

**DIGEST OF MUNICIPAL LAW
PART I: CASE LAW 2011-2012**

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INTRODUCTION

The **DIGEST OF MUNICIPAL LAW, PART I: CASE LAW 2011-2012** is a joint publication of the North Carolina League of Municipalities and the North Carolina Association of Municipal Attorneys. Included primarily are summaries of cases of significance to municipalities decided by the North Carolina Supreme Court and North Carolina Court of Appeals, along with selected federal cases. The cases primarily include those reported in the July 2011 through June 2012 issues (Volume XXXI) of **MUNICIPAL LAW NOTES**, the League's monthly publication for municipal attorneys. (Note: Pursuant to the North Carolina Rules of Appellate Procedure, a decision of the N.C. Court of Appeals which is reported without a published opinion may be cited under limited circumstances. *See* N.C. R. App. P. Rule 30(e)(3).¹ Unpublished opinions are not binding precedent in the Fourth Circuit. *See* Rules 32.1 & 36(b) of the Local Rules of the United States Court of Appeals for the Fourth Circuit.)

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

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¹ Rule 30(e) provides as follows, "(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion,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

ANNEXATION

Annexation; Services; Statement of Financial Impact; Boundaries

CAPPS V. CITY OF KINSTON, ___ N.C. App. ___, 715 S.E.2d 520 (No. COA10-1477, Le-noir– 8/16/11), *disc. review denied*, 365 N.C. 362, 719 S.E.2d 22 (No. 383P11, 11/9/11)

- **Holding**– Court of Appeals rejects petitioners’ arguments alleging inadequacy of plan as to street maintenance and sewer service and alleging insufficiency of statement regarding final impact of annexation. Court remands on boundary issue, as trial court had concluded that "the setting of the Annexation Boundary parallel to Silverdale Road within the [Greater] Galaxy Mobile Home Park Property complies with the requirements of [G.S.] 160A-48(e)."
- **Key Excerpt**– “In light of the amendment mandating that ‘a municipal governing board shall use recorded property lines and streets as boundaries[,]’ the plain language of [G.S.] 160A-48(e) requires that a municipal governing board draw annexation boundary lines on recorded property lines and on streets. Although the annexation boundary lines at issue may run parallel to Silverdale Road, they are not located on either a recorded property line or on a street. Mr. Stevens testified that the annexation boundary lines at issue were set off from Silverdale Road so that the Annexation Area would include portions of the Galaxy Home Mobile Park which were located on the opposite side of Silverdale Road from the remainder of the Galaxy Mobile Home Park. As such, the annexation boundary lines at issue do not substantially comply with [G.S.] 160A-48(e). Were we to hold that a municipal governing board's drawing of annexation boundary lines parallel to – rather than on – recorded property lines and streets substantially complied with the statute, the amendment to [G.S.] 160A-48(e) would essentially be ignored.” (Emphasis in original.)
- **Synopsis**– Appeal by petitioners from April 2010 judgment. Affirming in part and remanding in part. (Opinion by Judge McGee, with Judges Ervin and Beasley concurring.) Petitioners filed a petition for discretionary review in September 2011. The N.C. Supreme Court denied the petition for discretionary review on November 9, 2011.

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

ASHLEY V. CITY OF LEXINGTON, 209 N.C. App. 1, 704 S.E.2d 529, *disc. review denied*, 365 N.C. 347, 718 S.E.2d 377 (2011) (Petitioners' challenge to annexation ordinances (adopted July 2008), alleging *inter alia* insufficiency of City's utilization of tax parcel identification numbers under G.S. 160A-49(e)(1) and inadequacy of sewer line extension policy, rejected. (Opinion by Judge McGee, with Judges Geer and Stroud concurring.) Petitioners filed a petition for discretionary review in February 2011. The N.C. Supreme Court denied the petition for discretionary review on October 6, 2011.)

Annexation; Annexation Report; Meaningful Extension of Services

GATES FOUR HOMEOWNERS ASSOC., INC. V. CITY OF FAYETTEVILLE, 208 N.C. App. 281, 702 S.E.2d 553 (2010) (*unpublished*), *disc. review denied*, 365 N.C. 329, 717 S.E.2d 395 (No. 49P11, 8/25/11) (In petitioners' challenge to annexation ordinance, Court of Appeals holds that annexation report complied with requirements of G.S. 160A-47(3)(a) and that trial court correctly granted summary judgment for City. (Opinion by Judge Elmore, with Judges Jackson and Stephens concurring.) The N.C. Supreme Court denied petitioners' petition for discretionary review on August 25, 2011.)

Annexation; Financing of Extension of Services; Public Hearing

ROYAL PALMS MHP, LLC V. CITY OF WILMINGTON, ___ N.C. App. ___, 713 S.E.2d 793 (No. COA10-1259, New Hanover— 6/7/11) (*unpublished*), *disc. review denied*, 365 N.C. 359, 718 S.E.2d 397 (No. 289P11, 11/9/11) (Court of Appeals affirms trial court's entry of summary judgment for City in petitioners' challenge to 2009 annexation ordinance; petition alleged that the City failed to substantially comply with G.S. 160A-47 as to setting forth the method by which the City planned to finance the extension of services to Monkey Junction for the fiscal year the annexation became effective and that the City failed to comply with G.S. 160A-49 by denying City residents and persons resident or owning property in the annexation area the opportunity to be heard at the public hearing; Court of Appeals holds, "Where annexation did not actually take place in 2010, petitioners' argument that the City violated [G.S.]

160A-47 by failing to project cost for that year is moot. The accuracy of the City's prediction of the system development charges [for connecting existing developed properties to the Cape Fear Public Utility Authority water and sewer system] and sales tax revenues associated with annexation is beyond the scope of our appellate review"; in holding that petitioners failed to meet their burden to present evidence that they were prejudiced by the alleged lack of opportunity to be heard at the public hearing, G.S 160A-49(d), upon observing that three individuals spoke in favor of annexation and twenty spoke in opposition, Court states that, "There is no evidence presented that the individuals allegedly denied an opportunity to speak at the public hearing in opposition to annexation would have offered anything beyond what was offered by the twenty individuals that did speak in opposition to annexation." (Opinion by Judge Steelman, with Judges Calabria and Beasley concurring.) Petitioners filed a petition for discretionary review in July 2011. The N.C. Supreme Court denied the petition for discretionary review on November 9, 2011.)

Annexation; Land Bridge

EDMONDSON V. CITY OF ROCKY MOUNT, ___ N.C. App. ___, 714 S.E.2d 275 (No. COA10-669, Nash- 7/19/11) (*unpublished*) (In plaintiffs' challenge to January 2010 annexation ordinance, Court of Appeals affirms order granting summary judgment for City; rejecting *inter alia* petitioners' argument that a portion of the annexation area classified in the ordinance as a necessary land connection did not comply with the requirements of G.S. 160A-48(d)(2). (Opinion by Judge Calabria, with Judge Robert C. Hunter and Judge Elmore concurring.))

CONSTITUTIONAL LAW

Constitutional Law; Privilege License Tax; Internet Sweepstakes

IMT, INC. v. CITY OF LUMBERTON, ___ N.C. App. ___, 724 S.E.2d 588 (No. COA11-813, Robeson– 2/21/12), *notice of appeal filed*, ___ N.C. ___ (No. 127A12, 3/25/12)

- **Holding**– In a 2-1 decision, N.C. Court of Appeals holds that privilege license tax imposed upon businesses carrying out cyber-gambling through the use of computer terminals is authorized by G.S. 160A-211.

Rejecting plaintiffs-appellants’ arguments that: 1) the Ordinance is inapplicable because appellants do not operate "games of chance" as required under the Ordinance in that their prizes are predetermined; 2) the Ordinance is inapplicable because their games do not "require payment" as the Ordinance requires; 3) the Ordinance unlawfully classifies property for taxation; 4) the Ordinance violates the rule of uniformity by taxing similarly situated taxpayers differently in that the City is taxing only a specific type of computer terminal that conducts "games of chance" while excluding all other computer terminals located in other businesses from taxation; 5) the Ordinance does not apply uniformly because it unlawfully exempts certain property from taxation; 6) assuming *arguendo* the City had the authority to enact such a taxing scheme, there is no rational basis for such a discriminatory tax; 7) the Ordinance imposes an unjust and inequitable taxation scheme; 8) the Ordinance is preempted by the Internet Tax Freedom Act, 47 U.S.C.A. § 151 (2007), as it applies to businesses engaged in promotional activity using the internet.

- **Key Excerpt**– “Under [G.S.] 160A-211, the City has the authority to levy privilege license fees, imposed for the privilege of carrying on a certain business. [G.S.] 160A-211 (2011). Property is often used to carry on a certain business, and when the privilege of carrying on that business is taxed, the tax may also be levied on the property used to carry on that particular trade, profession, or business. Such a tax on the property is not considered a separate property tax but is incidental to the tax on the privilege of conducting a certain business. Basing a privilege license tax on the units of property a business has is common and will not invalidate a privilege license fee ordinance. Here, the City is not taxing individual computer terminals for the sake of taxing computers. The City is taxing businesses for the privilege of carrying out

cyber-gambling through the use of computer terminals, and we hold such a tax is authorized by [G.S.] 160A-211.

.....

Article V, Section 2 of the North Carolina Constitution provides ‘[n]o class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.’ N.C. Const. Art. V, § 2(2). ‘ “[A] tax is ‘uniform’ when it operates with equal force and effect in every place where the subject of it is found . . . and with reference to classification it is ‘uniform’ when it operates without distinction or discrimination upon all persons composing the described class.” ’ Hajoca Corp. v. Clayton, 277 N.C. 560, 569, 178 S.E.2d 481, 487 (1971) (citation omitted) (alteration in original). This uniformity standard applies to license taxes. *Id.* at 567, 178 S.E.2d at 486. Here, the City is taxing the business activity of cyber-gambling that uses computer or gaming terminals to carry on the business. Any tax on the computer terminals is incidental to the main purpose of the privilege license fee: to tax the privilege of conducting the particular business of cyber-gambling. With this understanding, we hold the tax to be uniform, as it applies to every single cyber-gambling establishment that utilizes computer or gaming terminals to carry on its business.

.....

[W]e hold the City's privilege license tax on cyber-gambling establishments uniformly applies to all persons engaged in the cyber-gambling business. The 43 other businesses being taxed lesser amounts for privilege license purposes are different classes of business and include, *inter alia*, businesses selling knives, movie theaters, pawnbrokers, beer and wine wholesalers, automobile dealerships, bowling alleys and even a circus. To compare the privilege license tax amount Appellants are subjected to with the amounts incredibly distinct businesses are subjected to and to claim disparate tax treatment requiring a rational basis is an invalid and misleading argument that we reject.” (Citations omitted.)

- **Dissent**— Concluding that a remand for trial was warranted based upon the observation that plaintiffs’ evidence, via verified pleadings demonstrating dissimilar tax rates, created a genuine issue of material fact as to whether the license tax was unjust and inequitable, the dissent stated, “As the majority notes, to be ‘just and equitable,’ as required by Art. V, § 2(1) of our state constitution, a license tax must not be ‘so

high as to amount to a prohibition of the particular business.’ State v. Razook, 179 N.C. 708, 710, 103 S.E. 67, 68 (1920)... The defendant in Razook alleged that a municipal ordinance imposing a license tax on his business was unreasonable and excessive, and thus invalid. *Id.* In rejecting his argument, our Supreme Court noted that defendant provided no evidence *at trial* that the tax was intended to prohibit his business. *Id.*... Granted, ' "the mere amount of the tax does not prove its invalidity." ' Razook, 179 N.C. at 711, 103 S.E. at 69 (citation omitted). However, the discrepancy between the tax imposed by the Ordinance upon Cyber Gambling establishments and all other businesses, while not conclusive evidence of the inequity of the tax, makes summary judgment improper.” (Emphasis in original.)

- **Synopsis**– Four separate cases were appealed, with orders entered during May and June 2011: the cases were consolidated pursuant to N.C. R. App. P. 11(d). Orders granting summary judgment for City affirmed in a 2-1 decision. (Majority opinion by Judge Robert N. Hunter, Jr., with Judge Geer concurring. Judge Robert C. Hunter dissented.) *Note:* In March 2012, a notice of appeal was filed with the Supreme Court (No. 127A12). The League filed an *amicus curiae* brief in July 2012. Oral argument occurred on November 13, 2012.

