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Land Use; Extraterritorial Jurisdiction; Local Act

Town of Pinebluff v. Moore County, ___ N.C. ___ (No. 398PA18, 4/3/20)

- ***Holding*- Court of Appeals erred by determining that there was an irreconcilable conflict between G.S. 160A-360(e) & (f) as amended by Session Law 1999-35, and by concluding that the Session Law operated to invalidate the applicability of subsection (e) with regards to the Town of Pinebluff. Since there is no irreconcilable conflict between the subsections of G.S. 160A-360 as modified by Session Law 1999-35, and as subsection (e) prohibits the Town from extending its ETJ into the proposed areas without an agreement between the Town and Moore County, the decision of the Court of Appeals affirming entry of summary judgment is reversed and remanded.**

- ***Key Excerpt*–** The Court initially observed, "Session Law 1999-35 amended subsections (a) and (f) of [G.S.] 160A-360 as they pertain to the Town of Pinebluff. The amendment to subsection (a) allows Pinebluff to extend its ETJ up to two miles beyond its corporate limits. S.L. 1999-35, § 1. We agree with the Court of Appeals that subsection (a) does not require approval from the county for an extension up to two miles. The amendment to subsection (f) allows Pinebluff to extend its ETJ two miles beyond an annexed area. S.L. 1999-35, § 2. When Pinebluff extends its ETJ under this subsection, the county must allow the extension so long as Pinebluff has presented proper evidence that the annexation has been accomplished. *Id*. ("[U]pon presenting proper evidence to the County Board of Commissioners that the annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing [Pinebluff] to exercise these powers within the extended area ... described.")."

"However, subsections (a) and (f), as amended, must be read in the context of the rest of the statute, since we assume 'that the Legislature acted with full knowledge of prior and existing law.' Ridge Cmty. Inv'rs, Inc. v. Berry, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) (citing State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970)). Despite the fact that

subsections (a) and (f) do not themselves impose restrictions on Pinebluff's authority to extend its ETJ within two miles of its corporate limits and annexed areas, we consider whether other subsections of [G.S.] 160A-360 impose limitations on Pinebluff's ability to extend its ETJ into those areas."

"Subsection (e) states that '[n]o city may ... extend its [ETJ] powers ... into any area for which the county at that time has adopted and is enforcing a zoning ordinance and subdivision regulations and within which it is enforcing the State Building Code.' [G.S.] 160A-360(e). The text also provides two exceptions to this rule: (1) where the county is not exercising each of the three powers enumerated in subsection (e) in the area, or (2) when the city and county have agreed on the area within which each will exercise its power. *Id*. Therefore, absent one of the exceptions, subsection (e) prohibits any city—including Pinebluff—from extending its ETJ into an area in which the county is exercising each of its three powers."

Noting that the Court of Appeals, ___ N.C. App. ___, 821 S.E.2d at 454, determined that, as to the Town, subsection (e) was invalidated by subsection (f) as amended by Session Law 1999-35, which required the County Board of Commissioners to approve Pinebluff's ETJ expansion, the Court emphasized, "[W]e disfavor any interpretation that repeals by implication another portion of the statute. *See* McLean v. Durham Cty. Bd. of Elections, 222 N.C. 6, 8, 21 S.E.2d 842, 844 (1942) ('[T]he presumption is always against implied repeal.... [r]epeal by implication results only when the statutes are inconsistent, necessarily repugnant, utterly irreconcilable, or wholly and irreconcilably repugnant.' (internal citations omitted)). We read the statute in its entirety, harmonize its subsections, and 'give effect to each' subsection. Charlotte City Coach Lines, Inc. v. Bhd. of R.R. Trainmen, 254 N.C. 60, 68, 118 S.E.2d 37, 43 (1961).... We conclude that there is no irreconcilable conflict between subsections (e) and (f). Indeed, Session Law 1999-35 has no effect on subsection (e) and Pinebluff may extend its ETJ under subsections (a) and (f) only if the extension also complies with the provisions of subsection (e)." (Citation omitted.)

