

**DIGEST OF MUNICIPAL LAW  
PART I: CASE LAW 2013-2014**

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## INTRODUCTION

The **DIGEST OF MUNICIPAL LAW, PART I: CASE LAW 2013-2014** is a joint publication of the North Carolina League of Municipalities and the North Carolina Association of Municipal Attorneys. Included primarily are summaries of cases of significance to municipalities decided by the North Carolina Supreme Court and North Carolina Court of Appeals. The cases include those reported in the July 2013 through June 2014 issues (Volume XXXIII) 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).<sup>1</sup>)

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 Rule 30(e) provides as follows, “(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion,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 If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to whom the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g) (‘Additional Authorities’). When citing an unpublished opinion, a party must indicate the opinion’s unpublished status.”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

CONSTITUTIONAL LAW

Constitutional Law; Privilege License Tax;  
Just and Equitable Tax Clause

SMITH V. CITY OF FAYETTEVILLE, \_\_\_ N.C. App. \_\_\_, 743 S.E.2d 662 (No. COA11-1263-2, Cumberland– 6/4/13), *disc. review denied, appeal dismissed*, 367 N.C. 238, 748 S.E.2d 558 (No. 236A12-2, 10/3/13)

- **Holding**– Upon Supreme Court’s order of remand for reconsideration in light of IMT, Inc. v. City of Lumberton, \_\_\_ N.C. \_\_\_, 738 S.E.2d 156 (No. 127A12, 3/8/13) (*see MLN* March 2013), Court of Appeals holds that City of Fayetteville’s privilege license tax violates the Just and Equitable Tax Clause of the N.C. Constitution. Trial court erred by awarding summary judgment to the City and by denying plaintiffs’ motion for summary judgment.
- **Key Excerpt**– “Here, the previous privilege license tax was only \$50. Smith I, \_\_\_ N.C. App. at \_\_\_, 725 S.E.2d [405] at 408 [(No. COA11-1263, Cumberland– 5/1/12)]. The 2010 ordinance enacted a new privilege license tax on ‘electronic gaming operations’ of \$2,000 per business location and \$2,500 per computer terminal. *Id.* The minimum tax under the ordinance, \$4,500, is a 8,900% increase from the prior \$50 tax. *See id.* Like in IMT, the actual tax to businesses is usually significantly higher since they operate multiple computer terminals. For instance, Plaintiff Jeffrey Smith’s business, Hi Rollers Sweepstakes, operates twelve computer terminals. His business was taxed \$32,000 under the new ordinance—almost a 64,000% increase from the previous \$50 tax.

While we acknowledge a 8,900% tax increase is not as substantial as the 59,900% increase in IMT, we conclude the 8,900% increase violates the Just and Equitable Tax Clause for the reasons stated in IMT. Specifically, the City’s 8,900% ‘minimum tax increase is wholly detached from the moorings of anything reasonably resembling a just and equitable tax.’ IMT, \_\_\_ N.C. at \_\_\_, 738 S.E.2d at 160. Therefore, it is unconstitutional as a matter of law. *See id.*”

- **Synopsis**– Appeal by plaintiffs from August 2011 order entered in Cumberland County Superior Court. The case was originally heard in the Court of Appeals in February 2012 and decided in May 2012. *See Smith v. City of Fayetteville (Smith I)*, \_\_\_ N.C. App. \_\_\_, 725 S.E.2d 405 (No. COA11-1263, Cumberland– 5/1/12) (*see Digest of Municipal Law 2011-12*, pp. 7-8). In June 2012, plaintiffs filed a notice of appeal based upon a constitutional question (No. 236A12, 6/1/12). In March 2013, the Supreme Court allowed plaintiffs’ notice of appeal only “for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in *IMT, Inc. v. City of Lumberton*.” The Court of Appeals subsequently filed this opinion on June 4, 2013. (Opinion by Hunter, Jr. (Robert N.), with Judge Bryant and Judge Davis concurring.) “Based on our Supreme Court’s holding in *IMT*, we reverse the trial court’s entire order and remand for proceedings consistent with this opinion. We further note that to the extent this opinion is inconsistent with our prior opinion filed 1 May 2012, *see Smith I*, \_\_\_ N.C. App. at \_\_\_, 725 S.E.2d at 405, the instant opinion modifies and replaces that opinion.” In August 2013, defendant filed a petition for discretionary review and notice of appeal based upon a constitutional question. The N.C. Supreme Court denied the petition and dismissed the appeal on October 3, 2013.

**Constitutional Law; Substantive Due Process;**  
**Land Use; Zoning; Parking**

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

- **Holding**– In plaintiffs’ challenge to zoning amendment limiting number of cars that can be parked on a residential lot in a neighborhood conservation district, trial court properly entered summary judgment for defendant-Town. “Where defendant enforced a zoning amendment by citing the owners of rental properties rather than their tenants because it was a more effective method of enforcement, their enforcement against property owners was rationally related to the purpose of the zoning restriction and did not violate plaintiffs’ right to substantive due process. [G.S.] 160A-301 governs a municipality’s

authority to regulate parking in public vehicular areas, while the zoning amendment was a land use restriction intended to curb over-occupancy of rental properties by limiting the number of cars parked on a rental property. Because the zoning amendment and [G.S.] 160A-301 do not address the same subject, the principle of *expressio unius est exclusio alterius* does not apply. Lanvale Properties, LLC v. County of Cabarrus, 366 N.C. 142, 731 S.E.2d 800, *reh'g denied*, 366 N.C. 416, 733 S.E.2d 156 (2012), held that an [adequate public facilities] ordinance was not a zoning ordinance, and did not change the law governing the requirements for a valid zoning ordinance.” (Emphasis in original.)

- **Key Excerpt**– In rejecting plaintiffs’ substantive due process claim, the Court stated, “[T]he zoning amendment was enacted to address the problem of over-occupancy of rental houses, and thereby reduce the problems associated with over-occupancy. Plaintiffs do not dispute that over-occupancy leads to other problems, or that decreasing the over-occupancy of rental properties is a valid goal of a zoning ordinance.... These affidavits, which were tendered by defendant’s employees with experience in enforcing zoning regulations, state that enforcement of the zoning amendment against property owners was more effective than trying to track down transient student tenants. We hold that the increased effectiveness of this enforcement mechanism is rationally related to the goal of decreasing over-occupancy in the NNC [Northside Neighborhood Conservation] district.”

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

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

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

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

PBK HOLDINGS, LLC V. COUNTY OF ROCKINGHAM, \_\_\_ N.C. App. \_\_\_, 756 S.E.2d 821 (No. COA13-865, Rockingham– 4/1/14), *appeal dismissed, disc. review denied*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 143P14, 12/18/14) (In plaintiff’s declaratory judgment action challenging ordinances regulating high impact uses (defined as “those which by their nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic and/or other impacts upon the lands adjacent to them”), Court of Appeals holds that trial court properly rejected claims that certain provisions of ordinance exceeded the authority of the Board of Commissioners, that the ordinance violated the Equal Protection clauses of the state and federal constitutions, and that the ordinance violated the Commerce Clause. “Defendant asserts, and we agree, that the objective of protecting the

health, safety, and environment of the community by mitigating the adverse impacts of high impact uses is a conceivable and legitimate government interest. The differences in requirements set out in the ordinance between regional and local landfills, with regional landfills being subject to more stringent regulation based on their projected higher impact to the surrounding area, are clearly rationally related to further defendant's conceivable, legitimate interest.” (Opinion by Judge McCullough, with Chief Judge Martin and Judge Ervin concurring.) Plaintiff filed a petition for discretionary review in May 2014. The Supreme Court denied the petition on December 18, 2014.)

EMINENT DOMAIN

Eminent Domain; Sewer Easement; Public Benefit;  
Affordable Housing

CITY OF ASHEVILLE V. RESURGENCE DEV. CO., \_\_\_ N.C. App. \_\_\_, 748 S.E.2d 751 (No. COA13-341, Buncombe– 10/15/13), *disc. review denied*, 757 S.E.2d 918 (No. 517P13, 4/10/14)

- **Holding**– Where plaintiff-City owned 16-acre parcel and condemned an easement from adjacent 5-acre parcel to extend sewer lines to affordable housing development, trial court did not err by entering order determining that plaintiff-City’s proposed condemnation of easement was for a public purpose.
- **Key Excerpt**– In holding plaintiff-City validly exercised its power of eminent domain to condemn a sewer easement over defendant’s land, the Court stated, “Currently, there is no sewer access on plaintiff’s property. Extending the sewer lines will allow the development of the land currently owned by the City of Asheville, whether this development is ultimately performed by Habitat for Humanity or some other entity, thereby increasing the availability of affordable housing in the area. The sewer line under defendant’s property has more than sufficient capacity to service plaintiff’s land. Indeed, when the sewer lines were initially set up, the pump station on defendant’s property was designed to service both plaintiff’s property and defendant’s. The separation of the ownership of the two properties is simply the fortuitous result of the sale of the two properties at foreclosure to two different buyers. Requiring plaintiff to construct a sewer pump station on its property—which is what defendant contends plaintiff ought to do— would result in wasteful and unnecessary duplication of resources.

