MUNICIPAL LAW NOTES

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Constitutional Law; Noise Ordinance; Probable Cause; Adequate State Remedy

Adams v. City of Raleigh, ___ N.C. App. ___ (No. COA15-782, Wake– 2/16/16)

- ***Holding–*** In plaintiff's action involving arrest for violating the City's Amplified Entertainment Permit (AEP) Ordinance, upon which charge was later dropped, Court of Appeals holds that trial court properly granted defendant-City's motion for summary judgment based on the presence of probable cause.

- ***Key Excerpt–*** The Court first addressed the issue of probable cause. "Here, defendant had probable cause to believe that plaintiff was violating the AEP ordinance on 19 August 2011. The AEP application that plaintiff filled out includes a one-page instruction sheet that states in bold and underlined text, 'A business may not provide Amplified Entertainment until it has received an Amplified Entertainment Permit.' Moreover, defendant had knowledge that plaintiff applied for the AEP and that an AEP had not been issued to Juice Bar. When the Netforces team and Raleigh Police arrived at Juice Bar, they observed a cash-box being used to collect admission fees, televisions mounted to the walls playing music videos, and a DJ playing amplified music through a sound system."

"Although the AEP ordinance does not specifically state how the exemption applies, Sergeant Peterson was reasonable in concluding there was a 'practical nontechnical probability that incriminating evidence' was involved. *See* [State v.] Biber, 365 N.C. [162] at 169, 712 S.E.2d [874] at 879 [(2011)]. Because an officer's probable cause determination is not one of a legal technician, *see* [Illinois v.] Gates, 462 U.S. [213] at 231, 76 L. Ed. 2d [527] at 544 [(1983)], Sergeant Peterson acted as a reasonable, prudent person in concluding that plaintiff was providing amplified entertainment, plaintiff was required to have an AEP, plaintiff could not present an AEP to Netforces, and, as a result, plaintiff was in violation of the AEP ordinance—a misdemeanor."

"Probable cause is not eliminated based on an after-the-fact decision by the State not to prosecute a particular claim or a conclusion by a court that a defendant is not guilty. Law enforcement

officers need not have *prima facie* proof of guilt of illegal activity, only a probability. Although plaintiff emphasizes that Sergeant Peterson has arrested thousands of people in his career but he has never arrested someone for failing to have an AEP, this is not relevant to the probable cause inquiry. Because a finding of probable cause necessarily defeats plaintiff's claims for false arrest and malicious prosecution, we need not address governmental immunity as there is no liability." (Citations omitted.)

The Court next addressed the constitutional claims: plaintiff argued that he did not have an adequate remedy under state law due to defendant's assertion of governmental immunity. The court rejected plaintiff's argument, which was based on Craig v. New Hanover County Board of Education, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009). The Court stated, "In Corum v. University of North Carolina, our Supreme Court stated, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Here, unlike Craig, governmental immunity does not stand as an absolute bar to plaintiff's state law claims. 'Because state law gives plaintiff the opportunity to present his claims and provides "the possibility of relief under the circumstances," plaintiff's state constitutional claims must fail.' Wilkerson v. Duke Univ., 229 N.C. App. 670, 676, 748 S.E.2d 154, 159 (2013)."

- ***Synopsis***−Appeal by plaintiff from March 2015 order. Affirmed. Opinion by Judge Elmore, with Judge Calabria and Judge Zachary concurring.

Land Use; Historic District; Certificate of Appropriateness; Standing; Aggrieved Party; Special Damages

Cherry v. Wiesner, ___ N.C. App. ___ (No. COA15-155, Wake− 2/16/16)

- ***Holding***− Respondent-residential landowner, whose property was across from neighbors' property in historic district, was not an aggrieved party, lacking standing to contest Historic District Commission's decision to approve the modernist design of a house, G.S. 160A-400.9(e), as respondent-residential landowner failed to allege special damages.

