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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), *disc. review denied*, ___ N.C. ___ (No. 036P18, 8/14/18)

- ***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, with Judge Calabria and Judge Davis concurring. On August 14, 2018, the N.C. Supreme Court denied plaintiff's petition for discretionary review.

Constitutional Law; Towing Ordinance; State and Federal Court Actions; Ordinance Amendment; Prior Action Pending Doctrine; Motion to Dismiss; Preliminary Injunction

LMSP, LLC v. Town of Boone, ___ N.C. App. ___ (No. COA17-1241, Watauga─ 7/17/18)

- ***Holding***- **Where plaintiff filed state court action challenging towing ordinance on largely constitutional grounds, Town had action removed to federal court based on federal question jurisdiction and subsequently amended ordinance, plaintiff thereafter filed another state court action ("the present action"), and Town amended ordinance again, orders denying plaintiff's motion for a preliminary injunction and granting Town's motion to dismiss were properly affirmed.**

- ***Key Excerpt***− The Court affirmed the trial court's order granting the Town's motion to dismiss the action on the grounds that it was barred by the prior action pending doctrine. "In the instant case, there is no question but that the prior filed federal action and the present action involve the same parties, implicate the towing ordinances of the Town of Boone, and request similar relief. However, plaintiff argues that the federal action and the present action do not present a substantial identity as to the issues involved, and the trial court erred in granting the Town's motion to dismiss. Plaintiff attempts to demonstrate a lack of substantial identity

between the two causes of action by parsing the particulars of the original and amended versions of the towing ordinance…."

"The existence of minute, immaterial variations between the two ordinances does not change the fact that the crux of both the federal and present action is plaintiff's contention that the towing ordinance exceeds the scope of the Town's authority. In essence, as [the trial court] expressed, plaintiff had a 'beef against the Town of Boone' because of its towing ordinance. Plaintiff filed suit against the Town in response. In the meantime, the Town amended its towing ordinance. Plaintiff then sued the Town once again, while the federal action remained pending. Both complaints provide practically identical descriptions of the suits: plaintiff's complaint in the federal action stated that "this action involves the constitutionality of various portions of Defendant Boone's immobilization ordinance known as Chapter 73 and whether or not Defendant Boone exceeded the scope of their authority granted to them in [G.S.] 160A-174[,]" while its complaint in the present action asserts that 'this action involves the constitutionality of Defendant's towing and booting ordinance known as Section 73 and whether or not Defendant exceeded the scope of their authority granted to them in [G.S.] 160A-174. These issues are substantially identical, thereby rendering the subsequent present action 'wholly unnecessary.' Shoaf v. Shoaf, 219 N.C. App. 471, 475, 727 S.E.2d 301, 305 (2012) (citations and quotation marks omitted). Moreover, the fact that plaintiff filed an amended complaint in the present action asserting the open meetings laws as an additional ground for relief does not change the fact that the federal court could 'dispose of the entire controversy in the prior action[,]' thus rendering 'the subsequent action . . . wholly unnecessary.' Clark [v. Craven Reg'l Med. Auth.,] 326 N.C. [15] at 20, 387 S.E.2d [168] at 171 [(1990)]."

"It is clear that plaintiff did not 'want to go to federal court[,]' and that it 'would rather have [its] case' heard in state court. However, after plaintiff remained dissatisfied with the Town's amended towing ordinance, a proper procedure would have been either for plaintiff to amend its complaint in the federal action in light of the amended ordinance; voluntarily dismiss the federal action; or wait for the federal court to dismiss the action as moot. Instead of opting for one of these routes, plaintiff filed the present action in State court, this time alleging only state causes of action in order to avoid federal question jurisdiction. This maneuver, however, did not negate the fact that the issues raised in the subsequent action were so substantially similar as to have been proper for determination by the federal court as a single litigation in the prior action." (Citation omitted.)

The Court also affirmed the trial court's denial of plaintiff's motion for a preliminary injunction. Noting *de novo* review and that a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, giving the party challenging the ruling the burden of showing it was erroneous, the Court stated, "In the instant case, [the trial court's] order denying plaintiff's motion for a preliminary injunction stated that '[t]he claims in the Plaintiff's Amended Complaint are likely barred by the doctrine of prior action pending. As such, there is a likelihood that the Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.' 'Because there is a high likelihood that Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted,' [the trial court] concluded that 'Plaintiff cannot show a likelihood of success on the merits.... Therefore, Plaintiff is not entitled to preliminary injunction.'"

