MUNICIPAL LAW NOTES

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Land Use: Development Agreement; Expired Preliminary Plat; Common Law Vested Rights

Walton N.C., LLC v. City of Concord, ___ N.C. App. ___ (No. COA17-822, Cabarrus– 12/19/17)

- ***Holding***– Trial court properly granted summary judgment in City's favor in property owner's appeal of the denial of its *inter alia* preliminary site plan: while the owner had ample time upon prior and actual notice to act upon a previously approved 2006 preliminary plat, it chose to pursue a "new development" plan, G.S. 160A-400.22(a), and only attempted to revert back to the prior approved plat after it had expired, the owner did not rely in good faith upon a valid governmental approval, and could not show a common law vested interest in developing the property under the expired 2006 preliminary plat.

- ***Key Excerpt***– The Court held that the trial court properly granted the City's motion for summary judgment, rejecting Walton's arguments that: (1) Walton had a common law vested right to develop the property based on the approved 2006 preliminary plat; (2) the development agreement between Walton and the City approved a 551-dwelling subdivision; and, (3) the City Council's denial of Walton's rezoning request was subject to reversal because it was arbitrary and capricious, and as such, the approval recommendation by the Planning and Zoning Commission should have been upheld.

The Court held that Walton failed to show any common law vested right in accord with the prior approved 2006 Preliminary Plat, holding that the record did not support a showing of Walton's good-faith reliance on a valid governmental approval resulting in its detriment. Upon emphasizing the general proposition that the adoption of a zoning ordinance does not confer upon individuals any vested rights, the Court stated, "It is uncontested Walton spent substantial sums prior to and after purchasing the property [in 2012]. The record also clearly indicates Walton did not intend to rely upon the prior approved 2006 Preliminary Plat, as Walton's pre-purchase report stated its intention to create a *new* development plan. Even if Walton argues its subsequent plans are almost identical to the prior approved Preliminary Plat, it waited nearly a year after the expiration of the 2006 Preliminary Plat to begin seeking new development approvals. *See* Warner v. W & O, Inc., 263 N.C.

37, 43, 138 S.E.2d 782, 786-87 (1964) (holding vested rights do not protect those who wait to develop their property after an ordinance has been passed prohibiting the use)." (Emphasis in original.)

"No genuine issue of material fact exists that Walton was well aware of the Preliminary Plat's expiration, as the City provided written notice to them over one year prior to the Plat's expiration. The pre-purchase report also correctly identifies the previous repeal of the cluster development provisions in the CDO [Concord Development Ordinance]."

"Walton erroneously argues the 2006 approval, which grandfathered the repealed cluster development provisions, in some way still allows those cluster provisions as common law vested rights long after its expiration. No vested rights exist where the party has prior knowledge of the existence of an ordinance prohibiting the proposed use. *Id.* at 43, 138 S.E.2d at 787."

"Walton also argues it was unclear of what the expiration of the 2006 Preliminary Plat meant. The record clearly shows Walton took no good-faith action to ascertain how the pending plat approval expiration may affect its proposed development scheme in the year between the City's notice and the Plat's expiration."

. . . .

"Walton failed to show any common law vested rights. The expenditures it made were not made in good-faith reliance on the approved 2006 Plat. Neither the expiration of the plat's approval nor the expenditures incurred are detrimental to Walton's ability to develop the property in accordance with the current RL [Residential Low Density] zoning requirements or to other densities upon rezoning. *See* Kirkpatrick [v. Village Council for the Village of Pinehurst], 138 N.C. App. [79] at 87, 530 S.E.2d [338] at 343 [(2000)]."