**Constitutional Law; First Amendment; Overbreadth;
Statute Prohibiting Electronic Machines and Devices for Sweepstakes**

HEST TECHNOLOGIES, INC. v. STATE OF NORTH CAROLINA, ___ N.C. App. ___, 725 S.E.2d 10 (No. COA11-459, Guilford– 3/6/12), *notice of appeal filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 169A11-2, 4/9/12) (In a 2-1 decision, N.C. Court of Appeals invalidates the General Assembly’s 2010 prohibition on electronic machines and devices for sweepstakes, G.S. 14-306.4 (entitled “Electronic machines and devices for sweepstakes prohibited”; *see* 2010 N.C. Sess. Laws 103); concluding that the entirety of G.S. 14-306.4 is an unconstitutionally overbroad regulation of free speech, majority holds, “[G.S.] 14-306.4 regulates constitutionally protected speech. Specifically, the portion of the statute which forbids revealing a sweepstakes result by means of an entertaining display acts as a regulation of plaintiffs’ right to communicate the results of otherwise lawful sweepstakes by means of a specific category of protected speech. While this Court has recognized, and we agree, that

‘[i]t is the legislature's prerogative to establish the conditions under which bingo, lotteries, or other games of chance are to be permitted,’ Animal Protection Society v. State of North Carolina, 95 N.C. App. 258, 269-70, 382 S.E.2d 801, 808 (1989), the portion of the statute at issue in the instant case regulates solely how a sweepstakes result is communicated, rather than the underlying circumstances under which the sweepstakes are permitted. The General Assembly cannot, under the guise of regulating sweepstakes, categorically forbid sweepstakes operators from conveying the results of otherwise legal sweepstakes in a constitutionally protected manner.” (Majority opinion by Judge Calabria, joined by Judge McGee. Judge Robert C. Hunter dissented.)

See also SANDHILL AMUSEMENTS, INC. V. STATE OF NORTH CAROLINA, ___ N.C. App. ___, 724 S.E.2d 614 (No. COA11-301, Wake-3/6/12), *notice of appeal filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 170A11-2, 4/9/12) (In a 2-1 decision by the same panel, majority states, “In a decision filed today in Hest Technologies, Inc. v. State, No. COA11-459, ___ N.C. App. ___, ___ S.E.2d ___ (2012), this Court held that ‘the portion of [G.S.] 14-306.4 which criminalizes the dissemination of a sweepstakes result through the use of an entertaining display must be declared void, as it is unconstitutionally overbroad.’ Since [G.S.] 14-306.4 has been declared void as unconstitutionally overbroad, the trial court’s order in the instant case must be reversed.”)

Constitutional Law; Privilege License Tax; Issue of Whether Tax is Just and Equitable

SMITH V CITY OF FAYETTEVILLE, ___ N.C. App. ___, 725 S.E.2d 405 (No. COA11-1263, Cumberland— 5/1/12), *notice of appeal filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 236A12, 6/1/12) (In appeal brought by internet sweepstakes operators from August 2011 order granting summary judgment to City, Court of Appeals affirms in part and reverses and remands in part; affirming trial court’s grant of City’s motion for summary judgment on the issues of whether the privilege license tax unlawfully classifies and exempts property for taxation, violates the rule of uniformity, and is preempted by federal law; setting forth “the following analysis to determine if a privilege license tax is reasonable and not prohibitory. The first step is to determine if the activity taxed is legal, and, if so, whether the city instituting the tax had the authority to do so. If so, the tax

enjoys a presumption of reasonableness. To rebut this presumption, the plaintiff must present evidence of his business's gross revenues, indicating that the tax is so high it prevented the plaintiff from conducting a profitable business. The plaintiff must also present evidence that the tax has prevented similarly situated businesses from being profitable. If the plaintiff successfully rebuts the presumption, the city instituting the tax may put forth evidence to show the tax is nevertheless reasonable and not prohibitory because either (1) the tax is reasonably related to the cost of increased police regulation of the taxed business or (2) the plaintiff inability to profit is due to his negligence in running his business and not because the tax is prohibitive. If the plaintiff successfully rebuts the presumption and the city presents evidence contradicting the plaintiff's evidence, the issue of whether the privilege license tax is reasonable and not prohibitory becomes a material question of fact reserved for the fact-finder"; reversing and remanding for trial as to the claims of 3 of 14 plaintiffs, on the issue of whether the tax is just and equitable of these plaintiffs' businesses given existence of genuine issue of material fact. "[W]e remand for trial for only these Plaintiffs and only on the issue of whether the privilege license tax is reasonable and not prohibitory." (Opinion by Judge Robert N. Hunter, Jr., with Judges Bryant and Beasley concurring.))

Constitutional Law; Separation of Powers; Tribal-State Compact; Standing; Video Poker

MCCRACKEN AND AMICK, INC., ET AL V PERDUE, ___ N.C. App. ___, 721 S.E.2d 765 (No. COA11-199, 2/7/12) (*unpublished*) (This appeal involved plaintiffs' separation of powers claim filed subsequent to a 2009 decision issued by the Court of Appeals in McCracken I, 201 N.C. App. 480, 687 S.E.2d 690 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010) (*see Digest of Municipal Law 2009-2010*, p. 15), which upheld the pertinent state legislation and its grant of exclusive gaming rights to the Eastern Band of Cherokee Indians. *See* 2006 N.C. Session Laws 6 (entitled "An Act ... to prohibit possession or operation of video-gaming machines as of January 1, 2007, except pursuant to a tribal-state compact.") Affirming trial court's order granting Governor's motion to dismiss, Court of Appeals states, "Plaintiffs ... appeal from the trial court's order granting the Governor's motion to dismiss

pursuant to Rule 12(b)(1), (b)(6), and (b)(7). Plaintiffs' lawsuit seeks a declaration that the separation of powers clause of the North Carolina Constitution mandates that only the General Assembly – and not the Governor – may negotiate, approve, and execute amendments to the existing Tribal-State compact between the Eastern Band of Cherokee Indians and the State of North Carolina ('the Compact') entered into under the federal Indian Gaming Regulatory Act ('IGRA') or any new IGRA compacts. We hold that plaintiffs have failed to demonstrate that they have standing to bring this action, and, therefore, we affirm the trial court's order granting the motion to dismiss." (Opinion by Judge Geer, with Judges Stroud and Thigpen concurring.)

Constitutional Law; Commerce Clause; Contract Cause; Landfills

WASTE INDUSTRIES USA, INC. v. STATE OF NORTH CAROLINA, ___ N.C. App. ___, 725 S.E.2d 875 (No. COA11-246, Wake— 5/1/12), *disc. review denied*, ___ N.C. ___, 731 S.E.2d 686 (No. 252P12, 8/23/12) (In plaintiffs' action presenting *inter alia* Commerce Clause challenge to G.S. 130A-295.6 (2011) (placing limitations on buffers, height, capacity, size, and location of solid waste landfills; *see* 2007 N.C. Sess. Laws ch. 543, § 1 & ch. 550, § 9), affirming trial court's September 2010 grant of summary judgment to defendants and defendants-intervenors; "We hold that plaintiffs have failed to forecast sufficient evidence to override the General Assembly's articulated objectives and that plaintiffs' evidence of discriminatory effect shows effects on solid waste generally and not out-of-state waste in particular. Because plaintiffs have also failed to show that any incidental effects on out-of-state waste outweigh the benefits to the State, the trial court properly granted summary judgment to defendants and defendant-intervenors on the Commerce Clause claim"; in rejecting plaintiffs' argument that the enacted legislation violates the Contract Clause by substantially impairing plaintiffs' franchise agreement with Camden County, Court states, "[T]he legislation at issue did not retroactively alter any rights of plaintiffs or Camden County under the franchise agreement or change either party's obligations. The franchise agreement did not grant plaintiffs a right to build or operate a landfill, but rather simply made it possible for plaintiffs to apply to the State for a permit allowing them to build and operate the landfill. See [G.S.] 130A-294(b1)(2). The agreement did not guarantee

plaintiffs would receive a permit or even be able to build their landfill. Indeed, the agreement anticipated that a permit might be denied or – as happened here — the law governing landfills might be changed”; also rejecting common law vested rights claim. Opinion by Judge Geer, with Judges Stroud and Thigpen concurring.) In June 2012, plaintiffs filed a petition for discretionary review and a notice of appeal based upon a constitutional question. The N.C. Supreme Court denied the petition and dismissed the appeal on August 23, 2012.)

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

AMWARD HOMES, INC. v. TOWN OF CARY, 365 N.C. 305, 716 S.E.2d 849 (2011) (*per curiam*) (After hearing oral argument on October 17, 2011, N.C. Supreme Court issues 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., Hall v. Toreros II, Inc.*, 363 N.C. 114, 678 S.E.2d 656 (2009).” The League filed an *amicus curiae* brief on behalf of defendant-appellant Town of Cary in this case in August 2011. (For a summary of the decision of the Court of Appeals, ___ N.C. App. ___, 698 S.E.2d 404 (No. COA09-923, Wake— 8/3/10), see *Digest of Municipal Law 2010-11*, p. 17.))

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

HAUGH v. COUNTY OF DURHAM, 208 N.C. App. 304, 702 S.E.2d 814, *disc. review denied*, 365 N.C. 328, 717 S.E.2d 397 (2011) (Rejecting plaintiffs’ challenge *inter alia* alleging that Durham’s tax incentive for benefit of Nitronex Corporation violated the Public Purpose Clauses of the N.C. Constitution, Article V, sections 2(1) (power of taxation) & 2(7) (contracts), or otherwise offered an incentive for a wholly intrastate relocation undertaken five years prior to awarding the incentive; Court of Appeals states, “Plaintiffs appear to attempt to distinguish the case *sub judice* from our holdings in Peacock [v. Shinn], 139 N.C. App. 487, 533 S.E.2d 842, *ap-*

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

Constitutional Law; First Amendment; Legislative Prayer

JOYNER V. FORSYTH COUNTY, 653 F.3d 341 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097, 181 L. Ed. 2d 978, 80 U.S.L.W. 3425 (No. 11-546, 1/17/12) (In a 2-1 decision, Fourth Circuit upholds district court’s issuance of both a declaratory judgment that the Board of Commissioners’ “invocation Policy, as implemented, violates the Establishment Clause of the Constitution” and an injunction against the Board “continuing the Policy as it is now implemented.” Majority observes, “The case law ... sets out clear boundaries.... [L]egislative prayer must strive to be non-denominational so long as that is reasonably possible — it should send a signal of welcome rather than exclusion. It should not reject the tenets of other faiths in favor of just one. Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. But legislative prayers that go further — prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith — transgress the boundaries of the Establishment Clause. Faith is as deeply important as it is deeply personal, and the government should not appear to suggest that some faiths have it wrong and others got it

right. Taken together, the principles set forth by the Supreme Court in Marsh [463 U.S. 783 (1983)] and Allegheny [492 U.S. 573 (1989)] and by this circuit in Wynne [376 F.3d 292 (4th Cir. 2004)] and Simpson [404 F.3d 276 (4th Cir. 2005)] establish that the Board's policy, as implemented, cannot withstand scrutiny.... Taken as a whole, it is clear that the prayers offered under the Board's policy did not 'evoke common and inclusive themes and forswear ... the forbidding character of sectarian invocations.' Simpson, 404 F.3d at 287. Wynne and Simpson set forth the constitutional line, and these prayers crossed it." Rejecting County's arguments that its neutral policy should be upheld given that the sectarian nature of the prayer at issue was simply a function of the "religious demographics of the communities" within the County, majority states, "It is not enough to contend, as the dissent does, that the policy was 'neutral and proactively inclusive,' when the County was not in any way proactive in discouraging sectarian prayer in public settings. Unlike in Simpson, the Board's policy did not require that invocations be 'non-sectarian' and avoid 'advanc[ing] any one faith or belief.' Simpson, 404 F.3d at 278. Moreover, while the Board's policy itself states that it is 'not intended ... to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination,' the letter it sends to the religious leaders actually giving the prayers sends a different message. The letter merely instructs them that the prayer opportunity should 'not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker.' In other words, the letter focuses on only one part of the Marsh test — proselytizing — and contains virtually no language discouraging leaders from advancing their own faith. *See Wynne*, 376 F.3d at 300 ("[P]roselytize" and "advance" have different meanings and denote different activities.').... This is not to say that the Board must abandon the practice of legislative prayer. Nor do we wish to set forth some sort of template for an ideal legislative prayer policy. After all, as we recognized in Simpson, 'too much judicial fine-tuning of legislative prayer policies risks unwarranted interference in the internal operations of a coordinate branch.' Simpson, 404 F.3d at 286–87. The bar for Forsyth County is hardly a high one." The County filed a petition for writ of certiorari in Oc-

tober 2011. *See* 80 U.S.L.W. 3309. The U.S. Supreme Court denied the petition for writ of certiorari on January 17, 2012.)

