DIGEST OF MUNICIPAL LAW
PART I: CASE LAW 2012-2013

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INTRODUCTION

The **DIGEST OF MUNICIPAL LAW, PART I: CASE LAW 2012-2013** 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 2012 through June 2013 issues (Volume XXXII) 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 P. Rule 30(e)(3).[1] Unpublished opinions are not binding precedent in the Fourth Circuit.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[1] Rule 30(e) provides as follows, "(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion,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).

ADMINISTRATIVE LAW

Administrative Law; Public Water Supply; Inverse Condemnation; Riparian Rights

L&S WATER POWER, INC. V. PIEDMONT TRIAD REGIONAL WATER AUTHORITY, 211 N.C. App. 148, 712 S.E.2d 146 (2011), *disc. review improv. allowed*, 366 N.C. 324, 736 S.E.2d 484 (No. 198PA11, 12/14/12)(*per curiam*), *reh'g denied*, ___N.C.___, 737 S.E.2d 379 (No. 198PA11, 1/30/13) (Upon hearing oral argument in October 2012, N.C. Supreme Court issues *per curiam* ruling that petition for discretionary review had been improvidently allowed in defendant-PTRWA's appeal from decision of Court of Appeals. In April 2011, Court of Appeals held 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. (For a summary of decision of the Court of Appeals, s*ee Digest of Municipal Law 2010-2011*, p. 75.) *Note:* The League, with assistance from the City of Raleigh, filed a new *amicus curiae* brief on behalf of defendant-appellant PTRWA in this case.)

Administrative Law; Standard of Review; Certification; Clean Water Act; FERC Licensing

CITY OF ROCKINGHAM & AMERICAN RIVERS V. NCDENR, ___ N.C. App. ___, 736 S.E.2d 764 (No. COA12-763, Richmond– 12/18/12) (In petitioners' appeal from January 2012 order affirming Environmental Management Commission's final agency decision adopting administrative law judge's findings and conclusions upholding Division of Water Quality's certification of intervenor-Progress Energy's section 401 application arising from Yadkin-Pee-Dee Hydroelectric Project, Court of Appeals affirms. "Petitioners argue that EMC failed to assess whether biological integrity is 'attained' and assert that the record as a whole shows that the minimum flow rate will not 'attain' biological integrity. For Petitioners' first argument on this issue, the standard of review is *de novo*. Petitioners' second argument on this issue is reviewed under the whole record test. We reject both arguments." Court also rejects arguments pertaining to evaluation of practical alternatives and minimization of adverse im-

pacts. (Opinion by Judge Beasley, with Judge Elmore and Judge Stroud concurring.))

CONSTITUTIONAL LAW

Constitutional Law; First Amendment; Sign Ordinance; Residential Signs

BROWN V. TOWN OF CARY, 706 F.3d 294 (4th Cir., No. 11-1480− 1/22/13)

- ***Holding***− In Town's appeal of federal district court's invalidation of sign ordinance as it applied to words painted in bright fluorescent orange across a fifteen (15) foot swath of the facade of a home, Fourth Circuit holds that because the ordinance regulates speech for reasons independent of content, it is a content neutral restriction subject to intermediate scrutiny. Applying intermediate scrutiny, the ordinance does not violate the First Amendment.

- ***Key Excerpt***− Rejecting an absolutist reading of content neutrality applied by three other circuits, Fourth Circuit states, "[S]uch an approach imputes a censorial purpose to every content distinction, and thereby applies the highest judicial scrutiny to laws that do not always imperil the preeminent First Amendment values that such scrutiny serves to safeguard. As we did in Wag More Dogs [v. Cozart, 680 F.3d 359 (4th Cir. 2012)], we again join those circuits that have interpreted Hill [v. Colorado, 530 U.S. 703 (2000)] as supporting a more practical test for assessing content neutrality…. Affirming the practical inquiry propounded in Wag More Dogs, we reiterate its operative test for content neutrality: 'A regulation is not a content-based regulation of speech if (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech.' *Id*. at 366 (quoting Covenant Media [v. City of N. Charleston], 493 F.3d [421] at 433 [(4th Cir. 2007)]). Distilling this three-part test into one succinct formulation of content neutrality, if a regulation is 'justified without reference to the content of regulated speech,' Hill, 530 U.S. at 720 (quoting Ward, 491 U.S. at 791), 'we have not hesitated to deem [that] regulation content neutral even if it facially differentiates between types of speech.' Wag More Dogs, 680 F.3d at 366." (Citations omitted.)

  Holding the sign ordinance to be content neutral and emphasizing that the inquiry focuses upon whether the ordinance's exemptions "have a

reasonable, not optimal, relationship" to the asserted legislative interests, the Court stated, "[I]t is clear that while the Sign Ordinance distinguishes content, the distinctions themselves are justified for reasons independent of content…. [T]he Sign Ordinance's exemptions reasonably advance the legislative interests of traffic safety and aesthetics. And as with the exemptions at issue in Wag More Dogs, we think it reasonable to presume that public art and holiday decorations enhance rather than harm aesthetic appeal, and that seasonal holiday displays have a temporary, and therefore less significant, impact on traffic safety…. [W]e focus our attention on whether the restriction was adopted because of a disagreement with the message conveyed. Hill, 530 U.S. at 719. Applying that focus here, we conclude that the Sign Ordinance places reasonable time, place, and manner restrictions only on the physical characteristics of messages—including those voicing political protest—and exempts certain categories of signs from those restrictions solely on the basis of the Town's asserted and legitimate interests of traffic safety and aesthetics." Applying intermediate scrutiny, the Court observed *inter alia* that "unlike the flat ban of residential signs invalidated by [City of] Ladue [v. Gilleo], 512 U.S. [43] at 56 [(1994)], the Sign Ordinance 'leave[s] open ample alternative channels of communication' by generally permitting residential signs subject to reasonable restrictions. *Id.* (internal quotations omitted)…. Within such limits, a sign can contain any message the speaker wishes to convey."

- ***Synopsis***− Appeal by defendant-Town from order entered December 2010, Bowden v. Town of Cary, 754 F. Supp. 2d 794 (E.D.N.C. 2010). Reversed and remanded. (Opinion by Judge Diaz, with Judge Niemeyer and Judge Cogburn, sitting by designation, concurring.)

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

HEST TECHNOLOGIES, INC. V. STATE *EX REL*. PERDUE, 366 N.C. 289, ___ S.E.2d ___ (No. 169A11-2, 12/14/12), *temp. stay denied, writ of supersedeas denied*, 366 N.C. 424, 735 S.E.2d 342 (No. 169A11-2, 12/19/12), *cert. denied*, ___ U.S. ___, 187 L. Ed. 2d 34, 82 U.S.L.W. 3179 (No. 12-1369, 10/7/13)

- ***Holding***– Reversing 2-1 decision of N.C. Court of Appeals, N.C. Supreme Court unanimously upholds 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). "We conclude that [G.S.] 14-306.4 regulates conduct, with only incidental burdens on associated speech, and is therefore constitutional."

- ***Key Excerpt***– "The central issue we face here is whether to characterize what [G.S.] 14-306.4 actually regulates as conduct or protected speech. Plaintiffs argue that the law prohibits the video games involved in their sweepstakes systems, and that these video games are entertainment and thus merit full First Amendment protection. Plaintiffs in the companion case, Sandhill Amusements, Inc. v. State of North Carolina, assert that the law is primarily a restriction on the announcement of the sweepstakes result, which they contend is protected speech. The State maintains that the law only prohibits specific conduct, namely, placing into operation an electronic machine that conducts sweepstakes using an entertaining display.

