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Land Use; Conditional Use Permit;
***Prima Facie* Case; Improper Burden of Proof**

Dellinger v. Lincoln County, ___ N.C. App. ___ (No. COA15-1370, Lincoln− 7/19/16)

- ***Holding***− Where petitioners' property was zoned for residential-single family use ("R-SF"), and the properties directly adjoining or abutting petitioners' property were zoned as planned development-residential ("PD-R") and general industrial ("I-G"), applicant produced substantial, material, and competent evidence to establish a *prima facie* case of entitlement for issuance of conditional use permit for a solar energy farm. Board of Commissioners incorrectly implemented a burden of persuasion upon applicant after it presented a *prima facie* case, rather than shifting the burden to the Intervenors-Respondents to produce rebuttal evidence contra to overcome applicant's entitlement to the conditional use permit.

- ***Key Excerpt***− The Court agreed with petitioners' first argument that the superior court erred by affirming the Board of Commissioners' decision denying the issuance of the conditional use permit. The Court held that the record showed that Strata Solar produced substantial, material, and competent evidence to establish its *prima facie* case of entitlement for issuance of the conditional use permit. "Strata Solar produced 'evidence that a solar farm would not emit noise, odors, or generate traffic, things that are considered to affect or reduce value to neighboring properties.'" The Court noted *inter alia* the introduction of expert testimony from two individuals. "The Board found Strata Solar had met its 'burden of production' but 'found the evidence unpersuasive.' The Board denied the conditional use permit and concluded Strata Solar failed to satisfy Condition (3) — that the use would not substantially injure 'the value of adjoining or abutting property.' The Board voted 2 to 1 that Strata Solar had failed to make out its *prima facie* case under Condition (3). The superior court reiterated: '[T]here was not substantial, material and competent evidence submitted by the Applicant, Strata Solar, to support a conclusion that issuance of a conditional use permit would not substantially injure the value of adjoining or abutting property.' In light of the evidence summarized above, we hold that the superior court erred by upholding the Board's

conclusion that Strata Solar failed to present substantial, material, and competent evidence to make a *prima facie* showing it was entitled to issuance of the conditional use permit…. We reverse that portion of the superior court's order, which affirmed the Board's decision that Strata Solar had failed to present substantial, material, and competent evidence to establish a *prima facie* case of meeting Condition (3) to warrant issuance of the conditional use permit."

The Court next rejected petitioners' argument that the Board erred by allowing a new commissioner to participate in the Board's vote on remand: petitioners argued he was not on the Board when it rendered its original decision to deny the issuance of Strata Solar's conditional use permit. (Another new commissioner had recused himself against the advice of the County Attorney.) The Court observed that the new commissioner had an opportunity to read and review all of the evidence previously considered and stated that he "reviewed the entire record of the prior proceedings." The Court stated, "The change in Board membership composition had no effect upon Petitioners or Strata Solar's ability to present its arguments in favor of issuance of the conditional use permit. *See* Cox v. Hancock, 160 N.C. App. 473, 483, 586 S.E.2d 500, 507 (2003) (holding 'access to the minutes and exhibits from the earlier meeting' assured petitioners were provided with due process and change in Board membership had no effect on petitioners' ability to present arguments). Petitioners have failed to show any prejudice by [the] new [commissioner's] participation in the hearing and vote on remand. *See* Baker v. Town of Rose Hill, 126 N.C. App. 338, 342, 485 S.E.2d 78, 81 (1997) (holding petitioners failed to show prejudice where four of five members of Town Board voted in favor of resolution to issue conditional use permit)."

