party's criminal act.’ Strickland [v. Univ. of N.C. at Wilmington], 213 N.C. App. [506] at 508, 712 S.E.2d [888] at 890 [(2011), *disc. review denied*, ___ N.C. ___, 720 S.E.2d 677 (2012)]. Indeed, we have applied the doctrine where — as here — the allegations of negligence stem from a law enforcement officer's handling of a motor vehicle accident. For example, in Lassiter v. Cohn, 168 N.C. App. 310, 607 S.E.2d 688, *disc. review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005), we concluded that the public duty doctrine shielded the City of Durham and one of its police officers from liability in an action arising out of the officer's allegedly negligent management and control of a multi-vehicle accident scene.... In Scott [v. City of Charlotte], 203 N.C. App. 460, 464, 691 S.E.2d 747, 750, *disc. review denied*, 364 N.C. 435, 702 S.E.2d 305 (2010)], we held that the public duty doctrine barred the plaintiff's negligence claim against the City of Charlotte where officers of the Charlotte-Mecklenburg Police Department had pulled over an individual, David Scott (‘Mr. Scott’), on suspicion of impaired driving, determined that he was ‘physically impaired in some respect,’ been informed that Mr. Scott had suffered a stroke during the past year, and failed to call for medical assistance.... In both Lassiter and Scott, this Court recognized that the plaintiffs' claims arose from circumstances in which the local governments at issue, through their law enforcement officers, were engaged in their general duty of protecting the public and that, consequently, they were shielded from liability by the public duty doctrine....”

“Here, Plaintiff's negligence claim is premised on the manner in which a motor vehicle accident was investigated by law enforcement officers. Specifically, Plaintiff has alleged that [the officer] and his supervisor ‘failed in their obligation and duty to perform competent law enforcement services in that they failed to determine both the responsible party [for] this [accident] and the facts indicating his responsibility.’ The duty to investigate motor vehicle accidents and to prepare accident reports is a general law enforcement duty owed to the public as a whole. *See Lassiter*, 168 N.C. App. at 320, 607 S.E.2d at 694 (describing officer's interview with parties involved in car accident as ‘general investigatory dut[y]’); *see also* [G.S. 20-166.1(2013) (re-

quiring police department of city or town to investigate ‘a reportable accident’ and ‘make a written report of the accident within 24 hours of the accident’). As such, the circumstances at issue in this case fall within the scope of the public duty doctrine.”

- *Synopsis*– Appeal by plaintiff from an August 2013 order dismissing plaintiff’s complaint pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure. Affirmed. Opinion by Judge Davis, with Judge Hunter, Jr. (Robert N.) and Judge Ervin concurring.

Torts; Negligence; Immunity; Child Abuse; Investigation

OLAVARRIA V. WAKE COUNTY HUMAN SERVICES, ___ N.C. App. ___, 763 S.E.2d 18 (No. COA13-1215, Wake– 7/1/14) (*unpublished*), *disc. review denied, appeal dismissed*, ___ N.C. ___, 763 S.E.2d 394 (No. 245P14, 10/9/14) (In plaintiff’s *pro se* action against defendants including *inter alia* Town of Wendell Police Department, trial court correctly dismissed action pursuant to Rules 12(b)(1), (2), (4), (5) & (6). of the N.C. Rules of Civil Procedure. (Opinion by Judge Dillon, with Judge Stroud and Judge Hunter, Jr. concurring.) Plaintiff filed a petition for discretionary review and notice of appeal based upon constitutional question in July 2014. The North Carolina Supreme Court denied the petition and allowed defendants’ motions to dismiss the appeal on October 9, 2014.)

Torts; Public Official Immunity; State Constitutional Claim; Malice

DEBAUN V. KUSZAJ, ___ N.C. App. ___, 767 S.E.2d 353 (No. COA12-1520-2, Durham- 12/16/14), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 853 (No. 386PA13-2, 3/5/15) (In plaintiff’s action arising from alleged injuries from having been tasered by police officer, Court affirms trial court’s grant of summary judgment with regard to state constitutional claims. Even though plaintiff must prove malice to overcome the affirmative defense of public officer immunity, his tort claims of assault and battery, use of excessive force, and malicious prosecution still provide him with an adequate common law remedy. Court of Appeals holds that plaintiff cannot bring a cause of action directly under the N.C. Constitution against either the City or the police officer. (Opinion by Judge Calabria, with Judge Ervin and Judge Dillon concurring.) Plaintiff filed a petition for discretionary review in January 2015. The N.C. Supreme Court denied the petition on March 5, 2015.))

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