As to the development agreement, the Court rejected Walton's argument that the development agreement for the construction and shared costs of water and sewer infrastructure to serve the proposed development acted as a *de facto* zoning approval of a 551-dwelling subdivision. The Court stated, "Here, the development agreement between the City and Walton recites and identifies Walton's intention to 'develop the Property into a residential subdivision with approximately 551 dwelling units' and its need for 'access to sanitary sewer and potable water' in order to develop the property. Paragraph 3 of the agreement unambiguously states: 'Walton shall submit to the Concord Planning and Zoning Commission a preliminary plat consistent with the purposes of this Agreement which shall at minimum depict the sizes, placements, and configurations of the lots, common open space, streets, sidewalks, and other improvements planned for the Property. The Property shall then be developed *consistent with the preliminary plat approved by the Concord Planning and Zoning Commission* and in accordance with this Agreement. . . . *Walton understands that the City's continued performance under this Agreement is contingent upon Walton receiving all necessary approvals for its preliminary plat[.]*' (Emphasis supplied). Paragraph 4 further clarifies '[t]he maximum number of dwelling units will be determined by the applicable zoning and the approved preliminary plat[.]'"

"The agreement also states '[t]he local ordinances applicable to the development of the Property are those in force as of the date of this Agreement,' in conformity with [G.S.] 160A-400.26(a). The agreement was executed on 4 October 2014, months after the expiration of the approved 2006 Preliminary Plat on 31 December 2013, and years after the repeal of cluster development provisions from the CDO in 2006."

"Walton erroneously asserts this development agreement constituted approval for 'approximately 551 dwelling units,' while the agreement clearly

imposes and requires compliance with the *current* zoning requirements. RL zoned property allows a net density of two dwellings per acre. Walton's arguments on this basis are overruled." (Emphasis in original.)

The Court held that the City Council's denial of the rezoning request was not arbitrary and capricious. Upon citing the well-established plausible basis standard set forth a half-century ago in Zopfi v. City of Wilmington, 273 N.C. 430, 437, 160 S.E.2d 325, 332 (1968), the Court concluded its opinion by stating, "At the conclusion of the second hearing before the City Council on 2 December 2015, Council members found the proposed rezoning was inconsistent with the current land use plan. They cited increased traffic in the area, a negative impact upon the public schools, and the potential negative impacts on the surrounding homes and properties. The Council also found the proposed rezoning, proposing a 25% increase in homes over the current RL zoned allowances, was unreasonable and not in the public interest. As these findings and the ultimate legislative decision to deny the rezoning request have a 'plausible basis,' we are not free to substitute our opinion for that of the City Council. *See id.*"

"Additionally, '[t]he Planning and Zoning Commission . . . ha[s] no legislative, judicial or quasi-judicial power.' In re Markham, 259 N.C. 566, 571, 131 S.E.2d 329, 334, *cert. denied*, 375 U.S. 931, 11 L. Ed. 2d 263 (1963). Whether or not property should be rezoned is a determination reserved for 'the City Council in the exercise of its purely legislative function.' *Id.* at 572, 131 S.E.2d at 334. The existing RL zone on the property is presumed to be correct. The burden of proof rested on Walton to overcome that presumption. *See* Rakestraw v. Town of Knightdale, 188 N.C. App. 129, 136, 654 S.E.2d 825, 830 (2008). The recommendation by the Commission in this case was advisory."

- ***Synopsis***− Appeal by plaintiffs from May 2017 order denying its motion for summary judgment and granting summary judgment in favor of defendant-City. Affirmed. Opinion by Judge Tyson. Judge Calabria and Judge Davis concurring.)

Land Use; Special Use Permit; Denial; Failure to Join a Necessary Party; Dismissal

Azar v. Town of Indian Trail Bd. of Adjustment, _ N.C. App. ___ (No. COA17-704, Union− 12/19/17)

- ***Holding***− Appellant failed to join the Town as respondent in his initial petition, as is statutorily required by G.S. 160A-393(e). The Town has not waived Appellant's failure to name them as the respondent in his initial petition by participating in the hearing on the Board of Adjustment's motion to dismiss. As this defect in Appellant's initial petition was not and could not be cured by his amended petition under the relation back doctrine, the superior court properly granted the Board's motion to dismiss under G.S. 1A-1, Rule 12(b)(7) for failure to join a necessary party.