  We are convinced that [G.S.] 14-306.4 primarily regulates noncommunicative conduct rather than protected speech. This conclusion turns directly on how we describe what [G.S.] 14-306.4 does. The statute here makes it 'unlawful for any person to operate, or place into operation, an electronic machine or device' to '[c]onduct a sweepstakes through the use of an entertaining display.' [G.S.] 14-306.4(b). Operating or placing into operation an electronic machine is clearly conduct, not speech. We conclude that the act of running a sweepstakes is conduct rather than speech, despite the fact that sweepstakes participants must be informed whether they have won or lost."

- ***Synopsis***– Appeal pursuant to G.S. 7A-30(2) by plaintiffs from 2-1 decision of N.C. Court of Appeals, ___ N.C. App. ___, 725 S.E.2d 10

(No. COA11-459, Guilford 3/6/12) (*see Digest of Municipal Law 2011-2012*, p. 6). In an opinion issued December 14, 2012, written by Justice Hudson, the Supreme Court reversed and remanded. A petition for certiorari was denied by the United States Supreme Court on October 7, 2013.

See also SANDHILL AMUSEMENTS, INC. V. STATE OF NORTH CAROLINA, 366 N.C. 323, 734 S.E.2d 570 (No. 170A11-2, 12/14/12) (*per curiam*), *cert denied*, ___ U.S. ___ 187 L. Ed. 2d 24, 82 U.S.L.W. 3178 (No. 12-973, 10/7/13) (In a 2-1 decision issued in March 2012 by the same panel of the Court of Appeals as Hest, the majority stated, "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." Sandill Amusements, ___ N.C. App. ___, 724 S.E.2d 614 (No. COA11-301, Wake− 3/6/12). In April 2012, the State filed a notice of appeal from that decision. In a *per curiam* decision issued on December 14, 2012, the Supreme Court reversed, stating, "For the reasons stated in *Hest Technologies, Inc. v. State ex rel. Perdue*, ___ N.C. ___, ___ S.E.2d ___ (2012) (No. 169A11-2), the decision of the Court of Appeals is reversed." A petition for certiorari was denied by the United States Supreme Court on October 7, 2013.)

Constitutional Law; Privilege License Tax; Internet Sweepstakes

IMT, INC. V. CITY OF LUMBERTON, 366 N.C. 456, 738 S.E.2d 156 (No. 127A12, 3/8/13), *reh'g denied*, ___ N.C. ___, 740 S.E.2d 478 (No. 127A12, 4/17/13)

- ***Holding***− Reversing 2-1 decision of N.C. Court of Appeals, ___ N.C. App. ___, 724 S.E.2d 588 (No. COA11-813, Robeson− 2/21/12) (*see Digest of Municipal Law* 2012-13, p. 4), North Carolina Supreme Court holds that City's privilege license tax violates Just and Equitable Tax Clause, which is a substantive constitutional protection against abuse of the taxing power. N.C. Const. Art. V, § 2(1).

- ***Key Excerpt***– Observing that while the Just and Equitable Tax Clause had been cited in several opinions but had not been directly addressed as a substantive claim in its own right, the Court stated, "The City argues that a challenge to the amount of a tax is not a justiciable claim under the Clause. We disagree. Our cases under both the Public Purpose Clause and the Contracting Away Clause show that these constitutional provisions impose distinct and enforceable limitations on the manner in which government entities may exercise their taxing power. Treating the Just and Equitable Tax Clause as mere precatory language, rather than as a substantive limitation like the Public Purpose and Contracting Away Clauses, would create internal inconsistency within this constitutional provision. The people of North Carolina placed the Just and Equitable Tax Clause in their Constitution, and we are not at liberty to selectively dismiss its relevance. Several cases relied upon by the parties and by the Court of Appeals were decided before the adoption of the Just and Equitable Tax Clause in 1935. Those cases concerned common law challenges to taxes…. We observe that the 1935 amendment to Article V did not incorporate the 'unreasonable and prohibitory' standard from the common law. Instead, the language ratified by the people stated '[t]he power of taxation shall be exercised in a just and equitable manner.' N.C. Const. of 1868, art. V, § 3 (1935) (now located in Article V, § 2); *see* Act of Apr. 29, 1935, ch. 248, sec. 1, 1935 N.C. Sess. Laws 270, 270." (Citations omitted.)

  In closing its opinion, the Court stated, "In cases arising under the Just and Equitable Tax Clause, trial courts should look to Nesbitt [v. Gill, 227 N.C. 174, 41 S.E.2d 646, *aff'd per curiam*, 332 U.S. 749, 68 S. Ct. 61 (1947)] for guiding factors in assessing such claims. But those factors should not be viewed as exhaustive. For example, in the instant case, the stark difference between the amount of tax levied on cybergambling establishments and the amounts levied against other economic activities under the Ordinance militates in favor of our conclusion that the tax is unjust and inequitable. We do not suggest, however, that any large increase in a tax, or simply a high tax, would alone be enough to run afoul of the Just and Equitable Tax Clause. Rather, challenges under the Just and Equitable Tax Clause must be determined on a case-by-case basis."

- ***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 were affirmed in a 2-1 decision by the Court of Appeals in February 2012. 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. In an opinion issued March 8, 2013, written by Justice Martin, the Supreme Court reversed and remanded. (Justice Beasley took no part in the consideration or decision of this case.)

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,* ___ N.C. ___, 738 S.E.2d 363 (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, 366 N.C. 456, 738 S.E.2d 156 (No. 127A12, 3/8/13), 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, [366] N.C. at [462], 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 2011-2012*, p. 7). 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 Robert N. Hunter, Jr., 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; Adequate Public Facilities Ordinance; School Impact Fees; Statute of Limitations; Local Act

LANVALE V. COUNTY OF CABARRUS, 366 N.C. 142, 731 S.E.2d 800 (No. 438PA10, 8/24/12), *reh'g denied*, 366 N.C. 416, 733 S.E.2d 156 (No. 438PA10, 10/26/12) (In a 5-2 decision, majority of N.C. Supreme Court affirms. (The unpublished opinion of the Court of Appeals is summarized at *Digest of Municipal Law 2010-2011*, p. 18.) N.C. Supreme Court majority holds that: "the County did not have statutory authority to adopt its APFO [adequate public facilities ordinance]; (2) Session Law 2004-39 did not authorize enact-

ment of the APFO; and (3) plaintiff's cause of action is not time barred. Accordingly, we affirm the decision of the Court of Appeals." The Supreme Court denied the County's petition for rehearing, N.C. R. App. P. Rule 31(a), on October 26, 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), *disc. review denied, appeal dismissed*, 366 N.C. 403, 737 S.E.2d 378 (No. 174P12, 12/12/12) (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 Dep't of Public Health, 213 N.C. App. 426, 724 S.E.2d 70, *disc. rev. denied*, 365 N.C. 361, 718 S.E.2d 396 (2011) (*see Digest of Municipal Law 2011-2012*, p. 13), in upholding statute on rational basis review. (Opinion by Judge Stephens, joined by Judge Stroud. Judge Beasley concurring in separate opinion.) In April 2012, petitioners 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 December 12, 2012.)

EMINENT DOMAIN

Eminent Domain; Sufficiency of Notice; Easement; 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*, 366 N.C. 244, 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, "[W]e 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 Judge Steelman and Judge Geer concurring.) Plaintiffs filed a notice of appeal and a petition for discretionary review in June 2012. The N.C. Supreme Court denied both on August 23, 2012.