....

As in Stout [v. City of Durham], 121 N.C. App. 716, 468 S.E.2d 254 (1996)], we conclude that the expansion of the sewer system to plaintiff’s property through the condemnation of an easement over defendant’s land is for public benefit. The fact that some benefit might also accrue to a private party does not change that conclusion. *See Carolina Tel. & Tel. Co. [v. McLeod]*, 321 N.C. [426] at 431, 364

S.E.2d [399] at 402 [(1988)] (“The mere fact that the advantage of the use inures to a particular individual will not deprive it of its public character.” (citation, quotation marks, and ellipses omitted)).

Finally, we must decide whether that public benefit is paramount to or merely incidental to the private benefit. *See id.* at 719, 468 S.E.2d at 257. We conclude that the development of affordable housing for the Asheville area is the predominant interest at stake. Here, regardless of whether one considers some private benefit as accruing to the City of Asheville, Habitat, or both, it is clear from the trial court’s findings and the record evidence that condemning a sewer easement over defendant’s land will facilitate the construction of affordable housing, which is to the benefit of the public. *See id.* Even the loan that plaintiff hopes to recoup in part through the sale of the land in question was intended to facilitate the construction of affordable housing. To the extent there are *any* private interests here, they all ultimately relate back to the purpose of building affordable housing for citizens in need. Condemnation of the easement here furthers that legitimate public interest.” (Emphasis in original.)

- **Synopsis**– Appeal by defendant from September 2012 order entered pursuant G.S. 40A-47 wherein trial court determined that plaintiff-City’s proposed condemnation of an easement over defendant’s land was for a public purpose. Affirmed. (Opinion by Judge Stroud, with Chief Judge Martin and Judge Geer concurring.) Defendant filed a petition for discretionary review in November 2013. The Supreme Court denied the petition on April 10, 2014.

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**Eminent Domain; Easement; Inverse Condemnation; Temporary Taking; Regulatory Taking; Unity of Ownership**

TOWN OF MIDLAND V. WAYNE, \_\_\_ N.C. App. \_\_\_, 748 S.E.2d 35 (No. COA12-1163, Cabarrus– 9/3/13), *petition for disc. review allowed*, 367 N.C. 292, 753 S.E.2d 664 (No. 458PA13, 1/13/14) (In appeals arising from eminent domain proceeding wherein Town sought easement (in which to construct a natural gas pipeline and a fiber

optic line) and defendant subsequently alleged counterclaim for inverse condemnation, Court of Appeals affirms in part and reverses and remands in part. “[W]e conclude the trial court did not err in ruling there was an inverse taking with regard the parking of construction vehicles and the temporary construction of a road on the Wayne Tracts outside of the Easement condemned by the Town's contractor. However, we hold that the trial court erred in concluding that there was a regulatory taking of the Wayne Tracts in their entirety. Lastly, regarding Defendant's cross-appeal, we affirm the trial court's ruling concerning the question of unity of ownership. Accordingly, we remand this matter to the trial court for a determination of damages with respect to both the Town's taking as described in its notice of taking to be calculated pursuant to [G.S.] 40A-46 *and* the temporary taking of portions of the Wayne Tracts outside the Easement by the Town's contractor.” In holding that the trial court erred as to the regulatory taking issue, Court states, “The trial court made no findings to support a conclusion that the Wayne Tracts, which include approximately 87 acres outside the three acre Easement, have no ‘practical use . . . or reasonable value.’ The trial court did not find that the Wayne Tracts could not be developed residentially at all. Rather, the trial court found that ‘[a]ny major changes or amendments to the [1997] Plan such as the elimination of roads will also render the [1997] Plan ineffective, eliminating [Defendant’s] vested rights in the Plan, and requiring [Defendant] to submit a new plan for approval by Cabarrus County[,]’ which suggests that the Wayne Tracts could still be developed for residential use, though not in accordance with the 1997 Plan. Therefore, the trial court’s findings do not support Defendant’s claim for inverse condemnation of the Wayne Tracts in their entirety based on a regulatory taking. Our holding does not prevent Defendant from presenting evidence at a subsequent trial on damages with respect to an inability to develop the Wayne Tracts in accordance with the 1997 Plan. Such evidence could be determined to be competent to show the diminution in value of the Wayne Tracts resulting from the taking of the Easement.” (Opinion by Judge Dillon, with Judge Calabria and Judge Ervin concurring.) Defendant appealed in October 2013. On January 13, 2014, the N.C. Supreme Court dismissed defendant’s notice of appeal based upon a constitutional question and allowed defendant’s petition for discretionary review.)

LAND USE

Land Use; Permits; Appeal; Standing;  
Mandamus; Board of Adjustment

MORNINGSTAR MARINAS/EATON FERRY, LLC v. WARREN COUNTY, \_\_\_ N.C. App. \_\_\_, 755 S.E.2d 75 (No. COA13-458, Warren– 3/18/14), *notice of appeal filed*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 131A14, 4/22/14), *disc. review as to additional issues denied*, \_\_\_ N.C. \_\_\_, 758 S.E.2d 862 (No. 131A14, 6/11/14)

- **Holding**– Divided panel of Court of Appeals affirms trial court’s order issuing a writ of mandamus compelling respondents to place adjoining property owner’s appeal on the Board of Adjustment’s agenda. Zoning Administrator had a statutory duty to transmit appeal to the Board of Adjustment, as the existence — or nonexistence — of standing is a legal determination that must be made by the Board.
- **Key Excerpt**– “Because [the zoning administrator] failed to comply with the statutory mandate and instead made clear his unwillingness to do so, mandamus was Morningstar’s only available remedy. Morningstar’s ability to appeal to the BOA [Board of Adjustment] was foreclosed by [the zoning administrator’s] refusal to place the appeal on the BOA’s agenda. Moreover, Morningstar could not appeal the substance of the zoning administrator’s decision directly to the superior court because only BOA decisions are subject to judicial review. *See* [G.S.] 153A-345(e2) (‘Each decision *of the board* is subject to review by the superior court by proceedings in the nature of certiorari.’ (emphasis added)).

The trial court’s order compelling Respondents to place Morningstar’s appeal on the BOA agenda does not allow Morningstar to circumvent the requirement of standing. To the contrary, its order fully recognizes that in accordance with § 153A-345, Morningstar must establish that it is an aggrieved party in order to have the merits of its appeal heard by the BOA. We believe the order correctly provides that the determination of whether Morningstar has standing to appeal must be made by the BOA rather than by [the zoning administrator]. We

express no opinion as to whether Morningstar does or does not possess standing to appeal because that issue is not before us.

Smith v. Forsyth Cty. Bd. of Adjust., 186 N.C. App. 651, 652 S.E.2d 355 (2007), the case the dissent relies upon in concluding that mandamus was not appropriate, did not involve a petition for a writ of mandamus or in any way address the authority of a zoning administrator to make a determination as to standing.... We do not read *Smith* as suggesting that a zoning officer would have the authority to refuse to transmit an appeal to the BOA based simply on his own belief that the appellant lacked standing. We cannot agree with the dissent that our holding in *Smith* somehow confers a gatekeeper role onto zoning officers given that such a role is nowhere conferred by statute or, for that matter, identified in our decision in that case.”

- **Synopsis**– Appeal by respondents from September 2012 order issuing writ of mandamus. Affirmed in a 2-1 decision. (Opinion by Judge Davis, joined by Judge McCullough. Judge Elmore dissenting.) *Note*: In a footnote, it was observed that G.S. 153A-345 was in effect during the time period relevant to this case but has since been repealed. Appeals to county boards of adjustment are now governed by G.S. 160A-388. *See* G.S. 153A-345.1 (effective October 1, 2013).

### Land Use; Permits; Cell Towers

BLAIR INVESTMENTS, LLC v. ROANOKE RAPIDS CITY COUNCIL, \_\_\_ N.C. App. \_\_\_, 752 S.E.2d 524 (No. COA13-690, 12/17/13)

- **Holding**– Where petitioner made a *prima facie* case that it was entitled to a special use permit to construct a cell tower in an area zoned I-1 industrial and the City Council’s denial of petitioner’s application was not supported by competent, material, and substantial evidence, the trial court erred by affirming the Council’s decision. Case remanded to trial court for remand to Council with instructions to grant petitioner’s application for a special use permit.
- **Key Excerpt**– Upon reviewing the record, including planning staff’s recommendation that the permit be issued, and determining that petitioner made a *prima facie* case of entitlement to a special use

permit, the Court turned to the issue of whether the record contained substantial, competent, and material evidence to support denial of petitioner's application for a permit. Noting that the only evidence offered in opposition to the permit's issuance consisted of comments by several local residents, the Court stated, "The comments from area residents were primarily concerned with the condition of a building on the property. To the extent that these speakers addressed the cell tower, their comments consisted entirely of speculative opinions, unsupported by any documentary or testimonial evidence, or of statements informing the council that the speaker had a question or a 'concern' about a particular issue.