- ***Key Excerpt***− "[Respondent] lives across the street from the single-family "modernist" design home of [petitioners] in Raleigh's Oakwood neighborhood. Oakwood is a designated historic district, where the design of new construction must be approved by the Raleigh Historic Development Commission ('the Commission'). As required by the rules of the historic district, before building on their vacant lot, petitioners applied for a certificate of appropriateness [G.S. 160A-400.9] to build their new home ('the Cherry-Gordon house'). When the Commission held hearings to consider the application, respondent and others objected to petitioners' proposed modernist design because they considered it incongruous with the other houses in the historic district. After a series of hearings, the Commission approved the design, but then the Raleigh Board of Adjustment ('the Board') rejected the design. Petitioners then appealed the Board's ruling to the Superior Court, which reviews decisions of the Board and the Commission to make sure that their rulings comply with the law. The Superior Court reversed the Board's decision, which meant that the Commission's decision to approve the design was affirmed. This opinion addresses respondent's appeal from the Superior Court's ruling."

The Court initially noted that the Superior Court did not rule on the question of the house's modernist design and the claim of "incongruity" with the historic district but decided that respondent did not have legal standing to challenge the approval of the design. Upon explaining that one who brings a legal action challenging a land use decision must have standing to bring the action, the Court stated, "The applicable statute gives 'standing' only to an 'aggrieved party,' as the law defines that term. Although respondent lives across the street from the Cherry-Gordon house, the location of her home does not automatically give her standing to challenge the issuance of the certificate. A nearby landowner has standing to challenge a land use decision like this one only if the new construction will cause him to suffer some type of 'special damages' distinct from other landowners in the area. Usually, special damages include economic damages such as a decrease in property value and other direct adverse effects on the property of the landowner challenging the proposed land use, such as smoke, light, noise, or vandalism created by the new property use, which are different from the effects on the rest of the neighborhood. Respondent's claims of damages from the Cherry-Gordon house are all essentially aesthetic, since she believes the house does not fit in with the historic neighborhood and is unpleasant for her to see from her home across the street. Even if she is correct in her assessment of the Cherry-Gordon house's design, respondent has failed to show that she is an 'aggrieved party' as the law defines that term, so the Superior Court's order reversing the Board's decision was correct and we affirm it."

"A reduction in value of property may be part of the basis for standing, but diminution in value alone is not sufficient.... The fact that respondent owns property 'immediately adjacent to or in close proximity to the subject property' also bears some weight on the issue of whether the party will suffer special damages, but status as an adjacent landowner alone is insufficient to confer standing. Mangum [v. Raleigh Bd. of Adjust.], 362 N.C. [640] at 644, 669 S.E.2d [279] at 283 [(2008)]…. Vague, general allegations that a property use will impair property values in the general area also will not confer standing…. In these cases [Lloyd v. Town of Chapel Hill, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900 (1997); Davis v. City of Archdale, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986)], although the challengers to the land use alleged impairment of property values, the allegation was general for the entire neighborhood or area and not specific to a certain parcel of property. *See id.*, 344 S.E.2d at 371; Lloyd, 127 N.C. App. at 351, 489 S.E.2d at 900. And we note that even assuming that respondent's allegations are true and the proposed use will actually adversely affect property values in the general vicinity, because this type of effect is not distinct to the particular landowner who is challenging a land use, this factor alone does not confer standing. *See* Davis, 81 N.C. App. at 508, 344 S.E.2d at 371; Lloyd, 127 N.C. App. at 351, 489 S.E.2d at 900."

The Court found respondent's allegations insufficient to demonstrate special damages. "On appeal, [respondent's] arguments are purely aesthetic or are not distinct to her property…. [T]hese allegations do not demonstrate special damages *distinct to respondent*, other than the view from her front porch; rather, respondent alleges a generalized damage to the overall neighborhood—'reduced property values and impaired enjoyment of the neighborhood.' The mere fact that respondent's home is 'directly across the street' from the Cherry-Gordon house does not constitute special damages. *See* Mangum, 362 N.C. at 644, 669 S.E.2d at 283; Kentallen, 110 N.C. App. at 770, 431 S.E.2d at 233. Respondent's allegation is akin to the allegations in Kentallen, Lloyd, and Davis, where this Court held that the party had failed to allege special damages. *See* Kentallen [Inc. v. Town of Hillsborough], 110 N.C. App. [767] at 770, 431 S.E.2d [231] at 233 [(1993)]; Lloyd, 127 N.C. App. at