LAND USE

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*, 366 N.C. 246, 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***− "[D]efendants 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 conclude 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 Judge Hunter and Judge McCullough concurring.) Plaintiff 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; 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*, 366 N.C. 247, 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 Judge Geer and Judge McCullough concurring.) Plaintiffs 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; 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), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (No. 100P12, 12/12/12) (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 Coun-

ty'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 permitted 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.) Intervenor-Tigerswan, Inc. filed a petition for discretionary review in March 2012. The N.C. Supreme Court denied the petition for discretionary review on December 12, 2012.)

Land Use; Municipal Challenge to County Rezoning; Poultry Processing Facility; Standing

MORGAN V. NASH COUNTY, ___ N.C. App. ___, 735 S.E.2d 615 (No. COA11-1544-2, Nash— 12/4/12), *disc. review denied*, 366 N.C. 561, 738 S.E.2d 379 (No. 012P13, 3/7/13) (In plaintiffs' appeal from June 2011 order, Court of Appeals rejects plaintiff-City's contention that trial court erred as a matter of law in concluding that it did not have standing to challenge County's April 2011 rezoning of 147-acre tract of land from "Rural Commercial" and "Residential" districts to a "General Industrial" zoning district. (The City of Wilson joined several property owners in challenging the rezoning, alleging inter alia failure to adopt a consistency statement and contract zoning.) Upon hearing, the trial court entered an order: dismissing the City and all its claims, with prejudice, for lack of standing; denying the County's motion to dismiss the remaining plaintiffs concluding they had standing to challenge the rezoning of the subject property; and granting *inter alia* the County's motion for summary judgment on all claims by all plaintiffs. In affirming June 2011 order, Court states, "We conclude the trial court did not err in dismissing the City of Wilson and its claims against Nash County for a lack of standing. The City cannot establish standing under the standard set forth in Lujan [v. Defenders of Wildlife], 504 U.S. [555] at 560-61, 119 L. Ed. 2d [351] at 364 [(1992)], or in Taylor [v. City of Raleigh], 290 N.C. [608] at 621, 227 S.E.2d [576] at 584 [(1976)], as Nash County's rezoning of the subject property did not enable the land use from which the City alleges it will suffer harm. We also conclude that the Nash County Board of Commissioners complied with the requirements of [G.S.] 153A-341, did not engage in an illegal contract zoning, and did not fail to consider all permissible uses when approving the rezoning of the subject property." As to orders entered approximately ten (10) months later (April 2012) during the pendency of the appeal, Court holds, "[W]e find no abuse of discretion in the trial court's advisory opinion, indicating that it would be inclined to deny plaintiffs' Rule 60(b) motion [seeking relief from the trial court's order granting the County's motion to dismiss the City and its claims], and we remand for the trial court to enter an order denying the motion. We conclude the trial court was without jurisdiction [see G.S. 1-294] to enter its order granting Nash County's motion for attorneys' fees and expenses, and the 30 April 2012 order is vacated." (Opinion by Judge Robert C. Hunter, with Judge Stroud and Judge

Ervin concurring.) *Note*: This decision, No. COA11-1544-2, replaces the initial decision (No. COA11-1544; 731 S.E.2d 228), which was issued August 21, 2012, and was subsequently withdrawn for the hearing of additional issues.)

Land Use; Municipal Challenge to County Rezoning; Appeal; Mootness

ALBRIGHT V. NASH COUNTY, ___ N.C. App. ___, 731 S.E.2d 276 (No. COA11-1530, Nash— 8/21/12) (***unpublished***), *disc. review denied*, 366 N.C. 573, 738 S.E.2d 367 (No. 404P12, 3/7/13) (Companion case to Morgan v. Nash County (COA11-1544-2), *supra*, involving City's challenge to initial November 2010 rezoning of subject property; Court of Appeals dismisses City's appeal as moot in light of Morgan; "[W]e dismiss the City's appeal from the trial court's 1 July 2011 order dismissing the City for lack of standing. We remand the trial court's 30 April 2012 advisory opinion for the trial court to enter an order denying plaintiffs' Rule 60(b) motion. We vacate the trial court's 30 April 2012 order awarding attorneys' fees and expenses to Nash County." (Opinion by Judge Robert C. Hunter, with Judge Stroud and Judge Ervin concurring.))

Land Use; Conditional Use Permit; Apartment Complex

AFFORDABLE HOUSING GROUP OF N.C., INC. V. TOWN OF MOORESVILLE, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA12-435, Iredell— 10/16/12) (***unpublished***) (In intervenors' appeal from December 2011 judgment ordering respondent-Town to issue conditional use permit for 41-unit apartment complex in highway business district allowing "live/work dwellings" as the only residential structures permitted in a HB zone, Court of Appeals affirms, noting *inter alia* contradictory provisions of ordinance and holding that "Petitioners made out a *prima facie* showing of conformity with the comprehensive land use plan and harmony with the area. This *prima facie* showing was not rebutted by competent, material, and substantial evidence. The trial court did not err in reversing respondent's denial of petitioners' application for a Conditional Use Permit." As to intervenors' argument that the proposed project was not allowed as a conditional use under the ordinance, Court states, "The only issue that was presented to the trial court, and which the trial court ruled upon, was whether petitioners met the fourth condi-

tion, compliance with the comprehensive land use plan and harmony with the area. On appeal, intervenors attempt to argue that the proposed apartment complex was not allowed as a conditional use under the ordinance. This issue was not raised before respondent or the trial court, and cannot be raised for the first time on appeal; we may judge respondent's decision solely on the basis of conformity with the land use plan and harmony with the area. *Id*. Had intervenors wished to raise this issue, they should have sought to intervene at an early stage of the proceedings before the trial court, and not after the trial court had entered judgment." (Opinion by Judge Steelman, with Judge Hunter and Judge Bryant concurring.))

Land Use; Permits; Telecommunications Towers

AMERICAN TOWERS, INC. V. TOWN OF MORRISVILLE, ___ N.C. App. ___, 731 S.E.2d 698 (No. COA11-1455, Wake− 9/4/12), *reh'g denied*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA11-1455, 10/16/12), *disc. review denied*, 366 N.C. 603, 743 S.E.2d 189 (No. 452P12, 6/12/13) (Citing SBA, Inc., v. City of Asheville City Council, 141 N.C. App. 19, 27, 539 S.E.2d 18, 23 (2000), Court of Appeals holds that trial court correctly affirmed Council's denial of special use permit for telecommunications tower in industrial management zoning district, as petitioner failed to make a *prima facie* showing under ordinance that the proposed use would not substantially injure the value of adjoining properties. (Opinion by Judge Steelman, with Judge Ervin and Judge Beasley concurring.) The Court of Appeals denied petitioner-appellant's petition for rehearing, N.C. R. App. P. Rule 31(a), on October 16, 2012. The Supreme Court denied petitioner-appellant's petition for discretionary review on June 12, 2013.)

Land Use; Timeliness of Appeal; Billboards

FAIRWAY OUTDOOR ADVERTISING V. TOWN OF CARY, ___ N.C. App. ___, 739 S.E.2d 579 (No. COA12-518, Wake- 3/5/13) (In Town's appeal from November 2011 order, Court of Appeals reverses trial court's determination that Fairway's appeal regarding compliance was timely; as Fairway did not timely appeal the issue of sign's compliance, Court of Appeals remands to trial court to reconsider issue of civil penalties. Court also finds no merit in Fairway's ar-

gument that sign must be permitted as "unlisted use" under the ordinance, as there was no basis for the trial court's determination that the planning director abused his discretion. (Opinion by Judge Stroud, with Judge Steelman concurring. Judge Robert N. Hunter, Jr. concurring in result only.))