- ***Key Excerpt***− Petitioner appealed from the trial court's order granting the Town of Indian Trail Board of Adjustment's motion to dismiss petitioner's petition for judicial review of the denial of the renewal of a special use permit.

As to petitioner's failure to name the Town in the original petition, the Court stated, "[G.S.] 160A-393(e) plainly requires the Town, and not the Town's Board of Adjustment, to be named as the respondent in the petition for judicial review. *Id.* Appellant originally named 'The Town of Indian Trail Board of Adjustment' as the respondent in his original petition. Defendant subsequently named 'Town of Indian Trail' as the respondent in his amended petition."

"It is undisputed Appellant filed his original petition on 5 January 2017, within 30 days of the

Board's provision of written notice to him of its denial of his special use permit on 15 December 2016. Appellant did not seek to amend his petition to name the Town as respondent, and not the Town's Board of Adjustment, until 29 March 2017, after the Board of Adjustment's motion to dismiss was filed, and nearly three and a half months after Appellant received written notice of the Board's decision."

. . . .

"Unlike the City of Asheville in MYC Klepper[/Brandon Knolls L.L.C. v. The Board of Adjust. for City of Asheville, 238 N.C. App. 432, 767 S.E.2d 668 (2014)], the Town has not participated in the hearings of this action to waive Appellant's failure to join them as a necessary party. *See Id.* There has not been a hearing in the superior court to review the Town's zoning decision, only a hearing on the Board of Adjustment's motion to dismiss, which the Town did not participate in. Although the Town filed a motion for an extension of time to respond to Appellant's initial petition, this action does not waive the defense of failure to join a necessary party. *See* [G.S.] 1A-1, Rule 12(b) ('Obtaining an extension of time within which to answer or otherwise plead shall not constitute a waiver of any defense herein set forth.')."

The Court also rejected petitioner's relation-back arguments, holding that a fatal defect in petitioner's initial petition was not and could not be cured by his amended petition under the relation back doctrine and that the superior court properly granted the Board's motion to dismiss under Rule 12(b)(7). "In this case, Appellant named the Board of Adjustment for the Town of Indian Trail as respondent instead of naming the Town, as is required by [G.S.] 160A-393(e). The real party-in-interest in this case is the Town, not the Board of Adjustment. *See* [G.S.] 160A-393(e). The question becomes whether the defect in the original petition of naming the Board as the respondent, instead of the Town, was sufficient to bar Appellant's petition and support the Town's motion to dismiss, or whether the defect was merely technical in nature and subject to remedy under the relation back rule."

"Appellant filed his amended petition naming the Town as the respondent on 29 March 2017, two and a half months late, and well outside the 30-day limitations period for filing petitions for judicial review of zoning decisions of towns. [G.S.] 160A-388(e2)(2). *Id.*"

"Here, the Board is a different party from the Town. According to our precedents, Appellant's amended petition does not relate back to his original filing. Piland v. Hertford Cty. Bd. of Comm'rs., 141 N.C. App. 293, 301-02, 539 S.E.2d 669, 674 (2000). . . ."

. . . .

"Appellant failed to join the Town as respondent in his initial petition, as is statutorily required by [G.S.] 160A-393(e), and he filed the amended petition outside the 30-day limitations period provided by [G.S.] 160A-388(e2)(2). Appellant's amended petition does not relate to his initial petition because it attempted to add the Town as a new party, outside the 30-day limitations period. *See id.; see also* Crossman [v. Moore], 341 N.C. [185] at 187, 459 S.E.2d [715] at 717 (1995)] (holding that relation back rule 'does not apply to the naming of a new party-defendant to the action')."

"The Town has not waived [Appellant's] failure to name them as the respondent in his initial petition by participating in the hearing on the Board of Adjustment's motion to dismiss. *See* MYC Klepper, 238 N.C. App. at 437, 767 S.E.2d at 671 (holding City of Asheville waived failure to be joined as a necessary party by participating in proceedings before superior court)."