**Constitutional Law; Smoking Ban; Definition of Private Club;
Equal Protection**

DON LIEBES, GATE CITY BILLIARDS COUNTRY CLUB V. GUILFORD COUNTY DEPT. OF PUBLIC HEALTH, ___ N.C. App. ___, 724 S.E.2d 70 (No. COA10-979, Guilford- 7/19/11), *disc. rev. denied*, 365 N.C. 361, 718 S.E.2d 396 (No. 346P11, 11/9/11) (Court of Appeals affirms district court's order upholding two civil penalties for allowing smoking in Gate City Billiards Country Club (GCBCC), a commercial establishment; rejecting GCBCC's argument that statutory scheme, exempting nonprofit private clubs but including for-profit private clubs within the ambit of the Smoking Ban, allegedly violated its equal protection rights. *See* G.S. 130A-496 & 130A-492(11). (Opinion by Judge Beasley, with Judges McGee and Bryant concurring.) A petition for discretionary review was filed in August 2011. The N.C. Supreme Court denied the petition for discretionary review on November 9, 2012.)

Constitutional Law; Smoking Ban; Equal Protection; Private Clubs

EDWARDS V. PITT COUNTY HEALTH DIRECTOR, ___ N.C. App. ___, 725 S.E.2d 366 (No. COA11-754, Pitt— 3/20/12), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 174P12, 4/23/12) (Court of Appeals reverses trial court's November 2010 order which had invalidated smoking ban, G.S. 130A-492(11) & G.S. 130A-496(b)(3), as applied to petitioners' establishments on equal protection grounds; Court cites Liebes v. Guilford County Dept. of Public Health, *supra*, in upholding statute on rational basis review. (Opinion by Judge Stephens, joined by Judge Stroud. Judge Beasley concurring in separate opinion.))

EMINENT DOMAIN

Eminent Domain; Sufficiency of Notice; Beach Renourishment Project

FISHER V. TOWN OF NAGS HEAD, ___ N.C. App. ___, 725 S.E.2d 99 (No. COA11-1140, Dare– 5/15/12), *disc. review denied, appeal dismissed*, ___ N.C. ___, 731 S.E.2d 166 (No. 271P12, 8/23/12)

- **Holding**– Where Town sought voluntary easement across plaintiffs’ properties for beach renourishment project and plaintiffs subsequently filed an action seeking an injunction in advance of exercise of eminent domain, N.C. Court of Appeals holds that trial court properly granted Town’s motion for judgment on the pleadings.
- **Key Excerpt**– Rejecting plaintiffs’ contention that the notice failed to give a reasonable estimate of just compensation in that a monetary value is always necessary, the Court stated, “[W]e cannot find any case law requiring the providing of monetary compensation and moreover, the statement from [plaintiffs’ cited case, Sale v. Highway Commission, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955)] includes the language, ‘or its equivalent.’ *Id.* Defendant argues plaintiffs are not entitled to monetary compensation due to the benefits plaintiffs will receive from the additional expanse of beach resulting from the project. We believe the value of the additional land could be considered an equivalent to ‘actual payment.’ *Id.* Nonetheless, the correct value of just compensation is an issue more adequately resolved in the condemnation proceeding and not for the preliminary injunctive issues of whether the notice was sufficient. Thus, we believe plaintiffs’ argument that a lack of monetary compensation warrants injunctive relief is misplaced as the case law allowing a claim for injunctive relief seems to apply to situations involving deficient notice and other allegations.” (Citation omitted.) Turning to the issue of the sufficiency of the notice, the Court stated that the issue of whether or not defendant Town satisfied the notice requirements of G.S. 40A-40 presented a question of law and held that, “we see no authority requiring that defendant obtain appraisals prior to giving its estimate of just compensation to satisfy the notice requirement. Defendant is within its rights to estimate that it does not owe plaintiffs monetary compensation due to the benefits plaintiffs will receive from the project. Otherwise, the issue is one for a jury to resolve in the condemnation proceedings. This Court has

addressed the sufficiency of the notice pursuant to [G.S.] 40A-40 in two cases and in neither have we held that defendant's estimate must be reasonable in plaintiffs' eyes. *See* Scotland County v. Johnson, 131 N.C. App. 765, 769, 509 S.E.2d 213, 215-16 (1998); Catawba Cty. v. Wyant, 197 N.C. App. 533, 541, 677 S.E.2d 567, 572-73 (2009). We believe the issue of whether the estimate of just compensation is proper is better left to the condemnation hearing and as a result we hold that defendant's estimate of no compensation adequately satisfies the notice requirement.”

Rejecting plaintiffs’ final argument that the public trust doctrine precluded defendant from going forward with the project, the Court stated, “[P]laintiffs contend that the State, in its sovereign capacity, and not defendant, may assert rights in private property by means of the public trust doctrine. *Id.* However, plaintiffs neglect to consider [G.S.] 40A-3(b1)(10) (2011), when contending that the public trust doctrine prevents defendant from asserting any rights of eminent domain over the beaches. Our General Assembly has authorized oceanfront municipalities to exercise the power of eminent domain when ‘[e]ngaging in or participating with other governmental entities in acquiring, constructing, reconstructing, extending, or otherwise building or improving beach erosion control or flood and hurricane protection works, including, but not limited to, the acquisition of any property that may be required as a source for beach renourishment.’ *Id.* Consequently, the State has granted defendant the authority to assert its eminent domain powers over certain parts of plaintiffs' property for the purpose of the project.”

- **Synopsis**— Appeal by plaintiffs from June 2011 order granting Town’s motion for judgment on the pleadings. Affirmed. (Opinion by Judge McCullough, with Judges Steelman and Geer concurring.) In June 2012, plaintiffs filed a petition for discretionary review and a notice of appeal based upon a constitutional question. The N.C. Supreme Court denied the petition and dismissed the appeal on August 23, 2012.)

Eminent Domain; Temporary Construction Easement; Expert Testimony; Reliability

CITY OF CHARLOTTE V. COMBS, ___ N.C. App. ___, 719 S.E.2d 59 (No. COA11-107, Mecklenburg— 10/4/11) (In defendants-property owners' appeal from trial court's judgment entered on jury's verdict that they were entitled to \$5,073.00 as just compensation (for the taking of their property from May 2007 – August 2009 for a temporary construction easement (TCE) arising from a business corridor project), Court of Appeals remands for new trial, as trial court erred in permitting City's tendered real estate appraiser to give his opinion as to value of the taking because his opinion lacked a sufficiently reliable method of proof. “Of particular importance in this case, although the parties dispute the length of time the Combs were prevented from accessing and using their driveway and parking lot as a result of the TCE, there is no dispute that a denial of access actually occurred. Because, however, [the expert] did not conduct a complete appraisal of the property, believing, based on his experience, that the TCE would not affect the remainder of the Combs' property, his valuation did not take into consideration the impact, if any, of the denial of access.... Here, as in [N.C. Dep't. of Transp. v.] Haywood County [360 N.C. 349, 626 S.E.2d 645 (2006)], because [the expert] based his valuation of the TCE on his experience that such temporary takings do not affect the remainder of the condemnee's property, rather than an actual assessment that the Combs' property outside of the TCE was not affected, his method of proof lacked sufficient reliability. The trial court, consequently, abused its discretion in failing to exclude [his] expert testimony regarding his valuation of the TCE. In light of the erroneously admitted expert testimony, the Combs are entitled to a new trial to determine just compensation.” (Opinion by Judge Robert C. Hunter, with Judge Stroud and Judge Robert N. Hunter, Jr., concurring.))

Eminent Domain; Appeal; Dismissal

TOWN OF APEX V. WHITEHURST, ___ N.C. App. ___, 712 S.E.2d 898 (No. COA10-697, Wake— 7/19/11) (Court of Appeals dismisses appeal due to defendants' failure to make a timely appeal from orders in condemnation action for gravity sewer line project. (Opinion by Judge Stroud; Judges Bryant and Beasley concurring in result only.))

Eminent Domain; Railway Right-of Way; Voluntary Dismissal

SOUTHEAST SHORTLINES, INC. V. RUTHERFORD RAILROAD DEV. CORP. & TOWN OF FOREST CITY, ___ N.C. App. ___, 727 S.E.2d 26 (No. COA11-1569, Rutherford– 6/19/12) (*unpublished*) (In Town’s appeal from trial court’s judgment granting summary judgment in favor of Southeast Shortlines, Inc. d/b/a Thermal Belt Railway, Court of Appeals affirms; rejecting Town’s argument that plaintiff has failed to show that the area in question was in actual public use and necessary to its operations, Court of Appeals states, "It is undisputed that the Town entered onto and made improvements to the Affected Property after acknowledging Plaintiff’s property interest therein. It is also undisputed that the Town implemented said improvements without first obtaining a final judgment that the Affected Property was not in actual public use or was not necessary to the operation of Plaintiff’s business. The Town now asserts *after the fact* that the Affected Property was not in actual public use or necessary to Plaintiff’s business at the time it initiated condemnation proceedings and made these improvements, and seeks to place the burden on Plaintiff to prove otherwise. Our statutory scheme clearly undermines the Town’s position. Without a judgment establishing the Affected Property was not in public use or not necessary to Plaintiff’s business, the Town had no right to possess or make improvements to that property. It was the Town’s burden to obtain this statutorily required judicial stamp of approval before entering upon the Affected Property, and it failed to meet that burden. The Town’s contention on this issue is without merit and is therefore overruled.” (Emphasis in original.) (Opinion by Judge Robert N. Hunter, Jr., with Judges McGee and Stephens concurring.))

Eminent Domain; Costs

TOWN OF FOREST CITY V. RUTHERFORD RAILROAD DEV. CORP., ET AL, ___ N.C. App. ___, 727 S.E.2d 26 (No. COA11-1567, Rutherford– 6/19/12) (*unpublished*) (Companion opinion to No. COA11-1569, *supra*; affirming trial court’s order granting Southeast Shortlines’ motion in the cause and ordering the Town to pay the costs incurred by Southeast in defending against the Town’s 2007 condemnation action, Court of Appeals holds that trial court did not abuse its discretion; “The trial court’s findings that the Town was

not authorized to condemn Southeast's property and, alternatively, that the Town had abandoned its condemnation proceedings by virtue of the parties' stipulation of dismissal provided two independent grounds for its order awarding costs pursuant to [G.S.] 40A-8(b). The Town's sole contention is that Southeast was not entitled to recover costs unless the 2007 condemnation action was 'wrongful,' and, because Southeast held no interest in the Depot Lot, the Town's conduct in attempting to condemn the Depot Lot cannot be construed as wrongful. We have addressed and rejected the Town's argument that Southeast held no interest in the Depot Lot in the companion opinion, COA11-1569, and we likewise reject that argument here for the reasons stated therein." (Opinion by Judge Robert N. Hunter, Jr., with Judges McGee and Stephens concurring.)

LAND USE

Land Use; Zoning Amendment; Statement of Reasonableness

WALLY V. CITY OF KANNAPOLIS, ___ N.C. ___, 722 S.E.2d 481 (No. 111PA11, 3/9/12)

- **Holding**— In plaintiffs-neighboring property owners' appeal, N.C. Supreme Court holds zoning amendment invalid because of Council's failure to properly approve a statement of reasonableness under G.S. 160A-383. Under the statute, the governing body 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.*
- **Key Excerpt**— "[W]e hold that the City Council did not approve a statement as required by [G.S.] 160A-383. First, while the City Council took the initial step of adopting the zoning amendment, it failed to take the second step and 'approve a statement' that addresses consistency, reasonableness, and the public interest. This failure is evidenced by the trial court's uncontested finding of fact that 'there was no per se written statement of reasonableness,' a fact that is binding on appeal.

Second, we are not persuaded by defendant's argument that it complied with the statute by impliedly approving the staff report by virtue of having the report in hand when adopting the zoning amendment. The language of section 160A-383 does not authorize an implied approval. Defendant cites no authority permitting implied approval in this context, and we have found none. Defendant's argument also fails because, while section 160A-383 requires the approved statement to explain why 'the board [the City Council] considers the action taken to be reasonable,' the staff report merely states that the *staff* considers the action reasonable.