Land Use; Variance; Nonconforming Use

MNC HOLDINGS, LLC V. TOWN OF MATTHEWS, ___ N.C. App. ___, 735 S.E.2d 364 (No. COA12-703, Mecklenburg– 11/20/12) (Court of Appeals holds that trial court correctly reversed Town's denial of variance petition for medical waste incineration facility which had existed as nonconforming use. "MNC contends that the Ordinance allows any alteration required by law; thus, the alteration should be allowed because the EPA [Environmental Protection Agency] regulation is a law requiring alterations to MNC's structure. The trial court agreed, explaining that 'the intent of [the Ordinance] is to allow property owners of buildings that house a nonconforming use to make structural alterations that are required by law,' and reversed the Town's narrow construction of the Ordinance. We agree with the trial court's interpretation that the plain meaning of the Ordinance suggests that it allows structural alterations when 'required by law' in general…. [B]ecause MNC is compelled by law to make the alteration, the Ordinance should be interpreted liberally. The provision of the Ordinance allowing for alterations 'required by law' was placed there by the legislators specifically for the purpose of 'provid[ing] flexibility and "prevent[ing] practical difficulties and unnecessary hardships."' *See* Morris Comm. Corp. [v. City of Bessemer City], 365 N.C. [152] at 159, 712 S.E.2d [868] at 873 [(2011)] (citation omitted) Accordingly, we affirm the trial court's reversal of the zoning board." (Opinion by Judge Robert N. Hunter, Jr., with Judge Robert C. Hunter and Judge Calabria concurring.))

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*, ___ N.C. ___, 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-signaled 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 Robert C. Hunter concurring.) Plaintiff filed a petition for discretionary review in March 2013. The Supreme Court denied the petition on August 27, 2013.)

Law Enforcement; Wrongful Death; Immunity; Public Official Immunity; Punitive Damages

LOWDER V. PAYNE, ___ N.C. App. ___, 739 S.E.2d 627 (No. COA12-512, Mecklenburg− 3/19/13) (***unpublished***) (Court of Appeals affirms where plaintiff-administratrix and defendant-City each appealed from trial court's order granting in part and denying in part defendants (City's and police officer's) motion for summary judgment in action arising from shooting during response to 911 call regarding a suspicious vehicle at a cell phone tower located in an area where armed robberies and other thefts had been reported. Court of

Appeals holds *inter alia* that: (1) trial court properly granted defendants' motion for summary judgment on plaintiff's claims against police officer in his individual capacity and properly denied their motion on plaintiff's claims against police officer in his official capacity; (2) trial court correctly granted defendants' summary judgment motion on plaintiff's claim for punitive damages; (3) City waived its sovereign immunity for plaintiff's remaining claims against it. (Opinion by Judge Calabria, with Judge Robert C. Hunter and Judge Robert N. Hunter, Jr., concurring.))

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*, 366 N.C. 389, 732 S.E.2d 352 (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 on October 4, 2012.)

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), *disc. review denied, appeal dismissed,* 366 N.C. 406, ___ S.E.2d ___ (No. 249P12, 12/12/12)

- ***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 immunity, 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.) 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 December 12, 2012.

Minimum Housing Code; Demolition; Exhaustion of Administrative Remedies; Subject Matter Jurisdiction

MCCOY V. CITY OF CHARLOTTE, ___ N.C. App. ___, 732 S.E.2d 394 (No. COA12-219, Mecklenburg— 10/2/12) (***unpublished***) (In plaintiff's action arising from ordinance authorizing an *in rem* demolition of property, Court of Appeals hold that trial court properly granted defendant-City's motion to dismiss, as plaintiff failed to exhaust his administrative remedies under G.S. 160A-446; trial court properly considered and ruled upon defendant's motion to dismiss for lack of subject matter jurisdiction, as subject matter jurisdiction may be raised at any time; "Plaintiff contends that he was entitled to judicial review of the demolition ordinance under [G.S.] 160A-

393 and [G.S.] 63-34. However, neither of these statutes are applicable to the instant case. [G.S.] 160A-393 governs the procedure for 'Appeals in the Nature of Certiorari' in city and town zoning cases. Under [G.S.] 63-34, [G.S.] 160A-393 also governs the procedure for judicial review of airport zoning regulations. [G.S.] 63-34 (2011) (A petition for judicial review under the Model Airport Zoning Act shall be filed 'within 30 days after the decision is filed in the office of the board. Such petition shall comply with the provisions of [G.S.] 160A-393.'). Since the instant case involves minimum housing standards, rather than zoning regulations, the statutory provisions cited by plaintiff do not apply to plaintiff's challenge to the demolition ordinance." (Opinion by Judge Calabria, with Judge Elmore and Judge Stephens concurring.))

Minimum Housing Code; Demolition; Salvage

FIELDS V. CITY OF GOLDSBORO, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA12-402, Wayne— 10/16/12) (***unpublished***) (In action alleging unlawful taking, trespass, and negligence *per se*, as well as City's alleged failure to salvage plaintiff's real and personal property during demolition, Court of Appeals holds that trial court correctly granted summary judgment for City; "[P]laintiff's complaint contains a bare assertion that the 'City failed to salvage the demolished real and personal property of 109 N. Slocumb St. Goldsboro[.]' In his complaint, Plaintiff did not allege what property the City failed to salvage and did not specify the value of any such property. Plaintiff also failed to present any evidence of same at the summary judgment hearing. Plaintiff having failed to forecast any evidence that his property was not salvaged by the City as required by section 160A-443(6)(c), there was no genuine issue of material fact on this issue before the trial court and the City was entitled to a judgment as a matter of law. *Compare* Town of Hertford [v. Harris], 169 N.C. App. [838] at 841, 611 S.E.2d [194] at 196 [(2005)] (reversing summary judgment where the property owners 'alleged in their complaint and in an affidavit . . . that the removed mobile homes and their contents had a value in excess of $5000 [while] the town contend[ed] that there was no salvageable material on [the] property when the mobile homes were removed'). (Opinion by Judge Stephens, with Judge Calabria and Judge Elmore concurring.))

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*, ___ N.C. ___, ___ S.E.2d ___ (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. Gulledge], 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 Robert N. Hunter, Jr., 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.

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*, 366 N.C. 386, 733 S.E.2d 85 (No. 133P12, 10/4/12), *appeal dismissed*, 366 N.C. 386, 732 S.E.2d 580 (No. 133P12, 10/4/12) (reversing 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 Judge Stephens and Judge Beasley concurring.) Plaintiff filed a petition for discretionary review in March 2012. The N.C. Supreme Court denied the petition on October 4, 2012.)

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), *notice of appeal filed*, ___ N.C. ___, ___ S.E.2d ___ (No. 172A13, 4/19/13) (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 rejects the argument that an exoneration does not constitute an "official personnel decision" for purposes of 160A-168(c1)(4). Dissent states that, "Based on this Court's reasoning in S.E.T.A. [UNC-CH v. Huffines, 101 N.C. App. 292, 295, 399 S.E.2d 340, 342 (1991)], as a matter of public policy, a municipal employer should be allowed to redact certain information when providing an employee with information that may be, technically, within an employee's personnel file. Such redactions may include the identities of those who alert their managers of misconduct by co-workers where the testimony of the original complainant is not used or needed to sustain the complaint or where the complaint is, otherwise, not sustained. Therefore, even if the materials sought by Plaintiff falls outside the exemption in subsection (c1)(4), I believe Defendant acted appropriately by providing the information with the names of the complainants redacted based on the public policy concern that has been recognized by this Court." (Opinion by Chief Judge Martin, with Judge Robert C. Hunter concurring. Judge Dillon dissenting.) In April 2013, a notice of appeal was filed with the Supreme Court (No. 172A13). Oral argument occurred in November 2013.)

