MUNICIPAL LAW NOTES

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Land Use; Beaches; Public Trust Rights; Police Power; Beach Vehicular Ordinance; Regulation of Beach Equipment

Nies v. Town of Emerald Isle, ___ N.C. App. ___, 780 S.E.2d 187 (No. COA15-169, Carteret– 11/17/15), *petition for disc. review allowed*, ___ N.C. ___ (No. 409PA15, 4/13/16), *appeal dismissed ex mero motu*, ___ N.C. ___, 793 S.E.2d 699 (No. 409PA15, 12/14/16)

- ***Holding***– The ocean beaches of North Carolina are subject to public trust rights unless those rights have been expressly abandoned by the State. Trial court properly granted defendant-Town's motion for summary judgment in plaintiffs' action alleging inverse condemnation arising from ordinances, as property owners had no right to exclude the public from public trust beaches. The regulation of the use of certain beach equipment, on public trust areas of the ocean beaches within the Town's jurisdiction, to facilitate the free movement of emergency and service vehicles, was within the scope of the police power.

- ***Key Excerpt***– The Court rejected plaintiffs' argument that privately owned dry sand beaches in North Carolina are not subject to the public trust doctrine. "[G.S.] 77-20 establishes that some portion, at least, of privately-owned dry sand beaches are subject to public trust rights. Lacking further guidance from prior opinions of our appellate courts, we must determine the geographic boundary of public trust rights on privately-owned dry sand beaches. We adopt the test suggested in [G.S.] 77-20(e): 'Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.' *Id*. We adopt this test because it most closely reflects what the majority of North Carolinians understand as a 'public' beach. *See, e.g.*, Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1877 (2000) ('the custom of the dry sand beaches being open to public trust uses has a long history in North Carolina'). We hold that the 'ocean beaches' of North Carolina include both the wet sand beaches — generally, but not exclusively, publically

owned — and the dry sand beaches — generally, but not exclusively, privately owned."

"For the purposes of [G.S.] 77-20, the landward boundary of North Carolina ocean beaches is the discernable reach of the 'storm' tide. This boundary represents the extent of semi-regular submersion of land by ocean waters sufficient to prevent the seaward expansion of frontal dunes, or stable, natural vegetation, where such dunes or vegetation exist. Where both frontal dunes and natural vegetation exist, the high water mark shall be the seaward of the two lines. Where no frontal dunes nor stable, natural vegetation exists, the high water mark shall be determined by some other reasonable method, which may involve determination of the 'storm trash line' or any other reliable indicator of the mean regular extent of the storm tide. The ocean beaches of North Carolina, as defined in [G.S.] 77-20(e) and this opinion, are subject to public trust rights unless those rights have been expressly abandoned by the State. *See* Gwathmey [v. State of North Carolina], 342 N.C. [287] at 304, 464 S.E.2d [674] at 684 [(1995)]."

The Court then turned to the issue of whether the Town, pursuant to public trust rights or otherwise, could enforce ordinances reserving unimpeded access over portions of plaintiffs' dry sand beach without compensating plaintiffs. The Court held, on these facts, that it could. "Plaintiffs cannot establish that the contested beach driving ordinances constitute physical invasion of the Property for purposes of the Takings Clause. The majority of Plaintiffs' argument is predicated on Plaintiffs' contention that the dry sand portion of the Property is not encumbered by public trust rights. We have held that the dry sand portion of the Property is so encumbered. Because public beach driving across the Property is permissible pursuant to public trust rights, regulation of this behavior by the Town does not constitute a 'taking.' Plaintiffs have never, since they purchased the Property in 2001, had the right to exclude public traffic, whether pedestrian or vehicular, from the public trust dry sand beach portions of the Property. The Town has the authority to both ensure public access to its ocean beaches, and to impose appropriate regulations pursuant to its police power. The contested beach driving portions of the Ordinances do not create a right of the public relative to the Property; they regulate a right that the public already enjoyed." (Citations omitted.)

". . . . We hold that passage of Section 5-102 of the 2010 Ordinances, and Section 5-19 of the 2013 Ordinances, constituted legitimate uses of the Town's police power. We hold that the regulation of the use of certain beach equipment, on public trust areas of the ocean beaches within the Town's jurisdiction, to facilitate the free movement of emergency and service vehicles, was '"within the scope of the [police] power[.]"' Finch v. City of Durham, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989) (citation omitted). Further, the '"means chosen to regulate,"' prohibiting large beach equipment within a twenty-foot-wide strip along the landward edge of the ocean beach, were '"reasonable."' *Id.* (citation omitted)."