Respondent denied petitioner's application for a special use permit on the grounds that the tower would more probably than not 'materially endanger the public health or safety' and that it was 'not in harmony with the area in which it is to be located.' However, no evidence was introduced that was competent or material on either the health and safety implications of the tower or whether it would be in harmony with the surrounding area. 'The inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district.' Woodhouse [v. Board of Commissioners], 299 N.C. [211] at 216, 261 S.E.2d [882] at 886 [(1980)]. Respondents cite no evidence that the tower would not be in harmony with the area, nor any evidence about health or safety issues. We hold that respondents' denial of petitioner's application was not supported by substantial, material, and competent evidence.

Respondents allege on appeal that the 'concerns' of local residents constituted substantial, material, and competent evidence. However, respondents neither acknowledge nor attempt to distinguish precedent holding that a board's decision to deny a permit request may not be based on speculative opinions...." (Citation omitted.)

- **Synopsis**– Appeal by petitioner from February 2012 order affirming Council's denial of special use permit. Reversed. Opinion by Judge Steelman, with Chief Judge Martin and Judge Dillon concurring.

**Land Use; Permits; Res Judicata**

MOUNT ULLA HISTORICAL PRESERVATION SOCIETY, INC. V. ROWAN COUNTY, \_\_\_ N.C. App. \_\_\_, 754 S.E.2d 237 (No. COA13-447, Rowan– 2/18/14)

- **Holding**– *Res judicata* generally applies to quasi-judicial land use decisions, unless there is a material change in the facts or circumstances since the issuance of the prior decision. Where whole record review provided no evidence that lowering of proposed tower by 150 feet in 2010 conditional use permit application constituted a material change from 2005 application (seeking to build a 1,350 foot radio tower in vicinity of airport), superior court properly concluded that the 2010 application was barred by *res judicata*.
- **Key Excerpt**– “[A] material change which precludes the use of the defense of *res judicata* occurs when the specific facts or circumstances which led to the prior quasi-judicial land use decision have changed to the extent that they ‘vitiates . . . the reasons which produced and supported’ the prior decision such that the application ‘can no longer be characterized as the same claim.’ In the instant case, the 2005 CUP application was denied because the proposed tower was determined to be a safety hazard to Miller Airpark. Accordingly, in order to avoid being barred by *res judicata*, DCBI’s 2010 CUP application must have materially changed the design of the proposed tower in such a way as to vitiate the concerns regarding air safety which led to the denial of the 2005 CUP application.

.....

..... Since there is nothing in the whole record which suggests that the prior evidence regarding the tower’s potential safety hazard to air travel from the 2005 CUP application hearing was vitiated by lowering the tower by 150 feet, the Board’s finding in the instant case that there was a material change in the 2010 CUP application was not supported by the evidence. The whole record reflects that the Board essentially considered the same information in both the 2005 and 2010 CUP applications and reached different decisions. *Res judicata* forbids such a result.... Ultimately, as there was no material change between the 2005 and 2010 CUP applications, *res judicata* barred the Board from reconsidering its previous decision. Therefore, the superior court properly concluded that *res judicata* required the Board to dismiss the 2010 CUP application.” (Citations omitted.)

- **Synopsis**– Appeal by respondent-County from September 2012 order reversing Board of Commissioners’ approval of 2010 conditional use permit application. Affirmed. (Opinion by Judge Calabria, with Judge Bryant and Judge Hunter, Jr. (Robert N.), concurring.) *Note*: A prior appeal in this matter appears at 186 N.C. App. 81, 649 S.E.2d 904 (2007).
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**Land Use; Certiorari; Motion Seeking Amendment and/or Alteration**

MYERS PARK HOMEOWNERS ASSOCIATION, INC. v. CITY OF CHARLOTTE, \_\_\_ N.C. App. \_\_\_, 747 S.E.2d 338 (No. COA12-1346, Mecklenburg– 8/20/13) (In petitioner-homeowner association’s appeal from trial court’s orders: (1) affirming Zoning Board of Adjustment’s decision pertaining to expansion of university’s campus and (2) denying petitioner’s subsequent request pursuant to Rules 52 and 59 of the N.C. Rules of Civil Procedure for *inter alia* additional conclusions of law, N.C. Court of Appeals affirms. “As we held in Markham v. Swails, we are of the opinion that Rule 52(b) has no application where the superior court sits in the posture of an appellate court. 29 N.C. App. 205, 208, 223 S.E.2d 920, 922 (1976). Similarly, we hold that a motion pursuant to Rule 59, concerning new trials and amendment of judgments, is inapplicable in the present case.” (Opinion by Judge McCullough, with Judge Calabria and Judge Steelman concurring.))

**Land Use; Fence; Notice of Violation**

LIPINSKI v. TOWN OF SUMMERFIELD, \_\_\_ N.C. App. \_\_\_, 750 S.E.2d 46 (No. COA13-468, Guilford– 11/5/13) (In petitioner’s appeal from superior court order upholding Board of Adjustment’s decision affirming a notice of violation issued by respondent- Town's code enforcement officer, Court of Appeals reverses, holding that Board erred in interpreting ordinance. “We acknowledge the Board's determination that the fence was constructed of unpermitted material because the tarps became part of the fence when they were attached. However, we find that interpretation of the ordinance

superimposes a limitation that is not found in the ordinance: that attaching things to a fence changes its structural composition. Petitioner's chain-link fence stood for approximately six months before he attached the tarps to it. The act of attaching tarps to the fence did not change the structure of the fence because if the fence was truly constructed of tarps it likely would not be a fence at all but rather a screen made of tarps. The tarps that petitioner attached are a nonstructural feature.” (Opinion by Chief Judge Martin, with Judge Geer and Judge Stroud concurring.)

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

TEMPLETON PROPERTIES, L.P. v. TOWN OF BOONE, \_\_\_ N.C. App. \_\_\_, 759 S.E.2d 311 (No. COA13-1274, Watagua– 6/3/14), *petition for disc. review allowed*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 234PA14, 12/18/14) (Reversing trial court’s order, Court of Appeals holds that the Board's denial of petitioner-Templeton's special use permit was supported by competent evidence and was proper under its harmony analysis. (Opinion by Judge Hunter, Jr. (Robert N.), with Judge Stroud and Judge Dillon concurring.) For prior appeals in this matter, *see* Templeton Properties, L.P. v. Town of Boone, 219 N.C. App. 266, 724 S.E.2d 604 (2012) (see *Digest of Municipal Law* 2011-2012, p. 29); Templeton Properties, L.P. v. Town of Boone, 198 N.C. App. 406, 681 S.E.2d 566 (No. COA08-1237, Watagua– 7/21/09) (*unpublished*) (see *Digest of Municipal Law* 2009-2010, p. 34). Petitioner filed a petition for discretionary review in July 2014. The North Carolina Supreme Court allowed the petition on December 18, 2014.)

LAW ENFORCEMENT

**Law Enforcement; Police Pursuits**

GREENE V. CITY OF GREENVILLE, \_\_\_ N.C. App. \_\_\_, 736 S.E. 2d 833 (No. COA12-908, Pitt- 1/15/13), *disc. review denied*, 367 N.C. 214, 747 S.E.2d 249 (No. 121P13, 8/27/13) (In wrongful death action involving police pursuit arising from suspected violation of drug laws, Court of Appeals holds that trial court erred in denying defendants’ motion for summary judgment. “Officer Campbell followed common procedure and exercised his discretion by waiting to activate the siren and lights. Moreover, there is no evidence that Officer Campbell lost control prior to his attempt to avoid a crash with the vehicle making an un-signalized turn. Although he violated policy by failing to notify the police communications center of the pursuit, this failure does not constitute gross negligence. *See e.g. Id.* [Young v. Woodall, 343 N.C. 459, 463, 471 S.E.2d 357, 360 (1996)] (violating a policy requiring that the blue light and siren be activated when a patrol car exceeds the speed limit does not establish gross negligence). Finally, we recognize that Officer Campbell reached a maximum speed of approximately 30 m.p.h. over the speed limit. However, exceeding the speed limit is also insufficient to establish gross negligence. *See Parish v. Hill*, 350 N.C. 231, 245, 513 S.E.2d 547, 555 (1999). We conclude that these circumstances do not demonstrate the degree of reckless indifference toward the safety of others required to establish gross negligence.” (Opinion by Judge Elmore, with Judge McGee and Judge Hunter (Robert C.) concurring.) Plaintiff filed a petition for discretionary review in March 2013. The Supreme Court denied the petition on August 27, 2013.)