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*, ___ N.C. ___, 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.)

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*, 366 N.C. 239, 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 Judge Bryant and Judge McCullough concurring.) Plaintiff filed a petition for discretionary review in May 2012. The N.C. Supreme Court denied the petition for discretionary review on August 23, 2012.)

POLICE POWER

Police Power; Ordinances; Towing

KING V. TOWN OF CHAPEL HILL, ___ N.C. App. ___, 743 S.E.2d 666 (No. COA12-1262, Orange− 6/4/13), *disc. review allowed, writ of supersedeas allowed*, ___N.C.___, ___ S.E.2d ___ (No. 281PA13, 11/7/13)

- ***Holding***− Trial court erred by entering permanent injunction against Town's towing ordinance. The towing ordinance constitutes a valid exercise of the Town's police power under G.S. 160A-174(a).

- ***Key Excerpt***− "[A]fter a thorough review of the Towing Ordinance and chapter 160A, we broadly construe section 174(a) of Chapter 160A − as the General Assembly mandated in section 4 of that same chapter − and hold that the Towing Ordinance covers a proper subject for regulation under the Town's police power." In examining the validity of the Town's towing ordinance, the Court reviewed the following: (i) municipal authority to enact ordinances; (ii) judicial interpretation of authority granted to municipalities after 1971; (iii) interpretive construction of G.S. 160A-174(a); and (iv) the Town's authority to implement the towing ordinance under G.S. 160A-174(a).

  Plaintiff argued *inter alia* that the towing ordinance did not "fall within the limited statutory prescriptions" of G.S. 160A-174(a) because "[towing on private lots] is not detrimental to the health or safety of the public . . . . [and] is not a nuisance that needs to be abated." In rejecting this argument, the Court stated, "At oral argument, the Town commented that the Towing Ordinance requires certain signs to be placed 'in an interval of one at every fifth parking space' for the purpose of informing citizens that they may be towed even when they lawfully park at a business and then walk to another business in a different parking lot. *See also* Chapel Hill, N.C., Code ch. 11, art. XIX, § 11-301(a) (2012) (requiring signs every fifth space to include the following phrase when the property owner has adopted a walk-off towing policy: 'If you walk[]off this property, you are subject to being towed. This includes patrons who are frequenting business on this property.'). The Towing Ordinance also includes a credit card requirement for payment of towing fees, which Defendant states is meant to protect young people who get towed early in the morning and do not have the

cash necessary to release their cars at that time of the day. *See id.* at § 11-304(d). While Plaintiff is correct that '[t]owing on private lots is done and allowed by state law for the purpose of protecting private property,' this does not obviate the need to regulate that process when it has become 'detrimental to the health, safety, or welfare' of the citizens of the Town. In the 'Findings and Intent' section of the Towing Ordinance, the Town states that its goal is to 'protect[] the health, safety, and welfare of the general public and preserv[e] the public order,' which it found had been threatened by certain 'practices related to the non-consensual towing of motor vehicles from private property[.]' *Id.* at § 11-300. The Town also states in its brief that the Towing Ordinance is meant to 'ensure that persons are on notice' regarding the towing rules that will be employed in various parking lots throughout Chapel Hill. Further, the Towing Ordinance requires 'detailed receipts and a towing information sheet' to provide the public with information on why their vehicles were towed, which 'can serve to prevent conflicts between unknowledgeable citizens and tow operators.' *See id.* For these reasons, we hold that the Towing Ordinance falls within the purview of section 174(a)."

The Court also found plaintiff's cited case of Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 581 S.E.2d 415 (2003), to be readily distinguishable. The Court stated, "Unlike the ordinance in Williams, the Towing Ordinance does not create a private cause of action against those individuals who would violate it. While the Towing Ordinance provides that an offender will be subject 'to a civil penalty' if he or she violates the ordinance, there is no language granting a private individual the right to bring suit against the towing party. Indeed, the ordinance clearly states that a conviction for its violation shall result in 'a misdemeanor,' which is a criminal sanction."

- ***Synopsis***− Appeal by defendant-Town from August 2012 order and judgment entering permanent injunction. Reversed. (Opinion by Judge Stephens, with Chief Judge Martin and Judge Robert N. Hunter, Jr., concurring.) *Note*: The League participates as *amicus curiae* in this case on behalf of defendant-appellant Town of Chapel Hill. In July 2013, plaintiff filed *inter alia* a petition for discretionary review under G.S. 7A-31 and notice of appeal based upon a constitutional question under G.S. 7A-30. On November 7, 2013, the N.C. Supreme Court: 1) allowed plaintiff's petition for discretionary review under

G.S. 7A-31; 2) allowed plaintiff's petition for writ of *supersedeas*; and 3) allowed defendant-Town's motion to dismiss plaintiff's notice of appeal for lack of a substantial constitutional question.

Police Power; Takings; Sale of Water System; Allocation of Portion of Gain

STATE OF N.C. *EX REL.* UTILS. COMM'N V. CAROLINA WATER SERV., INC., ___ N.C. App. ___, 738 S.E.2d 187 (No. COA12-475, Utilities Commission− 1/15/13), *disc. review denied, appeal dismissed*, 366 N.C. 580, ___ S.E.2d ___ (No. 81P13, 4/11/13) (Court of Appeals upholds December 2011 Utilities Commission order assigning $3.36 million (17.5%) of the $19.2 million gain (arising from sale of water and sewer infrastructure located in Cabarrus Woods Systems) to remaining CWSNC ratepayers. Rejecting CWSNC's takings challenge under N.C. Const. Art. I, § 19, Court of Appeals states, "Our Supreme Court addressed a similar challenge in State ex rel. Utils. Comm'n v. N.C. Nat. Gas Corp., 323 N.C. 630, 375 S.E.2d 147 (1989)…. Recognizing that '[a]ny exercise by the State of its police power is, of course a deprivation of liberty,' the Court looked to the degree of the reasonableness of the execution of that power when determining its constitutionality. *Id*. at 644, 375 S.E.2d at 155. Because an order of the Commission is legislative in nature, the Court subjected it to the same constitutional tests as other legislative enactments employing the police power. *Id*. Accordingly, the Supreme Court held that the Commission's actions were not an unconstitutional taking because the 'benefit to the public outweighs any deprivation of [the utility's] constitutional rights.' *Id*. at 645, 375 S.E.2d at 155. We apply that line of reasoning here…. [T]he Commission is empowered by the legislature to regulate utilities and, with that, allocate a portion of the gain on sale to either the utility or its ratepayers. The Commission's decision to employ that power here, while contrary to the general rule established in its Policy, is not an unconstitutional taking…. [T]he Commission allocated $3.36 million out of a $19.2 million gain on sale to the ratepayers because of (1) the significant adverse impact on ratepayers, (2) the likely persistence of that adverse impact, (3) the large number of customers being lost, and (4) its determination that $15.83 million was a sufficient incentive to live up to its policy goal of incentivizing the transfer of customers from utilities to municipalities…

> [T]o the extent that we must review the merits of the Commission's policy as an exercise of the Commission's police power under the North Carolina Constitution, we find that the benefit to the public realized by the Commission's exercise of its police power in assigning $3.36 million of the gain on sale to ratepayers is not outweighed by any constitutional deprivation to CWSNC." (Opinion by Judge Stephens, with Judge Calabria and Judge Elmore concurring.) The Supreme Court denied CWSNC's petition for discretionary review and notice of appeal on April 12, 2013.)