"The contested provisions in the 2010 Ordinances and the 2013 Ordinances did not result in a 'taking' of the Property. First, though Plaintiffs argue that the Ordinances deprived them of 'the right to control and deny access to others,' as discussed above, it is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights. The Ordinances restrict and regulate certain public and private uses pursuant to the Town's police power. The Town's reservation of an obstruction-free corridor on the Property for emergency use constitutes a greater imposition on Plaintiffs' property rights, but does not rise to the level of a taking. Though Plaintiffs argue that 'the Town has made it impossible for [them] to make any meaningful use of the dry [sand]

[P]roperty[,]' Plaintiffs retain full use of, and rights in, the majority of the Property. Plaintiffs' rights in the dry sand portion of all but the twenty-foot-wide strip of the Property are the same as when they purchased the Property. *Id.* Concerning the twenty-foot-wide strip, Plaintiffs retain all the rights they had when they purchased the Property other than the right to use large beach equipment on that portion of the Property 'between May 1 and September 14 of each year.' The Town, along with the public, already had the right to drive on dry sand portions of the Property before Plaintiffs purchased it." (Citations omitted.)

- ***Synopsis***− Appeal by plaintiffs from August 2014 order. Affirmed. Opinion by Chief Judge McGee, with Judge Elmore and Judge Davis concurring. On April 13, 2016, plaintiffs' petition for discretionary review was allowed. On December 14, 2016, the N.C. Supreme Court dismissed the appeal *ex mero motu*.

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

Eminent Domain; Takings; Private Use; No Adequate State Remedy Wilkie v. City of Boiling Spring Lakes, ___ N.C. App. ___ (No. COA16-652, Brunswick− 12/30/16) (In City's appeal from an order issued pursuant to G.S. 40A-47 determining all issues other than compensation, Court of Appeals holds that trial court erred in finding that there was a taking of the Wilkies' property by inverse condemnation, when the City's actions were not for the public use or benefit. "The trial court concluded that 'the City's taking of the [plaintiffs'] property was for a private use,' because it was intended to benefit the property owners whose lots bordered Spring Lake. Applying the plain language of section 40A-51, there is no remedy through an inverse condemnation action for the [plaintiffs], because their property was not taken 'for the public use or benefit.' Therefore, we reverse the trial court's order concluding that the City took the [plaintiffs'] property by inverse condemnation. . . . However, this holding does not dispose of the case. North Carolina case law is clear that an aggrieved person has a direct claim under the North Carolina Constitution for violation of his or her constitutional rights when no adequate state law remedy exists…. The trial court's order did not address [plaintiffs' Article I, Sec. 19] claim under the North Carolina Constitution. Accordingly, we remand this matter to the trial court for further proceedings consistent with this opinion." (Citations omitted.)) (Appeal by defendant-City from November 2015 order. Reversed and remanded. Opinion by Judge Stephens, with Judge Elmore and Judge Dietz concurring.))

Land Use; Certiorari; Failure to Name Applicant as Respondent: Lack of Subject Matter Jurisdiction Bizzarro v. County of Ashe, ___ N.C. App. ___ (No. COA16-211, Ashe− 2/7/17) (***unpublished***) (Court of Appeals holds that trial court did not err in dismissing petitioners' petition for writ of certiorari with prejudice. "We are both persuaded by the analysis in Hirschman [v. Chatham Cnty., ___ N.C. App. ___ (No. COA16-292, Chatham− 11/15/16)] and bound by its holding. Thus, we hold the trial court did not err in dismissing petitioners' petition with prejudice for lack of subject matter jurisdiction where petitioners failed to name the applicant as a respondent as required by [G.S.] 160A-393(e)." Petitioners sought review of the Planning Board's order approving Horvath Communications, Inc.'s application to construct a telecommunications tower on a parcel of property adjacent to a parcel of property owned by petitioners.) (Appeal by petitioners from December 2015 order. Affirmed. Opinion by Judge McCullough, with Judge Hunter, Jr., and Judge Dietz concurring.))