Petitioners argued that an improper burden of proof was imposed and their Due Process rights were violated because *inter alia* one commissioner stated he was voting against issuing the permit because the applicant did not prove its case "beyond a doubt" and the Board's findings of fact stated "[a]lthough [Strata Solar] did meet its burden of production and provided evidence as to this element, we found the evidence unpersuasive." The Court held that Strata Solar was held to an improper burden of proof and that the Board failed to shift the burden of proof to the Intervenors-Respondents. "[The commissioner's] reference to holding Strata Solar to a 'beyond a doubt' standard during the deliberations, in addition to [the new commissioner] stating and the Board's order denying Strata Solar's permit because it 'failed to meet its burden of proof' tends to show the Board imposed an improper standard or failed to recognize the requisite burden-shifting to the Intervenors-Respondents after Strata Solar had made its *prima facie* case for entitlement. Humble Oil [& Ref. Co. v. Bd. of Aldermen], 284 N.C. [458] at 468, 202 S.E.2d [129] at 136 [(1974)] (citations omitted). Once Strata Solar established its *prima facie* case, the Board's decision not to issue the permit must be 'based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.' *Id.* Here, the Board not only required Strata Solar to meet its burden of production to make its *prima facie* case, but one decision-maker apparently imposed a 'beyond a doubt' burden of proof on Strata Solar. The Board also incorrectly implemented a 'burden of persuasion' upon Strata Solar after Strata Solar it [sic] presented a *prima facie* case, rather than shifting the burden to the Intervenors-Respondents to produce rebuttal evidence contra to overcome Strata Solar's entitlement to the conditional use permit…. The superior court's order is reversed on this issue and remanded to that court for further remand to the Board for additional quasi-judicial proceedings, utilizing the proper legal procedures and standards, which hold Strata Solar and Intervenors-Respondents to their respective burdens of proof."

- ***Synopsis***− Appeal by petitioners from July 2015 order. Affirmed in part; reversed in part, and remanded. Opinion by Judge Tyson, with Judge Bryant and Judge Inman concurring.

Public Contracts; Indemnity Provision

CSX Transp., Inc. v. City of Fayetteville, ___ N.C. App. ___ (No. COA15-1286, Cumberland− 5/17/16)

- ***Holding***− A contract may validly provide for the indemnification of one against, or relieve one from liability for, one's own future acts of negligence.

- ***Key Excerpt***− The Court held that the trial court erroneously concluded that, under the 1951 Crossings Agreement, plaintiff CSX was barred from recovering indemnification from the Fayetteville Public Works Commission (PWC) because of CSX's admission of negligence in the harm caused to CenturyLink. (In 2011, CSX's crane hit PWC's power lines, causing a power surge resulting in damage to electrical equipment owned by CenturyLink.)

"In Cooper [v. H.B. Owsley & Son, Inc., 43 N.C. App. 261, 258 S.E.2d 842 (1979)], this Court analogized indemnification provisions to liability insurance policies, which 'have long been enforced by the courts.' Cooper, 43 N.C. App. at 266, 258 S.E.2d at 846. Rejecting the defendant's argument that it would be against public policy to permit the plaintiff to be indemnified against its own negligence, we noted 'it is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence[.]' *Id.* at 267, 258 S.E.2d at 846 ('[Defendant] contends that it is against public policy to permit [plaintiff] to be indemnified against its own negligence or against that of its employee for which it is responsible. We perceive, however, no sound reason why this must be so.'). More recently, this Court, citing Cooper, explicitly rejected the notion that North Carolina does not permit the contractual indemnification of a party for its own negligent acts. Malone v. Barnette, ___ N.C. App. ___, ___, 772 S.E.2d 256, 260-61 (2015)…."

"Here, the trial court granted summary judgment in favor of PWC on the grounds that CSX had admitted its negligence in causing or contributing to the incident, which gave rise to CenturyLink's claim, and this admission barred CSX from receiving indemnification from PWC as a matter of law. As discussed *supra*, this conclusion is contrary to well-established North Carolina law. The trial court's conclusion of law was incorrect and summary judgment entered upon this erroneous conclusion was improper. The trial court's 8 June 2015 order, which granted summary judgment in favor of PWC as a result of CSX's admitted negligence, is reversed."

The Court then turned to the enforceability of the indemnity provision. "Both parties also stipulated at oral argument that the language of the indemnity provision in the Crossings Agreement is not ambiguous and should be interpreted by this Court as a matter of law. CSX contends the second phrase in the indemnification provision, which requires indemnification where the injury is 'by reason of the exercise of any of the privileges conferred by this license or agreement[,]' mandates indemnification for the situation at bar. CSX reasons the only 'privilege[] conferred' by the agreement was to allow PWC to place power lines over the railroad tracks. CSX argues if not for, or 'but for,' the presence of the power lines above the railroad tracks, which exist only as a result of PWC's exercise of its privilege under the license granted, CSX's crane would not have hit PWC's power lines and damaged CenturyLink's equipment."