PROCEDURE

Procedure; Subject Matter Jurisdiction; *Sua Sponte* Order; Due Process; Mandamus

IN THE MATTER OF COMPLAINTS AGAINST OFFICIALS OF KILL DEVIL HILLS POLICE DEP'T, ___ N.C. App. ___, 733 S.E.2d 582 (No. COA12-398, Dare− 10/16/12)

- ***Holding***− A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, only if it is presented in the form of a proper pleading. Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question. Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction. Where superior court *sua sponte* issued order usurping Town's personnel policies, Court of Appeals vacates superior court's order.

- ***Key Excerpt***− Citing In re Transp. of Juveniles, 102 N.C. App. 806, 807-08, 403 S.E.2d 557, 558-59 (1991), the Court holds, "Where no action or proceeding has been commenced and is not pending before the court, jurisdiction does not exist. In the instant case, there was no action filed by any person or body, other than the trial court itself, which preceded the second order, or indeed which preceded the first order. There was no pending litigation or controversy. The trial court acted beyond its jurisdiction in issuing both orders, *sua sponte*, against petitioner."

  As to petitioner-Town's argument that the trial court's order deprived petitioner-Town of notice and an opportunity to be heard, the Court, citing In re Alamance Cty. Court Facil., 329 N.C. 84, 106-08, 405 S.E.2d 125, 137-38 (1991), states, "[N]o hearing was conducted, nor was any action commenced against petitioner. No notice was given to petitioner. The trial court, of its own volition, issued an order against petitioner, without providing notice or opportunity to be heard. The trial court's actions were therefore in violation of petitioner's due process rights, and were a nullity."

Agreeing with petitioner-Town's argument that the trial court lacked authority to enter subsequent order under its mandamus power, the Court states, "The court lacked jurisdiction. The court held no hearing upon proper notice. And the court attempted to compel a specific course of action, usurping control of petitioner's personnel decisions. In doing so, it exceeded the scope of its mandamus power."

- ***Synopsis***− Appeal by petitioner-Town from January 2012 order. Vacated. (Opinion by Judge Steelman, with Judge Robert C. Hunter and Judge Bryant concurring.)

Procedure; Appellate Procedure; Dismissal; Notice of Appeal

CITY OF CLINTON V. GLOBAL CONSTR., INC., ___ N.C. App. ___, 734 S.E.2d 140 (No. COA12-548, Sampson− 11/6/12) (***unpublished***) (In City's action seeking reimbursement for overpayments arising from contract for utility improvements, Court of Appeals dismisses defendant's appeal from trial court's January 2011 and March 2011 orders denying Rule 12(b)(6) motion. "Lanier's [Global's president's] Notice of Appeal addresses 'the judgment and order of Superior Court Judge Lucy N. Inman filed on the 19th day of January, 2012, which judgment granted plaintiff's motion for summary judgment as to all claims.' Nothing in the record indicates the existence of this order and Lanier makes no arguments on appeal regarding such an order. Rather, the substance of Lanier's appeal deals with the trial court's orders granting the motions to dismiss the City's negligence claim, but denying the motions to dismiss all other claims. Thus, we do not have jurisdiction to hear the instant appeal because Lanier failed to comply with North Carolina Rule of Appellate Procedure 3(d). 'A jurisdictional default ... precludes the appellate court from acting in any manner other than to dismiss the appeal.' Dogwood [Dev. & Mgmt. Co. v. White Oak Transp. Co.], 362 N.C. [191] at 197, 657 S.E.2d [361] at 365 [(2008)]." The Court of Appeals also indicates that appeal would be otherwise dismissed as interlocutory. (Opinion by Robert N. Hunter, Jr., with Judge Robert C. Hunter and Judge Calabria concurring.))

PUBLIC CONTRACTS

Contracts; Preaudit Requirement

EXEC. MED. TRANSP., INC., V. JONES CNTY. DEP'T OF SOC. SERVS., ___ N.C. App. ___, 735 S.E.2d 352 (No. COA12-573, Jones— 11/6/12), *disc. review denied*, 366 N.C. 435, 737 S.E.2d 378 (No. 507P12, 1/24/13)

- ***Holding***− In breach of contract action, Court of Appeals rejects plaintiff-corporation's argument that the preaudit certificate requirement, G.S. 159-28(a), applies only to written contracts. Trial court erred in denying defendants' motion to dismiss.

- ***Key Excerpt***− "In July 2008, [defendant DSS] entered into an oral contract with [plaintiff], in which plaintiff agreed to provide transportation services to residents of Jones County. The contract was for one year, and renewed annually in July 2009, July 2010, and July 2011. However, in November 2011, DSS informed plaintiff that it was terminating their arrangement. On 1 December 2011, plaintiff filed suit for breach of contract.

  . . . .

  The case at hand is similar to Cincinnati Thermal Spray [Inc. v. Pender County, 101 N.C. App. 405, 399 S.E.2d 758 (1991)]. There, the plaintiff filed suit against Pender County for breach of an oral contract. Pender County filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, and the trial court granted the county's motion. On appeal, this Court affirmed the trial court's decision because no valid contract existed between the parties. We determined that '[p]laintiff has made no showing that . . . a certificate of compliance . . . exists.' Cincinnati Thermal Spray, 101 N.C. App. at 408, 399 S.E.2d at 759. We then held 'that plaintiff's first claim for [breach of contract] fails because plaintiff is unable to show that [G.S.] 159-28(a) has been followed.' *Id*. at 408, 399 S.E.2d at 759.

  Likewise, here plaintiff has made no showing that a certificate of compliance exists. As such, no valid contract can exist between the parties. . . .

Further, we note that on appeal plaintiff argues that the certificate of compliance requirement of [G.S.] 159-28(a) only applies to written contracts. In essence, plaintiff contends that implicit in the plain language of [G.S.] 159-28(a) is the requirement that in order for the statute to apply, the agreement must be in writing. However, plaintiff has failed to distinguish its case from Cincinnati Thermal Spray in any meaningful or persuasive manner."

- ***Synopsis***− Appeal by defendants from March 2012 order denying defendants' motion for judgment on the pleadings and motion to dismiss. Reversed and remanded. (Opinion by Judge Elmore, with Judge Stroud and Judge Beasley concurring.) In December 2012, plaintiff filed a petition for discretionary review. The N.C. Supreme Court denied the petition on January 24, 2013.

