MUNICIPAL LAW NOTES

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Personnel; Law Enforcement; Promotions; Compliance with Established Procedures

Tully v. City of Wilmington, ___ N.C. ___ (No. 348A16, 3/2/18)

- ***Holding***– 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.

- ***Key Excerpt***– The Court initially stated that "Here we address whether a police officer states a claim under the Constitution of North Carolina against his employer when that employer violates its own policy by refusing to consider his appeal regarding the validity of an examination required for a promotion. Because we conclude that [plaintiff] has adequately stated a claim that his rights under Article I, Section 1 of the North Carolina Constitution were violated by [defendant-City], we affirm in part the decision of the Court of Appeals reversing the dismissal of his claims." For a description of this case and the Court of Appeals' holding, *see MLN* August 2016, p. 4.)

Reversing as to the holding of the Court of Appeals regarding plaintiff's Law of the Land clause (Article I, Section 19) claim, the Supreme Court initially observed, "[Plaintiff's] complaint specifically asserted that his Article I, Section 19 claim was based upon a 'property interest in his employment with the City of Wilmington' and that '[b]y denying [his] promotion due to his answers on the Sergeant's test and then determining that such a reason was not grievable, the City arbitrarily and irrationally deprived [him] of property in violation of the law of the land.'"

The Supreme Court stated, "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 [plaintiff] 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 [plaintiff's] Article I, Section 19 claim because no property interest is implicated here."

As to the Article 1, Section 1 "fruits of one's own labor" claim, the Court concluded that plaintiff had successfully stated a claim and affirmed the Court of Appeals on that ground.

The Supreme Court stated, "This Court has previously recognized claims against government defendants rooted in the right to enjoy the fruits of one's labor. "In State v. Ballance, in which we held that a statute regulating photographers violated Sections 1 and 19 of Article I, we explained that the 'fundamental guaranties' set forth in Sections 1 and 19 'are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights. 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949). [*See also* State v. Warren, 252 N.C. 690, 692-93, 114 S.E.2d 660, 663 (1960).]"

"We have also addressed a public employee's liberty interest in pursuing her chosen profession free from unreasonable actions of her employer. In Presnell v. Pell a school employee sued her employer school district and certain administrators for defamation and wrongful termination after, as her complaint alleged, the school's principal caused her to be fired based upon his false allegation that she had distributed liquor to maintenance contractors on school premises. 298 N.C. 715, 717- 18, 260 S.E.2d 611, 613 (1979). Although we held that the plaintiff's at-will employment status meant that she had no cognizable *property* interest in continued employment…. [w]e then concluded that the plaintiff's opportunity to avail herself of a post-termination administrative hearing that could be appealed to Superior Court provided her with sufficient procedural due process to safeguard her liberty interest. *Id*. at 725, 260 S.E.2d at 617." (Emphasis in original.)

"More recently, in King v. Town of Chapel Hill, which concerned a tow truck company's challenge to a local towing ordinance, we explained that '[t]his Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor.' 367 N.C. 400, 408-09, 758 S.E.2d 364, 371 (2014) (first citing N.C. Const. art. I, § 1; then citing Roller v. Allen, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957))."

….

"Here [plaintiff] 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 [Police Department] Policy Manual's plain statement that '[c]andidates may appeal any portion of the selection process.' [Plaintiff'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. [Plaintiff] 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 [plaintiff'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. "[W]e 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 [plaintiff's] claim. Accordingly, we need not speculate regarding whether [plaintiff] would likely have received the promotion had the Police Department followed its own policy. Similarly, we need not address the remedy to which [plaintiff] would be entitled if he ultimately succeeds in proving his claim."

- ***Synopsis***− 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.

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)

- ***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 constit-

ute 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. ***Note*:** Upon motion by defendant-Town pursuant to N.C. R. App. Rule 30(e)(4), this opinion was ordered published by the Court on March 14, 2018.