NUISANCES

Nuisances; Demolition; Takings; Collateral Estoppel;  
Exhaustion of Administrative Remedies

HILLSBORO PARTNERS, LLC v. CITY OF FAYETTEVILLE, \_\_\_ N.C. App. \_\_\_, 738 S.E.2d 819 (No. COA12-987, Cumberland– 3/19/13), *disc. review denied*, 367 N.C. 236, 748 S.E.2d 544 (No. 170P13, 10/3/13)

- ***Holding***– In plaintiff’s action alleging that it was entitled to just compensation for demolished building, trial court erred by denying City’s motion to dismiss. Plaintiff was estopped from claiming that its building was not a danger to public safety, as plaintiff failed to appeal from the inspector’s quasi-judicial determination that the building posed such a danger, making that determination final.
- ***Key Excerpt***– The Court initially determined that plaintiff was collaterally estopped from claiming that its building was not a fire, health, and safety hazard. “[D]efendant’s motion raised a colorable claim of collateral estoppel, as this is plaintiff’s second lawsuit against defendant arising from the demolition of the building. Accordingly, we hold that the trial court’s order denying defendant’s motion for summary judgment on the ground of collateral estoppel affects a substantial right and is properly before this Court... The issue of whether plaintiff’s building posed a danger to public health and safety meets all four elements of collateral estoppel. There was a final decision on the merits, the current issue of the safety of plaintiff’s building is the same issue as that in the prior proceeding, the issue was actually and necessarily litigated in the prior proceeding, and the issue was actually determined in that proceeding.”

As to plaintiff’s takings claim, the Court stated, “No compensation is required ... if the property taken is a nuisance threatening public health or safety, as that action is within the proper exercise of the State’s police power. [P]laintiff cannot maintain a claim for just compensation if its building posed a fire or safety hazard to the public when destroyed, consistent with long-established background principles of public nuisance. *See Lucas [v. South Carolina Coastal Council]*, 505 U.S. [1003] at 1029, 120 L. Ed. 2d [798] at 821 n.16 [(1992)] (noting

that the State’s power to abate a public nuisance ‘absolv[es] the State (or private parties) of liability for the destruction of “real and personal property, in cases of actual necessity, to prevent the spreading of a fire” or to forestall other grave threats to the lives and property of others.’) Moreover, unlike in Horton, where our Supreme Court reversed a demolition order, plaintiff does not claim that it was not given fair notice and a reasonable opportunity to correct the dangerous conditions before the City Council passed the demolition ordinance on 11 October 2010. *See Horton [v. Gullledge]*, 277 N.C. [353] at 363, 177 S.E.2d [885] at 892 [(1970)] (‘We do not have before us the question of the authority of the city to destroy this property, without paying the owner compensation therefor, in the event that the owner does not, within a reasonable time allowed him by the city for that purpose, repair the house so as to make it comply with the requirements of the Housing Code.’). Here, plaintiff failed to remedy the dangers posed by its building (or even to perform an adequate inspection of the building to discover if the building was actually not dangerous) in the 60 days allotted by the city’s final order after being given notice several times and an opportunity to be heard.” (Citations omitted.)

- **Synopsis**– Appeal by defendant-City from May 2012 order denying City’s motion to dismiss. Reversed and remanded. (Opinion by Judge Stroud, with Judge Hunter, Jr. (Robert N.) and Judge Davis concurring.) In April 2013, plaintiff filed a petition for discretionary review. The N.C. Supreme Court denied the petition on October 3, 2013.

**Nuisances; Order for Demolition; Jurisdiction;**  
**Insufficiency of Record on Appeal; Appellate Rules Violations;**  
**Dismissal**

FORD V. CITY OF WILSON, \_\_\_ N.C. App. \_\_\_, 752 S.E.2d 260 (No. COA13-376, Wilson– 10/15/13) (*unpublished*), *cert. denied, review dismissed*, 367 N.C. 295, 753 S.E.2d 675 (No. 540P13, 1/23/14)

- **Holding**– In plaintiff’s appeal from trial court’s order granting City’s motion to dismiss, N.C. Court of Appeals dismisses appeal due to insufficiency of the record. When the record on appeal, N.C.R. App. P.

9, is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed.

- **Key Excerpt**– “The superior court’s jurisdiction on appeal from these decisions was derivative and, therefore, dependent on the jurisdiction of the Senior Code Enforcement Officer and the City Council. ‘[R]eview is solely upon the record on appeal, the verbatim transcript of proceedings, . . . and any other items filed pursuant to this Rule 9.’ N.C.R. App. P. 9(a). There are notice, pleading, and hearing requirements that must be followed in order to condemn a building for demolition. [G.S.] 160A-443. Without record evidence of jurisdiction in the lower tribunals, we have no record evidence of jurisdiction in the superior court from which this appeal is taken....”

Furthermore, Plaintiff’s appeal from the decision of the City Council was, apparently, pursuant to [G.S.] 160A-446(e): ‘Every decision of the board shall be subject to review by proceedings in the nature of certiorari instituted within 15 days of the decision of the board, but not otherwise.’ There is nothing in the record indicating Plaintiff filed for review pursuant to [G.S.] 160A-446(e), nor anything from which we could determine if the filing time requirements were met even if Plaintiff did file for review. Because the record fails to demonstrate that the trial court had jurisdiction to issue the order, we dismiss Plaintiff’s appeal.” (Citations omitted.)

- **Synopsis**– Appeal by plaintiff from December 2012 order granting defendant-City’s motion to dismiss. Appeal dismissed. (Opinion by Judge McGee, with Judge McCullough and Judge Dillon concurring.) In November 2013, plaintiff filed petitions for discretionary review and for writ of certiorari. On January 23, 2014, the N.C. Supreme Court denied the petition for writ of certiorari and dismissed the petition for discretionary review.

PERSONNEL

**Personnel; Law Enforcement, Internal Investigation Files; Disclosure**

WIND V. CITY OF GASTONIA, \_\_\_ N.C. App. \_\_\_, 738 S.E.2d 780 (No. COA12-421, 3/19/13), *aff'd*, 367 N.C. 184, 751 S.E.2d 611 (No. 172A13, 12/20/13) (*per curiam*) (In plaintiff-police officer's action seeking access to contents of internal investigation files wherein both matters were dismissed by the Chief of Police with no action taken against plaintiff, a majority of the Court of Appeals affirms trial court's entry of summary judgment for plaintiff, including ordering defendant-City to disclose the identity of individuals filing the complaints. Majority of the Court of Appeals rejects the argument that an exoneration does not constitute an "official personnel decision" for purposes of 160A-168(c1)(4). Wind v. City of Gastonia, \_\_\_ N.C. App. \_\_\_, 738 S.E.2d 780 (No. COA12-421, 3/19/13) (*see Digest of Municipal Law 2012-13*, p. 30). In April 2013, a notice of appeal was filed pursuant to G.S. 7A-30(2). After hearing oral arguments in November 2013, the Supreme Court affirmed in a *per curiam* opinion issued December 20, 2013.)

**Personnel; Waiver of Governmental Immunity; Sheriff; Surety Bond; Wrongful Discharge; Workers' Compensation Retaliatory Discharge**

WHITE V. COCHRAN, \_\_\_ N.C. App. \_\_\_, 748 S.E.2d 334 (No. COA13-155, Swain- 8/20/13) (In plaintiff's action alleging *inter alia* common law wrongful discharge and workers' compensation retaliatory discharge, G.S. 95-241, Court of Appeals affirms, rejecting multiple arguments set forth in defendants' (sheriff and surety) appeal from denial of summary judgment motion. (Opinion by Judge Ervin, with Judge Hunter (Robert C.) and Judge Stroud concurring.) For a decision regarding a prior appeal in this matter, *see White v. Cochran*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 420 (No. COA10-1191, Swain- 10/4/11).)

**Personnel; Wrongful Discharge; Constitutional Claims; Motion for Judgment on the Pleadings**

BIGELOW V. TOWN OF CHAPEL HILL, \_\_\_ N.C. App. \_\_\_, 745 S.E.2d 316 (No. COA12-1105, Orange- 5/7/13), *disc. review denied*, 367

N.C. 223, 747 S.E.2d 543 (No. 257P13, 8/27/13) In plaintiff-sanitation workers' appeal from trial court's granting of defendant's motion for judgment on the pleadings, G.S. 1A-1, Rule 12(c), N.C. Court of Appeals affirms in part and vacates and remands in part. Court affirms the granting of the motion for judgment on the pleadings as to the claims against the Town Manager acting in his individual capacity. "North Carolina does not recognize direct North Carolina constitutional claims against public officials acting in their individual capacities. Corum v. University of North Carolina, 330 N.C. 761, 789, 413 S.E.2d 276, 293 (1992)." As to remaining claims against the Town, Court vacates and remands. "While we make no determinations on the merits of Plaintiffs' wrongful discharge claim, we hold that Plaintiffs have sufficiently pled a claim for wrongful discharge." As to the constitutional claims, Court states, "As long as Defendants' sovereign immunity defense remains potentially viable for any or all of Plaintiffs' wrongful discharge-related claims, our Supreme Court's decision in Craig, 363 N.C. [334] at 340, 678 S.E.2d [351] at 355 [(2009)], dictates that Plaintiffs' associated North Carolina constitutional claims are not supplanted by those claims. 'This holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case. Rather, it simply ensures that an adequate remedy must provide the possibility of relief under the circumstances.' *Id.*" (Opinion by Judge McGee, with Judge Geer and Judge Davis concurring.) Defendants filed a petition for discretionary review in June 2013. The Supreme Court denied the petition on August 27, 2013.)