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*, ___ N.C. ___, 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 Contracts; Pre-Audit Certificate; Repairs

M SERIES REBUILD, LLC V. TOWN OF MT. PLEASANT, ___ N.C. App. ___, 730 S.E.2d 254 (No. COA12-194, Cabarrus— 8/7/12), *disc. review denied*, 366 N.C. 413, 735 S.E.2d 190 (No. 387P12, 12/12/12) (In plaintiff's appeal from trial court's order granting Town's motion to dismiss unjust enrichment claim allegedly arising from additional repairs of fire truck, Court of Appeals affirms. "[G.S.] 159-28(a) (2011) outlines requirements to enter into a valid contract with a local government…. [I]f there is no pre-audit certificate, or if that certificate is not signed by the appropriate individual, then the local government has not entered into a valid contract. *See Id*. 'The language of [G.S. 159-28(a)] makes the pre-audit certificate a *requirement* when a town will have to satisfy an obligation in the fiscal year in which a contract is formed.' Myers v. Town of Plymouth, 135 N.C. App. 707, 713, 522 S.E.2d 122, 126 (1999) (emphasis in original), *disc. review improvidently allowed*, 352 N.C. 670, 535 S.E.2d 355 (2000)"; holding as controlling Data Gen. Corp. v. County of Durham, 143 N.C. App. 97, 545 S.E.2d 243 (2001) (*Digest of Municipal Law 2000-2001*, p. 103); also rejecting plaintiff's contention that Town insufficiently pled defense of sovereign immunity as to other equitable claims. (Opinion by Judge Stroud, with Judge Calabria and Judge McCullough concurring.) In September 2012, plaintiff filed a petition for discretionary review. The N.C. Supreme Court denied the petition for discretionary review on December 12, 2012.)

Public Contracts; Sewer System Construction; Immunity; Proprietary Function

TOWN OF SANDY CREEK V. EAST COAST CONTRACTING, INC., ___ N.C. App. ___, 741 S.E.2d 673 (No. COA12-561-2, Brunswick– 4/16/13) (Upon the Supreme Court's order of remand for reconsideration (of initial December 18, 2012 decision, No. COA12-561) in light of Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 732 S.E.2d 137 (No. 231PA11, 8/24/12), N.C. Court of Appeals once again affirms trial court's order on the basis of governmental immunity. (The City of Northwest (″Northwest″) had appealed from the trial court's denial of its motion to dismiss East Coast Contracting, Inc.'s (″ECC″) third-party complaint (filed

in November 2010 alleging breach of contract, negligence, and indemnity and contribution). The case began in September 2010 when the Town of Sandy Creek filed an action against ECC and others seeking recovery for damages to roads while ECC was constructing a sewer system for the City of Northwest.) "After reviewing the present case using the guidance set forth in Estate of Williams, we remain convinced that a local governmental unit acts in a proprietary function when it contracts with engineering and construction companies, regardless of whether the project under construction will be a governmental function once it is completed. This is ever more so when the party harmed is a neighboring municipality." (Opinion by Judge McCullough, with Judge Geer and Judge Stephens concurring.))

PUBLIC ENTERPRISES

Public Enterprises; Solid Waste; Reimbursement Policy; Statutory Discrimination Claim

CEDAR GREENE, LLC & O'LEARY GROUP WASTE SYSTEMS, LLC v. CITY OF CHARLOTTE, 366 N.C. 504, 739 S.E.2d 553 (No. 360A12, 4/12/13) (*per curiam*) (In a *per curiam* opinion, N.C. Supreme Court reverses 2-1 decision of N.C. Court of Appeals for the reasons set forth in the dissenting opinion, ___ N.C. App. ___, 731 S.E.2d 193 (No. COA12-212, Mecklenburg— 8/7/12). The August 2012 dissenting opinion of the Court of Appeals had voted to affirm the trial court's entry of summary judgment in plaintiffs' favor on the G.S. 160A-314 claim arising from the City's reimbursement policy for disposal of supplemental solid waste collected from multi-family complexes. Dissenting opinion holds that G.S. 160A-314 is applicable to service providers as well as customers and that the applicable standard for standing is found in Goldston v. State, 361 N.C. 26, 637 S.E.2d 876 (2006) and Mangum v. Raleigh Bd. of Adjust., 362 N.C. 640, 669 S.E.2d 279 (2008). Dissenting opinion further states, "The City . . . has admitted that the solid waste disposal service provided, whether by Republic, O'Leary, or another disposal service, is effectively the same. The identity of the provider does not indicate a different class of service. However, in refusing to pay any provider other than Republic, the City effectively subjects Multi-Family Complexes to pay elevated rates for their solid waste disposal. If a Multi-Family Complex hires Republic, they are subject to Republic's higher rates. If a Multi-Family Complex hires a different solid waste disposal service, they are subject to the Disposal Fees. In its order, the trial court found that the City's policy only reimbursed disposal fees to those Multi-Family Complexes that hired Republic to provide Supplemental Collection. The trial court determined that the City's policy constituted 'unlawful, unreasonable, and arbitrary discrimination in the provision of a public enterprise service and rates charged for such service' violated [G.S.] 160A-314. I agree.")

STREETS

Streets; Dedication; Acceptance; Prescriptive Easement

WATERWAY DRIVE PROPERTY OWNERS' ASSOCIATION, INC. V. TOWN OF CEDAR POINT, ___ N.C. App. ___, 737 S.E.2d 126 (No. COA12-614, Carteret– 12/18/12) (In a 2-1 decision, N.C. Court of Appeals affirms trial court's entry of summary judgment for homeowners' association declaring Front Street/Waterway Drive a private road. Dissenting opinion disagrees with majority's analysis as to the issues of acceptance and withdrawal and further finds a genuine issue of material fact as to whether the Town acquired a prescriptive easement. (Majority opinion by Judge Beasley, with Judge Elmore concurring. Judge Stroud dissenting.))

TORTS

Torts; Immunity; Parks; Rental for Private Parties

ESTATE OF WILLIAMS V. PASQUOTANK CNTY. PARKS AND RECREATION DEP'T, 366 N.C. 195, 732 S.E.2d 137 (2012)

- ***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 2010-2011*, 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***− From a 3-0 decision of the Court of Appeals, 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. The League filed an *amicus curiae* brief in December 2011. In an opinion issued August 24, 2012, written by Justice Timmons-Goodson, the Supreme Court vacated and remanded.

Torts; Immunity; Parks

HORNE V. TOWN OF BLOWING ROCK, ___ N.C. App. ___, 732 S.E.2d 614 (No. COA12-196, Watauga— 10/2/12)

- ***Holding***− In action for injuries sustained in park arising from alleged failure to properly maintain grass around drain hole, municipality was not entitled to summary judgment based on governmental immunity because the record did not address factors that were relevant to a determination of whether operation of park was a governmental or proprietary function, including issues of fact as to whether municipality derived revenue from park's operation.

- ***Key Excerpt***− Upon examining the Supreme Court's recent decision in Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 732 S.E.2d 137 (No. 231PA11, 8/24/12), the Court of Appeals stated, "We recognize our statutes and case law, in addition to the case law of other jurisdictions, generally favor the application of governmental immunity in the operation and maintenance of public parks, particularly in cases where there is no income derived by the municipality in operating and maintaining the park. *See generally*, *Liability of municipal corporations for injuries due to conditions in parks*, 142 A.L.R. 1340 (1943). Here, however, as the trial court properly found, there remain issues of fact as to the revenue or income derived, if any, from defendant's operation of the park. We note that, although plaintiffs attempt to distinguish the particular activity of lawn maintenance from the general undertaking of operating the public park here, such distinction is meaningless, as lawn maintenance of a public park is an indispensable aspect of establishing and operating such park."

- ***Synopsis***− Appeal by defendant-Town from November 2011 order converting its G.S. 1A-1, Rule 12(c) motion to dismiss into a motion for summary judgment and denying its motion to dismiss plaintiffs' action on the basis of governmental immunity. Affirmed. (Opinion by Judge McCullough, with Judge Calabria and Judge Stroud concurring.)

