MUNICIPAL LAW NOTES

NC LEAGUE OF MUNICIPALITIES
Good government. Great hometowns.

March 2019 **Volume XXXVIII, No. 9**

Procedure; Appellate Procedure; Variance; Appeal; Substitution; Appellate Jurisdiction

Weishaupt-Smith v. Town of Banner Elk, ___ N.C. App. ___ (No. COA18-903, Avery─ 3/19/19)

- ***Holding*─ To allow substitution by a party who failed to timely petition for agency review or timely request intervention would be to condone evasion of the clear jurisdictional requirements of G.S. 160A-388 & -393 governing judicial review of municipal quasi-judicial decisions.**

- ***Key Excerpt*─** Petitioner Weishaupt-Smith appealed from an order affirming the Board of Adjustment's decision to grant a variance to American Towers, LLC and issue a conditional use permit for its construction of a telecommunications tower. Upon filing Notice of Appeal, petitioner's counsel also filed a Motion to Substitute Party on behalf of Stevenson, citing N.C.R. App. P. 38, thus seeking to substitute Stevenson, a non-party to the proceedings below, for petitioner. The trial court granted this motion. However, the Court of Appeals determined that Stevenson was not an aggrieved party with standing to appeal the trial court's order and accordingly dismissed petitioner's appeal for lack of appellate jurisdiction.

Citing Ellison v. Alexander, 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010), the Court stated that it would find guidance on this question in case law interpreting the analogous federal appellate rule. "Rule 43(b) of the Federal Rules of Appellate Procedure provides: 'If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) [applicable to substitution in cases involving death of a party] applies.' Fed. R. App. P. 43(b). The previous version of Federal Rule 43(b) tracked the language of our Rule 38(b) and allowed substitution when 'necessary for any reason other than death.' *Compare* Fed. R. App. P. 43(b) (1986), *with* N.C.R. App. P. 38(b). When Federal Rule 43(b) was amended to its current version, the Advisory Committee Notes indicated that the change in Federal Rule 43(b) was 'intended to be stylistic only.' Fed. R. App. P. 43(b) advisory committee's notes to 1998 amendments."

The Court found the D.C. Circuit's interpretation of the prior version of Federal Rule 43(b) persuasive and held that it was equally applicable to N.C.R. App. P. 38(b). "Under Rule 38(b) of our Rules of Appellate Procedure, a substitution is appropriate only where 'necessary,' and '"[n]ecessary" means that a party to the suit is unable to continue to litigate.' *See id*. Therefore, substitution is permissible only when 'a party to the suit is unable to continue to litigate' and not when 'an original party has voluntarily chosen to stop litigating.' *See id*. The clear teaching of Alabama Power Co. [v. Interstate Commerce Commission, 852 F.2d 1361 (D.C. Cir. 1988)] is that a non-party to litigation below cannot be permitted to simply substitute in an appeal where the original party (or their successor) has ceased litigation."

"In this case, Stevenson does not allege he is a successor in interest to Petitioner's real property or her personal representative. Petitioner has sold her property, thus abandoning the litigation, and her actual successor in interest in her property has not sought substitution, thus dropping the case. Stevenson, as a non-party to the proceedings in the trial court below, has no right to appeal the trial court's ruling to this Court."

"Indeed, the D.C. Circuit made an important point, equally applicable to this case: to allow substitution by a party who failed to timely petition for agency review or timely request intervention under the governing statutes would 'condone the impermissible—an evasion of clear jurisdictional requirements ordained by Congress for obtaining judicial review.' *Id*. at 1366-67. Here, Stevenson could have timely filed his own Petition for Writ of Certiorari alleging his own standing to challenge the Board's decision. *See* [G.S.] 160A-388, -393 (2017). Stevenson could have also sought to timely intervene in the judicial review proceedings in the trial court. *See* [G.S.] 160A-393(h)(2). To allow Stevenson's substitution to automatically provide him standing as an aggrieved party on appeal would be to condone evasion of the clear jurisdictional requirements of [G.S.] 160A-388 and -393 governing judicial review of municipal quasi-judicial decisions. *See* McCrann v. Vill. of Pinehurst, 216 N.C. App. 291, 294, 716 S.E.2d 667, 670 (2011) (failure to timely file petition for writ of certiorari for judicial review of the issuance of a special use permit was a jurisdictional defect requiring dismissal)."