Finally, we do not agree that the City Council satisfied the statute by adopting a statement announcing that it acted within the guidelines of its zoning authority. Compliance with section 160A-383 requires more than a general declaration that the action comports with relevant law. Section 160A-383 explains that to meet the statutory requirements, an

approved statement must describe whether the zoning amendment is consistent with any controlling land use plan and explain why it is reasonable and in the public interest. The statement adopted by the City Council provides no such explanation or description. Rather, it consists of a general declaration that in adopting the zoning amendment, the City Council acted within the guidelines of its zoning authority.” (Citation omitted.)

- **Synopsis**– In August 2011, the Supreme Court allowed discretionary review pursuant to G.S. 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 709 S.E.2d 601 (No. COA09-1080, Cabarrus– 2/15/11) (*unpublished*) (affirming order granting summary judgment to City). Reversed and Remanded. (Opinion by Justice Timmons-Goodson for a unanimous Court.)

Land Use; Certiorari; Timely Appeal

MCCRANN V. VILLAGE OF PINEHURST, ___ N.C. App. ___, 716 S.E.2d 667 (No. COA11-291, Moore – 10/4/11)

- **Holding**– Trial court correctly denied petitioner’s “Petition for Writ of Certiorari and for Judicial Review” as time-barred. North Carolina courts have held that the requirements of timely filing and service of notice of appeal are jurisdictional, and failure to comply accordingly results in dismissal of the appeal. There is no reason to treat the requirements for timely “appeal” for judicial review under G.S. 160A-388(e2) differently.
- **Key Excerpt**– “We find the ‘substantial compliance’ cases cited by Petitioners inapposite as each involves application of Rule of Appellate Procedure 7 (regarding transcripts), a non-jurisdictional requirement, and in each case, the appeal was timely filed. Petitioners cite no case in which we have applied ‘substantial compliance’ review to a statute of limitations under facts analogous to those here, and we are aware of none. Further, even were we to apply a ‘substantial compliance’ analysis to the requirements of section 160A–388(e2), Petitioners would not prevail. As noted above, Petitioners not only failed to request the order in writing, they made the request to the wrong person and, even then, failed to make the request timely. We also reject Petitioners' alternative argument that

Respondents are estopped from ‘insisting upon a strictly “technical” compliance with the statute’ because the oral request ‘was completely consistent with the cooperative relationship’ between counsel for the parties during the pendency of the zoning matter. Petitioners appear to suggest that professional and courteous conduct between counsel operates to waive statutory requirements. To be clear: it does not.” (Citations omitted.)

- **Synopsis**– Appeal by petitioners from trial court’s December 2010 order denying “Petition for Writ of Certiorari and for Judicial Review” as untimely. Affirmed. (Opinion by Judge Stephens, with Judges Ervin and Beasley concurring.)

Land Use; Findings of Fact; Signs; Mistakenly Issued Permit; Revocation

PREMIER PLASTIC SURGERY CENTER, PLLC V. BD. OF ADJUST. FOR TOWN OF MATTHEWS,
___ N.C. App. ___, 713 S.E.2d 511 (No. COA10-863, Mecklenburg– 7/19/11)

- **Holding**– Court of Appeals holds trial court erred in determining that Board had no authority to grant a variance for petitioners’ sign and that remand was necessary given insufficiency of Board’s findings of fact.
- **Key Excerpt**– Court of Appeals rejects petitioners’ argument that trial court erred in concluding that they did not acquire vested rights in the mistakenly issued 2007 permit and that the Town was not barred by estoppel or laches from revoking the permit. “On 9 November 2007, the Board notified Dr. Ferrari that his appeal of the revocation of the sign permit had been denied. The written notification informed Dr. Ferrari that he had the right to appeal the Board’s decision to superior court, or draft a text amendment to the ordinance. Petitioners did not appeal the Board’s decision. Consequently, the Board’s determination that the permit was issued in error and properly revoked is the law of the case and the parties are bound by the decision. Provided the permit was issued in error, Petitioners cannot establish vested rights in reliance on the permit, and this argument is dismissed. Similarly, because Petitioners did not appeal the Board’s 9 November 2007 decision denying his appeal of MCLUESA’s [Mecklenburg County Land Use and Environmental Services Agency’s] revocation of the sign permit, Peti-

tioners are bound by the decision and cannot now assert the town was barred by estoppel or laches from revoking the permit.” (Citations omitted.)

- **Synopsis**– Appeal by petitioners from trial court’s January 2010 order affirming decision of Board of Adjustment to deny their application for a variance from sign ordinance. Reversed in part and remanded in part. (Opinion by Judge Robert N. Hunter, Jr., with Judges Calabria and Stroud concurring.)

Land Use; Permit Extension Act

CAMBRIDGE SOUTHPORT, LLC v. SOUTHEAST BRUNSWICK SANITARY DISTRICT, ___ N.C. App. ___, 721 S.E.2d 736 (No. COA11-438, Brunswick– 1/17/12)

- **Holding**- In action filed by developer which purchased a partially completed townhome subdivision from bank in 2009, Court of Appeals rejects Sanitary District’s argument that original developer’s 2006 Application for Service Capacity Allocation (setting forth a three year term for completion of project), as only a contract for service, did not constitute a "developmental approval" as defined in the Permit Extension Act of 2009, *see* 2010 N.C. Session Law ch. 177.
- **Key Excerpt**- “Defendant’s reading of ‘developmental approval’ is too narrow. First, the clearly stated purpose of the Act is to encourage and facilitate the completion of development projects, such as the subdivision, by tolling the expiration of state and local government approvals necessary for the completion of these projects. Second, Section 7 of the Act states: ‘The provisions of this act shall be liberally construed to effectuate the purposes of this act.’ Third, the Act was clearly intended to cover authorizations for wastewater treatment, evidenced by Section 3(1)(f), and was further intended to cover wastewater capacity allocation, evidenced by Section 5.1. Fourth, were the provisions of the Act limited to the permit obtained by Defendant from DENR, as Defendant contends, Section 5.1, and in most instances Section 3(1)(f), would have no effect. Defendant and other municipal entities in control of wastewater capacity allocation and treatment could thwart the purpose of the Act by preventing the completion of development projects ap-

proved during the tolling period included in the Act. Fifth, by refusing to recognize the Application as part of a developmental approval, and by refusing to recognize that the expiration period had been tolled, Defendant is preventing the issuance of other developmental approvals for the subdivision that are clearly covered by the Act. Due to Defendant's refusal to authorize, no Certificates of Occupancy may be issued, no townhomes may be inhabited and, therefore, there is no point in further developing the subdivision.

Construing the provisions of the Act liberally to effect the purpose of the Act, we hold that the Application constitutes a developmental approval as contemplated by the Act and, therefore, the Application is governed by the Act.”

- **Synopsis**- Appeal by defendant-Sanitary District from trial court’s entry of summary judgment ruling that the Act applied to the Application and "precluded and prohibited" defendant from charging plaintiff additional fees. Affirmed. (Opinion by Judge McGee, with Judge Robert C. Hunter and Judge Calabria concurring.)

Land Use; Restrictive Covenants; Mandamus;
Exhaustion of Administrative Remedies;
Subject Matter Jurisdiction

SANFORD V. WILLIAMS & CITY OF HICKORY, ___ N.C. App. ___, 727 S.E.2d 362 (No. COA11-1066, Catawba– 6/5/12), *disc. review denied*, ___ N.C. ___, 731 S.E.2d 144 (No. 296P12, 8/23/12)

- **Holding**–In plaintiff’s action against neighboring property owner for specific performance of restrictive covenants arising from construction of carport and alleging *inter alia* violation of setback, Court of Appeals holds that trial court was without subject matter jurisdiction to rule on plaintiff’s request for a writ of mandamus against City and accordingly vacates portions of trial court’s order granting plaintiff’s motion for summary judgment on his request for a writ of mandamus and ordering City to make a decision within 30 days.
- **Key Excerpt**–“Defendants contend that because Mr. Sanford is contesting the issuance of the zoning and building permits, he should have first appealed to the board of adjustment to exhaust his administrative

remedies. Mr. Sanford contends, however, that he is not contesting the issuance of the zoning and building permits because he never contended that Mr. and Mrs. Williams could not construct a carport. Rather, Mr. Sanford argues the issue is whether the side setback requirement has been violated, an issue the City of Hickory has not yet determined. Because we conclude the side setback requirement is an issue directly related to the issuance of the zoning permit, we agree with Defendants. We find this case analogous to Midgette [v. Pate], 94 N.C. App. at 498, 380 S.E.2d at 572 [(1989)]....

Here, the zoning and building permits authorize the construction of a detached carport with a five foot side setback. Both of the permits and the certificate of compliance state that the carport ‘must be detached from home for the 5' setback.’ Although Mr. Sanford contends he is not challenging the issuance of the permits, he also argues that because the carport is not an accessory structure under the Land Development Code, ‘it is part of the principal structure and must meet the ten feet [side] setback.’ We conclude that the issue of whether a five or ten foot side setback applies, and the issue of whether the carport violates the side setback, ‘arise as result of the permits’ that were granted to Mr. and Mrs. Williams, see *id.* at 501, 380 S.E.2d at 574 (distinguishing the plaintiff's claims ‘which arise as result of the permits’ from ‘those which would be the result of a refusal by town officials to enforce the ordinance’), and ‘specifically concern[]’ Mr. and Mrs. Williams' zoning and building permits. See *id.* at 503, 380 S.E.2d at 575 (holding that the plaintiff's argument that the defendant's pool, bathhouse, and fence violated zoning ordinances due to the distance from various right-of-ways ‘specifically concern[ed] [the] defendants' special use, or building permits’).

.... Because Mr. Sanford's request for a writ of mandamus specifically concerns Mr. and Mrs. Williams' zoning and building permits, he should have timely appealed the issuance of these permits to the board of adjustment. See Midgette, 94 N.C. App. at 503, 380 S.E.2d at 575 (‘Plaintiff's complaints specifically concerning defendants' special use, or building permits, may only be remedied by first appealing to the board of zoning adjustment. She failed to do so and therefore she cannot now attack these permits.’). Mr. Sanford failed to first appeal to the board of adjustment, and therefore he cannot now attack the permits. Having failed to exhaust his administrative remedies, we con-

clude the trial court was without subject matter jurisdiction to rule on Mr. Sanford's request for a writ of mandamus against the City of Hickory.” (Citation omitted.)

- **Synopsis**—Appeal by plaintiff and defendants from order entered April 2011. Affirmed in part and vacated in part. Affirming portion of trial court’s order granting summary judgment to defendant Williams on plaintiff Sanford’s claim for specific performance. Vacating portion of trial court’s order which had: (1) granted plaintiff Sanford’s motion for summary judgment on his request for a writ of mandamus and (2) ordered City to "make a decision as to the zoning matters in this case within thirty (30) days[.]" (Opinion by Judge Thigpen, with Judges Hunter and McCullough concurring.) Plaintiff Sanford filed a petition for discretionary review in July 2012. The N.C. Supreme Court denied the petition for discretionary review on August 23, 2012.

Land Use; Special Use Permits; Whole Record Test

ORANGE COUNTY V TOWN OF HILLSBOROUGH, ___ N.C. App. ___, 724 S.E.2d 560 (Nos. COA11-375 & COA11-386, Orange– 2/21/12)

- **Holding**– Court of Appeals holds that trial court properly applied the whole record test in determining that the Hillsborough Board of Adjustment’s (HBOA’s) final order denying a Zoning Compliance Permit to the County for the Orange County Justice Center Expansion Project was arbitrary and capricious.
- **Key Excerpt**– “A review of the whole record indicates that appellants conditioned site plan approval on submission of a written plan for a remote parking facility, or ‘presentation of acceptable remote parking facilities and process documents covering the operation thereof[.]’ after Orange County presented the proposal of the Durham Tech park-and-ride lot. Based on the manner in which the HBOA granted the conditional site plan approval, Orange County’s proposal of the Durham Tech lot was an acceptable, satisfactory alternative to fulfilling the requirements of the Zoning Ordinance. Thereafter, Orange County sent three letters throughout 2010 to the HBOA, outlining the remote parking facility and details of its operation. Orange County’s alternative proposals included the usage

of the 125 space park-and-ride lot at Durham Tech, usage of the Chapel Hill Transit Route 420 bus, use of an underutilized 94 space county lot, and requiring employees that were assigned county-owned vehicles to park personal vehicles off-site. Based on the foregoing, acceptable remote parking facilities were presented to appellants and process documents covering the operation thereof were received.”

