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Land Use; Conditional Use Permit; Solar Farm

Innovative 55, LLC v. Robeson County, ___ N.C. App. ___ (No. COA16-1101, Robeson− 6/6/17)

- ***Holding***− Court of Appeals reverses and remands in petitioner-FLS Energy, Inc.'s appeal from trial court's order affirming County Board of Commissioners' decision to deny application for a conditional use permit ("CUP") to construct a solar farm.

- ***Key Excerpt***− As to the Board of Commissioner's denial of the conditional use permit, the Court stated, "FLS Energy argues the Commissioners improperly denied its CUP to construct the solar farm. FLS Energy asserts it presented a *prima facie* showing it was entitled to issuance of a CUP under the standards and conditions of the [Robeson County Zoning] Ordinance, and the opponents of the solar farm failed to present competent and material evidence to overcome FLS Energy's *prima facie* showing to allow the denial of its application. We agree. 'The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property.' Dobo v. Zoning Bd. of Adjustment of Wilmington, 149 N.C. App. 701, 712, 562 S.E.2d 108, 115 (2002) (Tyson, J., dissenting), *rev'd per curiam,* 356 N.C. 656, 576 S.E.2d 324 (2003); *see also* City of Sanford v. Dandy Signs, Inc., 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983). 'Zoning regulations are not a substitute for private restrictive covenants.' Dobo, 149 N.C. App. at 712, 562 S.E.2d at 115."

The Court initially noted that a solar farm was a conditional use expressly contemplated and listed for property zoned Residential Agricultural (RA) under the County Zoning Ordinance as a "public utility facility." The Court further noted that petitioner's "burden to show its *prima facie* compliance with all requirements and conditions of the Ordinance is a burden of *production*, and not a burden of proof." (Emphasis in original; citation omitted.) The Court determined that petitioner had met its burden of production. "The Planning Board unanimously found that FLS Energy had clearly met its burden of production under Section 17.3 [entitled, 'Conditional Uses'] of the Ordinance. It produced a site plan and competent testimony

which complied with all of the specific CUP requirements set forth in that section. FLS Energy presented a *prima facie* entitlement to issue the CUP before the Commissioners. FLS Energy also met its burden of production by presenting competent, material, and substantial evidence before the Commissioners to show compliance with the more general requirements set forth in Section 30 of the Ordinance. FLS Energy presented material and substantial expert testimony from three witnesses to show: (1) solar farms are safe in both the short and long-term for the environment and surrounding community; (2) the project would generate 'virtually no traffic;' (3) due to the proposed setbacks and landscaping, the project would not impact the character of the surrounding area; and, (4) the project would not negatively affect the value of adjacent and nearby properties or be injurious to the use and enjoyment of other neighboring properties." (Citation omitted.)

Given petitioners' *prima facie* showing, the Court turned to the issues of whether the opponents had met their burden of establishing that the approval of the CUP would endanger the public health, safety and welfare and whether the denial of the CUP was based upon findings supported by competent, material, and substantial evidence in the record. The Court held that the testimony of three witnesses was not based on competent evidence. The Court observed *inter alia,* "Speculative and general lay opinions and bare or vague assertions do not constitute competent evidence before the Commissioners to overcome the applicant's *prima facie* entitlement to the CUP…. Opponents to the solar farm testified to unsupported and highly speculative claims about their unsubstantiated fears of solar farms and their possible dangers. Opposing contentions included assertions that the solar panels contain 'poison,' might be connected to 'dead birds in California,' might produce harmful radiation, and might be hit by hurricanes or tornadoes. The opponents produced no expert testimony or other material and substantial evidence in support of their claims. A lay witness's testimony regarding '[m]atters about which only expert testimony would generally be admissible under the rules of evidence' is not competent evidence. [G.S.] 160A-393(k)(3)(c) (2015); [G.S.] 153A-349(a). The lay testimony regarding the purported safety of solar farms is a matter requiring scientific, technical or other specialized or personal knowledge, normally outside the experience of an ordinary person. The opponents' testimonies on this topic did not constitute 'competent evidence' to rebut FLS Energy's *prima facie* showing to deny the CUP." (Citation omitted.)