"Consequently, we conclude the trial court's substitution of Stevenson for Petitioner in this appeal does not alter our result under Duke Power Co. v. Board of Adjustment[, 20 N.C. App. 730, 202 S.E.2d 607, *cert. denied*, 285 N.C. 235, 204 S.E.2d 22 (1974)]. Because Stevenson is not an aggrieved party with standing to appeal, we must dismiss the appeal. *See* Duke Power Co., 20 N.C. App. at 732, 202 S.E.2d at 608; *see also* King Fa, LLC [v. Ming Xen Chen], ___ N.C. App. at ___, 788 S.E.2d [646] at 650 [(2016)]."

- ***Synopsis***─ Appeal by petitioner from May 2018 order. Appeal dismissed. Opinion by Judge Hampson, with Chief Judge McGee and Judge Hunter concurring.

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

Land Use; Lakeside Resort; Conditional Zoning Ordinance; Spot Zoning; Restaurant; Offsite Parking; Accessory Use Eisenbrown v. Town of Lake Lure, __ N.C. App. __ (No. COA17-934, Rutherford─ 3/5/19) (***unpublished***) (Court of Appeals states, "Along the shore of scenic Lake Lure in Rutherford County is a small resort lodge operating as the Lodge on Lake Lure. The Lodge has existed in one form or another for nearly a century. In 2015, the owners of the Lodge proposed a conditional rezoning of the property that would permit it to grow in size and scope, including more overnight guests, a new lakeside restaurant, and offsite parking at two properties bordering a nearby golf course. After the Town of Lake Lure approved the conditional zoning application, Plaintiffs, who are nearby landowners of residential homes or vacation rentals, challenged the newly enacted conditional zoning ordinance in court. The trial court ultimately granted summary judgment

in favor of the Town and the Lodge owners on most claims, but invalidated the portion of the conditional zoning ordinance that permitted remote parking on the properties bordering the golf course…. [W]e affirm the trial court's determination that the challenged ordinance was not an *ultra vires* act; was not an arbitrary and capricious zoning act; was not an illegal spot zoning; and was procedurally proper. We also agree with the trial court's determination that the ordinance impermissibly removed restrictions on commercial parking in certain residential districts, amounting to a *de facto* rezoning without the required notice and procedure. But we disagree with the trial court's conclusion that a separate offsite parking provision was invalid because it permitted the Lodge to use offsite parking at other locations throughout the Town. We therefore affirm the trial court's order in part and reverse in part." As to the separate offsite parking provision, the Court stated, "[U]nder the Town's general zoning regulations, there are many residential properties throughout the Town that could be used for parking by an adjoining commercial property. If the challenged conditional zoning ordinance had merely authorized the Lodge Property to similarly use those properties for offsite parking—a use already permitted on those properties by the Town's existing zoning regulations—then the newly enacted ordinance would not be a de facto rezoning of those other properties. But the conditional zoning ordinance does more than that. The challenged parking provision also removed the requirement that offsite residential parking must adjoin a commercial district and that the parking cannot extend more than 120 feet into a residential district…. [The] third portion of the offsite parking provision would permit the Lodge to use other residential property as offsite parking in situations where that was not a permissible use of that property under the generally applicable zoning regulations. We agree with the trial court that this provision, because it changes the permissible uses of those other properties, is a rezoning that entitled those property owners to notice and other procedures or rules applicable to zoning changes. That did not occur here, and thus this particular provision is invalid. George v. Town of Edenton, 294 N.C. 679, 687, 242 S.E.2d 877, 882 (1978)." In closing, the Court rejected plaintiffs' argument that since the offsite parking provision could not be severed from the remainder of the ordinance, the entire ordinance should be struck down. (Appeals by plaintiffs and defendant from January 2017 order. Reversed in part, affirmed in part. Opinion by Judge Dietz, with Judge Hunter, Jr. and Judge Zachary concurring.))

Land Use; Subdivisions; Streets; Performance Guarantees; Substantive and Procedural Due Process; Notice of Violation; Record Tucker Chase , LLC v. Town of Midland, ___ N.C. App. ___ (No. COA18-847, Cabarrus– 3/19/19) (***unpublished***) (After petitioner received a notice of violation in October 2016 that it was in violation of the road compliance certifications contained within plats, for a subdivision project initially approved approximately a dozen years before, as well as sections of the development ordinance because of the inadequate condition of the subdivision's streets, petitioner appealed to the Board of Adjustment, arguing that the Town should have accepted one of its previously proposed plans to repair the roads, and that it was improper for the Town to apply its current development ordinance when the streets were platted before that ordinance was adopted. The Board affirmed in April 2017, and the trial court affirmed in March 2018. The Court of Appeals rejected *inter alia* petitioner's arguments that the Board of Adjustment's decision was not supported by competent, material, and substantial evidence in the record. "Petitioner contends the Board's decision is not supported by the evidence in the record because neither the Town Manual nor the DOT's standards were admitted into evidence, even though the Board found the subdivision's roads were required to comply with the DOT's standards and 'applicable plans and manuals adopted by the Town of Midland,' and that the roads failed to satisfy these requirements. After a careful review of the whole record, we hold that the superior court did not err in holding the Board decision was supported by substantial evidence because