- *Synopsis*– Appeals by respondents Town of Hillsborough and Hillsborough Board of Adjustment (collectively “appellants”) and petitioner Orange County from order entered November 2010. Pursuant to N.C. R. App. P. 40, the appeals were consolidated for hearing. Trial court’s order affirmed. (Opinion by Judge Bryant, with Judges Elmore and Stephens concurring.)

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

CRLP DURHAM, LP v. DURHAM CITY/COUNTY BD. OF ADJUST., ___ N.C. App. ___, 706 S.E.2d 317 (No. COA10-120, Durham–3/1/11), *disc. review denied*, 365 N.C. 348, 717 S.E.2d 744 (No. 153P11, 10/6/11) (Court of Appeals dismisses petitioner’s appeal from interpretation of development plan and zoning code due to insufficiency of record, given that appellate courts cannot take judicial notice of ordinances, see High Point Surplus Co. v. Pleasants, 263 N.C. 587, 591, 139 S.E.2d 892, 895 (1965); Court of Appeals states, “From the record before us, we cannot, without engaging in speculation, determine whether the MZO [Merged Zoning Ordinance, 2000] or the UDO [Unified Development Ordinance, 2006] is the ‘applicable municipal ordinance’ as petitioner failed to include in the record on appeal any portion of the UDO containing language stating when or if the UDO ‘superseded’ the MZO or language from the UDO explaining its applicability to development plans approved under the MZO.” (Opinion by Judge Stroud, with Judges McGee and Ervin concurring.) Petitioner filed a petition for discretionary review in April 2011. The N.C. Supreme Court denied the petition for discretionary review on October 6, 2011.)

**Land Use; Firearms Training Facility; Zoning Ordinance;
Agricultural District; Definition of Schools**

FORT V. COUNTY OF CUMBERLAND, ___ N.C. App. ___, 721 S.E.2d 350 (No. COA11-758, Cumberland— 2/7/12), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 100P12, 3/12/12) (In petitioners-neighboring landowners' appeal, Court of Appeals holds that trial court erred in concluding that the TigerSwan Training Facility was a permitted use within the A1 Agricultural District under the County's Zoning Ordinance; ordinance provided that permitted uses in A1 district included "SCHOOLS, public, private, elementary or secondary"; TigerSwan's site plan classified the proposed Training Facility as a "firearms training facility" and the evidence presented in subsequent appeals established *inter alia* that TigerSwan intended to provide instruction to military, law enforcement, and security personnel. Court of Appeals states, "[W]e conclude the inclusion of 'elementary or secondary' in the description of permissible schools was intended to exclude other types of 'SCHOOLS,' whether they be private or public. It would be illogical for the drafters to provide that all public and all private schools are permitted *in addition to* elementary and secondary schools. Rather, in light of the drafters' express intent for the A1 Agricultural District to limit commercial uses to those providing 'essential services,' we regard the inclusion of 'public' and 'private' as an affirmation that *private* elementary or secondary schools are permitted as commercial uses providing 'essential services' to residents. This interpretation is reinforced by the drafters' express prohibition of 'SCHOOL[S], business and commercial for nurses or other medically oriented professions, trade, vocational & fine arts.' Petitioners argue that the Training Facility should be prohibited based upon this language, while TigerSwan attempts to distinguish the Training Facility from trade or vocational schools by arguing they will teach *skills*, not occupations. Without deciding whether the Training Facility qualifies as either a trade or vocational school, we conclude that the Training Facility is not a permitted use as it is not a public or private, elementary or secondary school.... TigerSwan stresses that it will also instruct adults and children in leadership, first aid, and foreign languages skills commonly taught in elementary and secondary schools. However, the Zoning Ordinance expressly states in the introduction to the section on permit-

ted and conditional uses that ‘no land, building or structure shall be used . . . *in whole or in part* for any use other than the uses permitted’ by the district in question. (Emphasis added.) Thus, while TigerSwan may offer some instruction that would be permitted in an elementary or secondary school, the inclusion of permitted uses cannot offset the uses prohibited by the Ordinance.” (Opinion by Judge Robert C. Hunter, with Judge McGee and Judge Robert N. Hunter, Jr., concurring.)

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

SANCHEZ V. TOWN OF BEAUFORT, ___ N.C. App. ___, 710 S.E.2d 350 (No. COA10-750, Carteret– 5/3/11), *disc. review denied*, 365 N.C. 349, 717 S.E.2d 745 (No. 227P11, 10/6/11) (affirming Board of Adjustment’s reversal of Beaufort Historic Preservation Commission’s (BHPC’s) decision which had denied Certificate of Appropriateness; Court of Appeals holds that BHPC’s decision to limit proposed one-and-one-half story structure to 24-feet in height “was not supported by the facts disclosed by the whole record and was made without the use of any determining principle”; Court of Appeals states, “While there was evidence presented before the BHPC that there were other one-and-one-half story structures in the historic district that ranged between twenty and twenty-two feet in height, there was also evidence presented that the residences closest to the Smith property ranged from twenty-six to thirty-five feet in height. [G.S.] 160A–400.9 does not permit the BHPC to ‘cherry pick’ certain properties located within the historic district in order to determine the congruity of proposed construction; instead, the BHPC must determine congruity contextually, based upon ‘the total physical environment of the Historic District.’... Since the twenty-four foot height requirement was established by each member of the BHPC without the use of any determining principle from the BHPC guidelines, it was clearly arbitrary.” (Citation omitted.) (Opinion by Judge Calabria, with Judge Robert C. Hunter and Judge Elmore concurring.) Petitioner filed a petition for discretionary review in June 2011. The N.C. Supreme Court denied the petition for discretionary review on October 6, 2011.)

**Land Use; Permits; Medical Clinic; Law of the Case;
Reviewable Findings of Fact; Remand**

TEMPLETON PROPERTIES, L.P. v TOWN OF BOONE, ___ N.C. App. ___, 724 S.E.2d 604 (No. COA11-1025, Watauga— 3/6/12) (In petitioner’s appeal from superior court’s order affirming Board of Adjustment’s denial of application for special use permit to develop medical clinic in single family residential district, Court of Appeals reverses and remands to the superior court for remand to the board of adjustment with instruction again to make reviewable findings of fact. “It appears that the superior court failed in its *de novo* review... as the record shows that the Board conducted a new hearing and gathered additional evidence on 2 September 2010, contrary to ‘the law of the case’ from our prior opinion [in Templeton Properties, L.P. v Town of Boone, ___ N.C. App. ___, ___ S.E.2d ___, 2009 N.C. App. LEXIS 1240 (7/21/09) (*unpublished*)].... [T]his Court’s only instruction to the superior court was for it to remand to the Board ‘with instructions to remand to the Board of Adjustment for *reviewable findings of fact*.’ Id. at *14 (emphasis added).... This Court made no instruction to the Board to gather additional evidence. The *reviewable findings of fact* were to be based on the evidence presented at the 5 April and 1 May 2007 hearings and to support the Board’s decision to deny petitioner’s application. As noted above, ‘[a] decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.’ Lea Co. [v. North Carolina Bd. of Transp.], 323 N.C. [697] at 699, 374 S.E.2d [866] at 868 [(1989)]. But contrary to ‘the law of the case[,]’ *see id*, the Board conducted a new hearing and gathered more evidence from residents on 2 September 2010 before making its findings of fact. Therefore, the superior court failed in its *de novo* review of the record, as it did not address this ‘error of law[.]’ *See Wright [v. Town of Matthews]*, 177 N.C. App. [1] at 8, 627 S.E.2d [650] at 656 [(2006)].” N.C. Court of Appeals clarifies that on remand “the board of adjustment must make its findings of fact based only upon the testimony and evidence presented at the hearings held on 5 April and 1 May 2007. The Board may on remand consider legal arguments regarding the application of the law to the factual evidence presented at the hearing in 2007 but may not receive additional factual testimony or evidence, sworn or unsworn.” (Opinion by Judge Stroud, with Judges Stephens and Beasley concurring.))

Land Use; Permits; Open Space; Modification

WAKE FOREST GOLF & COUNTRY CLUB, INC. v. TOWN OF WAKE FOREST, ___ N.C. App. ___, 711 S.E.2d 816 (No. COA10-972, Wake-6/21/11), *disc. review denied, appeal dismissed* 365 N.C. 359, 719 S.E.2d 21 (No. 303P11, 11/9/11) (Court of Appeals holds, “Where Wake Forest Golf & Country Club, Inc. (WFGCC) voluntarily designated its entire golf course as open space in its 1999 PUD [planned unit development] application and subsequently exercised the right to develop the property in accordance with the special use permit, the Wake Forest Board of Commissioners did not abuse its discretion when it refused to consider WFGCC’s 2009 application to reduce the area covered by the special use permit in order to selectively develop the remaining property for residential use. Where WFGCC had no right to demand that the Board of Commissioners consider its 2009 application, it was not entitled to the issuance of a writ of mandamus or to injunctive relief.” (Opinion by Judge Steelman, with Judges Elmore and Ervin concurring.) Plaintiff filed a petition for discretionary review in July 2011. The N.C. Supreme Court denied the petition for discretionary review on November 9, 2011.)

Land Use; Permits; Remand; Mandate

SCHAEFER v. TOWN OF HILLSBOROUGH, ___ N.C. App. ___, 712 S.E.2d 727 (No. COA10-968, Orange- 7/5/11) (In Schaefer I (2009), the Court of Appeals remanded “for entry of judgment directing the BOA [Board of Adjustment] to issue the conditional use permit for which petitioners applied.” See Schaefer v. Town of Hillsborough, 198 N.C. App. 703, 681 S.E.2d 866 (No. COA08-796, *unpublished*), *disc. review denied*, 363 N.C. 656, 686 S.E.2d 676 (2009) (*Digest of Municipal Law 2009-10*, p. 36). In this appeal (Schaeffer II), the Court of Appeals holds that the trial court properly carried out the mandate in ordering issuance of the permit “without application of any new or different conditions.” The Court also rejected the Town’s argument that the trial court abused its discretion by taxing it with costs under N.C. R. App. P. 35. (Opinion by Judge Bryant, with Judges McGee and Beasley concurring.))

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

WILSON V. CITY OF MEBANE BD. OF ADJUST., ___ N.C. App. ___, 710 S.E.2d 403 (No. COA10-971, Alamance– 5/17/11), *disc. review denied*, ___ N.C. ___, 724 S.E.2d 524 (No. 305P11, 4/12/12 (Reversing trial court, N.C. Court of Appeals holds Board of Adjustment’s issuance of building permit to intervenor void *ab initio*, as expenditures made prior to the issuance of a permit are not considered in common law vested rights analysis. “We conclude the expenditures on the Walgreens Project made by Crown, prior to the enactment of the UDO [Unified Development Ordinance], were not made in reasonable reliance on and after the issuance of a valid building permit. Accordingly, Crown did not acquire a common law vested right to have its development plan evaluated under the LSO [Landscape Standards Ordinance] and the MZO [Mebane Zoning Ordinance]. The building permit issued by the City of Mebane was void *ab initio*.” (Opinion by Judge Robert N. Hunter, Jr., joined by Judges Calabria and Stroud.) *See Digest of Municipal Law 2010-11*, p. 48. Respondent and intervenor filed a petition for discretionary review in July 2011. The N.C. Supreme Court denied the petition on April 12, 2012.)

Land Use; Nonconformities; Wall Sign

BOJANGLES' RESTAURANTS, INC. V. TOWN OF PINEVILLE, ___ N.C. App. ___, 716 S.E.2d 441 (No. COA11-202, Mecklenburg– 10/4/11) (*unpublished*) (Trial court correctly affirmed decision citing plaintiff for violations arising from removal and reattachment of non-conforming wall sign while changing abutting fabric awning to metal awning. (Opinion by Judge Robert N. Hunter, Jr., with Judges McGee and Elmore concurring.))

