MUNICIPAL LAW NOTES

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Constitutional Law; Takings; Map Act; Inverse Condemnation

Kirby v. N.C. Department of Transportation, ___ N.C. ___ (No. 56PA14-2, 6/10/16)

- ***Holding***– Trial court improperly dismissed plaintiffs' inverse condemnation claim, as utilization of the Map Act by the North Carolina Department of Transportation resulted in a taking of certain property rights of plaintiffs without just compensation. By recording the corridor maps at issue here, which restricted plaintiffs' rights to improve, develop, and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights.

- ***Key Excerpt***– ". . . . Upon NCDOT's recording of the highway corridor maps at issue here, the Map Act [G.S. 136-44.50 to G.S. 136-44.54] restricted plaintiffs' fundamental rights to improve, develop, and subdivide their property for an unlimited period of time. These restraints, coupled with their indefinite nature, constitute a taking of plaintiffs' elemental property rights by eminent domain. The extent to which plaintiffs may be entitled to just compensation, however, depends upon market valuation of the property before and after the taking. Such determinations must be made on an individual, property-by-property basis. We therefore affirm the decision of the Court of Appeals."

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"The NCDOT contends that the Map Act is a valid, regulatory exercise of the police power, not the power of eminent domain, and that therefore no taking has occurred. The NCDOT asserts that 'cost-cutting' is not the only underlying purpose of the Map Act and, quoting Blades v. City of Raleigh, 280 N.C. 531, 546, 187 S.E.2d 35, 43 (1972), argues that the Act promotes the general welfare of the public 'by conserving the values of other properties and encouraging the[ir] most appropriate use.' The NCDOT points to 'facilitating orderly and predictable development' with 'the least impact on the natural and human environments, and minimizing the number of businesses, homeowners and renters who will have to be relocated when a [highway] project is authorized for right-of-way acquisition and road construction' in support of its contentions. While these policies are laudable, we do not agree that the

Map Act is a valid, regulatory exercise of the police power. We concur with the analysis of the Court of Appeals."

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"The language of the Map Act plainly points to future condemnation of land in the development of corridor highway projects, thus requiring NCDOT to invoke eminent domain. *See* Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ('The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.' (citations omitted)). Section 136-44.50 contemplates the filing of 'a transportation corridor official map' that has been adopted or amended by a governing board overseeing a 'long-range transportation plan,' and 'establishment of' an 'official map or amendment' triggers the beginning of 'environmental impact studies' and 'preliminary engineering work.' Sections 136-44.51 to -44.53 provide not only for approval of a building permit or variance but establish procedures for 'advanced acquisition of' the property."

"The Map Act's indefinite restraint on fundamental property rights is squarely outside the scope of the police power. No environmental, development, or relocation concerns arise absent the highway project and the accompanying condemnation itself. Justifying the exercise of governmental power in this way would allow the State to hinder property rights indefinitely for a project that may never be built. Though the reduction in acquisition costs for highway development properties is a laudable public policy, economic savings are a far cry from the protections from injury contemplated under the police power. The societal benefits envisioned by the Map Act are not designed primarily to prevent injury or protect the health, safety, and welfare of the public. Furthermore, the provisions of the Map Act that allow landowners relief from the statutory scheme are inadequate to safeguard their constitutionally protected property rights." (Citations omitted.)

"A taking effectuated by eminent domain does not require 'an actual occupation of the land,' but 'need only be a substantial interference with elemental rights growing out of the ownership of the property.' Long [v. City of Charlotte], 306 N.C. [187] at 198-99, 293 S.E.2d [101] at 109 [(1982)]. These elemental rights are generally considered 'an important feature of' the land and, as such, are accounted for within the valuation of the land." (Citations omitted.)