351, 489 S.E.2d at 900; Davis, 81 N.C. App. at 508, 344 S.E.2d at 371; Sarda v. City/Cty. of Durham Bd. of Adjust., 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) ('Petitioners' mere averment that they own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of special damages distinct from the rest of the community in their Petition, is insufficient to confer standing upon them.') (citation and quotation marks omitted). Respondent makes no allegation of damages particular to her property like the allegation of potential "vandalism, safety concerns, littering, trespass, and parking overflow" in Mangum or the allegation of the loss of a waterfront view and the resulting reduction of market value of the property in Sanchez. *See* Mangum, 362 N.C. at 645-46, 669 S.E.2d at 283-84; Sanchez [v. Town of Beaufort], 211 N.C. App. [574] at 579, 710 S.E.2d [350] at 353-54 [, *disc. review denied*, 365 N.C. 349, 717 S.E.2d 745 (2011)]. Because respondent has failed to even *allege* special damages, she is not an aggrieved party and thus lacks standing to contest the Committee's decisions. *See* Casper [v. Chatham Cty.], 186 N.C. App. [456] at 458, 651 S.E.2d [299] at 301 [(2007)]; [G.S.] 160A-400.9(e)." (Emphasis in original.)

- ***Synopsis***− Appeal by respondent from September 2014 order. Affirmed. Opinion by Judge Stroud, with Judge Calabria and Judge McCullough concurring.

Land Use; Procedure;
Petitions for Writ of Certiorari;
Rules of Civil Procedure; Voluntary Dismissal

Henderson v. County of Onslow, ___ N.C. App. ___ (Nos. COA14-1355 & 56, Onslow− 2/2/16)

- ***Holding***− In a 2-1 decision, N.C. Court of Appeals holds that G.S. 1A-1, Rule 41(a)(1) is not applicable to petitions for writ of certiorari seeking review of decisions of a board of adjustment. Because Rule 41(a)(1) did not apply to the original petition and, therefore, did not allow petitioners to refile their petition within a year of the voluntary dismissal, refiled petition was untimely, and the trial court properly dismissed it.

- ***Key Excerpt***− The majority stated, "Petitioners Russell and Julie Henderson have brought two separate appeals related to petitions for writ of certiorari they filed in superior court seeking review from a determination by the Onslow County Board of Adjustment ('OCBOA'). As the issues presented in the appeals are interrelated and involve common questions of law, we have consolidated the appeals for purposes of decision. On appeal, petitioners primarily argue that they had a right under Rule 41(a)(1) of the Rules of Civil Procedure to voluntarily dismiss their first petition for writ of certiorari without prejudice and refile it within one year without the refiled petition being deemed untimely. Because we hold that Rule 41(a)(1) did not apply to petitioners' petition for writ of certiorari, and the superior court otherwise had no jurisdiction to hear the refiled petition, the trial court properly dismissed the refiled petition in File No. 13 CVS 2589. While petitioners also argue that the trial court erred in File No. 10 CVS 4596 by denying their motion to amend the petition, because petitioners had voluntarily dismissed that petition, there was no existing petition to amend, and we, therefore, affirm the trial court's denial of the motion to amend."

  ". . . . Darnell [v. Town of Franklin, 131 N.C. App. 846, 508 S.E.2d 841 (1998)] … instructs that we look first at the actual language of the Rule of Civil Procedure to determine whether it applies to proceedings pursuant to petitions for writ of certiorari…. Rule 41(a)(1) thus is confined to 'actions' and, in contrast to Rule 15, is not made applicable to pleadings. It is well established that a petition for writ of certiorari is not a civil action…. Because a petition for writ of certiorari is not a civil action within the meaning of the Rules of Civil Procedure and because Rule 41(a)(1) applies only to civil actions, Rule

41(a)(1) by its express terms does not apply to petitions for writ of certiorari."