- ***Synopsis***- Appeal by plaintiff from orders entered February and June 2017. Affirmed. Opinion by Judge Zachary, with Judge Elmore and Judge Tyson concurring.

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

Land Use; Rezoning of an Adjacent Property; Declaratory Judgment; Constitutional Challenge; Three Judge Panel; Standing; Dismissal Byron v. Synco Properties, Inc., ___ N.C. App. ___ (No. COA17-318, Mecklenburg─ 3/20/18), *disc. review denied*, ___ N.C. ___ (No. 127P18, 8/14/18) (Court of Appeals holds that, "Landowners whose property is not directly and adversely affected by a zoning statute do not have standing to bring a declaratory judgment action to challenge the constitutionality of the statute or a municipality's interpretation of the statute." Plaintiffs had appealed from a summary judgment order dismissing their declaratory judgment action against defendant SYNCO Properties, Inc. ("SYNCO") and the City (collectively "defendants") challenging the rezoning of real property. Plaintiffs contended that, because their complaint alleged facial constitutional challenges to both a statute and session laws, the trial court was required to transfer those claims to a three-judge panel in Wake County pursuant to G.S. 1-81.1, 1-267.1, & 1A-1, Rule 42(b)(4) (2015). Plaintiffs further challenged the trial court's dismissal of their claims challenging G.S. 160A-385 (2015) and Session Law 2015-160 as moot, as well as its determination that the prior version of G.S. 160A-385 (2013) did not apply to the rezoning based on its interpretation of that session law. Defendants contended that plaintiffs lacked standing, and the Court of Appeals agreed that plaintiffs lacked standing to assert the claims they sought to revive on appeal. The Court of Appeals stated, "Because Plaintiffs do not have a constitutionally protected interest in the rezoning of an adjoining landowner's property, and because their remaining constitutional challenges assert only generalized grievances, we hold these claims were properly dismissed." In holding that trial court was not required to transfer plaintiffs' constitutional claims due to their lack of standing, the Court further stated, "[F]acial constitutional challenges must be transferred to the three-judge panel only if the constitutionality of the statute in question must be resolved in order to conclude the action. Because we hold that Plaintiffs did not have standing to bring their constitutional challenges . . . the transfer of Plaintiffs' constitutional claims to a three-judge panel was not necessary, as 'a determination as to the facial validity of [the] act[s]' in question was not required to 'completely resolve any matters in the case.' [G.S.] 1A-1, Rule 42(b)(4); see also [G.S.] 1-81.1(a1) (requiring the transfer of claims only if a determination of facial validity is necessary 'after all other questions of law in the action have been resolved')." (Appeal by plaintiffs from November 2016 order. Affirmed. Opinion by Judge Inman, with Judge Bryant and Judge Davis concurring. On August 14, 2018, the N.C. Supreme Court dismissed plaintiffs' petition for discretionary review.))

Condemnation; Voluntary Dismissal; Motion to Amend; Deposit City of Charlotte v. Univ. Fin. Props., LLC, ___ N.C. App. ___ (COA17-388, Mecklenburg─ 7/3/18) ("[Defendant] appeals from the trial court's order entered 29 September 2016 granting plaintiff[-City]'s motion to amend its "Complaint, Declaration of Taking and Notice of Deposit and Service of Plat." On appeal, defendant argues that the trial court erred by ruling that defendant's voluntary dismissal had no effect to end the case and in granting plaintiff's motions to amend its complaint. We reverse the trial court's order because after defendant filed its notice of voluntary dismissal, the trial court no longer had authority to rule on plaintiff's motion to amend its complaint, declaration of taking, and deposit. Under [G.S.] 136-105 and 136-107 (2017), defendant was in the position of the claimant and had the right to elect to accept the deposit or to go to trial, and plaintiff had no right to force defendant to proceed to trial after defendant elected to dismiss its claim for determination of just compensation. We reverse and remand for entry of a final judgment in accord with [G.S.] 136-107, setting compensation based on the deposit." In so holding, the Court concluded that "a defendant does have the right to take a voluntary dismissal of its claim for determination of just compensation, as this result is consistent with the practice under Rule 41(a) and in

