MUNICIPAL LAW NOTES

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Land Use; Subdivision Plats; Procedural Due Process; Generally Stated Standards; Physical Hardship; Quasi-Judicial Decision

Butterworth v. City of Asheville, ___ N.C. App. ___ (No. COA15-919, Buncombe– 5/17/16)

- ***Holding***– Planning and Zoning Commission's decision to approve proposed subdivision plat, with street-width modification, was quasi-judicial in nature. In approving the plat, the Commission was required to determine under the ordinance whether the Developer would suffer "physical hardship" without the modification, a decision which required the exercise of judgment and discretion in applying this general standard.

- ***Key Excerpt***– "In their sole argument on appeal, the Neighbors contend that the trial court erred in concluding that the City was *not* required to afford them all fair trial rights before approving the Developer's subdivision preliminary plat. Specifically, the Neighbors contend that the approval of the street-width modification required the Commission to exercise discretion and, therefore, rendered the Commission's approval process quasi-judicial in nature, and *not* ministerial/ administrative in nature. We hold that the Commission's approval of the plat in this case was, in fact, quasi-judicial in nature and that, therefore, the Neighbors were deprived of certain due process rights in the approval process." (Emphasis in original.) (The Court observed in a footnote that neither party contested the Neighbors' standing in this matter.) Reviewing principles from County of Lancaster v. Mecklenburg, 334 N.C. 496, 434 S.E.2d 604 (1993), the Court stated that the due process required in the Commission's decision process depended upon whether its decision was quasi-judicial or administrative in nature.

"This is not to say that *every* decision to allow a modification in a subdivision proposal is quasi-judicial in nature. That is, the decision to allow a modification may be administrative in nature if the decision process does not involve the exercise of discretion but rather involves the application of specific, neutral, and objective criteria as set out in the municipality's governing code. *See id.* at 510, 434 S.E.2d at 614 (explaining that a decision which requires the application of objective standards is administrative). However,

where the decision requires the exercise of discretion in applying generally stated standards, the decision is of a quasi-judicial nature. As our General Assembly has provided, 'an ordinance **shall be deemed to authorize a quasi-judicial decision** if the city council or planning board is authorized to decide whether to approve or deny the plat based not only upon whether the application complies with the specific requirements set forth in the ordinance, but also on **whether the application complies with one or more generally stated standards requiring a discretionary decision** to be made by the city council or planning board.' [G.S.] 160A-377(c) (2014) (emphasis added)."

The Court determined that here the Commission viewed its decision as ministerial/administrative in nature and *not* quasi-judicial in nature. "Notwithstanding the provisions of the Asheville Code suggesting otherwise, the decision regarding the Developer's proposed modification required a determination of whether the Developer would suffer 'physical hardship' if the modification was not allowed. *See* [Asheville City Code of Ordinances] § 7-5-8(c)(2). We hold that this determination required an exercise of discretion in the application of this generally stated standard, rendering the Commission's decision quasi-judicial in nature. *See* [G.S.] 160A-377(c) (2014). Our conclusion is in spite of the language in Asheville's Code stating that review before the Commission 'shall be ministerial.' *See* Asheville City Code of Ordinances § 7-5-8(a)(3)(d)(1) (2014). Indeed, our General Assembly has provided that 'an ordinance shall be deemed to authorize a quasi-judicial decision if the . . . planning board is authorized to decide whether to approve or deny the plat based . . . on whether the application complies with one or more generally stated standards.' [G.S.] 160A-377(c) (2014). Here, determining the presence of 'physical hardship' as defined in § 7-5-8(c)(2) of Asheville's Code required the exercise of judgment and discretion in applying the relevant 'generally stated standard[][.]' *See id.* That is, the decision did not require the mere application of specific, neutral, and objective criteria, which would render the decision administrative in nature."

Having determined that the Commission's decision to approve the proposed subdivision was quasi-judicial in nature, the Court held that the trial court erred in dismissing the Neighbor's petition for *certiorari*, and remanded the matter to the trial court for further remand to the Commission so that a hearing with "fair trial standards" could be held. "In the present case, the Neighbors alleged in their petition for *certiorari*, which they labeled in the alternative as a complaint seeking a declaratory judgment and injunctive relief, that the Commission failed to comply with the due process requirements for quasi-judicial proceedings, alleging additionally that in doing so the Commission acted arbitrarily and capriciously. Therefore, under Blue Ridge Co. [, L.L.C. v. Town of Pineville, 188 N.C. App. 466, 655 S.E.2d 843 (2008)], the allegations in the Neighbors' petition required the trial court to review the Commission's decision under both the *de novo* and whole record standards. *Id.* at 469-70, 655 S.E.2d at 845-46. The trial court, however, did neither, apparently simply agreeing with the Respondents' position in their answers and motions to dismiss, ordering that the Neighbors' petition be dismissed without addressing any of the relevant issues set out by our Supreme Court in Coastal Ready-Mix Concrete [Co., Inc. v. Bd. of Comm'rs of Town of Nags Head, 299 N.C. 620, 265 S.E.2d 379 (1980)], or making any findings or conclusions indicating its rationale for so ruling. In any event, we hold that the trial court on remand shall remand the case to the Commission to conduct further proceedings which provide the Neighbors with the level of due process required for quasi-judicial proceedings before that Commission."