"Through inverse condemnation the owner may 'recover to the extent of the diminution in his property's value' as measured by 'the difference in the fair market value of the property immediately before and immediately after the taking.' Long, 306 N.C. at 201, 293 S.E.2d at 110-11 (citations omitted); *see* [G.S.] 136-112(1) (2015). 'Obviously, not every act or happening injurious to the landowner, his property, or his use thereof is compensable.' Long, 306 N.C. at 199, 293 S.E.2d at 109. Thus, to pursue a successful inverse condemnation claim, a plaintiff must demonstrate not only a substantial interference with certain property rights but also that the interference caused a decrease in the fair market value of his land as a whole."

"By recording the corridor maps at issue here, which restricted plaintiffs' rights to improve, develop, and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights. On remand, the trier of fact must determine the value of the loss of these fundamental rights by calculating the value of the land before the corridor map was recorded and the value of the land afterward, taking into account all pertinent factors, including the restriction on each plaintiff's fundamental rights, as well as any effect of the reduced *ad valorem* taxes." (Citation omitted.)

- ***Synopsis***− Appeal by defendant from unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 218 (2015), reversing January

2013 and June 2013 orders and remanding for further proceedings. Affirmed. Opinion by Justice Newby.

Personnel; Resolution; Defense of Employees; Immunity

Wray v. City of Greensboro, ___ N.C. App. ___ (No. COA15-912, Guilford− 6/7/16)

- ***Holding***− In a 2-1 decision arising from plaintiff-former employee's action seeking reimbursement of litigation expenses, Court of Appeals holds that trial court erred in entering complaint's dismissal based on the doctrine of governmental immunity to the extent that plaintiff's action is based in contract.

- ***Key Excerpt***− "The City's motion to dismiss was made pursuant to Rule 12(b)(1), (2) and (6). The trial court granted the City's motion on the sole ground that the City was 'shielded by the doctrine of governmental immunity, which immunity has not been waived.' The trial court based this holding on its conclusion that the City's enactment of the City Policy pursuant to its authority granted under [G.S.] 160A-167 was *not* an action which waives governmental immunity. However, we hold that Plaintiff has, in fact, set forth allegations that the City has waived governmental immunity, though *not* based on the City's act of enacting the City Policy, *but rather* based on the City's act of entering into an employment agreement with Plaintiff. Specifically, Plaintiff has made a breach of contract claim, essentially alleging that he had a contract with the City to work for the City *and* that pursuant to the City's contractual obligations, the City is required to pay for his litigation expenses. Importantly, the City is authorized to enter into employment contracts with its police officers, and the City is authorized by [G.S.] 160A-167 to enact a policy by which it may contractually obligate itself to pay for certain legal expenses incurred by these officers. Whether the City is, in fact, contractually obligated to pay for Plaintiff's litigation expenses as alleged in the present case (under a theory that the City Policy is part of his contract or based on some other theory) goes *to the merits* of Plaintiff's contract claim and is not relevant to our threshold review of whether the City *is immune* from having to defend against these contract claims in court. Rather, we merely hold that the trial court erred in dismissing Plaintiff's complaint *based on the doctrine of governmental immunity*, the only basis of its order." (Emphasis in original.)

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". . . . [T]he General Assembly has authorized municipalities to provide for the defense of their officers and employees in any civil or criminal action brought against a member in the member's official or individual capacity. [G.S.] 160A-167 (1980). We hold that under G.S. 160A-167, one way a municipality is authorized to provide such benefit is by contract. We note that [G.S.] 160A-167 is permissive; the General Assembly does *not* require a city to make any provision for the defense of employees, contractual or otherwise, but if a municipality does so, '[t]he city council, authority governing board, or board of county commissioners . . . shall have adopted . . . uniform standards under which claims made or civil judgments entered against . . . employees or officers, or former employees or officers, shall be paid.' [G.S.] 160A-167. . . . Whether the City Policy is, in fact, an element of Plaintiff's employment contract and whether Plaintiff's litigation expenses are covered thereunder go to the merits of Plaintiff's contract claim. However, in the present appeal, we are not concerned with the *merits* of Plaintiff's contract claims; rather, we only address whether the City is shielded from having to defend against those claims based on governmental immunity." (Emphasis in original.)