Land Use; Certiorari; Failure to Name Applicant as Respondent; Lack of Subject Matter Jurisdiction Hirschman v. Chatham County, ___ N.C. App. ___ (No. COA16-292, Chatham− 11/15/16) (Court of Appeals affirms trial court's

dismissal of petition for writ of certiorari. "Here, petitioners were not the applicant before the decision-making board whose decision was appealed. Therefore, under [G.S.] 160A-393(e), petitioners were required to name the applicant as a respondent, which they failed to do…. [W]hen an applicant is granted a conditional-use permit and an outsider appeals the decision through a petition for writ of certiorari but does not include the applicant as a respondent in the appeal, the superior court is without jurisdiction to review the merits. Accordingly, the trial court correctly concluded that it lacked jurisdiction because petitioners did not properly perfect their appeal in accordance with [G.S.] 160A-393." Petitioners sought review of the Board of Commissioners' decision to issue a conditional use permit to erect and operate a monopole telecommunications tower.) (Appeal by petitioners from October 2015 order. Affirmed. Opinion by Judge Elmore, with Judge Zachary and Judge Enochs concurring.))

Land Use; Site Development Plan; Truck Stop; Burden of Proof; Recusal Campbell v. City of Statesville (Campbell II), ___ N.C. App. ___ (No. COA16-101, Iredell− 10/4/16) (***unpublished***), *disc. review denied*, ___ N.C. ___ (No. 412P16, 1/26/17) (In petitioners' appeal from order affirming the determination of the City Council approving a site development plan to build a truck stop on a roughly 14.4-acre site in the B-4 Highway Business zoning district, Court of Appeals affirms.) (Appeal by petitioners from October 2015 order. Affirmed. Opinion by Judge Calabria, with Chief Judge McGee and Judge Stroud concurring.)) For Campbell I, *see* Campbell v. City of Statesville, ___ N.C. App. ___, 786 S.E.2d 433 (No. COA15-329, Iredell- 5/3/16) (***unpublished***), *disc. review denied*, ___ N.C. ___, 792 S.E.2d 507 (No. 218P16, 8/18/16) (see *MLN* October 2016, p. 4).

Land Use; Special Use Permit; Small Place of Assembly Shelley v. County of Henderson, ___ N.C. App. ___ (No. COA16-475, Henderson− 12/20/16) (***unpublished***) **(**Trial court correctly affirmed decision of Zoning Board of Adjustment to issue special use permit to respondents for construction of a "small place of assembly" as defined by the ordinance: the application stated that the "small place of assembly" would consist of a barn that would be primarily used for events such as weddings, receptions, and birthday parties, and that the events would mostly occur on weekends with a maximum occupancy of 150 people.) (Appeal by petitioners from March 2016 order. Affirmed. Opinion by Judge McCullough, with Judge Stroud and Judge Zachary concurring.))

Land Use; Subdivisions; Performance Bonds Brookline Residential, LLC v. City of Charlotte, ___ N.C. App. ___ (No. COA16-202, Mecklenburg− 1/17/17) (In a case presenting the issue of whether a successor developer could compel defendant-City to enforce a performance bond that had originally been obtained by the prior developer to guarantee the construction of certain infrastructure improvements, Court of Appeals holds that summary judgment was properly granted for City. Court of Appeals rejects plaintiffs' argument that "a municipality's statutory authority to obtain a performance bond to secure improvements required in connection with the approval and recordation of a subdivision plat, carries an implicit obligation on the municipality to enforce that bond when the primary obligor defaults and loses the development to foreclosure." Court of Appeals states, "Based upon our careful reading of the above-quoted provisions [of the statutes, G.S. 160A-371 (2015); G.S. 160A-372(c) (2013) and ordinance], we are unable to conclude that Brookline is entitled to an order compelling the City to call the Bond. Neither the statutes nor the ordinance contain language either specifying the circumstances under which the City must enforce a performance guarantee or authorizing a developer to compel the City to take such action. This Court is not at liberty to read into the statutes and ordinance words that simply do not exist therein." (Citation omitted.)) (Appeal by plaintiffs from August 2015 order. Affirmed. Opinion by Judge Davis, with Judge Elmore and Judge Dietz concurring.))