POLICE POWER

Police Power; Ordinances; Towing

KING V. TOWN OF CHAPEL HILL, 367 N.C. 400, 758 S.E.2d 364 (No. 281PA13, 6/12/14)

- ***Holding***– Affirming in part and reversing in part the Court of Appeals’ decision, the Supreme Court held, “Under a broad reading of Chapel Hill's ordinance-making power, we hold that the Town is generally permitted to regulate vehicle towing and that it acted within its authority by enacting signage, notice, and payment requirements for towing from private lots. Even construing Chapel Hill's powers broadly, however, we hold that the Town exceeded those powers by imposing a fee schedule and prohibiting towing companies from charging credit card fees. Additionally, we hold that the legislature's comprehensive scheme regulating mobile telephone usage on our streets and highways precludes municipalities from intruding into this sphere wholly occupied by the State.”
- ***Key Excerpts***– The Court initially examined principles pertaining to the exercise and delegation of the general police power, G.S. 160A-174(a) (“A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.”). The Court stated, “This Court has long recognized that the police power of the State may be exercised to enact laws, within constitutional limits, "to protect or promote the health, morals, order, safety, and general welfare of society." Standley v. Town of Woodfin, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (quoting State v. Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)). The General Assembly has delegated a portion of this power to municipalities through [G.S.] 160A-174. *Id.*... Like the State's police power, [G.S.] 160A-174 is by its very nature ambiguous, and its reach cannot be fully defined in clear and definite terms. *See City of Winston-Salem v. S. Ry. Co.*, 248 N.C. 637, 642-43, 105 S.E.2d 37, 41 (1958) (“Since the police power of the State has not been, and by its nature cannot be, placed within fixed definitive limits, it may be extended or restricted to meet changing conditions, economic as well as social.”); Ernst Freund, *The Police Power* § 3, at 3 (1904) (“[An

examination of police power] will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i.e., capable of development.’). Therefore, we are bound to construe [G.S.] 160A-174 ‘to include any additional and supplementary powers that are reasonably necessary or expedient to carry [the grant of power] into execution and effect.’ [G.S.] 160A-4; *see also Lanvale [Props., LLC v. Cnty. of Cabarrus]*, 366 N.C. [142] at 157, 731 S.E.2d [800] at 811 [(2012)].”

The Court turned to the issue of whether G.S. 160A-174, when construed in accordance with G.S. 160A-4, bestowed any authority on municipalities to regulate towing from private lots. Reading G.S. 160A-174 broadly, the Court determined that the general authority to regulate nonconsensual towing from private lots emanated from the “municipal power to protect citizen health, safety, or welfare.” The Court stated, “Protection of the real property rights and business interests of those who own or lease parking lots depends on having the ability to remove vehicles parked without permission. On the other hand, the right to remove vehicles collides with the personal property rights of vehicle owners. Towing can leave unknowing drivers without means of transportation and can lead to altercations between vehicle owners and towing personnel. In an urban setting the general power to regulate towing ameliorates these dangers in addition to protecting lot owners’ and lessees’ property rights by ensuring that parking is available to those lawfully present on the property.”

However, the Court held that the Town exceeded its authority by imposing a fee schedule (and prohibiting towing companies from charging credit card fees) for nonconsensual towing from private lots. “Despite our expansive reading of [G.S.] 160A-174, we do not believe that statute permits a city or town to create the fee schedule at issue here. The prices that citizens pay for towing are wholly unrelated to the protection of citizen health or safety, leaving only the question of whether the fee schedule provision falls under the protection of citizen welfare. Allowing Chapel Hill to engage in price setting under the general and undefined rubric of ‘welfare’ could subject other enterprises not only to price setting but also to officious and inappropriate regulation of other aspects of their businesses. Where any relationship between ‘welfare’ and the specific activity sought to

be regulated is as attenuated as here, we believe that the more prudent course is for the General Assembly to grant such authority expressly, as it has done in regard to rates that may be charged in other contexts such as, for instance, taxi cabs. [G.S.] 160A-304 (2013). While Chapel Hill has the general authority to regulate towing, by capping fees, the town inappropriately places the burden of increased costs incident to the regulation solely on towing companies.” While the Court concluded that “[r]equiring towing companies to accept credit and debit cards bears a rational relation to a broad interpretation of citizen safety or welfare by enabling vehicle owners to quickly and easily regain access to their vehicles[,]” the Court held that the prohibition on charging credit card fees also was “tantamount to creating a fee cap.” The Court proceeded to find these sections severable from the remainder of the ordinance. “At oral argument counsel for Chapel Hill acknowledged that certain provisions of the Towing Ordinance are indeed severable. Striking only the fee schedule and credit card fee provisions would not hinder the overall purpose of the ordinance to ‘minimize and control the harmful and adverse effects that occur during the non-consensual towing of motor vehicles,’ Towing Ordinance § 11-300(f), and it is apparent that the Town Council would have enacted the Towing Ordinance even absent the offending provisions. In sum, we strike the fee schedule and credit card fee provisions of the Towing Ordinance, but leave the remainder of the ordinance intact.”

The Court then turned to the mobile phone ordinance, observing that the Court of Appeals did not reach the issue given the absence of an issuance of a citation. Concluding “that the ordinance’s alleged substantial encumbrance on economic activity constitutes a manifest threat of irreparable harm sufficient to invoke the equity jurisdiction of the Court,” the Court held the mobile phone ordinance was preempted. The Court determined that there was a complete and integrated regulatory scheme, as “the General Assembly has, on a statewide scale, repeatedly amended our Motor Vehicle Act [Chapter 20 of the General Statutes] to reduce the dangers associated with mobile phone usage on roads and highways.” The Court interpreted three statutes *in pari materia* in so holding. See G.S. 20-137.3(b) (“no person under the age of 18 years shall operate a motor vehicle on a public street or highway or public vehicular area while using a mobile telephone or any additional technology associated with a mobile telephone while

the vehicle is in motion"); G.S. 20-137.4(b) (prohibiting using a mobile phone while operating a school bus); G.S. 20-137.4A (entitled "Unlawful Use of mobile telephone for text messaging or electronic mail.").

- **Synopsis**– Plaintiff-appellant filed a petition for discretionary review in June 2013. The N.C. Supreme Court allowed the petition for discretionary review on November 7, 2013. Unanimous opinion written by Justice Newby. (For a summary of the decision of the Court of Appeals, \_\_\_ N.C. App. \_\_\_, 743 S.E.2d 666 (No. COA12-1262, Orange– 6/4/13), see *Digest of Municipal Law 2012-13*, p. 32.) The League filed a new *amicus curiae* brief as to the towing ordinance on behalf of defendant-appellee Town in January 2014.

PROCEDURE

Procedure; Board of Adjustment; Permits; Attorney's Fees

IZYDORE V. CITY OF DURHAM, \_\_\_ N.C. App. \_\_\_, 746 S.E.2d 324 (No. COA12-1284, Durham– 8/6/13), *disc. review denied*, 367 N.C. 261, 749 S.E.2d 851 (No. 404P13, 11/7/13)

- **Holding**– Trial court properly denied petitioner’s petition to recover attorney’s fees from Board of Adjustment under G.S. 6-19.1 (entitled “Attorney’s fees to parties appealing or defending against agency decision.”). The City, the Board of Adjustment, and the Planning Department are not “agencies” for purposes of G.S. 6-19.1.
- **Key Excerpt**– “[B]ecause statutes authorizing the award of attorney’s fees are in derogation of the common law, they must be strictly construed. As such, ‘everything [should] be excluded from [the statute’s] operation which does not clearly come within the scope of the language used . . . .’

Neither [G.S.] 6-19.1 nor Chapter 6 of the General Statutes in its entirety provides a definition of the terms ‘agency’ or ‘State action.’ Section 6-19.1 does, however, twice reference Chapter 150B of the North Carolina General Statutes, which contains North Carolina’s Administrative Procedure Act (‘APA’). Although the APA nowhere defines the phrase ‘State action,’ it does define the term ‘agency’ as follows:

‘Agency’ means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor’s Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. *A local unit of government is not an agency.*

[G.S.] 150B-2(1a) (2011) (emphasis added).

Thus, because counties and municipalities are considered local units of government, they do not constitute ‘agencies’ for purposes of the APA.

....

[G.S.] 6-19.1’s limitation of attorney’s fees to those civil actions with ‘State’ involvement coupled with its repeated references to the APA strongly suggest that the legislature intended for the statute to apply to entities falling within the APA’s definition of the term ‘agency’ as set out in [G.S.] 150B-2(1a).” (Citations omitted.)

