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Torts; Immunity; Urban Redevelopment; Downtown Revitalization; Nonprofit Art Guild; Lease; Negligence; Steps; Slip and Fall

Meinck v. City of Gastonia, ___ N.C. ___ (No. 130PA17– 10/26/18)

- ***Holding***– Governmental immunity applies to tort claim arising from defendant-City's lease of property to nonprofit Art Guild as part of downtown revitalization efforts in redevelopment area. The provisions of the Urban Redevelopment Law and the Municipal Service District Act of 1973 are statutory indications that an urban redevelopment project undertaken in accordance with these statutes and for the purpose of promoting the health, safety, and welfare of the inhabitants of the State of North Carolina constitutes a governmental function.

- ***Key Excerpt***– Defendant-City argued that the Court of Appeals erred in reversing the trial court's order granting summary judgment for defendant-City based on governmental immunity. The Supreme Court agreed.

The Court utilized its framework for analysis set forth in Estate of Williams v. Pasquotank Cty. Parks & Recreation Dep't, 366 N.C. 195, 732 S.E.2d 137 (2012). The Court stated that the threshold inquiry is whether, and to what extent, the General Assembly has addressed the issue. It was undisputed that: 1) the activity out of which the alleged tortious conduct arose was defendant-City's leasing of the property at 212 West Main Avenue to the Art Guild; and 2) defendant-City purchased this historic and vacant property, and entered into the lease, as part of its efforts in furtherance of urban redevelopment and downtown revitalization. The Court noted the thrust of plaintiff's argument appeared to be that case law allegedly dictates that the government's lease of property to third parties constitutes a proprietary function. The Court disagreed. Focusing upon the analysis set forth by Williams, the Court initially concluded that G.S. 160A-272 was not determinative as to the issue of whether the leasing by a municipality of its unused property constituted generally a governmental or proprietary function, and the Court observed that additional statutes were more specific to the activity engaged in by defendant-City here.

The Court then turned to a detailed analysis of two articles within Chapter 160A of the General Statutes: 1) Article 22, the "Urban Redevelopment Law," wherein the General Assembly has addressed the problem of "blighted areas" and authorized municipalities to engage in "redevelopment projects" in the interest of public health, safety, convenience, and welfare, G.S. 160A-500 to -526, and; 2) Article 23, the "Municipal Service District Act of 1973" (the Municipal Service District Act), G.S. 160A-535 to -544, which allows municipalities to establish "service districts in order to finance, provide, or maintain for the districts one or more of the following services, facilities, or functions in addition to or to a greater extent than those financed, provided or maintained for the entire city," *id*. G.S. 160A-536(a), with services including "[d]owntown revitalization projects," *id*. G.S. 160A-536(a)(2). The Court noted that plaintiff *inter alia* argued that defendant-City's activity here was not a valid downtown revitalization project, because it did not meet any of the "categories of conduct" defined by the legislature in G.S. 160A-536(b). The Court rejected this argument, concluding that there was no genuine issue of material fact with respect to that issue. "Plaintiff neglects to mention that the 'categories' enumerated in the statute are mere examples and are explicitly nonexhaustive. *See id*. [G.S.] 160A-536(b) (providing that '[e]xamples of downtown revitalization projects include by way of illustration but not limitation all of the following'). We conclude that the uncontroverted evidence presented in the trial court establishes that defendant's activity is a valid 'service[ ], function[ ], promotion[ ], [or] developmental activit[y] intended to further the public health, safety, welfare, convenience, and economic well-being of the central city or downtown area.' *Id*. We further conclude that defendant's activity falls under the example in subdivision (7) in that defendant's 'Arts on Main' project is a cooperative public and private initiative wherein a market is established to sell and promote the arts in the downtown area."

Emphasizing the language of Williams, the Court noted error in the analysis set forth in the decision below, which "tend[ed] to suggest that a legislative provision that addresses a particular activity but does not explicitly provide that such activity is a governmental function immune from suit has no bearing on a determination of whether the activity is governmental or proprietary. The inquiry, however, is not merely whether the legislature has explicitly provided that a specific activity is governmental but rather, '***whether, and to what degree***, the legislature has addressed the issue.' Williams, 366 N.C. at 200, 732 S.E.2d at 142 (emphasis added)…. [E]ven when the legislature 'has not directly resolved whether a specific activity is governmental or proprietary in nature,' Williams, 366 N.C. at 202, 732 S.E.2d at 142, a legislative provision addressing the activity may still be relevant—in conjunction with the other Williams factors—to a determination of whether an activity is governmental, particularly if the statutory language suggests 'a significant "statutory indication" that the [activity] is a governmental function,' *id*. at 200, 732 S.E.2d at 141 (quoting Evans [ex rel. Horton v. Hous. Auth. of Raleigh], 359 N.C. [50] at 55, 602 S.E.2d [668] at 672 [(2004)])."

Noting that language from the Urban Redevelopment Law was similar in significant respects to the emphasized language from the Housing Authorities Law (G.S. Chapter 157, Article 1) in Evans, the Court observed that "in both enactments the legislature recognized a serious problem that could not be adequately remedied by private enterprise alone… We conclude that these provisions of the Urban Redevelopment Law [G.S. 160A-502(3)] and the Municipal Service District Act [G.S. 160A-536(b)] are statutory indications that an urban redevelopment project undertaken in accordance with these statutes and for the purpose of 'promot[ing] the health, safety, and welfare of the inhabitants' of the State of North Carolina is a governmental function. [G.S.] 160A-501; *see* Williams, 366 N.C. at 200,

732 S.E.2d at 141 (explaining that a municipality is "an agency of the sovereign" and engaged in a governmental function when it 'is acting "in behalf of the State" in promoting or protecting the health, safety, security, or general welfare of its citizens' (quoting Britt [v. City of Wilmington], 236 N.C. [446] at 450, 73 S.E.2d [289] at 293 [(1957)])."