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

Land Use; Accessory Use; Animal Boarding Business Hagerman v. Union Cty. Bd. of Adjustment, ___ N.C. App. ___ (No. COA17-319, Union− 3/20/18) (***unpublished***) (Property owners appealed from a trial court order affirming on *certiorari* review the Board of Adjustment's decision that the continued accessory use of their residentially zoned property to operate an animal boarding business violated the zoning ordinance. The Court rejected petitioners' request that the trial court's order be reversed and that judgment be entered allowing them to continue operating their business, with petitioners arguing *inter alia*: (1) the presiding judge should have *sua sponte* recused himself from the case; (2) the Board violated their due process rights; (3) there were other legal errors in the Board's actions, deliberations, and

ultimate decision; and (4) the Board abused its discretion by issuing an allegedly arbitrary and capricious decision. In holding that the Board correctly determined that petitioners' operation of the animal boarding business violated the UDO, the Court stated, "Several issues [petitioners] raised on appeal were summarily addressed because the UDO [2014 Unified Development Ordinance] was the proper ordinance to apply in determining whether [petitioners'] operation of Doggie Nirvana violated zoning, and the Board properly concluded that [petitioners'] operation of Doggie Nirvana could not lawfully continue under the UDO. Therefore, the Board's interpretations or applications of the LUO [2008 Land Use Ordinance], or their decision that Doggie Nirvana was not a permissible home occupation under the LUO, were legally irrelevant to our review. [Petitioners'] remaining arguments were either unpreserved, abandoned, or meritless. [Petitioners] failed to preserve any issue relating to the superior court judge's alleged impropriety in failing to recuse himself from presiding over the case. [Petitioners'] arguments concerning the alleged inadequacies of the superior court's order were immaterial in light of our decision not to remand the matter to the superior court and fully analyze the issues raised in their appeal. [Petitioners] failed to advance any meritorious or legally supported due process argument. Further, [petitioners] have failed to demonstrate that the Board committed any reversible or remandable legal error, or that its decision was arbitrary or capricious." (Appeal by petitioners from November 2016 order. Affirmed. Judge Elmore wrote the opinion, joined by Judge Dietz and Judge Inman.))

Land Use; Lumber Company; Rezoning Application to Modify Site Plan; Relocation of Chemical Vat McDowell v. Randolph Cty., ___ N.C. App. ___ (No. COA17-401, Randolph– 12/5/17) Plaintiffs appealed from the trial court's entry of summary judgment in favor of the County and the Board of County Commissioners (collectively defendants), in a case involving the question of whether the County properly rezoned certain real property bordering plaintiffs' property. The Court of Appeals affirmed, concluding that the trial court properly rejected plaintiffs' arguments that the rezoning was null and void because (1) defendant-Board's decision was arbitrary and capricious, (2) defendants had failed to adopt a proper consistency statement, and (3) defendants engaged in illegal spot zoning. "No genuine issue of material fact exists of Defendant-Board's approval of the modified site plan of the Subject Property in 2016. Defendants rezoned the Subject Property to Rural Industrial Overlay Conditional District zoning classification in 2010. In the 2016 rezoning action Plaintiffs challenge here, Defendant-Board did not change the classification of the subject property from Rural Industrial Overlay Conditional District to another zoning district, or reclassify any other tract of property to this zoning district. Defendant-Board merely approved the relocation of the existing chemical vat to another location on the Subject Property, by approving the modification to the Subject Property's site plan…. Under [G.S.] 1-54.1, 2010 would have been the appropriate time to have brought a spot zoning challenge to Defendants' classifying the subject property as Rural Industrial Overlay Conditional District. Plaintiffs cannot challenge this classification now, which is not a reclassification of zoning, but is merely a review and approval of the modification to the previously approved site plan." (Appeal by plaintiffs from January 2017 order. Affirmed. Judge Tyson wrote the opinion, joined by Judge Stroud and Judge Hunter.))