- ***Synopsis***− Appeal by petitioner from April 2017 order granting respondent's motion to dismiss. Affirmed. Opinion by Judge Tyson. Judge Calabria concurring. Judge Davis concurring in result only.

Land-Use: Lack of Subject Matter Jurisdiction; Ripeness; Permits; Coastal Area Management Act; NFIP

Fleischhauer v. Town of Topsail Beach, ___ N.C. App. ___ (No. COA17-915, Pender– 3/6/18) (***unpublished***)

- ***Holding–*** In plaintiffs' appeal from order granting defendant-Town's motion to dismiss for lack of subject matter jurisdiction and dissolving a previously issued temporary restraining order, Court of Appeals affirms.

- ***Key Excerpt–*** Plaintiffs presented two issues on appeal: (1) the trial court erred in concluding the issues raised in the complaint are not ripe for adjudication based upon the lack of a final determination about what uses of land would be permitted by the Town, and (2) the trial court erred in concluding that plaintiffs did not have the standing to institute this action. The Court agreed with the trial court that this matter was not ripe for adjudication, and accordingly affirmed the trial court's order dismissing plaintiffs' action for lack of subject matter jurisdiction. The Court did not reach the issue of whether plaintiffs had standing to institute the action.

"Rule 12(b)(1) of the North Carolina Rules of Civil Procedure 'permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy.' Trivette v. Yount, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011)…. We review a trial court's dismissal for lack of subject matter jurisdiction *de novo* and may consider evidence outside the pleadings. *Id.* at 482, 720 S.E.2d at 735 (citation omitted)."

"'Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy.' Prop. Rights Advocacy Grp. *ex rel.* Its Members v. Town of Long Beach, 173 N.C. App. 180, 182, 617 S.E.2d 715, 717 (2005) (citation and internal quotation marks omitted). To satisfy this requirement, the complaint must show 'that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough[,]' *id.* at 182, 617 S.E.2d at 717 (citation and internal quotation marks omitted), because '[t]he resources of the judicial system should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions." Andrews v. Alamance Cty., 132 N.C. App. 811, 814, 513 S.E.2d 349, 350 (1999) (citation and internal quotation marks omitted)."

"A speculative possibility that land development might proceed in the future does not constitute a justiciable case or controversy. See Prop. Rights Advocacy Grp. *ex rel.* Its Members, 173 N.C. App. at 183-84, 617 S.E.2d at 718. Indeed, '[a]ny challenges relating to land use are not ripe until there has been a final determination about what uses of the land will be permitted.' Andrews, 132 N.C. App. at 815, 513 S.E.2d at 351 (citation omitted)."

"Here, plaintiffs sought a declaratory judgment that the development of the oceanfront lots, and the issuance of permits to develop the same, violates local and federal law because any development would alter the landward dune on the properties. However, plaintiffs have not shown that defendant made a final determination as to what development of the land, if any, will be permitted by the town. Plaintiffs have not even shown that the oceanfront lot owners have submitted applications for zoning or building permits to defendant to request such a determination. Additionally, there is no evidence that FEMA [Federal Emergency Management Agency] has notified defendant, or any flood insurance policyholder within Topsail Beach, that, with regard to NFIP [National Flood Insurance Program], probationary status is impending or that policyholders' insurance premiums may increase."

The Court held that the trial court correctly dismissed plaintiffs' action for lack of subject matter jurisdiction. "In essence, plaintiffs ask us to rule that they may challenge the permissible uses of neighboring oceanfront lots based on a speculative possibility that development will proceed in the future. We decline to do so, as, until defendant makes a final decision about what uses of the oceanfront lots will be permitted, any challenge related to the use thereof will not be ripe for adjudication. *See* Andrews, 132 N.C. App. at 815, 513 S.E.2d at 351 (citation omitted)."