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"In sum, Plaintiff has essentially pleaded that he had an employment relationship with the City and that the City has contractually obligated itself to pay for his defense as a benefit of his contract.

Whether the City is, in fact, obligated to pay *contractually* by virtue of its passage of the City Policy goes to the merits and is not the subject of this appeal." (Emphasis in original.)

- ***Dissenting opinion***− "The Resolution declares 'the *policy* of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments[.]' (emphasis added). This statement prescribes an *intent* to provide for the defense of officers and employees. Furthermore, the Resolution does not provide substantive rights or procedural steps. Thus, I would hold that the Resolution is not a contractual provision upon which plaintiff can compel defendant's performance. While we acknowledge there is plenary support for the proposition that an employer-employee relationship is essentially contractual and such a relationship often waives immunity from suit on the contract, here, the Resolution central to this action is not a contractual provision. Though the majority opinion frames the issue as purely a determination of whether the employee-employer relationship between plaintiff and defendant is a contractual one and reasons that that alone determines the waiver of defendant's immunity, I believe that the record before the trial court was sufficient to determine that plaintiff could not establish a valid contractual agreement with defendant City of Greensboro on the issue central to this action, the provision of a legal defense as a condition of employment. Moreover, there is no indication of an express waiver or an applicable insurance provision. Thus, I would hold the trial court was correct in concluding that defendant City of Greensboro, a municipality, did not waive its governmental immunity to plaintiff's suit. Therefore, I would affirm the order of the trial court granting defendant's motion to dismiss plaintiff's complaint." (Emphasis in original; citations omitted.)

- ***Synopsis***− Appeal by plaintiff from May 2015 order. Reversed and remanded in a 2-1 decision. Majority opinion by Judge Dillon, with Judge Zachary concurring. Judge Bryant dissenting.

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

Constitutional Law; Substantive Due Process; Summary Ejectment; Wildlife Sanctuary Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., ___ N.C. App. ___ (Nos. COA15-260 & No. COA15-517, Watauga− 5/10/16) (In Town's summary ejectment action, N.C. Court of Appeals in a 2-1 decision upholds grant of summary judgment in favor of defendant-wildlife sanctuary as to Town's breach of lease claim and upholds denial of Town's motions for directed verdict and JNOV regarding defendant-wildlife sanctuary's substantive due process counterclaim presenting as-applied challenge to buffer ordinance. (Appeal by plaintiff-Town from judgment and orders entered September 2014, October 2014, and November 2014. Affirmed in a 2-1 decision. Majority opinion by Judge Geer, with Judge Hunter Jr. concurring. Judge Dillon dissenting.)).

Land Use; Single Family Detached Dwelling Long v. Currituck Cnty., ___ N.C. App. ___ (No. COA15-376, Currituck− 6/21/16) (Trial court erred in affirming Board of Adjustment's decision that proposed 15,000 square foot project, including multiple connected buildings, constituted a single family detached dwelling under the County's Unified Development Ordinance and was a permitted use in the Single Family Residential Outer Banks Remote District. (Appeal by petitioner-adjacent property owners from December 2014 decision and order. Reversed and remanded. Opinion by Judge Stroud, joined by Judge Calabria and Judge Inman.)).

Torts; Collision; Immunity; Self-Insured Retention Pryor v City of Raleigh, ___ N.C. App. ___ (No. COA15-1403, Wake− 6/7/16) (***unpublished***) (In plaintiff's action for *inter alia* damage to real property arising from collision between ambulance

and police vehicle, Court of Appeals affirms entry of summary judgment for defendants. "Defendants' liability insurance policies clearly preserved the defense of governmental or sovereign immunity to bar Plaintiffs' claims. Plaintiffs failed to forecast damages above the required amount to trigger coverage and waive governmental or sovereign immunity." (Appeal by plaintiffs from August 2015 order. Affirmed. Opinion by Judge Tyson, joined by Judge Calabria and Judge Hunter, Jr.)).