Land Use; Appeals; Untimely Filing

IN RE PEACOCK, ___ N.C. App. ___, 718 S.E.2d 424 (No. COA11-317, Macon- 11/1/11) (*unpublished*) (Where the zoning administrator for respondent Town of Highlands issued a citation for violation of ordinance prohibiting manufactured homes within the R-1 ETJ zoning district and where petitioner failed to file a petition for *certiorari* seeking review of the Board of Adjustment's affirmation within the 30-day time period set forth in G.S. 160A-388(e2), trial court properly granted respondent's motion to dismiss petition for

certiorari as untimely filed. (Opinion by Judge Steelman, with Judge Robert C. Hunter and Judge McCullough concurring.))

**Land Use; Conditional Use Zoning; Flexible Design Option;
Minimum Lot Size**

EXPERIENCEONE HOMES, LLC v. TOWN OF MORRISVILLE, ___ N.C. App. ___, 727 S.E.2d 26 (No. COA11-1193, Wake— 6/19/12) (*unpublished*), *disc. review denied*, ___ N.C. ___, 731 S.E.2d 149 (No. 310P12, 8/23/12) (In action brought by plaintiffs (developers who obtained initial rezoning to residential multi-family conditional use (RMF-CU) district for construction of 200 townhomes and 3 detached single family homes) seeking *inter alia* declaratory judgment that plaintiffs were entitled to proceed with development as revised in new site plan (submitted approximately 17 months after initial rezoning and seeking to instead construct 143 detached single family homes), Court of Appeals affirms trial court’s grant of summary judgment entered in favor of defendant Town; “As a matter of law, we hold that deviation from the established [6,000 square foot] lot area minimum, as articulated in Defendant’s Zoning Ordinance, especially a downward deviation of 3,500 square feet, did not qualify as a ‘minor amendment.’ Defendant properly required Plaintiffs to apply for an FDO [Flexible Design Option]. We further note that deleting a substantial portion of the proposed development that required elimination of a roadway connection to the neighboring Kitts Creek development, along with a rerouting of some of the roads and a proposed second entry/exit to Church Street, among other changes, constituted a violation of the requirement of the ordinances that development ‘must occur in a manner consistent with the provisions of the Townes at Everett Crossing Site Plan and Preliminary Subdivision Plat[.] These changes also required an FDO or reapplication for a new conditional use zoning ordinance.” (Opinion by Judge McGee, with Judges Geer and McCullough concurring.))

LAW ENFORCEMENT

**Law Enforcement; Torts; False Imprisonment; Malicious Prosecution;
Warrants; Probable Cause; Public Official Immunity**

BEESON V. PALOMBO, ___ N.C. App. ___, 727 S.E.2d 343 (No. COA11-1324, Craven- 5/1/12), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 235P12, 10/4/12) (In plaintiff's action alleging false imprisonment, malicious prosecution, and claims for emotional distress arising from defendants' alleged wrongful conduct in obtaining and executing arrest warrants against plaintiff for assault on a female, N.C. Court of Appeals reverses trial court's denial of defendants' motion for summary judgment. "[I]t is a judicial official's function to determine whether probable cause exists and a law enforcement officer's function to explain the facts to the judicial official so that such a determination may be made. *See* [G.S.] 15A-304. Clearly [the magistrate who issued the arrest warrants for plaintiff] at the time [the police officer who sought the warrants] was before him, believed there to be probable cause of assault on a female, as is evidenced by the arrest warrants he issued as well as both of his affidavits; the fact that someone from the district attorney's office may have disagreed with [the magistrate] has no bearing on our analysis. Viewing the facts alleged 'in the light most favorable to' plaintiff, and considering 'the evidence ... as a whole' we conclude that there was 'a sufficient basis for the magistrate's finding' of probable cause, and thus the seeking and issuance of the arrest warrants. As substantively plaintiff only challenges the existence of probable cause for the seeking and issuance of the arrest warrants, and as the arrest warrants were properly sought and issued based upon probable cause, and as plaintiff has not demonstrated any 'deliberate falsehood or . . . reckless disregard' by defendants in seeking the arrest warrants, defendants are shielded by immunity. As such, we see no 'genuine issue of material fact' and defendants are 'entitled to judgment as a matter of law.'" (Citations omitted.) Opinion by Judge Stroud, joined by Judge Elmore; Judge Steelman concurring in the result by separate opinion, writing "I am not persuaded that the lack of probable cause to issue an arrest warrant, standing alone, is sufficient to negate immunity. *Cf. Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000) (stating that a plaintiff cannot defeat public official immunity by alleging 'reckless indifference'). I would affirm on this basis." Plaintiff

filed a petition for discretionary review in June 2012. The N.C. Supreme Court denied the petition for discretionary review on October 4, 2012.)

Law Enforcement; Torts; Gross Negligence; High Speed Pursuit

NIKOPOULOS V. HAIGLER, ___ N.C. App. ___, 711 S.E.2d 876 (No. COA10-616, Stanly– 4/19/11) (*unpublished*), *disc. review denied*, 365 N.C. 357, 718 S.E.2d 389 (No. 199P11, 11/9/11) (In plaintiff’s action for damages for personal injuries sustained during a motorcycle collision, trial court correctly granted motion for summary judgment in favor of police chief and City of Locust; “[W]e find that Chief Haigler’s conduct was neither done with a wicked purpose, nor needlessly, so as to manifest a reckless indifference to the rights of others. Fowler [v. N.C. Dept. of Crime Control & Public Safety], 92 N.C. App. [733] at 736, 376 S.E.2d [11] at 13 [(1989)]. On the contrary, Chief Haigler had ‘good reason to attempt to remove [Plaintiff] from the road due to the immediate and significant potential danger to the public posed by his driving [at excessive speeds].’ Norris [v. Zambito], 135 N.C. App. [288] at 295, 520 S.E.2d [113] at 118 [(1999)]. Further, Chief Haigler’s alleged loss of control of his vehicle was ‘significantly less severe’ than those involved in either Bray [v. N.C. Dep’t of Crime Control & Pub. Safety, 151 N.C. App. 281, 564 S.E.2d 910 (2002)] or Eckard [v. Smith, 166 N.C. App. 312, 323, 603 S.E.2d 134, 141 (2004)].... Here, Chief Haigler momentarily took his eyes off a fleeing suspect in order to observe the motorist he was passing, and, upon returning his attention to Plaintiff, found that Plaintiff had slowed down such that Chief Haigler was unable to avoid colliding with Plaintiff’s motorcycle. We hold that ‘[t]hese circumstances do not exemplify the degree of conscious or reckless indifference toward the safety of others necessary to establish gross negligence.’ Fowler, 92 N.C. App at 736, 376 S.E.2d at 13.” (Opinion by Judge McGee, with Chief Judge Martin and Judge Ervin concurring.) Plaintiff filed a petition for discretionary review in May 2011. The N.C. Supreme Court denied the petition for discretionary review on November 9, 2011.)

MINIMUM HOUSING CODE

Minimum Housing Code; Mobile Homes; Notice; Due Process;
Inverse Condemnation

PATTERSON V. CITY OF GASTONIA, ___ N.C. App. ___, 725 S.E.2d 82 (No. COA11-520, Gaston– 5/1/12), *petition for disc. review filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 249P12, 6/5/12)

- **Holding**– In action arising from demolition of several mobile homes, Court of Appeals holds that trial court did not err in granting City’s motion for summary judgment as to *inter alia* due process claims asserted under the North Carolina Constitution.
- **Key Excerpt**– In holding that the trial court properly concluded that plaintiffs’ son was not entitled to notice as he had no ownership interest in the property that had been recorded, the Court stated, “Neither [of plaintiffs’ cited cases, Lawyer v. City of Elizabeth City N.C., 199 N.C. App. 304, 681 S.E.2d 415 (2009), Farmers Bank of Sunbury v. City of Elizabeth City, 54 N.C. App. 110, 282 S.E.2d 580 (1981)] ... suggests that a city has a duty to investigate interests not identifiable through a search of the public record. Here, the Pattersons have presented no evidence that Keith Patterson's interest in the mobile homes appeared anywhere in the public record. Instead, they contend that the City should have gone beyond a public record search and conducted an investigation to uncover whether there might have been owners other than those appearing of record. Neither the statute [G.S. 160A-443(2)] nor the case law imposes this duty on a city.” As to plaintiffs’ state constitutional claim grounded in the alleged inadequacy of notice of the meeting at which the ordinance of demolition was adopted, the Court determined that an adequate state remedy existed and that plaintiffs failed to exhaust their administrative remedies.

Rejecting plaintiffs’ arguments that trial court should not have found that the alleged tort claims were barred by sovereign immunity, the Court stated, “[T]he Pattersons seem to argue that, regardless of any absence of insurance, the City waived sovereign immunity by failing to follow the procedures in its Code. Although the Pattersons have not demonstrated that the City failed to follow proper procedures, the Pattersons, in any event, have not cited cases addressing sovereign im-

munity, but rather have relied on cases addressing constitutional claims or public official immunity even though the Pattersons sued only the City and not any public officials. The Pattersons have not, therefore, identified any error in the trial court's decision that sovereign immunity barred their claims for conversion, trespass to chattels, and trespass to real property.” (Citations omitted.)

Rejecting plaintiff’s arguments that trial court improperly granted summary judgment as to their claim for inverse condemnation, the Court stated, “The Pattersons have acknowledged in their brief ... that they cannot bring an inverse condemnation claim for the loss of mobile homes because mobile homes are considered personal property.... The Pattersons nonetheless argue that the City's unauthorized entry onto the property they leased supported a claim for inverse condemnation. The Pattersons cite no authority and we have found none suggesting that the City's entry onto a leasehold in accordance with its authority under the City's Minimum Housing Code and the enabling legislation constitutes a taking within the meaning of inverse condemnation.” (Citations omitted.)

- ***Synopsis***— Appeal by plaintiffs from orders granting City’s motions to dismiss and for summary judgment entered January 2009, November 2009, and December 2010. Affirmed. (Opinion by Judge Geer, with Chief Judge Martin and Judge Stroud concurring.)
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NUISANCES

**Nuisance; Storm or Erosion Damaged Structures; Wet Sand Beach;
Demolition; Summary Judgment**

TOWN OF NAGS HEAD V. CHERRY, INC., ___ N.C. App. ___, 723 S.E.2d 156 (No. COA11-931, Dare— 2/21/12), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 133P12, 10/4/12) (Court of Appeals reverses trial court’s order of demolition for dwelling on wet sand beach and remanding for further proceedings as to the issue of whether the dwelling constitutes a nuisance under the Town’s ordinance (and if so, for determination of appropriate relief); also dismissing Town’s alternative claim of abatement under the public trust doctrine; “[The Town] claims it has the right to remove the dwelling based solely upon public trust rights. This is not a case involving access to the shoreline across private property, protecting property which has already been determined to be a public trust area, or a myriad of other such similar situations; this is a case where a governmental agency is attempting to take private property from an individual, destroy the Dwelling, and claim the land on the basis that it currently lies within a public trust area.... Plaintiff is not merely seeking public access to the shoreline across defendant's property; plaintiff is seeking to demolish defendant's Dwelling and to prevent defendant from making any economic use of the property whatsoever. Because only the *State*, acting through the Attorney General, has standing to bring an action to enforce the *State's* public trust rights in accord with [G.S.] 113-131, we conclude that this claim must be dismissed. [G.S.] 113-131; Neuse River Found., Inc. [v. Smithfield Foods, Inc.], 155 N.C. App. [110] at 119, 574 S.E.2d [48] at 54 [(2002)].” (Opinion by Judge Stroud, with Judges Stephens and Beasley concurring.) In March 2012, plaintiff-Town filed a petition for discretionary review and a notice of appeal based upon a constitutional question. The N.C. Supreme Court denied the petition and dismissed the appeal on October 4, 2012.)

PERSONNEL

Personnel; Confidential Personnel File; Petition for Disclosure
Scope of Trial Court's Authority to Release Information

IN RE RELEASE OF SILK PLANT FOREST CITIZEN REVIEW COMMITTEE'S REPORT AND APPENDICES V. BARKER, ___ N.C. App. ___, 719 S.E.2d 54 (No. COA10-1516, Forsyth – 10/4/11), *disc. review denied*, ___ N.C. ___, 720 S.E.2d 670 (No. 492P11, 1/26/12)

- **Holding**– Under G.S. 160A-168(c)(4), a trial court does not have the authority to order the release of any portion of a city employee's confidential personnel file to the general public. Court of Appeals reverses trial court's order which had granted City's petition for disclosure of transcripts contained in respondents-officers' personnel files arising from Committee's inquiry as to whether police procedures were properly followed in police department's investigation of assault and battery.
- **Key Excerpt**– “This Court has never directly addressed the scope of the trial court's authority to allow examination of confidential personnel files pursuant to [G.S.] 160A-168(c)(4), and the statute itself is silent as to the extent of the trial court's authority. Consequently, the primary issue before us is whether the legislature intended to grant the trial court the authority to release portions of a city employee's confidential personnel file to the general public pursuant to [G.S.] 160A-168(c)(4). We hold that the trial court was not granted such authority under the statute.