- **Synopsis**– Appeal by petitioner from May 2012 order denying petitioner’s petition for attorney’s fees. Affirmed. (Opinion by Judge Davis, with Judge McGee and Judge Geer concurring.) In September 2013, petitioner filed a petition for discretionary review. The N.C. Supreme Court denied the petition on November 7, 2013.

**Procedure; Subject Matter Jurisdiction; Pole Attachment Agreements; Just, Reasonable, and Non-Discriminatory Rates**

TIME WARNER ENTERTAINMENT ADVANCE/NEWHOUSE PARTNERSHIP V. TOWN OF LANDIS, \_\_\_ N.C. App. \_\_\_, 747 S.E.2d 610 (No. COA13-22, N.C. Business Court– 8/6/13)

- **Holding**– In plaintiff-Time Warner Entertainment Advance/Newhouse Partnership’s (TWEAN’s) action under G.S. 62-350 arising from dispute concerning pole attachment agreement, N.C. Court of Appeals holds that Business Court erred in dismissing case for lack of subject matter jurisdiction. G.S. 62-350 creates a statutory right for both communications service providers and municipalities to establish "just, reasonable, and nondiscriminatory" pole attachment rates within 90 days of a request to negotiate. The statute creates a private cause of action to enforce these rights, allowing “either party [to] bring an action in Business Court in accordance with the procedures for a mandatory business case.” G.S. 62-350(c).
- **Key Excerpt**– “[T]he Business Court determined it did not have subject matter jurisdiction because TWEAN did not satisfy the controversy requirement. Specifically, the Business Court held TWEAN did not allege: (i) a prior violation of its rights; or (ii) the

imminent threat of a violation. Upon review, we conclude the Business Court erred because TWEAN showed a controversy exists under [G.S.] 62-350.

To this effect, TWEAN alleged a prior violation of its statutory right to establish ‘just, reasonable, and nondiscriminatory’ pole attachment rates within 90 days of a request to negotiate. *See* [G.S.] 62-350(c). It then presented evidence supporting its allegation. First, TWEAN submitted a request to negotiate to Landis on 31 August 2009. Next, TWEAN negotiated with Landis for more than 90 days. In fact, the Business Court implicitly acknowledged the parties negotiated when it dismissed TWEAN's refusal to negotiate claim. Despite these negotiations, the parties failed to reach an agreement. Once 90 days had passed, TWEAN filed its complaint under [G.S.] 62-350.

Contrary to the Business Court's determination, the controversy here is not the future possibility of increased pole attachment rates. Instead, the controversy arises from the parties' failure to reach an agreement within 90 days. This failure violated TWEAN's right to establish ‘just, reasonable, and nondiscriminatory’ pole attachment rates within 90 days of a request to negotiate. While we make no determination as to whether the pole attachment rates in the Proposed Agreement are ‘just, reasonable, and nondiscriminatory,’ we determine there exists a justiciable controversy.” (Citations omitted.) The Court remanded for further proceedings.

- **Synopsis**– Appeal by plaintiff-TWEAN from October 2012 order. Reversed and remanded. (Opinion by Judge Hunter, Jr. (Robert N.), with Judge McGee and Judge Stephens concurring.)

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

PHILADELPHUS PRESBYTERIAN FOUND., INC., v. ROBESON COUNTY BD.

OF ADJUSTMENT, \_\_\_ N.C. App. \_\_\_, 754 S.E.2d 258 (No. COA13-777, Robeson– 1/7/14) (*unpublished*), *disc. review denied*,

\_\_\_ N.C. \_\_\_, 758 S.E.2d 873 (No. 45P14, 6/11/14) (In petitioners’ appeal from an order dismissing their *certiorari* petition seeking review of County’s issuance of conditional use permit to Buie Lake Plantation, LLC, for construction of sand mining and processing facility, Court of Appeals affirms. Court also rejects contention that the trial court erred by depriving petitioners of the ability to amend their petition to join the omitted necessary party. “[G]iven that Petitioners violated the relevant provisions of [G.S.] 160A-393(e) by failing to name Buie Lakes as a respondent, the trial court correctly dismissed their *certiorari* petition for lack of subject matter jurisdiction. *N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612-13, 471 S.E.2d 115, 118 (1996) (stating that ‘[f]ailure to meet the pleading requirements for this extraordinary writ deprives the superior court of subject matter jurisdiction of the particular matter over which the moving party seeks review’), *aff’d*, 345 N.C. 630, 481 S.E.2d 83 (1997).... [G]iven that the trial court lacked jurisdiction over this case as a result of Petitioners’ failure to join Buie Lakes as a party respondent, it also lacked the authority to allow them to amend their petition to cure this defect.” (Opinion by Judge Ervin, joined by Judge Calabria and Judge Stephens.) Petitioners filed a petition for discretionary review in February 2014. The Supreme Court denied the petition on June 11, 2014.)

**Procedure; Interlocutory Appeals; Legislative Immunity; Quasi-Judicial Immunity**

ROYAL OAK CONCERNED CITIZENS ASSOCIATION V. BRUNSWICK COUNTY, \_\_\_ N.C. App. \_\_\_, 756 S.E.2d 833 (No. COA13-884 & 885, Brunswick– 4/1/14) (In County’s appeals from orders compelling former County Manager to appear for deposition, Court of Appeals dismisses appeals as interlocutory. “We ... hold that the trial court’s orders do not preclude Defendant from making objections based on privilege at [the former County Manager’s] deposition if Defendant has a good-faith basis to believe that the information is protected by legislative or quasi-judicial immunity. Whether [he], as a county manager, actually performed actions ‘in the sphere of legitimate legislative activity’ or ‘in the exercise [of a] judicial function’ is not properly before us at this time. Once a specific question has been propounded by Plaintiffs to [him] at the deposition, the trial court can properly decide whether the

information sought is protected by privilege.... [B]ecause we hold that the trial court's orders do not preclude Defendant from making good-faith objections based on privilege at [his] deposition, Defendant has not been deprived of any right nor suffered injury warranting our immediate review." (Opinion by Judge Hunter, Jr. (Robert N.), with Judge Stroud and Judge Dillon concurring.))

**Procedure; Interlocutory Appeals; Land Use; Standing; Challenge to Permit Issuance**

WISE RECYCLING, LLC v. TOWN OF CLAYTON, \_\_\_ N.C. App. \_\_\_, 762 S.E.2d 532 (No. COA14-4, Johnston— 6/17/14) (*unpublished*) (Respondent-Town's appeal dismissed in a case arising from Town's issuance of a temporary use permit to Source Recycling, wherein trial court: 1) concluded that petitioner Wise Recycling had standing to appeal planning director's interpretation that permit was properly issued; (2) reversed Board of Adjustment's decision to dismiss Wise's appeal; and 3) remanded for further proceedings. "The only issue raised by the Town is standing. On that issue . . . the Town offers no rationale for its appeal from the trial court's interlocutory order, merely making the erroneous statement that it appeals from a final judgment as a matter of right. By denying the Town's motion to dismiss and remanding the case to the Board of Adjustment, the trial court did not finally dispose of this case. Because the Town has not shown that the trial court's order affected a substantial right, we must dismiss this appeal as interlocutory." (Citation omitted.) (Opinion by Judge Stephens, with Judge Stroud and Judge McCullough concurring.))

**Procedure; Interlocutory Appeals; Negligence; Storm Drainage System**

BELL v. CITY OF NEW BERN, \_\_\_ N.C. App. \_\_\_, 759 S.E.2d 710 (No. COA13-817, Craven— 5/6/14) (*unpublished*), *disc. review denied*, \_\_\_ N.C. \_\_\_, 762 S.E.2d 205 (No. 172P14, 8/19/14) (In defendant-Town of Trent Woods' appeal from an order denying its motion to dismiss, on defense of governmental immunity, claims for negligence, nuisance, trespass, inverse condemnation, and a permanent injunction, arising out of flooding damage allegedly caused by the construction of a sewer pump station on an intense watershed overflow lot and inadequate storm drain pipes, Court of Appeals affirms in part and dismisses appeal in part. (Opinion by Judge Geer, with Judge Bryant and Judge Calabria concurring.))

Defendant-Town filed a petition for discretionary review in May 2014. The Supreme Court denied the petition for discretionary review on August 19, 2014.)

**Procedure; Jurisdiction; Negligence; Minimum Housing Code**

SIMMONS V. CITY OF GREENSBORO, \_\_\_ N.C. App. \_\_\_, 758 S.E.2d 706 (No. COA13-1065, Guilford– 4/1/14) (*unpublished*), *disc review denied*, \_\_\_ N.C. \_\_\_, 758 S.E.2d 876 (No. 147P14, 6/11/14) (Superior court properly granted defendants’ motion to dismiss for lack of subject matter jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(1) in plaintiff’s action filed under the Tort Claims Act, G.S. 143-291, seeking damages stemming from disposition of her property. In affirming, Court of Appeals states, “Here, neither the City of Greensboro nor [its] HCD [Housing and Community Development Department] is an agency of the State. Rather, under North Carolina law, a ‘city’ is ‘a municipal corporation organized under the laws of this State.’ [G.S.] 160A-1(2) (2013). Thus, the Tort Claims Act does not authorize claims against cities or departments thereof. Further, the Tort Claims Act does not grant jurisdiction to hear such claims in Superior Court. Subject matter jurisdiction of claims under the Tort Claims Act is ‘within the exclusive and original jurisdiction of the Industrial Commission’ and ‘not within the jurisdiction of the Superior Court.’” (Citations omitted.) (Opinion by Judge Hunter, Jr. (Robert N.), with Chief Judge Martin and Judge Elmore concurring.) Plaintiff filed a petition for discretionary review in May 2014. The Supreme Court denied the petition on June 11, 2014.)