Torts; Emergency Medical Services; Third Party Tortfeasor Standard; Special Relationship

SCADDEN V. HOLT, ___ N.C. App. ___, 733 S.E.2d 90 (No. COA12-303, Carteret− 9/18/12), *disc. review denied*, 366 N.C. 416, 736 S.E.2d 177 (No. 438P12, 12/12/12) (In plaintiff-deputy sheriff's action against emergency medical service provider working for the Town of Newport, as well as against the Town itself, Court of Appeals holds that trial court correctly granted defendants' motion to dismiss. (Plaintiff claimed that that defendant Holt (the EMT) was negligent in failing to properly restrain the patient.) "[E]ven construed liberally, the facts as alleged are insufficient to support an inference that defendant was or should have been aware of his patient's violent tendencies. We hold that under the facts of this case, defendant Holt was not party to any special relationship with the tortfeasor-patient. Therefore, defendant did not, as a matter of law, owe plaintiff Scadden any legal duty and the trial court did not err in granting defendants' motion to dismiss." (Opinion by Judge Stroud, with Chief Judge Martin and Judge Geer concurring.) In October 2012, plaintiff filed a petition for discretionary review. The N.C. Supreme Court denied the petition for discretionary review on December 12, 2012.)

Torts; Immunity; Animal Control

RUIZ V. FRANKLIN COUNTY ANIMAL CONTROL, ___ N.C. App. ___, 732 S.E.2d 393 (No. COA12-286, Franklin— 10/2/12) (***unpublished***) (In plaintiff's action alleging negligence resulting in plaintiff's dog being improperly impounded and euthanized, reversing trial court's denial of summary judgment and remanding for entry of summary judgment for defendants; "[T]here is no dispute in the record that Franklin County Animal Control and Stallings, in his official capac-

ity as an Animal Control Officer, were performing a governmental function in impounding and euthanizing plaintiff's dog, thereby entitling them to governmental immunity from plaintiff's negligence action. Plaintiff failed to allege in her complaint that defendants waived governmental immunity, subjecting her action to dismissal. In addition, here, as in [Estate of] Earley [v. Haywood Cnty. Dep't of Soc. Servs., 204 N.C. App. 338, 694 S.E.2d 405 (2010)], the language of both the applicable statute and the exclusion clause in the insurance contract is clear. Earley, 204 N.C. App. at 343, 694 S.E.2d at 409-10. There remains no genuine issue of material fact concerning whether defendants have waived governmental immunity as to plaintiff's negligence action. The affirmative defense of governmental immunity is a complete bar to liability. Clayton v. Branson, 170 N.C. App. 438, 449, 613 S.E.2d 259, 268 (2005). (Opinion by Judge McCullough, with Judge Hunter, Jr., and Judge Ervin concurring.))

Torts; Immunity; Negligent Inspection

BULLARD V. WAKE COUNTY, ___ N.C. App. ___, 729 S.E.2d 686 (No. COA11-1022, Wake— 7/17/12), *disc. review denied*, 366 N.C. 409, 735 S.E.2d 184 (No. 351P12, 12/12/12) (Court of Appeals affirms trial court's grant of summary judgment for County in plaintiff's action alleging negligent inspection; Court holds that County did not waive sovereign immunity as to claims, as County, pursuant to Resolution, limited its waiver of immunity with respect to the $500,000.00 retained limit to those instances involving the "voluntary settlement of claims" prior to the filing of any legal proceedings, and as County did not otherwise waive immunity by purchase of insurance for claims exceeding the $500,000.00 retained limit under Arrington v. Martinez, ___ N.C. App. ___, 716 S.E.2d 410 (2011), and Magana v. Charlotte-Mecklenburg Bd. of Educ., 183 N.C. App. 146, 645 S.E.2d 91 (2007). "Here, as this Court held in Magana and Arrington, because the County is entitled to sovereign immunity as to the Bullards' negligence claims for the first $500,000.00 of their damages and because defense costs are excluded from the amount included within the retained limit, there will be no 'complete expenditure' of the retained limit through payments for judgments. While the County's Resolution regarding the self-insured retention provides for waiver of the immunity in the

event of voluntary settlements, it specifies that '[s]ettlements are not available under this Resolution after the institution by Claimant of any legal proceeding regarding the claim against the County, its officials, employees, or agents.' Accordingly, there can be no qualifying settlements in this case. There will, therefore, be no expenditure of the retained limit. As a result, Magana and Arrington require that we conclude that the County has not, pursuant to [G.S.] 153A-435, waived sovereign immunity as to the Bullards' claims." (Opinion by Judge Geer, with Judge Steelman and Judge Robert N. Hunter, Jr. concurring.) In August 2012, plaintiff filed a petition for discretionary review. The N.C. Supreme Court denied the petition for discretionary review on December 12, 2012.)

Torts; Law Enforcement; Public Official Immunity; State Constitutional Claims

WILCOX V. CITY OF ASHEVILLE, ___ N.C. App. ___, 730 S.E.2d 226 (No. COA12-12, Buncombe— 8/7/12), *reh'g denied*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA12-12− 9/18/12), *disc. review denied, appeal dismissed*, 366 N.C. 574, 738 S.E.2d 363 (No. 416P12, 3/7/13) (N.C. Court of Appeals affirms in part and reverses and remands in part; case involves both defendants' appeal and plaintiffs' cross-appeal in tort action involving police pursuit arising from traffic stop in which plaintiff, a passenger in the fleeing automobile, was shot. As to defendants' appeal, Court of Appeals holds that trial court properly denied summary judgment as to plaintiff's claims against responding officers in their individual capacities; Court reverses trial court's order denying defendants' motion for summary judgment as to police chief in his individual capacity. As to plaintiffs' cross-appeal, Court of Appeals affirms trial court's order granting summary judgment for defendants as to state constitutional claims. "As we have concluded … that Wilcox's claims against [the] officers … in their individual capacities remain viable, the question is whether, despite that conclusion, Wilcox may still pursue her constitutional claims against Defendants. We conclude the answer is no…. As in Glenn-Robinson [v. Acker, 140 N.C. App. 606, 538 S.E.2d 601 (2000), *appeal dismissed, disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001)], in this case we have held that the applicability of public official immunity is a question for the jury and have allowed Wilcox's state law tort claims to proceed. Thus, we must conclude, as we did in Glenn-Robinson, that Wilcox has an ad-

equate state remedy that precludes her state constitutional claims. This conclusion … comports with our Supreme Court's decision in Craig [v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 337, 678 S.E.2d 351, 353-54 (2009)]…. Our Supreme Court stated in Craig that an adequate remedy must give the plaintiff 'at least the *opportunity* to enter the courthouse doors and present his claim' and must 'provide the *possibility* of relief under the circumstances.' *Id*. at 339-40, 678 S.E.2d at 355 (emphasis added). Thus, adequacy is found not in success, but in chance…. As we have concluded that there is a genuine issue of material fact as to the applicability of public official immunity, it follows that Wilcox still has a chance to obtain relief and that her claims against the Individual Defendants in their individual capacities are not absolutely, entirely, or automatically precluded. Therefore, because the Supreme Court's decision in Craig indicates that such a possibility warrants a finding of adequacy, we conclude that Wilcox's claims against the Individual Defendants in their individual capacities serve as an adequate remedy." (Citation omitted; footnote omitted.) Plaintiff-appellee's petition for rehearing was denied on September 18, 2012. (Opinion by Judge Stephens, with Judge Thigpen concurring. Judge Bryant concurred in the result.) *Note*: The League participated as *amicus curiae* in the cross-appeal in this case.)

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