. . . .

"The language in the Crossings Agreement provides for indemnification for damage 'which may be incurred by the Railroad Company *by reason of* the construction, maintenance, use or operation of the said conductors, wires or supports, or *by reason of* the exercise of any of the privileges conferred by this license or agreement.' (emphasis supplied)."

"PWC forcefully argues 'by reason of' does not mean 'but for,' and is more akin to a proximate causation requirement. PWC asserts it is only required to indemnify CSX for injuries incurred 'by reason of,' or caused by, the construction, maintenance, use, or operation of PWC's equipment. We disagree with this narrow interpretation. If this Court were to accept PWC's interpretation of the indemnification provision, it would 'effectively rob[] the indemnity clause of nearly all meaning.'" (Citations omitted.)

. . . .

"The Crossings Agreement was an arm's length, bargained-for exchange between two equally sophisticated parties. The language in the indemnification provision, which both parties concede is unambiguous, was granted as consideration for, and as a result of, PWC's power lines being installed and maintained over CSX's railroad tracks. This provision allows CSX to be indemnified for damages paid to CenturyLink, because the damage was 'by reason of,' or 'by virtue of,' PWC's exercise of its privilege, *i.e.* hanging power lines above the railroad tracks."

"In other words, but-for, or 'stemm[ing] from,' PWC's exercise of its privilege and license pursuant to the Crossings Agreement, CenturyLink's equipment would not have been damaged as a result of CSX's crane colliding with PWC's power lines. Under the agreement, CSX is entitled to indemnification from PWC, even though damages resulted from CSX's own negligence. On *de novo* review, CSX's motion for partial summary judgment on its claim for contractual indemnity is granted." (Citation omitted.)

- ***Synopsis***− Appeal by plaintiff from May 2015 and June 2015 orders. Reversed and remanded. Opinion by Judge Tyson, with Judge Calabria and Judge Hunter, Jr. concurring.

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

Land Use; Special Use Permit; Due Process; Broadcast Tower Davidson County Broad. Co., Inc. v. Iredell Cnty., ___ N.C. App. ___ (No. COA15-959, Iredell− 7/19/16) (***unpublished***) ("Where petitioners were unable to show they were entitled to a special use permit for their proposed [broadcast] tower which was determined to not be in conformity with the county's plan of development and not in harmony with the area [R-A, Residential-Agricultural], the Board's denial was proper, and the Superior Court utilized the appropriate standard of review in upholding the Board's decision. Further, where the Superior Court properly applied the appropriate standard of review, we affirm the order of the Superior Court." In so holding, the Court states, "Where the record shows petitioners were given the right to offer testimony, cross-examine witnesses, and inspect documents, there was no violation of due process rights." (Appeal by petitioners from March 2015 order. Affirmed. Opinion by Judge Bryant, with Judge Dillon and Judge Zachary concurring.)).

Procedure; Default Judgment; Excusable Neglect; Building; Failure to Repair Dangerous Conditions Town of Beech Mountain v. Milligan, ___ N.C. App. ___ (No. COA15-1267, Watauga− 7/5/16) (***unpublished***) **(**In action where Town sued defendant Milligan after he repeatedly failed to repair dangerous conditions on his property, Court of Appeals affirms trial court's denial of defendant's motion to set aside a default judgment under Rule 60(b). "In light of those findings, Milligan failed to show excusable neglect. As the trial court found, Milligan is 'a sophisticated businessman' who had previously been involved in litigation. His attorney advised him that he needed to file an answer to

avoid a default, but Milligan ignored that advice and instructed his attorney not to file an answer. Moreover, Milligan personally appeared in court in October, and the trial court warned him that he must immediately file an answer or risk entry of default. Even after the direct warning from the court, Milligan did not file an answer. We agree with the trial court that Milligan's repeated and knowing inattention to Beech Mountain's lawsuit is unreasonable and does not constitute excusable neglect. We thus affirm the trial court's order denying his Rule 60(b) motion." (Appeal by defendant from August 2015 order. Affirmed. Opinion by Judge Dietz, with Judge Calabria and Judge Dillon concurring.)).