"Thus, if Moore County is not exercising all three powers enumerated in subsection (e), Pinebluff may extend its ETJ up to two miles beyond its corporate limits under subsection (a) or beyond its annexed areas under (f) without seeking approval from the county. Likewise, if Moore County and Pinebluff reach an agreement on the area within which each will exercise its powers, Pinebluff may extend its ETJ up to two miles beyond its existing corporate limits under subsection (a) or beyond its annexed areas under (f) without seeking approval from the county. But where no agreement is in place and Moore County has adopted and is enforcing a zoning ordinance and a subdivision regulation, and is also enforcing the State Building Code, Pinebluff may not extend its ETJ into that area without approval of the county, regardless of whether the area falls within two miles of its corporate limits or an annexed area."

The Court concluded its opinion by stating, "Here, Moore County was exercising all three powers under subsection (e) within Pinebluff's proposed ETJ expansion area: it had adopted and was enforcing a zoning ordinance and subdivision regulations, and was enforcing the State Building Code. Therefore, Pinebluff was not allowed to extend its ETJ into that area unless it reached an agreement with or received approval from Moore County. The county held public hearings and voted to deny

Pinebluff's request, refusing to adopt a resolution that would allow Pinebluff to expand its ETJ. Thus, Moore County and Pinebluff did not reach an agreement, and the county did not approve the requested resolution. Therefore, Pinebluff was prohibited from expanding its ETJ into that area."

- ***Synopsis***— On discretionary review sought by defendant-County pursuant to G.S. 7A-31 of a unanimous, published decision of the Court of Appeals, ____ N.C. App. ___, 821 S.E.2d 446 (2018), which affirmed the trial court's December 2016 entry of summary judgment and writ of mandamus. Reversed and remanded. Opinion by Justice Hudson.

Land Use; Permits; Downtown; Hotel

PHG Asheville, LLC v. City of Asheville, ___ N.C. ___ (No. 434PA18, 4/3/20)

- ***Holding***— **In matter involving whether respondent-City properly denied petitioner's conditional use permit application seeking authorization to construct a downtown hotel, a 5-2 majority of Supreme Court of North Carolina concludes that petitioner-PHG presented competent, material, and substantial evidence that the proposed hotel satisfied the relevant conditional use permit standards set out in the unified development ordinance and that the record did not contain any competent, material, and substantial evidence tending to establish that the proposed development failed to satisfy applicable ordinance standards. Accordingly, City lacked the authority to deny the requested conditional use permit.**

- ***Key Excerpt***— In affirming the Court of Appeals' decision and holding that the City lacked the authority to deny the requested conditional use permit, the majority initially stated, "The trial court and the Court of Appeals both held that the City had improperly concluded that PHG had failed to present competent, material, and substantial evidence tending to show that the proposed hotel satisfied the standards for the issuance of a conditional use permit set out in the City's unified development ordinance. In seeking relief before this Court, the City argues that the Court of Appeals ignored this Court's precedents concerning the manner in which applications for the issuance of conditional use permits should be evaluated, incorrectly applied the applicable standard of review, and erroneously disregarded the City's findings of fact…. [W]e conclude that PHG presented competent, material, and substantial evidence that the proposed hotel satisfied the relevant conditional use permit standards set out in the City's unified development ordinance and that the record did not contain any competent, material, and substantial evidence tending to establish that the proposed development failed to satisfy the applicable ordinance standards."

The majority observed that, "As the record reflects, PHG presented the testimony of two architects, an appraiser, a traffic engineer, a certified planner, and the Vice President of PHG who, between them, presented evidence concerning each of the standards enunciated in the relevant portion of the City's land use ordinance." The majority recognized that, "A city council is, of course, entitled to rely upon the special knowledge of its members concerning conditions in the locality which they serve. However, this principle does not justify the City Council's decision to deny PHG's permit application in this case." Upon reiterating that principle, the majority stated, "[S]everal members of the City Council mentioned facts within their special knowledge about the city that they

represented during the quasi-judicial hearing held for the purpose of considering PHG's application. Among other things, various members of the City Council questioned Mr. Dean [a registered professional engineer] concerning the manner in which he conducted his traffic study, with their questions raising issues about the extent to which his study should have been based upon conditions existing at a different date and time. Aside from the fact that Mr. Dean was able to answer and provide reasonable explanations for his answers, nothing in the relevant ordinance provision required Mr. Dean to have anticipated these questions and to have conducted his study in the manner that these questions seemed to believe to have been appropriate without sufficient advance notice to have permitted him to present any necessary rebuttal evidence. As a result, nothing in the special facts known to the members of the City Council in this case justified the making of a decision that PHG had failed to satisfy its burden of production or to reject PHG's permit application."