**Procedure; Land Use; Permits; Adjacent Property Owner Challenge to Permit Issuance; Certiorari; Subject Matter Jurisdiction**

WHITSON V. CAMDEN COUNTY BOARD OF COMM’RS, \_\_\_ N.C. App. \_\_\_, 748 S.E.2d 775 (No. COA12-1282, Camden– 7/16/13) (*unpublished*) (In petitioner-adjacent property owner’s appeal from order granting County’s motion to dismiss, N.C. Court of Appeals affirms dismissal of petition for writ of certiorari for lack of jurisdiction where petitioner failed to name Camden Plantation (the conditional use permit applicant) as a respondent in accordance with G.S. 160A-393(e). “The relevant portion of [G.S.] 160A-

193(e) provides, ‘[i]f the petitioner is not the applicant before the decision-making board whose decision is being appealed, the petitioner shall also name that applicant as a respondent.’ [G.S.] 160A-393(e). We hold this language clear and unambiguous. In this case, Camden Plantation submitted the application for the CUP and was identified as the applicant on the application. It follows that Camden Plantation was the applicant before the Board required by statute to be named as a respondent. We find this analysis based on the plain meaning of the language of the statute sufficient to affirm the trial court’s dismissal.” Court also rejects petitioner-adjacent property owner’s argument that he could not name Camden Plantation as a respondent because doing so would waive his argument that Camden Plantation lacked standing before the Board. (Opinion by Judge McCullough, with Judge Bryant and Judge Hunter, Jr. (Robert N.) concurring.))

**Procedure; Mediation; Sanctions; Annexation**

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

**Procedure; Quorum; Recusal**

HERSHNER V. N.C. DEP’T OF ADMIN., \_\_\_ N.C. App. \_\_\_, 754 S.E.2d 847 (No. COA13-790, Wake– 3/4/14), *petition for disc. review allowed*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 115PA14, 12/18/14) (Rejecting *inter alia* respondent’s contention that the State Personnel Commission (“SPC”) lacked the authority to make its decision because a quorum of its members was not present. “[S]everal other North Carolina statutes note that once a person is

deemed present for quorum purposes, he is deemed present for the remainder of that meeting. *See* [G.S.] 55-7-25(b), [G.S.] 55A-7-22(a) (2013). We hold that a quorum of the SPC is to be determined at the beginning of a meeting; once the meeting is opened, the SPC may conduct business regardless of subsequent recusals that may reduce the number of members voting on a particular issue below the number required for a quorum. In the instant case, when the SPC commenced business, seven [of its nine] members were present, exceeding the six required for a quorum. [See G.S. 126-2(f) (2011)]. At that time, a quorum was established. Respondent cites no authority to support the contention that this quorum was subsequently nullified by the recusal of two of its members.” (Opinion by Judge Steelman, with Judge Geer and Judge Ervin concurring.) Respondent filed a petition for discretionary review in April 2014. The N.C. Supreme Court allowed the petition on December 18, 2014.)

PUBLIC CONTRACTS

**Public Contracts; Pre-Audit Certificates; Mediation; Settlement**

HOWARD V. COUNTY OF DURHAM, \_\_\_ N.C. App. \_\_\_, 748 S.E.2d 1 (No. COA12-1484, Durham– 5/7/13), *disc. review denied*, 367 N.C. 238, 748 S.E.2d 321 (No. 242P13, 10/3/13) (In plaintiff’s breach of contract and negligent misrepresentation action arising from alleged breach of a settlement reached in a mediated conference, Court of Appeals affirms trial court’s granting of defendant-County’s motion to dismiss. Court holds that no valid settlement agreement was formed due to the lack of a pre-audit certificate. “A settlement agreement requiring a county to pay money is subject to the requirements of [G.S.] 159-28(a).” (Citation omitted.) In rejecting negligent misrepresentation claim, Court states, “Plaintiff cites no case recognizing a failure to settle a case as a compensable ‘pecuniary loss’ and we decline to extend the definition of negligent misrepresentation to cover such a situation. It is well recognized that not all mediated settlement conferences will result in a settlement agreement.... Even if plaintiff believed for a few hours, or at the most two days, that they had reached a settlement, when in fact no settlement had been reached, this is simply not a pecuniary loss, even if her belief was reasonable based on the representations of the other party. Plaintiff has not alleged any other facts that could constitute pecuniary loss.” (Opinion by Judge Stroud, with Judge Elmore and Judge Steelman concurring.) In June 2013, plaintiff filed a petition for discretionary review. The N.C. Supreme Court denied the petition on October 3, 2013.)

PUBLIC ENTERPRISES

**Public Enterprises; Electricity; Agreement Between Electric Suppliers**

IN RE TOWN OF SMITHFIELD, \_\_\_ N.C. App. \_\_\_, 749 S.E.2d 293 (No. COA13-435, Utilities Commission– 11/5/13), *petition for disc. review withdrawn*, 367 N.C. 296, 753 S.E.2d 659 (No. 558P13, 1/16/14) (In Town’s appeal, N.C. Court of Appeals affirms Utilities Commission’s order denying approval of agreement between electric suppliers which allocated rights to serve certain areas. “The Commission correctly interpreted [G.S.] 160A-331.2(a) to only authorize those agreements wherein the parties exchange rights to serve premises that each would not have the right to serve but for the agreement. Because both parties had rights to serve the premises they purported to exchange, the Agreement was not authorized by the statute.” (Opinion by Judge Stroud, with Chief Judge Martin and Judge Geer concurring.))

PUBLIC RECORDS ACT

**Public Records Act; Custodian; Database**

LEXISNEXIS RISK DATA MGMT., INC. v. N.C. ADMIN. OFFICE OF THE COURTS, \_\_\_ N.C. App. \_\_\_, 754 S.E.2d 223 (No. COA13-547, Wake- 2/18/14), *writ of supersedeas allowed, petition for disc. review allowed*, \_\_\_ N.C. \_\_\_, 758 S.E.2d 862 (No. 101PA14, 6/11/14) (N.C. Court of Appeals holds that the Automated Criminal/Infraction System database (“ACIS”) is a public record and that the North Carolina Administrative Office of the Courts (“AOC”) is its custodian. “[T]he clerks [of court] have acted at the direction of the AOC to create an entirely new and distinct public record, to wit, ACIS. *See* [G.S.] 7A-109(a) (2013) (‘Each clerk [of court] shall maintain such records, files, dockets[,] and indexes as are prescribed by rules of the Director of the [AOC].’).... [W]e hold that ACIS is a public record in the custody of the AOC.” Affirmed in part and reversed and remanded in part: (1) trial court’s entry of judgment on the pleadings for defendant AOC reversed– matter remanded with instructions to enter judgment for plaintiff; (2) trial court’s entry of motion for judgment on the pleadings for defendant Clerk of Wake County Superior Court affirmed. (Opinion by Judge Stephens, with Judge Geer and Judge Ervin concurring.) AOC filed a petition for discretionary review in March 2014. The N.C. Supreme Court allowed the petition for discretionary review on June 11, 2014.)

TORTS

Torts; Governmental Immunity; Slip and Fall; Payment of Water Bill

BYNUM V. WILSON COUNTY, 367 N.C. 355, 758 S.E.2d 643 (No. 380PA13, 6/12/14), *petition for reh'g denied*, \_\_\_ N.C. \_\_\_, 761 S.E.2d 904 (No. 380PA13, 7/18/14)

- **Holding**— Reversing decision of Court of Appeals, Supreme Court holds that claims against County are barred by governmental immunity in plaintiff's action seeking damages from fall, after payment of water bill, on steps of multi-use office building. The rule set forth by the Court of Appeals, subjecting different plaintiffs injured by the same act or omission to different immunity analyses on the basis of their reasons for visiting the same government property, is inconsistent with precedent.
- **Key Excerpts**— Justice Jackson wrote the majority opinion, joined by Chief Justice Parker, Justice Newby, and Justice Hudson. “The approach advanced by plaintiffs and adopted by the Court of Appeals would base the availability of immunity upon ‘the nature of the plaintiff's involvement with the governmental unit and the reason for the plaintiff's presence at a governmental facility’ — here Mr. Bynum's payment of a water bill. Bynum II, \_\_\_ N.C. App. at \_\_\_, 746 S.E.2d [296] at 303 [(2013)]. This approach is contrary to the test recently set forth in Estate of Williams [v. Pasquotank Cnty. Parks & Recreation Dept.], which mandates that the analysis should center upon the governmental act or service that was allegedly done in a negligent manner. 366 N.C. [195] at 199, 732 S.E.2d [137] at 141 [(2012)]. Moreover, we have emphasized repeatedly the importance of the character of the municipality's acts, rather than the nature of the plaintiff's involvement. As a result, the Court of Appeals erred by shifting the focus of the test and inappropriately injecting Mr. Bynum's actions and subjective intentions into its analysis.” (Citations omitted.)