Land Use; Zoning; Planned Development; Master Plan; Small Area Plans; Development Agreement Pittsboro Matters, Inc. v. Town of Pittsboro, ___ N.C. App. ___ (No. COA16-323, Chatham− 12/30/16) (***unpublished***) (In this action, plaintiffs sought *inter alia* temporary and permanent injunctive relief to prohibit defendant-Town from issuing any permits or approval for further development activity of Chatham Park. Court of Appeals upholds dismissal of complaint alleging that Town's Board of Commissioners "did not conduct any public hearing or provide any public notice" prior to its adoption of the development agreement ordinance, and further alleging that the Board did not provide notice and a public hearing for its adoption of the "small area plans" process and review ordinance. Plaintiffs had sought the nullification of the Board's adoption of: (1) the planned development district ordinance adopted on 11 May 2015; (2) the Third Rezoning Ordinance and revised Chatham Park Master Plan adopted on 10 August 2015; (3) the Small Area Plan process adopted on 14 September 2015; and (4) the development agreement ordinance adopted on 28 September 2015.) (Appeal by plaintiffs from December 2015 order. Affirmed in part; dismissed in part. Opinion by Judge Enochs, with Judge Davis and Judge Inman concurring.)) For an earlier decision upholding trial court's denial of Rule 11 sanctions, see Pittsboro Matters, Inc. v. Town of Pittsboro, ___ N.C. App. ___, 790 S.E.2d 751 (No. COA16-28, Chatham- 7/19/16) (***unpublished***), *disc. review denied*, ___ N.C. ___ 793 S.E.2d 692 (No. 312P16, 12/8/16).

Ordinances; Tree Removal; Permits; Violations; Fines; Due Process Lewis-Solar v. Town of Beech Mountain, ___ N.C. App. ___ (No. COA16-321, Watauga− 11/15/16) (***unpublished***) (In plaintiffs' appeal of trial court order affirming decision of the Board of Adjustment, which fined petitioners for the unauthorized removal of trees under a Town ordinance, Court of Appeals affirms.) **(**Appeal by petitioners from December 2015 order. Affirmed. Opinion by Judge Dietz, with Judge Hunter, Jr. and Judge McCullough concurring.))

Procedure; Default Judgment; G.S. 1A-1, Rule 60(b)(4) Motion to Set Aside Judgment; Service of Process by Publication; Due Diligence; Fire Code; Fines City of Greensboro v. Fewell, ___ N.C. App. ___ (No. COA16-501, Guilford− 12/20/16) (***unpublished***) (Plaintiff-City cited, and fined, defendant (a nightclub operator) for violations of the fire code. Upon his neither paying nor appealing the citations, defendant-City filed a complaint to collect the outstanding fines: multiple summonses were issued, and defendant-City attempted to serve its summonses and complaint on him at 2 locations on 4 separate occasions. After all attempts at service were returned, defendant-City served him by publication in a local newspaper and eventually obtained a default judgment, which attached to his real property. Thereafter, he sold a parcel, and defendant-City's judgment was satisfied out of the proceeds of that transaction. He then filed a motion to set aside the default judgment under G.S. 1A-1, Rule 60(b) on the ground that the judgment was void due to insufficient service of process: the trial court denied the motion. "On appeal from the denial of his Rule 60(b) motion, [defendant] focuses on steps he contends that the City had to take to serve him personally before resorting to service by publication. However, the proper inquiry should focus on steps that the City actually took to effect personal service…. [T]he City's unsuccessful efforts to serve [defendant] personally were more than sufficient to justify eventual service by publication.") (Appeal by defendant from February 2016 order. Affirmed. Opinion by Judge Zachary, with Judge Stroud and Judge McCullough concurring.))

Public Contracts; Breach of Contract; Operation of Airport; Waiver; Estoppel; Motion to Dismiss Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach, ___ N.C. App. ___ (No. COA16-396, Brunswick− 2/7/17) (In plaintiff-airport operator's action alleging *inter alia* breach of contract, Court of Appeals holds that trial court erred by granting defendant-Town's motion to dismiss and

alternative motion for judgment on the pleadings, given plaintiff's arguments that the Town waived application of the portions of the contract concerning the ordinance and that the Town is estopped from using the ordinance against it in light of the terms of the contract and statements and actions by town officials. "[M]any legal issues remain to be resolved before final judgment may be entered in this case.") (Appeal by plaintiff from November 2015 order and judgment. Reversed and remanded. Opinion by Judge Dietz, with Chief Judge McGee and Judge Tyson concurring.))