The majority observed that in seeking a reversal of the Court of Appeals' decision, the City argued that, pursuant to a previous decision of the Supreme Court, "a local government may deny a conditional use permit if, at the permit hearing, the developer is unable to definitively address whether the proposed development presents a safety risk" and "that this rule applies even when the safety risk is raised by members of the public whose testimony is ultimately inadmissible," citing Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 16–17, 565 S.E.2d 9, 19 (2002). The City further argued that "there is no meaningful difference between Mann Media and this case" given that, in Mann Media, public members raised concerns about ice falling from a tower while, here, a member of the public raised a safety issue concerning the presence of a blind hill near a parking garage. The City further argued, that, just as in Mann Media, "PHG's witness could not state with certainty—much less 'satisfactorily ... prove' or 'guarantee'—that the proposed development would not create a 'safety risk'" and that PHG's failure to adequately address this safety issue necessitated denial of PHG's permit, quoting Mann Media, 356 N.C. at 17, 565 S.E.2d at 19. In addition, the City contended that "when the local government assesses the evidence at the permit hearing, the local government may rely on its knowledge of the local community," citing Humble Oil & Refining Co. v. Bd. of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974). The City further contended that "instead of allowing local knowledge to inform local permitting decisions, the Court of Appeals expressly constrained local governments from considering that local knowledge," thus presenting a conflict with the Supreme Court's precedent set forth in Mann Media and Humble Oil.

The majority *inter alia* rejected the City's arguments regarding Mann Media. "In Mann Media, the Randolph County Planning Board denied an application for the issuance of a conditional use permit authorizing the construction and operation of a broadcast tower based upon concerns that ice would fall from the necessary support beams. Mann Media, 356 N.C. at 3–5, 565 S.E.2d at 11–12. After determining that the evidence presented in opposition to the issuance of the proposed permit constituted incompetent 'anecdotal hearsay,' *id*. at 17, 565 S.E.2d at 19, this Court held that 'petitioners [had] failed to carry their burden of proving that the potential of ice falling from support wires of the proposed tower was not a safety risk' in light of the fact that the applicant had 'candidly acknowledged his inability to state with certainty that ice would not travel a

greater distance in the event of wind or storm,' *id*., and that, for that reason, 'petitioners [had] failed to meet their burden of proving this first requirement [that the proposed tower would not materially endanger public safety] and did not establish a *prima facie* case.' *Id*. The same result would not be appropriate in this case given that nothing in the relevant ordinance provision, particularly given the advice that Mr. Dean received from the City staff, set forth any requirement that the sort of sight distance study that the City Council wanted to have been conducted was required in order to obtain the issuance of the requested conditional use permit. If Department of Transportation regulations do require a sight distance survey, it is not the City Council's role to enforce those regulations in the guise of implementing the City's ordinances relating to conditional use permits."

Holding that petitioner PHG presented competent, material, and substantial evidence that its proposed hotel satisfied the relevant ordinance standards and that no competent, material, and substantial evidence was presented in opposition to PHG's showing, the majority held that the City lacked the legal authority to deny PHG's application. The majority concluded its opinion by stating, "[W]e hold that the Asheville City Council made a legislative decision to allow certain uses by right in specified zones 'upon proof that certain facts and conditions detailed in the ordinance exist.' Woodhouse [v. Bd. of Comm'rs], 299 N.C. [211] at 215–16, 261 S.E.2d [882] at 886 [(1980)] (quoting Humble Oil, 284 N.C. at 467, 202 S.E.2d at 135). The effect of the making of this decision was to bind the Asheville City Council to the use of quasi-judicial procedures and to exclusive reliance upon the substantive standards enunciated in the relevant provisions of its land use ordinance in determining whether conditional use permit applications should be granted or denied. *See id*. at 219, 261 S.E.2d at 887 (stating that, '[w]here a zoning ordinance specifies standards to apply in determining whether to grant a [conditional] use permit and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law' (quoting Hay v. Township of Grow, 206 N.W.2d 19, 22 (Minn. 1973)). As a result, in the event that an applicant for the issuance of a conditional use permit presents competent, material, and substantial evidence tending to show that it has satisfied the applicable ordinance standards, it has made out a *prima facie* case of entitlement to the issuance of the conditional use permit, with any decision to deny the permit application being required to rest upon contrary findings of fact that have adequate evidentiary support…. As a result, subject to the modified logic set forth in this opinion, we affirm the Court of Appeals' decision." In a footnote, the Supreme Court observed that it was not "argue[d] before the Court of Appeals that the trial court had erred by concluding that PHG had satisfied its burden of producing competent, material, and substantial evidence addressing the three ordinance criteria that are not discussed in the text of this opinion, thereby abandoning its right to challenge the trial court's decision with respect to those criteria on appeal. *See* N.C.R. App. P. 28(a) (stating that '[i]ssues not presented and discussed in a party's brief are deemed abandoned')."