"In addition, this Court has already held that when a party seeks review of a quasi-judicial zoning decision denying a special use permit, the 'matter [is] not commenced by the filing of' the pleading in the superior court challenging the denial, but rather is 'commenced by the filing of plaintiff's application for a special use permit with defendant[.]' Northfield Dev. Co. v. City of Burlington, 165 N.C. App. 885, 888-89, 599 S.E.2d 921, 924 (2004). Likewise, here, this proceeding was not commenced with the filing of the petition for writ of certiorari. Instead, this proceeding was initiated by the zoning office when it issued petitioners a notice of violation. Assuming that Rule 41(a)(1) did apply to this proceeding, if any party could be deemed the plaintiff, it would have to be the zoning office, which initiated the proceedings. In filing the petition for writ of certiorari, petitioners were simply following the only *route of appeal* available to them from the final decision of the OCBOA [Onslow County Board of adjustment], when they filed the 23 November 2010 petition for writ of certiorari. *See*, *e.g.*, Batch, 326 N.C. [1] at 11, 387 S.E.2d [665] at 662 [(1990)] (holding that '[i]n reviewing the errors raised by plaintiff's petition for writ of certiorari, the superior court was sitting as a court of appellate review'). Petitioners could no more voluntarily dismiss the petition for writ of certiorari and refile it outside the statutorily-mandated time frames than could a party file a notice of appeal, dismiss it, and refile it after the 30-day deadline for appeals had run." (Emphasis in original.)

"…. Therefore, we hold that Rule 41(a)(1) is simply not relevant to petitions for writ of certiorari seeking review of decisions of a board of adjustment. Because Rule 41(a)(1) did not apply to File No. 10 CVS 4596 and, therefore, did not allow petitioners to refile their petition within a year of the voluntary dismissal of the 10 CVS 4596 petition, the petition filed in 13 CVS 2589 was untimely, and the trial court properly dismissed it. *See* Teen Challenge Training Ctr., Inc. v. Bd. of Adjustment of Moore Cnty., 90 N.C. App. 452, 455, 368 S.E.2d 661, 664 (1988) (affirming dismissal of untimely petition for certiorari to superior court)."

- ***Synopsis***−Appeal by petitioners from February 2014 and May 2014 orders. Affirmed in a 2-1 decision. Opinion by Judge Geer, with Chief Judge McGee concurring. Judge Tyson dissents.

Torts; Negligence; Sidewalk; Statutory Duty of Care; Notice of Defective Condition

Steele v. City of Durham, ___ N.C. App. ___ (No. COA15-246, Durham− 2/2/16)

- ***Holding***− According to G.S. 160A-296 and regulations, absent an agreement to the contrary, the City is responsible to maintain sidewalk which runs parallel to Highway 55, a State Municipal Highway, within its municipal borders. Trial court could not properly grant summary judgment for defendant-City based upon the absence of a legal duty to maintain sidewalk.

- ***Key Excerpt***− The Court agreed with the plaintiff's contention that the City owed him a statutory duty to keep the sidewalk reasonably safe. "The City acknowledges its statutory authorization to maintain sidewalks within its corporate boundaries under [G.S.] 160A-296…. [W]e take judicial notice, pursuant to [G.S.] 150B-21.22 (2015), of the following relevant provision of the North Carolina Administrative Code relating to the maintenance of the state highway system within a municipality: 'The maintenance of sidewalks is a municipal responsibility.' 19A N.C.A.C. 2D.0404(c)(6)…. The area in question is a 'sidewalk,' as defined by 19A N.C.A.C. 2D.0404(a)(13), which runs parallel to Highway 55, a 'State Municipal ... Highway,' as defined by 19A N.C.A.C. 2D.0404(a)(3); according to 19A

N.C.A.C. 2D.0404(c)(6), '[t]he maintenance of sidewalks is a municipal responsibility.'"

"In its attempt to demonstrate that NCDOT is solely responsible to maintain this particular sidewalk, the City offered the plans and municipal agreement between the State Highway Commission and the City, entered in 1970, for the widening and improvement of 'Alston Avenue from Price Street north to the Expressway.' But this agreement addresses only the construction and financing of the project; it does not allocate responsibility for maintenance of the road or sidewalk after construction. In addition, the City offered the affidavit of H. Wesley Parham, P.E., who has 'worked for the City of Durham since 1986' and was 'employed as Assistant Transportation Director for the [NCDOT].' Parham's affidavit states that the plans for the 1970 project included the area where plaintiff fell and that he is not aware of any 're-engineering or construction improvements' at the location since the 1970 project was completed. Parham also stated that he is unaware of any 'agreement that applies to the City of Durham which would require the City to assume street and/or sidewalk maintenance and improvement responsibility' for the relevant area of sidewalk."