the written manual and standards were not included in the record. There was other evidence in the record that the roads did not comply with these standards. Town engineer, Richard McMillan, testified as an expert about the DOT's standards, the condition of the streets, and the failure of the streets to meet the DOT's standards and the Town's standards. Mr. McMillan authored a report detailing this failure on 29 November 2016, which is included in the record. The record also includes a memorandum authored by another town engineer, which concludes the subdivision's streets did not meet the DOT and Town standards." (Appeal by petitioner from March 2018 order. Affirmed. Opinion by Judge Arrowwood, with Judge Stroud and Judge Tyson concurring.))

Torts; Arrest; Public Official Immunity; Adequate State Remedy Painter v. City of Mt. Holly, ___ N.C. App. ___, (No. COA 18-197, Gaston─ 3/5/19) (***unpublished***) (This case arose out of events taking place in 2012, leading to the arrest of plaintiff, who owned property that was the site of an auto body shop, following an eviction-based dispute with lessees at the property. The Assistant District Attorney took voluntary dismissal of all cases against plaintiff in the absence of a witness to testify. In 2015, plaintiff filed an amended complaint raising seven causes of action: (1) False Imprisonment & Arrest; (2) Abuse of Process/Malicious Prosecution; (3) Conspiracy to Violate the N. C. Constitution; (4) Negligent Hiring, Training, Supervision, and Retention; (5) Violation of Rights under the U.S. Constitution pursuant to 42 U.S.C. § 1983; (6) Conspiracy to Violate Constitutional Rights pursuant to 42 U.S.C. § 1985; and (7) Malicious Conduct giving rise to Punitive Damages. Defendants appealed the trial court's denial of their motion for summary judgment, alleging that they were entitled to both public official and qualified immunity, that there was sufficient probable cause to support plaintiff's arrest, that plaintiff failed to make *prima facie* cases regarding claims (4) and (5), and that plaintiff had an adequate state law remedy that barred him from bringing his state constitutional claim. The Court determined that defendant-officers should have been granted summary judgment on Claims (1), (2), and (7) based on public official immunity. "…. [Defendant-officers] were acting in their official capacity at all relevant times for the purposes of Plaintiff's suit, and Plaintiff has not forecast any evidence that their actions fall within an exception to public official immunity. [Defendant-officers] acted in response to criminal complaints about Plaintiff by conducting an investigation and seeking arrest warrants. These actions are well within the scope of official duties for a law enforcement officer; it is the crux of their job. Plaintiff does not allege any facts suggesting [defendant-officers] acted outside the scope of their official duties such that those actions would fall under an immunity exception." The Court held that because there was probable cause for Plaintiff's arrest, defendant-City was entitled to summary judgment on Claims (1) and (2) alleging false arrest and malicious prosecution. The Court also found that plaintiff's third claim failed because there existed an adequate state law remedy, rendering his direct constitutional claim unavailable. "In Claim (1), Plaintiff alleges he was falsely arrested by the Defendants, and sues under state law. Likewise, in Claim (3) Plaintiff alleges the Defendants 'intentionally acted, combined and conspired to deprive Plaintiff of his constitutional rights to the equal protection of the laws; [and] ... subjected Plaintiff to an unlawful search and seizure under the laws of the State of North Carolina, depriving him of his liberty and freedom....' Claim (3) seeks redress for the same actions Plaintiff argued, in Claim (1), amount to a false arrest in violation of state law. Additionally, North Carolina law recognizes civil conspiracy as a valid cause of action where a plaintiff can show '(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to [the] plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.' Strickland v. Hedrick, 194 N.C. App. 1, 19, 669 S.E.2d 61, 72 (2008). Plaintiff did not pursue such a claim." (Appeal by defendants from denial of summary judgment entered October 2017. Reversed. Opinion by Judge Murphy, with Judge Stroud and Judge Zachary concurring.))