....

The plain language of [G.S.] 160A-168(c)(4) allows, by order of the trial court, ‘examination’ by ‘any person’ the relevant ‘portion’ of a city employee's personnel file. The natural meaning of these terms indicate a clear intent to maintain the privacy of a city employee's personnel file except under limited circumstances where examination of only the relevant portion of the file is allowed. The key term in this subsection is ‘any person.’ The legislature did not use the term ‘general public’ or even the word ‘people.’ We must presume that the legislature chose ‘any person’ as a limiting mechanism. While we do not read the term ‘any person’ so narrowly as to mean only one individual,

we do not read it so broadly as to mean the general public. Certainly, there are circumstances when justice requires that an individual, or perhaps a group of individuals sharing a common goal, be permitted to examine a relevant portion of a city employee's personnel file, but a wholesale publication of even a portion of the file would be contrary to the legislative intent behind [G.S.] 160A-168(c)(4). Had the legislature intended to grant the trial court the authority to release these protected records to the general public, it would have done so in specific terms, or at least in terms that would render such an interpretation logical. Rather, the legislature chose to grant the trial court *limited authority* to allow 'any person' to 'examine' a relevant 'portion' of the file.

Furthermore, when subsection (c) is read *in pari materia* with the remainder of the statute, the intent to keep these personnel files confidential is clear. In contrast to subsection (c), subsection (b) specifically states what information is deemed public, such as the employee's name, age, salary, and the office to which the employee is assigned. [G.S.] 160A-168(b). Thus, there is a clear delineation between what is public and what is confidential. What is confidential is, necessarily, not public information under this statute. Moreover, according to the statute, public records can not only be examined, they can by [sic] copied, and, consequently, disseminated to the general public. *Id.* That portion of a City employee personnel file that is not deemed public can only be 'examine[d]' when so ordered by the trial court. [G.S.] 160A-168(c)(4). The use of the word 'examine,' as opposed to 'copy' or another word pertaining to mass publication, indicates the legislature's intent to limit the exposure of these personnel files. In fact, [G.S.] 160A-168(e) makes it a criminal offense for a 'public official or employee ... [to] permit[] any person to have access to information contained in a personnel file[.]' with the exception of what is made public by subsection (b)." (In a footnote, the Court of Appeals further observed, "We note that [G.S.] 160A-168(c)(7) pertains to release of information regarding 'disciplinary action'; however, this information may only be released if the procedures outlined in that subsection are followed. It does not appear from the record that any disciplinary action was taken against respondents.")

- **Synopsis**— Appeal by respondents-officers from trial court's March 2010 order granting City 's petition for disclosure of transcripts contained in respondents' personnel files. Reversed. (Opinion by Judge

Robert C. Hunter, with Judge Stroud and Judge Robert N. Hunter, Jr., concurring.) The City filed a petition for discretionary review in November 2011. The N.C. Supreme Court denied the petition for discretionary review on January 26, 2012.

Personnel; Wrongful Discharge; Immunity; Personal Jurisdiction

BESS V. COUNTY OF CUMBERLAND, ___ N.C. App. ___, 722 S.E.2d 13 (No. COA11-1044, Cumberland— 2/21/12 (*unpublished*), *appeal dismissed, disc. review denied*, ___ N.C. ___, 724 S.E.2d 920 (No. 85A12, 4/12/12) (In defendants' appeal from June 2011 order denying motion to dismiss complaint, N.C. Court of Appeals reverses, given *inter alia* plaintiff's failure to allege waiver of governmental immunity. (Opinion by Judge McCullough, with Judge Robert C. Hunter and Judge Thigpen concurring.) On April 12, 2012, the N.C. Supreme Court dismissed plaintiff's notice of appeal based upon a constitutional question and denied plaintiff's petition for discretionary review.)

Personnel; Wrongful Discharge

COLE V. CITY OF CHARLOTTE, ___ N.C. App. ___, 723 S.E.2d 584 (No. COA11-1307, Mecklenburg— 4/17/12) (*unpublished*), *disc. review denied*, ___ N.C. ___, 731 S.E.2d 164 (No. 227P12, 8/23/12) (In plaintiff's appeal from June 2011 order, N.C. Court of Appeals affirms trial court's entry of summary judgment for City and dismissal of plaintiff's claims for wrongful, unconstitutional, or retaliatory discharge under Article 1, § 14 of the North Carolina Constitution or the public policy of the State of North Carolina. (Opinion by Chief Judge Martin, with Judges Bryant and McCullough concurring.))

PROCEDURE

Procedure; Interlocutory Appeals; Default Judgment; Condemnation

CITY OF CHARLOTTE V. MPP SOUTH POINT LAND, LLC, ___ N.C. App. ___, 727 S.E.2d 25 (No. COA11-1191, Mecklenburg-6/19/12) (*unpublished*) (Court of Appeals dismisses appeal from trial courts' order granting defendant-MPP's Rule 60 motion to set aside default judgment, entered pursuant to G.S. 136-107, as interlocutory. (Opinion by Judge McGee, with Judges Geer and McCullough concurring.))

Procedure; Motion for Relief from Judgment;

Site Specific Development Plan

TOWN OF LELAND V. HWW, LLC, ___ N.C. App. ___, 721 S.E.2d 762 (No. COA11-210, Brunswick- 2/7/12) (*unpublished*) (In HWW's appeal from October 2010 order denying in part and granting in part HWW's G.S. 1A-1, Rule 60(b) motion and from June 2008 order granting summary judgment in favor of Town, Court of Appeals affirms orders of trial court issued following remand from Leland I, 203 N.C. App. 374, 692 S.E.2d 487 (No. COA08-987-2, Brunswick- 4/6/10) (*unpublished*) (2010) (*see Digest of Municipal Law* 2009-2010, p. 59). Court of Appeals rejects appellant-HWW's arguments that: 1) the trial court erred in granting summary judgment in favor of the Town because there are genuine issues of material fact as to several issues in the case, including whether HWW's improvements brought the property into compliance with the site specific plan, and 2) the trial court's order denying HWW's Rule 60(b) motion improperly granted relief that was inconsistent with the Town's prayer for relief. (Opinion by Judge Robert N. Hunter, Jr., with Judges Geer and Ervin concurring.))

Procedure; Transfer of Case; Summary Judgment;

Declaratory Judgment; Water Main

PETTY V. CITY OF KANNAPOLIS, ___ N.C. App. ___, 718 S.E.2d 423 (No. COA11-322, Cabarrus- 11/1/11) (*unpublished*), *disc. review denied, appeal dismissed*, ___ N.C. ___, 720 S.E.2d 686 (No. 496P11, 1/26/12) (In plaintiffs' action seeking *inter alia* a declaratory judgment that defendant-City did not have an easement for water main on plaintiffs' property, attorney's fees, and punitive damages, Court of Appeals affirms trial court's orders: 1) transfer-

ring case from district court to superior court; 2) allowing defendant-City to withdraw initial motion for summary judgment, and; 3) granting subsequently filed motion for summary judgment in favor of defendant-City. (Opinion by Judge Stroud, with Judges Geer and Thigpen concurring.) Plaintiff filed a petition for discretionary review in November 2011. The N.C. Supreme Court denied the petition for discretionary review on January 26, 2012.)

PUBLIC ENTERPRISES

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

L&S WATER POWER, INC. V. PIEDMONT TRIAD REGIONAL WATER AUTHORITY, ___ N.C. App. ___, 712 S.E.2d 146 (No. COA10-1063, Guilford– 4/19/11), *petition for disc. review allowed*, ___N.C.___, 724 S.E.2d 518 (No. 198PA11, 4/12/12) (N.C. Supreme Court allows defendant-Piedmont Triad Regional Water Authority’s (PTRWA’s) petition for discretionary review of Court of Appeals’ decision holding that, in plaintiffs-hydroelectric companies’ inverse condemnation action, trial court properly found that plaintiffs were entitled to be compensated for the loss of stream flow arising from Randleman Dam project. (PTRWA includes *inter alia* the City of Archdale, the City of Greensboro, the City of High Point, the Town of Jamestown, and the City of Randleman.) *See Digest of Municipal Law 2010-11*, p. 75. The League, with assistance from the City of Raleigh, filed a new *amicus curiae* brief in June 2012 on behalf of defendant-appellant PTRWA in this case. Oral argument occurred on October 16, 2012.)

STREETS

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

KENNEDY V. POLUMBO, ___ N.C. App. ___, 704 S.E.2d 916 (Nos. COA10-586 & COA10-389, Cumberland– 2/1/11), *disc. review denied*, 365 N.C. 331, 718 S.E.2d 368 (No. 110P11, 8/25/11) (Municipalities do not generally owe any duty to individuals injured on roads that are part of the state highway system. The existence of a contract between a city and the N.C. Department of Transportation (NCDOT) for the maintenance of a street within the state highway system does not automatically shift liability for injury from NCDOT to the City; such liability must arise expressly out of contract. (Opinion by Chief Judge Martin, with Judges McGee and Ervin concurring.) The N.C. Supreme Court denied plaintiffs’ petition for discretionary review on August 25, 2011.)

Streets; Development of Street End; Sanctions; Gatekeeper Restriction

SEIDNER V. TOWN OF OAK ISLAND, ___ N.C. App. ___, 719 S.E.2d 254 (No. COA11-361, Brunswick– 11/15/11) (*unpublished*) (Court of Appeals affirms summary judgment order enjoining Town from developing the end of a public street and affirms the portion of the trial court’s Sanctions Order awarding attorney’s fees, costs, and expenses in favor of plaintiffs; vacating portion of Sanctions Order imposing a gatekeeper restriction, Court of Appeals states, “This Court, however, cannot uphold the trial court’s imposition of a gatekeeper sanction. A gatekeeper restriction is reserved for rare instances in which a party repeatedly abuses the judicial system with actions that are frivolous and unsupported by law or fact. See Dalenko v. Collier, 191 N.C. App. 713, 719, 664 S.E.2d 425, 429 (2008). While it is true that the Town has recently litigated this precise issue before this Court in Barris [v. Town of Long Beach, ___ N.C. App. ___, 704 S.E.2d 285 (2010)] and in Scronce [v. Town of Long Beach, 133 N.C. App. 190, 520 S.E.2d 609 (1999)(*unpublished*)], the instant case involves new plaintiffs challenging a new project plan in a new location. In light of this Court’s discussions in Wooten [v. Town of Topsail Beach, 127 N.C. App. 739, 493 S.E.2d 285 (1997), *disc. review denied*, 348 N.C. 78, 505 S.E.2d 888 (1998)] and Scronce concerning whether proposed developments constituted a park, or blocked the roadway

... we cannot conclude that the Town's asserted legal position, however tenuous, was frivolous. We therefore vacate this portion of the trial court's Sanctions Order." (Opinion by Judge Robert N. Hunter, Jr., with Judges McGee and Elmore concurring.)

Streets; Implied Dedication; Remand

TOWN OF MATTHEWS V. WRIGHT, ___ N.C. App. ___, 714 S.E.2d 867 (No. COA11-68, Mecklenburg— 8/16/11) (*unpublished*), *disc. review denied*, 365 N.C. 362, 718 S.E.2d 389 (No. 400P11, 11/9/11) (Court of Appeals holds that trial court failed to follow the mandate issued in Town of Matthews v. Wright, 194 N.C. App. 552, 669 S.E.2d 841 (2008) (*Digest of Municipal Law 2008-2009*, p. 70) and accordingly reverses and remands for further findings of fact to determine whether a street was impliedly dedicated to the Town. (Opinion by Judge Bryant, with Judges Geer and Beasley concurring.) Plaintiff filed a petition for discretionary review in September 2011. The N.C. Supreme Court denied the petition for discretionary review on November 9, 2011.)