In closing its opinion, the Court noted that plaintiffs failed to show the existence of a justiciable case or controversy. "We note that plaintiffs argue that because defendant permitted the construction of a beach house in 2014, prior to the [2016] decision to repeal the Dune Protection Ordinance, it is clear that defendant will approve similar development, which plaintiffs allege violates federal and local laws. We disagree. It would be precipitous to presume Topsail Beach has made a final decision as to the permissible development of the oceanfront lots because defendant previously authorized a building permit for an oceanfront property. Plaintiffs' speculation that defendant will make a certain determination is insufficient to create a justiciable case or controversy. *See* Prop. Rights Advocacy Grp. *ex rel.* Its Members, 173 N.C. App. at 183-84, 617 S.E.2d at 718."

- ***Synopsis***− Appeal by plaintiffs from April 2017 order dismissing complaint pursuant to G.S. 1A-1, Rule 12(b)(1) for lack of subject matter jurisdiction. Affirmed. Opinion by Judge Arrowood, with Judge Calabria and Judge Zachary concurring.

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

Personnel; Law Enforcement; Compliance with Established Procedures; Internal Operations Tully v. City of Wilmington, ___ N.C. ___ (No. 348A16, 3/2/18) (In officer's action alleging state constitutional claims arising from employer's alleged violation of its own policy by refusing to consider his appeal regarding the validity of exam required for promotion, Supreme Court reverses in part and affirms in part decision of divided panel of Court of Appeals finding in favor of plaintiff. Reversing as to the Law of the Land clause claim, Supreme Court states, "We have previously explained that a property interest in employment 'can arise from or be created by statute, ordinance, or express or implied contract, the scope of which must be determined with reference to state law," Presnell [v. Pell], 298 N.C. [715] at 723, 260 S.E.2d [611] at 616 (citations omitted), and that '[n]othing else appearing, an employment contract in North Carolina is terminable at the will of either party,' *id*. at 723-24, 260 S.E.2d at 616 (citation omitted). Moreover, '[t]he fact that plaintiff was employed by a political subdivision of the state does not itself entitle her to tenure, nor does the mere longevity of her prior service.' *Id*. at 724, 260 S.E.2d at 616. We are aware of no authority recognizing a property interest in a promotion, and Tully concedes in his brief to this Court that no such property interest exists here. Accordingly, we conclude that the trial court correctly granted the City's motion to dismiss Tully's Article I, Section 19 claim because no property interest is implicated here. On this issue we reverse the Court of Appeals." As to the Article 1, Section 1 "fruits of one's own labor" claim, the Court held, "Here Tully has adequately stated a claim under the portion of Article I, Section 1 safeguarding the fruits of his labor because, taking all the facts in his complaint as true, he alleges that the City arbitrarily and capriciously denied him the ability to appeal an aspect of the promotional process despite the Policy Manual's plain statement that '[c]andidates may appeal any portion of the selection process.' Tully's allegations state that by summarily denying his

grievance petition without any reason or rationale other than that the examination answers 'were not a grievable item' despite their being a 'portion of the selection process,' the City ignored its own established rule. Tully then alleges that in so doing, 'the City arbitrarily and irrationally deprived [him] of enjoyment of the fruits of his own labor.' Accordingly, we conclude that the City's actions here implicate Tully's right under Article I, Section 1 to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process." Emphasizing that "[t]his right is not without limitation, however[,]" the Court specified the prerequisites for establishing a claim. "Based upon our distillation of the admittedly sparse authority in this area of the law, we hold that to state a direct constitutional claim grounded in this unique right under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation. If a public employee alleges these elements, he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor." The Court concluded this section of its opinion by emphasizing, "At this stage we express no opinion on the ultimate viability of Tully's claim. Accordingly, we need not speculate regarding whether Tully would likely have received the promotion had the Police Department followed its own policy. Similarly, we need not address the remedy to which Tully would be entitled if he ultimately succeeds in proving his claim." For a description of this case and the Court of Appeals' holding, *see MLN* August 2016, p. 4. (Appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 790 S.E.2d 854 (2016). Affirmed in part; reversed in part; and remanded. Justice Hudson wrote the opinion.))