Turning to the facts presented here, the majority continued, “Here Mr. Bynum was injured while walking down the front steps of the Miller Road building, which houses numerous county departments, including the county commissioners meeting room, the planning department, the inspections department, the water department, the finance department,

the human resources department, and the office of the county manager. Thus, the Miller Road building serves the County's discretionary, legislative, and public functions, several of which only may be performed by the Wilson County government. *Cf. Seibold v. Kinston-Lenoir Cnty. Pub. Library*, 264 N.C. 360, 361, 141 S.E.2d 519, 520 (1965) (*per curiam*) (noting the importance of the building's underlying function as a public library in a case involving injuries sustained in a fall). Notably, the legislature has specifically assigned to the county government the responsibilities of locating, supervising, and maintaining the county buildings that provide these functions. [G.S.] 153A-169 (2013) ('The board of commissioners shall supervise the maintenance, repair, and use of all county property.');

*see also id.* at §§ 153A-351 & 153A-352 (requiring counties to perform duties and responsibilities associated with enforcing State and local laws and ordinances relating to, *inter alia*, construction and maintenance of buildings). According to the analysis set forth in Estate of Williams, the fact that the legislature has designated these responsibilities as governmental is dispositive."

*Concurrence-* Justice Martin concurred in the result only, joined by Justice Edmunds and Justice Beasley. The concurrence emphasized that the common law doctrine of governmental immunity needs case-by-case resolution. "Instead of applying categorical rules, we have performed case-by-case inquiries in our previous governmental immunity cases. I would apply the following analysis here. The determinative question is 'whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature.' Estate of Williams, *id.* at 199, 732 S.E.2d at 141. Here, Mr. Bynum was injured when he fell down the steps of Wilson County's main office building. The complaint alleges Mr. Bynum's fall resulted from the County's failure to inspect, maintain, and repair the steps to this building. So, the resulting question is whether the County's administration of these functions was governmental or proprietary. This multi-use building, which is open to the public, houses the county commissioner's meeting room, the county manager's office, and several county departments, including water, finance, planning, inspections, human resources, and geographic information systems. This building provides a convenient location for Wilson County residents to access numerous government offices and services. As the majority opinion aptly observes, this building 'serves the County's

discretionary, legislative, and public functions, several of which only may be performed by the Wilson County government.’ Based on these facts, this multi-use governmental office building undoubtedly serves a governmental function, not a proprietary function. Accordingly, plaintiffs’ claims are barred by governmental immunity because the alleged tort arose out of the operation and maintenance of this government office building, which is a governmental function.”

- **Synopsis**– From a 3-0 decision of the Court of Appeals, defendants-appellants filed a petition for discretionary review in August 2013. The Supreme Court allowed the petition for discretionary review on October 3, 2013. The League, with assistance from the City of Raleigh, filed an *amicus curiae* brief in November 2013 on behalf of defendants-appellants. In an opinion issued June 12, 2014, the Supreme Court reversed in part and remanded.

**Torts; Immunity; Fact-Based Analysis;**  
**Governmental v. Proprietary Capacity; Contract**

VIKING UTILS. CORP. V. ONSLOW WATER & SEWER AUTH., \_\_\_ N.C. App. \_\_\_, 755 S.E.2d 62 (No. COA13-597, Onslow– 3/4/14)

- **Holding**– In plaintiff’s action alleging that defendant had breached asset purchase agreement by refusing to allow plaintiffs to connect with sewer system without payment of a tap fee, trial court did not err by denying motion to dismiss, where further development of record is necessary for determination of whether defendant is entitled to assert defense of governmental immunity.
- **Key Excerpt**– Upon reviewing Estate of Williams v. Pasquotank County, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (*see Digest of Municipal Law 2012-13*, p. 44) and Town of Sandy Creek v. E. Coast Contr., Inc., \_\_\_ N.C. App. \_\_\_, 741 S.E.2d 673 (2013) (*see Digest of Municipal Law 2012-13*, p. 40), the Court stated, “Based on Williams and Sandy Creek, we hold that determination of whether defendant is entitled to assert the defense of governmental immunity will require the trial court to consider the pertinent statutory provisions as well as factual evidence regarding plaintiffs’ allegations, fees charged by defendant, whether the fees cover more than the operating costs of the

water authority, and any other evidence relevant to the issue of whether, in executing and interpreting its contract with plaintiffs, defendant was acting in a governmental or proprietary capacity. Because such evidence was not before the court in ruling on a motion to dismiss under [G.S.] 1A-1, Rule 12(b)(1), (2), or (6), the trial court did not err by denying defendant's motion to dismiss at this stage of the proceedings. Our decision to affirm the trial court does not prevent the parties from seeking summary judgment, at which time they may offer documentary or testimonial evidence in support of their positions. As we are holding that the trial court did not err by denying the motion to dismiss, we do not reach the parties' arguments concerning whether, in the event that the court determines that defendant is entitled to assert the defense of governmental immunity, the defense has been waived by execution of a valid contract with plaintiffs."

- **Synopsis**– Appeal by defendant from February 2013 order denying defendant's motion to dismiss. Affirmed. (Opinion by Judge Steelman, with Judge Hunter (Robert C.) and Judge Bryant concurring.)

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## J

Judgment on the Pleadings, Motion for (*see* Personnel)  
Jurisdiction (*see* Nuisances; Procedure)  
Just and Equitable Tax Clause (*see* Constitutional Law)  
Just, Reasonable, and Non-Discriminatory Rates (*see* Procedure)

## L

Land Use (*see* Constitutional Law; Land Use; Procedure)  
Landfill (*see* Constitutional Law)  
Law Enforcement (*see* Law Enforcement; Personnel; Torts)  
Legislative Immunity (*see* Procedure)

## M

Mandamus (*see* Land Use)  
Mediation (*see* Procedure; Public Contracts)  
Medical Clinic (*see* Land Use)  
Minimum Housing Code (*see* Procedure)  
Motion for Judgment on the Pleadings (*see* Personnel)  
Motion Seeking Amendment and/or Alteration (*see* Land Use)  
Motion to Amend (*see* Procedure)  
Motion to Dismiss (*see* Procedure)

## N

Necessary Party, Failure to Join (*see* Procedure)  
Negligence (*see* Procedure)  
Notice of Violation (*see* Land Use)

## O

Order for Demolition (*see* Nuisances)  
Ordinance Regulating High Impact Uses (*see* Constitutional Law)  
Ordinances (*see* Police Power)

## **P**

Parking (*see* Constitutional Law)  
Payment of Water Bill (*see* Torts)  
Permit Denial (*see* Land Use)  
Permits (*see* Land Use; Procedure)  
Pole Attachment Agreements (*see* Procedure)  
Police Pursuits (*see* Law Enforcement)  
Pre-Audit Certificates (*see* Public Contracts)  
Preemption (*see* Constitutional Law)  
Privilege License Tax (*see* Constitutional Law)  
Procedure (*see* Procedure)  
Public Benefit (*see* Eminent Domain)

## **Q**

Quasi-Judicial Immunity (*see* Procedure)  
Quorum (*see* Procedure)

## **R**

Rates, Just, Reasonable, and Non-Discriminatory (*see* Procedure)  
Record on Appeal, Insufficiency of (*see* Nuisances)  
Recusal (*see* Procedure)  
Regulatory Taking (*see* Eminent Domain)  
*Res Judicata* (*see* Land Use)  
Retaliatory Discharge (*see* Personnel)

## **S**

Sanctions (*see* Procedure)  
Self-Insured Retention (*see* Torts)  
Settlement (*see* Public Contracts)  
Sewer Easement (*see* Eminent Domain)  
Sheriff (*see* Personnel)  
Slip and Fall (*see* Torts)  
Standing (*see* Land Use; Procedure)  
Storm Drainage System (*see* Procedure)

## **S (*Continued*)**

Subject Matter Jurisdiction (*see* Procedure)  
Substantive Due Process (*see* Constitutional Law)  
Surety Bond (*see* Personnel)

## **T**

Takings (*see* Eminent Domain; Nuisances)  
Temporary Taking (*see* Eminent Domain)  
Towing (*see* Police Power)

## **U**

Unity of Ownership (*see* Eminent Domain)

## **W**

Waiver of Governmental Immunity (*see* Personnel)  
Water Bill, Payment of (*see* Torts)  
Workers' Compensation (*see* Personnel)  
Wrongful Discharge (*see* Personnel)

## **Z**

Zoning (*see* Constitutional Law)