TORTS

Torts; Immunity; Parks; Rental for Private Parties

ESTATE OF WILLIAMS V. PASQUOTANK COUNTY PARKS & RECREATION DEPT. & PASQUOTANK COUNTY, ___ N.C. ___, 732 S.E.2d 137 (No. 231PA11, 8/23/12)

- **Holding**— North Carolina Supreme Court unanimously vacates decision of Court of Appeals, ___ N.C. App. ___, 711 S.E.2d 450 (No. COA10-491, Pasquotank— 5/3/11) (which held in May 2011 that the trial court had properly denied the County’s motion for summary judgment in a negligence action filed by the estate of a drowning victim at an area of a park rented out for use by private parties; for a summary of the decision of the Court of Appeals, see *Digest of Municipal Law 2010-11*, p. 87.) In remanding the matter to the trial court, the Supreme Court states, “[I]t appears that the decision of the Court of Appeals that defendants were not entitled to governmental immunity, turned solely or predominantly upon the fact that the services defendants provided could also be provided by nongovernmental entities. As noted, this distinction lacks the utility it once had. Accordingly, we vacate and remand the decision of the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion. Again, in so doing, we express no position on whether defendants in this case are ultimately entitled to governmental immunity.”
- **Key Excerpt**— “[I]n deference to our tripartite system of government, the appellate courts of this State should consider whether our legislature has designated the particular function at issue as governmental or proprietary. For example, in Evans ex rel. Horton v. Housing Authority of the City of Raleigh [359 N.C. 50, 55, 602 S.E.2d 668, 672 (2004)], we considered the Housing Authorities Law ... language a significant ‘statutory indication that the provision of low and moderate income housing is a governmental function.’ *Id.* We therefore conclude that the threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue. This is especially so given our pronouncement in Steelman v. City of New Bern [279 N.C. 589, 184 S.E.2d 239 (1971)] that any change in the common law doctrine of governmental immunity is a matter for the legislature.

.

. . . . Here the Court of Appeals made a passing reference to section 160A-351, which is clearly *relevant* to the question of whether defendants’ conduct—maintaining and operating the Swimming Hole at Fun Junktion—is a governmental or proprietary endeavor. While we reserve comment on whether [G.S.] 160A-351 is ultimately determinative in light of the facts at hand, we remand to the Court of Appeals for further remand to the trial court for detailed consideration of the degree of effect, if any, of section 160A-351. . . .

. . . . We recognize that not every nuanced action that could occur in a park or other recreational facility has been designated as governmental or proprietary in nature by the legislature. We therefore offer the following guiding principles going forward. When the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant. . . .

. . . . Since we first declared in Britt [v. City of Wilmington], 236 N.C. 446, 73 S.E.2d 289 (1952)], over half a century ago, that an activity is governmental in nature if it can only be provided by a governmental agency, many services once thought to be the sole purview of the public sector have been privatized in full or in part. Consequently, it is increasingly difficult to identify services that can only be rendered by a governmental entity.

Given this reality, when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider. We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity.... [T]he proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case.” (Emphasis in original; footnotes omitted; citations omitted.)

- **Synopsis**– Defendant-appellant County filed a petition for discretionary review in June 2011. The N.C. Supreme Court allowed the petition for discretionary review on November 9, 2011. Unanimous opinion written by Justice Timmons-Goodson. (Note: The League filed an *amicus curiae* brief in this case.)

Torts; Immunity; Self-Funded Reserve; Limited Waiver Resolution

ARRINGTON V. MARTINEZ, ___ N.C. App. ___, 716 S.E.2d 410 (No. COA10-1204, Wake – 9/6/11)

- **Holding**– Provision of police services is a governmental function protected by governmental immunity, and this immunity can be waived in whole or in part. Under the terms of G.S. 160A-485, a municipality is permitted to determine the extent of its waiver of immunity, as the “adoption of such a resolution waives the city's governmental immunity only to the extent specified in the council's resolution, but in no event greater than funds available in the funded reserve for the payment of claims.” G.S. 160A-485(a).
- **Key Excerpt**– “Plaintiff's position is that she should be able to benefit from the City's SFR [self-funded reserve] and insurance for all types of damages she claims and also to preserve her rights to recover against other potentially liable parties. Plaintiff argues that the City ‘cannot arbitrarily and capriciously prohibit parties from recovering under its laws.’ Yet plaintiff has not presented any legal basis for claiming that the City's SFR [self-funded reserve for claims up to \$1 million] and insurance coverage [for claims above this amount, up to \$11 million] are arbitrary or capricious. [G.S.] 160A-485(a) provides that a municipality may purchase insurance coverage and may waive its immunity to whatever extent it determines appropriate. It may also elect not to waive its immunity at all, in which case plaintiff would have no possibility of any recovery from the City. Based on the City’s limited waiver, the City has acknowledged that plaintiff would be entitled to recover \$18,325.68 for medical and funeral expenses from the SFR, for damages permitted by the resolution as documented by bills provided by plaintiff in discovery. In fact, the City tendered a check in this amount to plaintiff on or about 3 May 2010, in conjunction

with a Release and Settlement Agreement, but she declined to execute the release or accept the check. There is thus no genuine issue of material fact as to plaintiff's failure to trigger the City's waiver of immunity, and the trial court erred in denying the City's motion for summary judgment as to governmental immunity." (Emphasis in original.)

- **Synopsis**– Appeal by defendant-City from superior court's June 2010 order granting in part its motion for summary judgment but denying its "motion for summary judgment . . . based on immunity[.]" Reversed and remanded. (Opinion by Judge Stroud, with Judge Robert N. Hunter, Jr., and Judge Thigpen concurring.) (Note: In April 2010, case was remanded to superior court from Arrington v. City of Raleigh, 369 Fed Appx. 420 (4th Cir. 2010) (*unpublished*) (*per curiam*)).

Torts; Negligence; Immunity; Road Closure Decisions

KIRKPATRICK V. TOWN OF NAGS HEAD, ___ N.C. App. ___, 713 S.E.2d 151 (No. COA10-309, Dare– 7/5/11)

- **Holding**– Court of Appeals holds that trial court erred by failing to enter summary judgment in favor of defendant-Town in plaintiffs' action alleging negligence under G.S. 160A-296(a) arising from failure to reconstruct Surfside Drive after 2004 nor'easter "washed out the improved road surface ... completely."
- **Key Excerpt**– "A review of the reported decisions of this Court and the Supreme Court reveals that no appellate court in this State has ever held that governmental immunity was not available in a civil action arising from municipal street maintenance issues outside the context of personal injury or property damage arising from an accident within or near the right-of-way and clearly attributable to an unsafe condition existing in the street or road in question. Plaintiffs have not asserted any claims resembling those that have been held not to be subject to a governmental immunity defense in our reported decisions. Instead, Plaintiffs assert that they are entitled to recover damages resulting from various forms of economic injury that they attribute to Defendant's failure to reconstruct Surf-

side Drive after the 2004 nor'easter and its decision to barricade the route formerly traversed by Surfside Drive in the affected area. If we were to accept Plaintiffs' contentions and hold Defendant liable to Plaintiffs for economic injuries resulting from the making of such decisions, we would effectively be depriving a municipality, such as Defendant, of its discretion to determine the identity of the streets upon which travel should be allowed at all. Put another way, accepting Plaintiffs' argument would effectively require a municipality to compensate a landowner or other person adversely affected by a street or roadway closure decision for economic losses arising from the closure of the road in question. We do not believe that either the Supreme Court or the General Assembly intended such a result at the time that they initially established and later codified the exception to the general rule that street and road maintenance is a governmental function entitled to governmental immunity protection applicable to municipal thoroughfares. Given these factors and the well-established policy providing for the availability of governmental immunity in the absence of a clear statutory mandate to the contrary, we conclude that the extent to which particular municipal streets and roads are kept open for use by members of the public, such as Plaintiffs, is a governmental function and that governmental immunity is available to municipalities as a defense to damage claims arising from such discretionary road closure decisions." (Citations omitted.)

- *Synopsis*– Appeal by defendant-Town from trial court's December 2009 order denying Town's motion for summary judgment. Reversed and remanded. (Opinion by Judge Ervin, with Judges Bryant and Steelman concurring.)

Torts; Negligence; Sewer Line Back-Up

WILLIAMS V. DEVERE CONSTRUCTION CO., INC., ___ N.C. App. ___, 716 S.E.2d 21 (No. COA10-900, Randolph– 8/16/11)

- *Holding*– Court of Appeals affirms trial court's dismissal of negligence claim against City of Thomasville arising from sewer line back-up at residence.

- **Key Excerpt**– “[P]laintiffs allege that ‘Thomasville was involved in the process of construction of the sewage system for the new school being constructed by De Vere in preparation for taking over operation and control of said sewer system’ City of Thomasville’s negligence, plaintiffs’ assert, was its failure to ‘communicate with [defendants Terry’s Plumbing and Davis, Martin, Powell & Associates, Inc.] and properly establish and maintain a procedure for control over the sewage flowing through the sewer system for the new school....’ Because plaintiffs fail to assert a duty on the part of City of Thomasville in the construction of the sewer system for the new Randolph County school, they have failed to state a claim for relief. Further, plaintiffs allege that City of Thomasville’s involvement was only ‘in preparation for taking over operation and control’ of the new sewer system; as such, the complaint reveals an absence of facts establishing City of Thomasville’s duty, or conduct constituting a breach of said duty that would proximately cause plaintiffs’ damages. Therefore, plaintiff has failed to make out a prima facie claim of negligence.” (Citations omitted.)
- **Synopsis**– Appeal by plaintiffs from trial court’s March 2010 order dismissing claim against City of Thomasville pursuant to G.S. 1A-1, Rule 12(b)(1) and (6). Affirmed. (Opinion by Judge Bryant, with Judges McGee and Beasley concurring.)

Torts; Constitutional Law; Immunity

FILARSKY V. DELIA, ___ U.S. ___, 132 S. Ct. 1657, 182 L. Ed. 2d 662, 80 U.S.L.W. 4318 (No. 10–1018, 4/17/12), *reh’g denied*, ___ U.S. ___, 132 S. Ct. 2764, 183 L. Ed. 2d 631, 80 U.S.L.W. 3679 (No. 10–1018, 6/11/12) (In an opinion by Chief Justice Roberts, U.S. Supreme Court unanimously reverses Ninth Circuit’s decision which had held that private attorney conducting internal affairs investigation for City was not entitled to seek the protection of qualified immunity; “[T]he common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.... [E]xamples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself....

We read [42 U.S.C.] § 1983 ‘in harmony with general principles of tort immunities and defenses.’ And we ‘proceed[] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so.’ Under this assumption, immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis. Nothing about the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common law rule.” (Citations omitted.)

Torts; Negligence; Natural Conditions; Jury Instructions

COBB EX REL. KNIGHT V. TOWN OF BLOWING ROCK, ___ N.C. ___, 722 S.E.2d 479 (No. 300A11, 1/27/12) (*per curiam*) (In a *per curiam* decision, N.C. Supreme Court reverses majority decision of Court of Appeals, ___ N.C. App. ___, 713 S.E.2d 732 (No. COA09-1443, Watagua– 7/5/11), which had held that trial court erred by denying plaintiffs’ motion for new trial in negligence action seeking damages for a 12-year old’s fall at Glen Burney Falls (child had slipped when crossing creek, instead of staying on designated trail, after leaving overlook platform). Court of Appeals majority stated, “Whether a natural condition is involved may inform the jury’s determination of what is reasonable under the circumstances, but it provides no basis for forcing the jury to ignore the known or foreseeable characteristics of lawful visitors. We hold that, regardless of whether the plaintiff, who is a lawful visitor, is injured by an artificial or natural condition, the jury must be instructed to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether the defendant has discharged its duty to exercise reasonable care in maintaining its property for the protection of the plaintiff. Here, the trial court erred in failing to instruct accordingly.” Finding plaintiffs’ new trial motion correctly denied, the dissent stated, “I believe that this instruction . . . would give improper emphasis to the age of the plaintiff under existing case law and would create a ‘higher standard of care’ in any case where a plaintiff has some sort of ‘characteristic’ which may decrease that person’s ability to look out for her own safety. . . . But our law already takes these factors into consideration in the determination of negligence in several ways.” (Court of Appeals majority opinion by Judge Robert N. Hunter, Jr., with Judge McGee con-

curing; Judge Stroud concurring in part and dissenting in part.) Defendant Town filed notice of appeal pursuant to G.S. 7A-30(2) in July 2011, and oral argument occurred on January 11, 2012. On January 27, 2012, the N.C. Supreme Court issued a *per curiam* opinion holding, “For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.”)

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