Civil Procedure; Standing; Corporate Entity; Internal By-Laws and Governance Procedures; Land Use Willowmere Cmty. Ass'n, Inc. v. City of Charlotte, ___ N.C. ___ (No. 419PA16, 3/2/18) (In reversing Court of Appeals, Supreme Court states, "In this appeal we consider the extent to which a corporate entity must affirmatively demonstrate compliance with its internal bylaws and governance procedures before it may invoke the jurisdiction of the General Court of Justice. The Court of Appeals held that plaintiffs lacked standing because they failed to strictly comply with their corporate bylaws in bringing this suit. We agree with plaintiffs that a showing of strict compliance is not necessary to satisfy the requirements of our standing jurisprudence." Supreme Court holds, "Nothing in our jurisprudence on standing requires a corporate litigant to affirmatively plead or prove its compliance with corporation bylaws and internal rules relating to its decision to bring suit. Indeed, since 'standing is a "necessary prerequisite to a court's proper exercise of subject matter jurisdiction,"' and can be challenged 'at any stage of the proceedings, even after judgment,' adopting such a rule would subject countless judgments across North Carolina to attack for want of subject matter jurisdiction. We decline to adopt such a rule. There is no evidence . . . suggesting that any member of the communities of Willowmere or Nottingham opposed plaintiffs' prosecution of this suit. We decline to permit a defendant who is a stranger to an association to invoke the association's own internal governance procedures as an absolute defense to subject matter jurisdiction in a suit filed by the association against that defendant. If a member of either plaintiff association disagrees with the decision to file suit, the proper vehicle to challenge the association's failure to comply with its respective bylaws in making that decision is a suit against the nonprofit corporation brought by the aggrieved member or members of the association or, in certain circumstances, a derivative action. *Cf.* [G.S.] 55A-3-04 (2017) . . . *id.* [G.S.] 55A-7-40 (2017). . . . *see* [G.S.] 47F-2-103(a) (2017)." (Citations omitted.) For a brief description of this case and the Court of Appeals' holding, *see MLN* November 2016, p. 4. (On discretionary review

of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 805 (2016). Reversed and remanded. Justice Beasley wrote the opinion.))

Eminent Domain; Private Purpose; Inverse Condemnation; Flooding Wilkie v. City of Boiling Springs Lakes, ___ N.C. ___ (No. 44PA17, 3/2/18) (In action involving whether plaintiffs were entitled to seek compensation pursuant to G.S. 40A-51 based upon the extended flooding of their property as the result of actions taken by defendant-City for an allegedly private purpose, Supreme Court reverses decision of Court of Appeals. "[G.S.] 40A-3(b) and (c), to which reference is made in [G.S.] 40A-51(a), contain a list of entities that have 'the power of eminent domain' '[f]or the public use or benefit.' In other words, [G.S.] 40A-3(b) and (c) specify the public entities that are entitled to exercise the power of eminent domain and the purposes for which the entities in question are entitled to exercise that authority. When read in context and in accordance with ordinary English usage, the reference to [G.S.] 40A-3(b) and (c) contained in [G.S.] 40A-51(a) makes most sense as a simple delineation of the range of entities against whom a statutory inverse condemnation action can be brought rather than as a description of the motivations underlying the 'act[s] or omission[s]' necessary for the existence of a statutory inverse condemnation claim. As a result, we hold that the plain meaning of the reference to [G.S.] 40A-3(b) and (c) contained in [G.S.] 40A-51(a) is to specify the entities against whom a statutory inverse condemnation claim can be asserted and nothing more. A number of additional considerations support this 'plain meaning' construction of the relevant statutory language." Court concludes by stating, "In light of these fundamental principles [N.C. Const. art. I, §§ 19 & 35] and the manner in which [G.S.] 40A-51(a) is worded, we cannot conclude that the General Assembly intended to make the availability of the statutory inverse condemnation remedy provided by [G.S.] 40A-51 dependent upon the purpose which led to the infliction of the injury for which the affected property owner seeks redress. As a result, we reverse the Court of Appeals' determination to the contrary and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's order." For a brief description of this case and the Court of Appeals' holding, *see MLN* February 2017, p. 3. (On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 57 (2016). Reversed and remanded. Justice Ervin wrote the opinion.))