"Essentially, the City argues that it would be responsible to maintain the sidewalk *only* if it had entered into an agreement with the NCDOT to provide maintenance, and it has not done so. But the City is responsible to maintain the sidewalk *unless* it has entered into a maintenance agreement that says otherwise. *See* [G.S.] 160A-296 (a)(1)-(2); *see also* 19A N.C.A.C. 2D.0404(c)(6). The City's responsibility to maintain the sidewalk was created by [G.S.] 160A-296 and by 19A N.C.A.C. 2D.0404, and the City has not forecast any evidence that the NCDOT has agreed to take on maintenance responsibility for this sidewalk." (Emphasis in original.)

The Court concluded its opinion by stating, "According to the applicable North Carolina General Statutes and regulations, absent an agreement to the contrary, the City was responsible to maintain this sidewalk which runs parallel to Highway 55 within its municipal borders. After determining that the City owed plaintiff a statutory duty of care, we reviewed the record evidence and conclude genuine issues of material fact were presented as to whether the City had actual or constructive notice of the defective condition of this sidewalk. These issues of fact are directly relevant to whether the City was negligent. Therefore, the trial court's order granting summary judgment for the City must be reversed, and this case must be remanded for further proceedings."

- ***Synopsis***− Appeal by plaintiff from August 2014 order. Reversed and remanded. Opinion by Judge Calabria, with Judge Stroud and Judge Inman concurring.

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

Land Use; Standing; Nonconforming Use; Setback Area; Special Damages Sugar Mountain Ski Resort, LLC v. Village of Sugar Mountain & Round Boys LLC, ___ N.C. App. ___ (No. COA15-544, Avery− 3/1/16) (***unpublished***) (In appeal considering appeal whether a neighboring landowner alleged sufficient facts to establish its standing, G.S. 160A-393(d), to seek judicial review of a decision by a local zoning board, Court holds that superior court did not err in declining respondent-owner's (Round Boys LLC's) motion to dismiss the petition for lack of standing, given petitioner-resort sufficiently alleged: "(1) that the [home] improvements the Board allowed were unlawful in that they were located 'within the prohibited [setback] area [abutting ski slopes]' as provided in the ordinance and (2) that the resort would suffer 'special damages' in the form of interfering with skiing operations and reducing the safety of the resort's ski slopes for

members of the public who were guests and patrons of the resort. Mangum [v. Raleigh Bd. of Adjustment], 362 N.C. [640] at 643, 669 S.E.2d at 282 [(2008)]." (Appeal by respondent-Round Boys LLC from January 2015 order. Affirmed. Opinion by Judge Stephens, with Judge Stroud and Judge Davis concurring)).

Land Use; Zoning; Enforcement Action; Nonconforming Use Whitehurst v. Sipes, ___ N.C. App. ___ (No. COA15-265, Alexander– 2/2/16) (***unpublished***) (In petitioner's appeal from superior court's order affirming the decision of the Planning and Zoning Board of Adjustment to dismiss the notification of zoning enforcement action issued against respondent Sipes for enlarging or extending his existing nonconforming use (boat repair business in a residential district) of his property, Court of Appeals affirms and remands for the correction of a clerical error. "Although the superior court's order was incomplete, we identified and applied the proper standards of review to resolve the dispositive issues before us. We reviewed *de novo* Whitehurst's challenges to the Board's interpretation and application of the ACZO [Alexander County Zoning Ordinance]. Moreover, we reviewed Whitehurst's challenges that required a consideration of the evidence before the Board under the whole record test. We concluded that Sipes had not enlarged nor extended his nonconforming use of property in violation of the ACZO. Therefore, we affirm the trial court's order that upheld the Board's decision to overturn the 2013 Zoning Violation issued against Sipes. In addition, we remand to the superior court for the limited purpose of correcting the clerical error in its order." (Appeal by petitioner from November 2014 order. Affirmed. Opinion by Judge Calabria, with Judge Stroud and Judge Inman concurring.)