The Court also noted that the Commissioners' denial of the CUP was based upon *inter alia* a signed petition in opposition to the CUP. "Finally, the petition that was presented to the Board, purportedly signed by citizens of the surrounding community is not competent evidence to overcome FLS Energy's *prima facie* showing to entitlement to the CUP. *See* Humane Soc'y of Moore Cty., Inc. [v. Town of Southern Pines], 161 N.C. App. [625] at 631-32, 589 S.E.2d [162] at 167 [(2003)] (recognizing a public poll or 'survey cannot be used as competent, material evidence as the answers are simply speculative comments from neighborhood residents'). The preamble to the petition merely states, 'We, the undersigned, petition Commissioners to deny the request for a Conditional Use Permit to allow for the establishment of a Solar Farm in a Residential Agricultural District owned by Randal [sic] and Charles D. Andrews . . . .' The record before us demonstrates FLS Energy's CUP was impermissibly denied 'based solely upon the generalized objections and concerns of neighboring community members.' Blair Investments [LLC v. Roanoke Rapids City Council], 231 N.C. App. [318] at 324, 752 S.E.2d [524] at 529 [(2013)]. The opposition was not based upon any specific or supported testimony, or substantial and material evidence, facts, or data. The Board's denial of FLS Energy's *prima facie* entitlement to the CUP was

clearly based upon testimonies and a non-specific signed petition 'which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.' Howard [v. City of Kinston], 148 N.C. App. [238] at 246, 558 S.E.2d [221] at 227 [(2002)]."

- ***Synopsis***− Appeal by petitioners from March 2016 trial court's order affirming Commissioners' decision to deny their CUP application to construct a solar farm. Reversed and remanded. Opinion by Judge Tyson, joined by Chief Judge McGee and Judge Calabria.

Open Meetings Law; Sub-Quorum Discussions; Meeting Room; Reasonable Opportunity for Public Access

Hildebran Heritage & Dev. Ass'n, Inc. v. Town of Hildebran, ___ N.C. App. ___ (No. COA16-568, Burke− 3/21/17), *appeal dismissed*, ___ N.C. ___ (No. 134A17, 5/16/17)

- ***Holding***− As to plaintiffs' claims regarding: (1) councilmember's sub-quorum discussions, and (2) inadequacy of venue for access to meeting, trial court did not err in concluding as a matter of law that the Town substantially complied with the Open Meetings Law.

- ***Key Excerpt***− The majority rejected plaintiffs' contention that the Town violated the Open Meetings Law by purposefully conducting sub-quorum meetings. Plaintiffs contended that the Town violated the Open Meetings Law by permitting Councilman Lowman to conduct one-on-one meetings, by contacting members of the Town Council individually and in private, rather than openly. "Plaintiffs attempt to analogize these facts with those in News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976). In that case, the defendant created a special 'committee of the whole' in order to enact business without invoking the Open Meetings Law. This Court acknowledged that certain grounds might exist to form a closed session committee of the whole, such as theft or embezzlement, but held that 'we do not think a board can evade the provisions of statutes requiring its meetings to be open to the public merely by resolving itself into a committee of the whole.' *Id*. at 49, 223 S.E.2d at 588."

"We hold, however, that plaintiffs' analogy is inapplicable. In News & Observer, the defendant board met to conduct votes in closed session, in violation of the Open Meetings Law. Plaintiffs do not allege, however, that Lowman conducted any business during these one-on-one meetings. Rather, Lowman discussed with other members of the Town Council his plan to present a motion to amend at the meeting proper. Even assuming *arguendo* that Lowman's conduct was designed to avoid the protections of the Open Meetings Law, the vote itself took place at the 26 January 2015 meeting, at which the public was present, minutes were taken, and the votes of the Town Council were recorded. Unlike News & Observer, in which a closed session was held in violation of the Open Meetings Law, this meeting was held in view of the public, with members of the public able to speak, and with records taken of the proceedings. As such, we hold that the trial court did not err in concluding that the Town did not violate the Open Meetings Law."