- ***Synopsis***− Appeal by petitioners from April 2015 order. Reversed and remanded. Opinion by Judge Dillon, with Judge Bryant and Judge Zachary concurring.

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

Land Use; Zoning; Truck Stop Campbell v. City of Statesville, ___ N.C. App. ___ (No. COA15-329, Iredell- 5/3/16) (***unpublished***) (In petitioners-residents' and business owners' appeal of superior court's order affirming City Board of Adjustment's determination that a "truck stop" is permitted in B-4 Highway Business zoning district, Court of Appeals affirms. "The superior court properly conducted a *de novo* review of the Board's order. In addition, the Board did not err by considering the B-4 zone's purpose in rendering its decision. Furthermore, the Board did not err in approving of the holistic inquiry and comparison that [the Planning Director] conducted pursuant to Section 3.03(F). Finally, the record does not demonstrate that a truck terminal most closely resembles a truck stop under the UDC. We therefore hold that the Board properly approved Love's proposed truck stop as a land use permitted in the City's B-4 Highway Business district." (Appeal by petitioners from November 2014 order. Affirmed. Opinion by Judge Calabria, with Judge Stroud and Judge Inman concurring.))

Personnel; Wrongful Discharge Claims; Summary Judgment; Pretext Bigelow v. Town of Chapel Hill, ___ N.C. App. ___ (No. COA15-897, Orange- 5/3/16) (***unpublished***) (In appeal from order awarding summary judgment to Town as to plaintiffs-sanitation workers' wrongful discharge claims, Court of Appeals affirms. "Assuming *arguendo* that Plaintiffs carried their burden of forecasting a *prima facie* case, it is clear from the record that the Town rebutted the burden by explaining the nondiscriminatory reasons for Plaintiffs' termination. [N.C. Dep't of Correction v.] Gibson, 308 N.C. [131] at 139, 301 S.E.2d [78] at 84 [(1983)] (citation omitted). The Town provided evidence from its internal investigation that shows Plaintiffs were terminated for poor job performance and inappropriate behavior, thereby shifting the burden to Plaintiffs to show pretext. Plaintiffs have not forecast evidence of pretext because they fail to point 'to specific, non-speculative facts' that discredit the Town's non-discriminatory motives for termination. Head [v. Adams Farm Living, Inc.], ___ N.C. App. [___] at ___, 775 S.E.2d [904] at 912 [(2015)] (citation omitted). After reviewing the record *de novo* and in the light most favorable to Plaintiffs, we hold there is no genuine issue of material fact." (Appeal by plaintiffs from August 2014 order. Affirmed. Opinion by Judge Hunter, Jr., with Judge Stephens and Judge Inman concurring.))

Procedure; Eminent Domain; Issues other than Just Compensation; Content of Notice of Appeal Town of Cary v. Southerland, ___ N.C. App. ___ (No. COA15-740, Wake− 5/17/16) (***unpublished***) (In defendants' appeal from trial court's order denying their motion pursuant to G.S. 40A-47 for determination of issues other than just compensation in an action brought by plaintiff-Town for condemnation against a portion of their real property, appeal dismissed as issue was not preserved for appellate review. "[Defendants] designated only the trial court's 9 January 2015 order in their notice of appeal to this Court. However, our review of the record demonstrates that in its 20 October 2014 order [denying defendants' motion to amend their answer], the trial court made its determination that [defendants] had failed to raise the descriptions of the property taken and lands affected by the taking provided in the Town's complaint as an issue in their pleadings or discovery responses or at any other point in the history of this litigation prior to filing their motion to amend. [Defendants] did not timely notice any appeal from the 20 October 2014 order after it was entered, nor did they designate it for appeal in their notice of appeal from the 9 January 2015 order. Moreover, [defendants'] principal brief to this Court omits any reference whatsoever to the 20 October 2014 order. Consequently, we must

conclude that we lack jurisdiction to review the trial court's 20 October 2014 order.") (Appeal by defendants from January 2015 order. Dismissed. Opinion by Judge Stephens, with Judge Hunter Jr., and Judge Inman concurring.))

Torts; Libel *Per Se*; Absence of Justiciable Issue; Attorneys' Fees; Reimbursement Alford v. Green, ___ N.C. App. ___ (No. COA15-1101, Granville- 5/3/16) (***unpublished***) (In litigation between plaintiff ex-mayor and defendant mayor, trial court's award of defendant's attorneys' fees, to be paid by plaintiff to the Town, affirmed. "Plaintiff has failed to show the trial court erred in finding and concluding her complaint presented 'a complete absence of a justiciable issue' on her claim of libel *per se* and awarding attorney's fees under [G.S.] 6-21.5. Plaintiff has failed to preserve for appellate review any issue pertaining to the propriety of the portion of the trial court's order that directs Plaintiff to pay the attorney's fees to the Town of Stem to reimburse the town for its payment of Defendant's attorney's fees under [G.S.] 160A-167.") (Appeal by plaintiff from May 2015 order. Affirmed. Opinion by Judge Tyson, with Chief Judge McGee and Judge Inman concurring.))