Public Contracts: Breach of Contract; Real Property; Reversionary Interest Town of Belhaven v. Pantego Creek, LLC, ___ N.C. App. ___ (No. COA16-373, Beaufort− 11/15/16) (Case involved the closure of a hospital and subsequent transfer of the associated real property. Court of Appeals rejects *inter alia* plaintiff-Town's breach of contract claim primarily alleging that because Defendants were successors in interest to the 1948 Deed, they were subject to language included therein which amounted to a reversionary interest held by the Town providing the granted property be used for the operation of a hospital for the benefit of citizens. "The fundamental flaw with Plaintiffs' position is that Belhaven did not include any language creating a reversionary interest in the 1948 Deed to the effect that the land would revert to Belhaven in the event that the land ceased being used for the operation of a hospital. Instead, the language in the 1948 Deed clearly states that the land was conveyed in fee simple absolute to PDHC [Pungo District Hospital Corporation]…. Here, we are satisfied that the language of the 1948 Deed does nothing more than express the purpose for which Belhaven wished the subject property to be used. There does not exist any express and unambiguous reversionary interest in the deed…. Plaintiffs cite no authority for their proposition that an implicit reversionary interest is created simply because the granting party is a governmental entity which had a public purpose in mind at the time it conveyed certain property, nor are we aware of any. Consequently, we are bound by Station Assocs., Inc. [v. Dare Cnty., 350 N.C. 367, 370-71, 513 S.E.2d 789, 792-93 (1999)] and analogous cases requiring that for a reversionary interest to exist it must be expressly and unambiguously stated in a grant of real property. We therefore hold that no reversionary interest was created in the 1948 Deed and PDHC and its successors in interest acquired title to the subject property in fee simple absolute." Court of Appeals also rejects Town's arguments under Article V, Sec. 3 of the North Carolina Constitution. Defendants' motion to dismiss the portion of plaintiffs' appeal concerning the issues surrounding the designation of the case as exceptional under Rule 2.1 was granted.) (Appeal by plaintiffs from October 2015 order. Affirmed in part; dismissed in part. Opinion by Judge Enochs, with Chief Judge McGee and Judge Inman concurring.))

Public Contracts; Revitalization Project; Motion to Compel Arbitration Town of Belville v. Urban Smart Growth, LLC, ___ N.C. App. ___ (No. COA16-817, Brunswick− 2/21/17) (In plaintiff-Town's interlocutory appeal from denial of motion to compel defendant to submit to binding arbitration and to stay all other proceedings in dispute between the parties, Court of Appeals affirms the judgment of the trial court that plaintiff-Town had impliedly waived its right to compel arbitration, as plaintiff-Town took actions contrary to its contractual rights. "Because Defendant has expended significant amounts of money in defense of Plaintiff's initiation of this suit, before Plaintiff belatedly demanded arbitration, we affirm the trial court's order based upon the prejudice to Defendant.") (Appeal by plaintiff-Town from April 2016 order. Affirmed. Opinion by Judge Berger, with Chief Judge McGee and Judge Davis concurring.))

Streets; Subdivision Roads; Maintenance; Notice of Violation; Laches Harrell v. The Midland Bd. of Adjustment, ___ N.C. App. ___ (No. COA16-646, Cabarrus− 12/30/16) (***unpublished***) (Trial court correctly affirmed Board of Adjustment's unanimous vote to uphold the decision of the

Planning, Zoning and Subdivision Administrator to issue a notice of violation to petitioner-developer for failing to maintain subdivision streets, which were in a state of continuous deterioration posing a potential threat to public safety. Court of Appeals rejects petitioners' laches defense.) (Appeal by petitioners and cross-appeal by respondent-Town from April 2016 order. Affirmed. Opinion by Chief Judge McGee, with Judge Bryant and Judge Enochs concurring.))

NOMINATIONS FOR THE 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.

The Award for Excellence in Municipal Law is intended to recognize persons who have made valuable contributions to the field of municipal law, whether through a single accomplishment or through an entire career. (A nominee does not have to be an attorney, and the Award is not necessarily intended to be presented annually, as the Association reserves the right not to make a presentation in any given year.)

Past recipients of the Award include: Philip P. Green, Jr., David M. Lawrence, Jesse L. Warren, Claude V. Jones, Henry W. Underhill, Jr., Warren Jake Wicker, the Honorable Louis B. Meyer, Roddey M. Ligon, Jr., William I. Thornton, Jr., William A. Campbell, Judith W. Wegner, Gerry F. Cohen, DeWitt F. "Mac" McCarley, Henry D. Blinder, and Frayda S. Bluestein.

Nominations and brief supporting material should be submitted to Kim Hibbard, NCLM General Counsel, by Thursday, March 16, 2017.

A committee of past presidents will meet during the Winter Conference scheduled for March 23 - 24, 2017, after which a recommendation may be submitted to the Association's Board of Directors. If the Board chooses to make an award for 2017, it will be presented during the Annual Banquet at the Summer Conference in Wrightsville Beach, August 3 - August 5, 2017. For more information, please contact Kim Hibbard at (919) 715-3936 or khibbard@nclm.org.