- ***Synopsis***— On discretionary review sought by respondent-City pursuant to G.S. 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 822 S.E.2d 79 (2018), affirming a November 2017 order. Modified and affirmed. Majority opinion by Justice Ervin. Justice Earls dissenting, joined by Justice Hudson.

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

Torts; Arrest; Public Official Immunity; Adequate State Remedy Painter v. City of Mt. Holly, ___ N.C. App. ___, 823 S.E.2d 583 (No. COA18-197, Gaston– 3/5/19) (***unpublished***), *disc review denied*, *cert. denied*, ___ N.C. ___ (No. 127P19, 4/3/20) (This case arose out of events taking place in 2012, leading to plaintiff's arrest: he owned property that was the site of an auto body shop, following an eviction-based dispute with lessees at the property. The Assistant District Attorney took voluntary dismissal of all cases in the absence of a witness to testify. In 2015, plaintiff filed an amended complaint raising seven causes of action: (1) False Imprisonment & Arrest; (2) Abuse of Process/Malicious Prosecution; (3) Conspiracy to Violate the N. C. Constitution; (4) Negligent Hiring, Training, Supervision & Retention; (5) Violation of Rights under the U.S. Constitution pursuant to 42 U.S.C. § 1983; (6) Conspiracy to Violate Constitutional Rights pursuant to 42 U.S.C. § 1985; and (7) Malicious Conduct giving rise to Punitive Damages. Defendants appealed the trial court's denial of summary judgment, alleging that they were entitled to both public official and qualified immunity, that there was sufficient probable cause to support the arrest, that plaintiff failed to make *prima facie* cases regarding claims (4) & (5), and the existence of an adequate state law remedy barring the state constitutional claim.

The Court determined that defendant-officers should have been granted summary judgment on Claims (1), (2) & (7) based on public official immunity. "…. [Defendant-officers] were acting in their official capacity at all relevant times for the purposes of Plaintiff's suit, and Plaintiff has not forecast any evidence that their actions fall within an exception to public official immunity. [Defendant-officers] acted in response to criminal complaints about Plaintiff by conducting an investigation and seeking arrest warrants. These actions are well within the scope of official duties for a law enforcement officer; it is the crux of their job. Plaintiff does not allege any facts suggesting [defendant-officers] acted outside the scope of their official duties such that those actions would fall under an immunity exception." The Court held that because there was probable cause for Plaintiff's arrest, defendant-City was entitled to summary judgment on Claims (1) and (2) alleging false arrest and malicious prosecution. The Court also found that plaintiff's third claim failed because of an adequate state law remedy, rendering his direct constitutional claim unavailable. "In Claim (1), Plaintiff alleges he was falsely arrested by the Defendants, and sues under state law. Likewise, in Claim (3) Plaintiff alleges the Defendants 'intentionally acted, combined and conspired to deprive Plaintiff of his constitutional rights to the equal protection of the laws; [and] ... subjected Plaintiff to an unlawful search and seizure under the laws of the State of North Carolina, depriving him of his liberty and freedom....' Claim (3) seeks redress for the same actions Plaintiff argued, in Claim (1), amount to a false arrest in violation of state law. Additionally, North Carolina law recognizes civil conspiracy as a valid cause of action where a plaintiff can show '(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to [the] plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.' Strickland v. Hedrick, 194 N.C. App. 1, 19, 669 S.E.2d 61, 72 (2008). Plaintiff did not pursue such a claim." (Appeal by defendants from October 2017 denial of summary judgment. Reversed. Opinion by Judge Murphy, with Judge Stroud and Judge Zachary concurring. On April 3, 2020, the Supreme Court of North Carolina denied plaintiffs' petition for discretionary review and writ of certiorari based upon constitutional question.))