Workers' Compensation; Third Party Proceeds; Settlement; Employer's Lien Easter-Rozzelle v. City of Charlotte, ___ N.C. ___ (No. 52PA16, 12/8/17) (Reversing the Court of Appeals' decision which held that because plaintiff had elected to settle his personal injury claim against third-party tortfeasor, without the consent of defendant, and had received disbursement of the settlement proceeds, plaintiff was barred from pursuing compensation for that claim under the Workers' Compensation Act, the Supreme Court holds the Act protects *both* the employer's lien against third party proceeds and the employee's right to pursue workers' compensation benefits. "[D]efendant had an opportunity to participate in the settlement process with the third-party tortfeasor but did not do so. Plaintiff had no reason to delay negotiations with the third party or disbursement of the settlement proceeds because, based on the unchallenged findings of the [Industrial] Commission, he did not know that his injuries were potentially compensable under the [Workers' Compensation] Act. On the other hand, because defendant received actual notice, it had an opportunity to promptly investigate the [2009 automobile] accident and determine its compensability. Had defendant done so, it would have discovered what became apparent in the 9 April 2012 mediation—that plaintiff suffered compensable injuries—and it could have participated in the settlement process. In sum, we hold that the Commission correctly concluded that Hefner [v. Hefner Plumbing Co., 252 N.C. 277, 113 S.E.2d 565 (1960)] is inapplicable here and that plaintiff had not waived his right to compensation under the Act. Further, the Commission correctly determined that once the subrogation lien amount is determined by agreement of the parties or by a superior

court judge, defendant is entitled to reimbursement of its lien from the benefits due to plaintiff." (On writ of certiorari of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 780 S.E.2d 244 (2015). Reversed and remanded. Justice Hudson wrote the opinion.))

Land Use; Special Damages; Standing; Declaratory Judgment Action; Dismissal Cherry Cmty. Org. v. City of Charlotte, ___ N.C. App. ___ (No. COA16-1292, Mecklenburg− 2/6/18) (The Cherry Community Organization ("CCO") appealed from the trial court's order granting defendant-City's motion for summary judgment, granting Midtown Area Partners II, LLC's ("LLC's") motion for summary judgment, and denying CCO's motion for summary judgment. Specifically, CCO argued: (1) the City's approval of an oral amendment made to LLC's rezoning petition violated its ordinance and was arbitrary and capricious; and (2) the City's violation of ordinances and G.S. 160A-383 rendered the zoning amendment null and void. The Court of Appeals concluded that CCO failed to show it had standing to maintain its declaratory judgment action and dismissed this appeal, without reaching the issues raised by CCO. "Even considering the record in the light most favorable to CCO, it has forecasted no evidence of special damages due to diminution in the value of their property. The loss of the waterfront view in Sanchez [v. Town of Beaufort, 211 N.C. App. 574, 710 S.E.2d 350 (2011)] was a portion of the loss in their land value, not a separate element on its own. CCO, on the other hand, points us to a *change* in its skyline view and presented no evidence of a loss in value. Simply stated, CCO's forecast of evidence of special damages consists of nothing more than conclusory, unsupported allegations that certain damages will ensue coupled with evidence that, at one point, the proposed development plan included a building that was taller than that which is permitted in the area. The latter point was rendered moot prior to CCO filing its complaint by [LLC's] decision to lower the height of its development to a compliant 100 feet. Therefore, CCO has failed to point us to any record evidence to meet its burden of production at summary judgment that CCO will suffer special damages distinct from the rest of the community by rezoning, nor can we find any. Accordingly, we conclude that CCO has failed to establish it has standing to maintain its action for declaratory judgment." (Emphasis in original.) (Appeal by plaintiff from August 2016 order granting defendants' motion for summary judgment. Modified and affirmed. Judge Murphy wrote the opinion. Judge Davis concurred in result only. Judge Hunter, Jr. concurred in a separate opinion.))