The panel rejected plaintiffs' contention that the Town failed to provide reasonable public access to the 26 January 2015 meeting. "Pursuant to the Open Meetings Law, the court must consider a defendant's actions 'according to the standard of reasonableness of opportunity for public access to the meetings.' Garlock v. Wake Cty. Bd. of Educ., 211 N.C. App. 200, 201, 712 S.E.2d 158, 162 (2011). Plaintiffs contend that the venue used for the meeting was inadequate to address the public's interest, that between twenty and twenty-five people were forced to stand outside the meeting room, and that no equipment was available to permit these excess attendees to observe or hear what

transpired during the meeting. Plaintiffs contend that whether the opportunity for public access was reasonable is a question of fact for the jury, and that the trial court erred in ruling on it as a matter of law."

"However, '[w]hether a violation of the Open Meetings Law occurred is a question of law.' Knight [v. Higgs], 189 N.C. App. [696] at 700, 659 S.E.2d [742] at 746 [(2008)]. As such, it was appropriate for the trial court to determine this issue on a motion for directed verdict. The trial court's order set out numerous facts, which are supported by the evidence, in support of its determination as a matter of law that opportunity for public access was reasonable, and that no violation of the Open Meetings Law resulted. We agree. We decline to find that a lack of overflow seating or external speakers, absent more, constitutes an unreasonable failure of access. We therefore hold that the trial court did not err in holding, as a matter of law, that there was reasonable opportunity for access to the meeting under the Open Meetings Law." Plaintiffs' contention that the trial court erred in declining to award attorney's fees based upon defendants' purported violation of the Open Meetings Law was also rejected.

Dissent −Judge Bryant concurred in part and dissented in part. Upon reviewing Councilman Lowman's testimony (appearing verbatim in the opinion), Judge Bryant stated, "The trial court's findings of fact, particularly that Councilman Lowman (1) contacted other council members one-on-one specifically 'to avoid holding an official meeting,' and (2) did not contact Councilman Hildebran as he knew he held an adverse position, are clearly based on evidence in the record that the other council members were called 'to ensure that they had the vote to amend the agenda, which would allow them to vote on the school building demolition without any prior notice to the public.' Councilman Lowman admitted that he didn't contact Councilman Hildebran because he knew Hildebran held an adverse position, and if Lowman asked Hildebran about voting to amend the agenda, he would alert the public. The only reasonable inference to be drawn from these facts is that Councilman Lowman's action of contacting other council members individually was to evade the purpose of the Open Meetings Law."

"Thus, because the findings by the trial court support a conclusion that Councilman Lowman's actions were purposeful and undertaken in order to evade the purpose and spirit of the Open Meetings Law and the council's obligation to conduct meetings in public, I submit the trial court erred in concluding the above-described actions did not amount to a violation. Therefore, I respectfully dissent."

- ***Synopsis***− Appeal by plaintiffs from August 2015 judgment and September 2015 order. Affirmed in part and dismissed in part. Opinion of the Court by Judge Calabria, concurred in by Judge Tyson. Judge Bryant concurring in part and dissenting in part. On May 16, 2017, the Supreme Court allowed plaintiffs' motion to dismiss appeal.

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

Constitutional Law; Substantive Due Process; Summary Ejectment; Wildlife Sanctuary
Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., ___ N.C. App. ___ (Nos. COA15-260 & No. COA15-517, Watauga− 5/10/16), *aff'd*, ___ N.C. ___ (No. 230A16, 6/9/17) (*per curiam*) (In Town's summary ejectment action, N.C. Court of Appeals in a 2-1 decision upholds grant of summary judgment in favor of defendant-wildlife sanctuary as to Town's breach of lease claim and upholds denial of Town's motions for directed verdict and JNOV regarding defendant-wildlife sanctuary's substantive due process counterclaim presenting as-applied challenge to buffer ordinance.