compliance with [G.S.] 136-105 and 136-107. But one additional twist in this case is that the plaintiff also moved to amend the deposit. Deposits do not exist in other civil proceedings, so we must consider if Chapter 136 could allow amendment of the deposit despite the filing of the voluntary dismissal. The statute [G.S. 136-103(d)] is quite clear that although a complaint or declaration of taking may be amended, a deposit may only be *increased*, not reduced." (Emphasis in original.) Court observes, "Here, defendant's voluntary dismissal ended the case, and the trial court had no authority to rule on plaintiff's pending motion to amend. We need not address the trial court's ruling on the motion to amend any further, since it had no authority to rule on that motion. Once the dispute as to determination of just compensation ended with the dismissal, the trial court must enter final judgment 'in the amount deposited. . . .' [G.S.] 136-107. We therefore reverse the trial court's order and remand for entry of a final judgment in accord with [G.S.] 136-107." (Appeal by defendant from September 2016 order. Reversed and remanded. Opinion by Judge Stroud, with Judge Murphy and Judge Arrowood concurring.))

Condemnation: Easement; Beach Renourishment; Public Trust Doctrine; Condemnation; JNOV; Expert Testimony Town of Nags Head v. Richardson, ___ N.C. App. ___ (COA17-498, Dare─ 7/3/18) (Opinion of the Court holds, "This appeal, following a jury verdict for property owners and entry of judgment notwithstanding the verdict ("JNOV"), presents an issue of first impression: whether a municipality that takes an easement in privately owned oceanfront property to replenish the beach can avoid compensating the private property owner by asserting public trust rights vested in the State. On the record before us, we hold that the property owner is entitled to compensation as provided by the eminent domain statute. We also hold that the jury's verdict was supported by a scintilla of evidence and reverse the trial court's entry of JNOV. But because expert testimony supporting the verdict was admitted in error, we remand for a new trial." "The Town is not entitled to JNOV on the ground that it already possessed the Easement Rights through the public trust doctrine, nor on the ground that the doctrine otherwise precludes all recovery, because these arguments were not raised until months after final judgment. Further, the Town is estopped from asserting that no condemnation occurred and that it already possessed these rights because: (1) it admitted it did not possess them in its complaint; (2) it did not raise the issue at the 'all other issues' hearing under Section 40A-47; (3) it expressly disavowed reliance on the public trust doctrine at that hearing and at its hearing on its motions *in limine*; and (4) it did not raise the issue at trial, in its motions for directed verdict, or in its motion for JNOV. Further, [plaintiffs] introduced evidence sufficient to support the jury verdict. We therefore reverse the entry of JNOV. We nonetheless remand for a new trial on the Town's cross-appeal, as we hold that the trial court abused its discretion in admitting [plaintiffs' hired appraiser's] expert testimony. At the new trial the parties may introduce additional new evidence on the issue of damages in conformity with this opinion." (Appeal by defendants from JNOV entered October 2016; cross-appeal by plaintiff-Town from December 2014 and August 2015 orders. Reversed and remanded for new trial. Opinion by Judge Inman, with Judge Hunter concurring. Judge Dillon concurring in part and dissenting in part.))

Torts; Immunity; Law Enforcement; Gross Negligence; Resolution; Self-Retained Limit; Excess Liability Insurance Flood v. Crews, ___ N.C. App. ___ (No. COA17-740, Wake─ 7/17/18) (***unpublished***) (Trial court correctly granted defendants' motion for summary judgment, in action wherein plaintiff-administrator alleged tort claims arising out of accident in which officer's patrol car collided head-on with decedent's scooter; officer was speeding in the westbound lane of a two-lane road in silent pursuit of a speeding driver when the motorized scooter, driving in the opposite direction in the eastbound lane, without activating a turn signal abruptly turned left into officer's driving lane. "Even when viewed in the light most favorable to plaintiff, the

forecasted evidence presented no genuine issues of material fact that [the officer's] conduct in pursuing the speeding driver was grossly negligent or malicious, or that defendants waived their immunity defense by the City's purchasing excess liability insurance or adopting the 1999 resolution." (Appeal by plaintiff-administrator from January 2017 order. Affirmed. Opinion by Judge Elmore, with Judge Inman and Judge Berger concurring.))