Land Use; Quarry; Expert Testimony; Whole Record Test Little River, LLC v. Lee Cty. ___ N.C. App. ___ (No. COA17-461, Lee− 12/19/17) Affirming the trial court's ruling on Respondent-Intervenors' standing before the Board of Adjustment and allowance of intervention before the trial court, the Court held that petitioner presented a *prima facie* showing of entitlement to a special use permit (SUP) to establish an aggregate rock quarry. "Respondent-Intervenors' experts agreed that the proposed quarry use would be heavily regulated, and, as such, would not endanger the public health and safety due to blasting, sound, air quality, water quality, or traffic. The only rebuttal evidence Respondent-Intervenors produced, beyond 'generalized fears' and speculation, was that Petitioner had not yet received the required approvals and permits from other regulatory agencies. The UDO [Unified Development Ordinance] does not mandate all required approvals to be granted and permits issued prior to the approval of the SUP application. If needed, the Board can condition issuance of the SUP upon Petitioner securing these approvals and permits. The lack of all required approvals and permits at the time of the hearings does not rebut Petitioner's *prima facie* showing for the SUP. The expert witness evidence to rebut Petitioner's showing of compliance with the UDO's condition 2 mistakes the process for site approval in Lee County. Petitioner presented evidence of compliance with all requirements for a SUP, and any information the Board contends was missing was not required at this application for approval. These

missing elements may affect the site plan and building approvals, and conditions imposed, but are insufficient to rebut the substantial, material evidence and to overcome Petitioner's *prima facie* showing or to support the Board's denial of the SUP. The UDO clearly states the impact on property values only applies to 'adjoining or abutting property.' No residents of CTA [Carolina Trace Association, Inc.] or other Respondent-Intervenors who testified or intervened own property that adjoins or abuts the Petitioner's property. Their expert's assertion that several properties located in CTA may be negatively impacted by the quarry does not, *ipso facto*, overcome Petitioner's showing in the consideration of conclusion 3. Additionally, it was improper for the superior court to weigh the evidence and to assert Respondent-Intervenors' expert was 'substantially more compelling.' The superior court erred by re-weighing the evidence, as compared to reviewing the whole record as an appellate court. The superior court's review is limited to competent evidence in the whole record. As noted, the County has already made a legislative decision to permit the operation of quarries in RA and RR zoned districts with approval of a special use permit. Respondent-Intervenors' rebuttal evidence regarding the lack of harmony with the surrounding uses consisted of 'generalized fears' and speculation of lay witnesses. This testimony is insufficient to rebut Petitioner's *prima facie* showing and the prior legislatively determined harmony of this use within these zoning districts and with the surrounding area." (Citations omitted.) (Appeal by petitioner from December 2016 order upholding denial of application for special use permit. Affirmed in part; reversed in part; and remanded. Judge Tyson wrote the opinion. Judge Stroud and Judge Hunter concurred.))

ERNEST H. BALL AWARD FOR EXCELLENCE IN MUNICIPAL LAW

The Award for Excellence in Municipal Law was established in 1991 by the Past Presidents Group of the North Carolina Association of Municipal Attorneys. Originally known as the Distinguished Service Award, in 1994 it was renamed in honor of Ernest H. Ball, former General Counsel of the North Carolina League of Municipalities.

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Nominations and brief supporting material should be submitted to Kim Hibbard, NCLM General Counsel, by Tuesday, March 20, 2018.

A committee of past presidents will meet during the Winter Conference scheduled for March 22 - 23, 2018, after which a recommendation may be submitted to the Association's Board of Directors. If the Board chooses to make an award for 2018, it will be presented during the Annual Banquet at the Summer Conference in Atlantic Beach, August 2 - August 4, 2018. For more information, please contact Kim Hibbard at (919) 715-3936 or khibbard@nclm.org.