(Appeal by plaintiff-Town from judgment and orders entered September 2014, October 2014, and November 2014. Affirmed in a 2-1 decision. Majority opinion by Judge Geer, with Judge Hunter Jr. concurring. Judge Dillon dissenting. On June 9, 2017, the N.C. Supreme Court issued a *per curiam* opinion stating, "As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for writ of certiorari as to the additional issue was improvidently allowed."))

Personnel; Civil Service Commission; Fire Department Ragavage v. City of Wilmington, ___ N.C. App. ___ (No. COA16-1028, New Hanover− 6/20/17) (***unpublished***) (Trial court correctly affirmed (on remand from federal court) Wilmington Civil Service Commission's decision to uphold termination of petitioner from his employment with fire department. **"**Based on the unchallenged findings of fact regarding City policy and Petitioner's conduct, we conclude that the City had cause to terminate Petitioner." (Appeal by petitioner from July 2016 order. Affirmed. Opinion by Judge Dillon, joined by Judge Bryant and Judge Murphy.))

Personnel; Unredacted Investigative Notes; *In Camera* Inspection; Appellate Record; Grievance Hearing Bray v. Swisher, ___ N.C. App. ___ (No. COA16-928, Forsyth− 5/2/17) (***unpublished***) ("[T]he Town Manager of the Town of Kernersville, appeals from the trial court's order and writ of mandamus. The trial court directed [Town Manager] Swisher to disclose to Plaintiff Kevin Bray the full, unredacted version of internal investigative notes used in the town's decision to terminate [plaintiff's] employment with the Kernersville Fire Department…. State law requires the town to disclose to [plaintiff] all notes and other internal communications used in the official decision to terminate him. [G.S.] 160A-168(c1)(4). The trial court reviewed the full, unredacted investigative notes *in camera* and found, based on their contents, that those notes were used in the town's decision to terminate [plaintiff]. The unredacted notes that the trial court reviewed *in camera* are not in the record on appeal—meaning this Court has no way to know what they say. Thus, under our precedent, we must presume that the trial court's finding is supported by the record below. We therefore affirm the trial court's order instructing [Town Manager] Swisher to produce the notes to [plaintiff]. We also hold that [G.S.] 160A-168(c1)(4) provides a right for [plaintiff] to review those notes *before* engaging in the administrative grievance process offered by the town. Because the town failed to produce those notes as the law required, it deprived [plaintiff] of a meaningful opportunity to defend himself at the grievance hearing. Accordingly, the trial court properly held that the town violated [plaintiff's] due process rights and that [plaintiff] is entitled to a new grievance hearing after being provided an opportunity to review all records subject to disclosure under [G.S.] 160A-168(c1)(4)." (Emphasis in original.) (Appeal by defendant-town manager from June 2016 order. Affirmed. Opinion by Judge Dietz, joined by Judge Elmore and Judge Tyson.))

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***), *disc. review denied*, ___ N.C. ___ (No. 064P17, 6/8/17) (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. On

June 8, 2017, the N.C. Supreme Court denied petitioners' petition for discretionary review.))

Torts; Immunity; Emergency Medical Services (EMS); Governmental Function Fuller v. Wake County, ___ N.C. App. ___ (No. COA16-869, Wake− 6/20/17) (In governmental immunity case concerning whether a county can face liability for making discretionary decisions relating to the manner by which it meets its statutorily delegated responsibilities to ensure its citizens are provided emergency medical services (EMS) and to regulate EMS within its jurisdiction, trial court correctly entered order granting summary judgment for County. "Because the alleged tortious conduct of Wake County arose from its statutory obligations to ensure its citizens are provided EMS and to regulate EMS within its jurisdiction, both of which are governmental functions, Wake County established that it was entitled to summary judgment as a matter of law, and [plaintiff] raised no genuine issue of material fact that Wake County was acting in a proprietary manner." (Appeal by plaintiff from March 2016 order. Affirmed. Opinion by Judge Elmore, joined by Judge Dillon and Judge Zachary.))