Land Use: Special Use Permit; Solar Energy Array Farm Ecoplexus, Inc. v. Currituck County, ___ N.C. App. ___ (No. COA17-656, Currituck– 12/19/17) (The County's Unified Development Ordinance provided that a "solar array" was allowed as a permitted use on AG (agricultural) zoned land, subject to a use permit, and County Planning Staff and the Planning Board unanimously recommended the application for the permit be approved, finding petitioners' application fulfilled all the Use Permit Review Standards. However, the Board of Commissioners denied the permit for failure to comply with

the Use Permit Review Standards, finding the proposed solar farm: (1) would endanger the public health or safety, (2) would not be in harmony with the surrounding area, and (3) would not be in conformity with the 2006 Land Use Plan. The Court of Appeals reversed and remanded. "Based upon review of the whole record, Petitioners presented a *prima facie* showing of entitlement to their use permit to construct a solar energy farm in a zoning district where such facility is a permitted use. The Board's denial of the application was not based on competent, material, and substantial evidence to rebut the Petitioners' *prima facie* showing. 'When a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary.' MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796, *disc. review denied*, 359 N.C. 634, 616 S.E.2d 540 (2005). The superior court's order affirming the Board's denial of Petitioners' application is reversed. This matter is remanded with instructions to the superior court to further remand to the Board to approve Petitioners' application. Upon remand, the Board may hear and require reasonable terms for the Petitioners to comply with the development standards, including Petitioners securing any required approvals of other local, state, and federal authorities' and agencies' permits required to operate the solar array energy farm." (Appeal by petitioners from March 2017 order affirming the Board of Commissioners' denial of petitioners' application for a use permit to construct a solar energy array farm. Reversed and remanded. Judge Tyson wrote the opinion, joined by Judge Calabria and Judge Davis.))

Public Records Act; Failure to Initiate Mediation; Subject Matter Jurisdiction Tillett v. Town of Kill Devil Hills, ___ N.C. App. ___ (No. COA17-433, Dare− 12/19/17) (Plaintiff filed an action under the Public Records Act to compel the production of documents he contended were public records subject to disclosure. Upon *in camera* inspection, the trial court determined that two documents were subject to disclosure and ordered them to be produced under seal to plaintiff. Both parties appealed. On appeal, defendant-Town argued that the trial court lacked subject matter jurisdiction to enter the challenged order. The Court of Appeals agreed and vacated the order. "The applicable section of the Public Records Act states that a litigant 'may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court *shall have jurisdiction* to issue such orders if the person has complied with G.S. 7A-38.3E.' [G.S.] 132-9(a) (emphasis added)…. [T]he General Assembly's use of the word 'jurisdiction' demonstrates that it intended for Section 132-9(a) to impose a jurisdictional rule, rather than an ordinary procedural rule. [Plaintiff] concedes that he did not satisfy the requirements of [G.S.] 132-9(a) because he failed to initiate mediation within 30 days of the Town's filing of a responsive pleading, as required by [G.S.] 7A-38.3E. Accordingly, we must vacate the trial court's order for lack of subject matter jurisdiction." (Appeal by plaintiff and defendant-Town from November 2016 order. Vacated. Judge Dietz wrote the opinion, joined by Judge Elmore and Judge Inman.))

Torts; Law Enforcement; Accident; Response; Procedure; JNOV; Verdict Cabrera v. City of Durham, ___ N.C. App. ___ (No. COA17-617, Durham− 12/5/17) (***unpublished***) (In action against defendant-officers alleging injuries sustained by passengers during response to accident where vehicle hit utility pole and driver fled the scene, Court of Appeals holds, "Where defendant raised arguments on his motion for judgment notwithstanding the verdict which were not raised on his motion for directed verdict, the trial court did not err by disregarding those arguments, and did not err by denying defendant's motion for judgment notwithstanding the verdict. Where defendant failed to show that the jury's verdict was mutually exclusive or the result of jury compromise, the trial court properly denied defendant's motion for new trial." (Appeal by defendant-City from December 2015 order and judgment and from August 2016 amended judgment. No error. Judge Calabria wrote the opinion, joined by Judge Davis and Judge Tyson.))