Upon noting that "while the applicable statutory provisions are 'clearly relevant,'" the Court concluded that the General Assembly had not "directly resolved" whether defendant-City's lease "as part of its downtown revitalization efforts 'is governmental or proprietary in nature,' thus requiring us to examine 'other factors [that] are relevant.' Williams at 201-02, 732 S.E.2d at 142 (emphasis omitted)." The Court *inter alia* observed that the revenues received under the lease by defendant-City were not substantial. Upon recognizing that the additional factors listed in Williams are not exhaustive, *id*. at 203, 732 S.E.2d at 143, the Court considered as relevant the particular—and decidedly noncommercial—nature of defendant-City's undertaking. "Art occupies a unique role in our society and our state, as evidenced by the legislature's tasking the Department of Natural and Cultural Resources in Chapter 143, Article 47 (Promotion of Arts), with various duties connected with promoting the arts in this state, including '[a]ssist[ing] local organizations and the community at large with needs, resources and opportunities in the arts' and '[a]ssist[ing] in bringing the highest obtainable quality in the arts to the State; promot[ing] the maximum opportunity for the people to experience, enjoy, and profit from those arts.'" [G.S.] 143-406(2), (5) (2017). Defendant's undertaking to promote the arts by bringing individual, local artists into the downtown area furthers these aims, which in turn dovetail with the overall goal of revitalizing the downtown area."

The Court concluded its opinion by stating, "After careful consideration of all the factors set forth in Williams, we conclude that—in light of the statutory indications that urban redevelopment activities undertaken to promote the health, safety, and welfare of North Carolina citizens are governmental functions, and the legislative determination that urban blight 'cannot be effectively dealt with by private enterprise' [G.S. 160A-501(4)] alone, as well as the uncontroverted evidence: that defendant's lease of the historic property to the nonprofit Art Guild in order to promote the arts in the downtown area was a valid urban redevelopment and downtown revitalization activity; that defendant did not seek to make a profit; and that the fees charged by defendant were not substantial and did not cover its operating costs—defendant's activity here in leasing the property to the Art Guild so as to promote the arts for the purpose of redeveloping and revitalizing the downtown area was a governmental function. Our decision should not be construed as holding that every urban redevelopment activity is a governmental function or even that every lease of historic property to a nonprofit arts group for the purpose of promoting the arts is a governmental function. Urban redevelopment and downtown revitalization activities defy straightforward definition, and such projects could seemingly cast a wide net encompassing a number of local government endeavors, many of which may be more commercial in nature or less geared towards remedying blighted areas and promoting the public interest than defendant's cooperative enterprise here with the Art Guild…. Because we conclude that the trial court correctly determined that defendant was engaged in a governmental function, we reverse the decision of the Court of Appeals. Because the Court of Appeals determined that defendant was not entitled to governmental immunity, it did not address whether the trial court correctly ruled that defendant did not waive governmental immunity by purchasing liability insurance. We remand this case to the Court of Appeals to address that issue."

- ***Synopsis***– On discretionary review pursuant to G.S. 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 417 (2017), reversing and remanding a June 2016 order granting summary judgment for defendant-City. (In June 2017, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues pertaining to contributory negligence, subsequently deemed not necessary to decision.) Reversed and remanded; discretionary review improvidently allowed in part. Opinion by Justice Hudson. ***Note*****:** The League participated as *amicus curiae* in this case.

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

Land Use; Permits; High Impact Land Use; Asphalt Plant; Definition of Educational Facility; Administrative Building Appalachian Materials, LLC v. Watagua Cty., ___ N.C. App. ___ (No. COA18-188, Watagua– 11/6/18) (Court of Appeals holds that trial court erred by upholding Board of Adjustment's decision denying petitioner's application for asphalt plant. "This case requires us to construe a single provision of a Watauga County land use ordinance prohibiting the construction of an asphalt plant within 1,500 feet of an 'educational facility.' Although this appeal arises in the zoning context, the resolution of this issue provides this Court with an opportunity to reiterate fundamental principles of statutory interpretation applicable to the construction of any law or ordinance. [Petitioner-Appalachian] appeals from the trial court's order upholding the denial of its application for a High Impact Land Use ('HILU') permit. The trial court affirmed the denial of Appalachian's permit because the proposed asphalt plant site was located within 1,500 feet of … a building [the 'Gragg Center'] that serves as the central administrative office for the Watauga County Schools. Because we conclude that the Gragg Center does not qualify as an 'educational facility' based on the plain language of the ordinance's definition of that term, we reverse the trial court's order." The Court emphasized that although Appalachian had raised several arguments, the Court need only address the question of whether the Gragg Center constituted an "educational facility" as that term was defined by the HILU ordinance, because that issue was dispositive of this appeal. "Were we to accept the County's invitation to effectively add new words to this provision of the ordinance, we would be creating a new definition out of whole cloth rather than interpreting the one that is currently before us. This we cannot do. Courts do not possess the authority to insert language into an ordinance or statute that could have been included therein but was not…. Simply put, in construing the HILU ordinance this Court lacks the authority to add words that the drafters themselves left out…. Words matter — be they contained in an ordinance, statute, contract, will, deed, or any other document possessing legal significance. Our holding today is not the result of a hypertechnical reading of the HILU ordinance. Rather, it applies longstanding principles of statutory construction by relying on the ordinance's plain language, which simply does not lend itself to the interpretation sought by the County in this appeal. Accordingly, we hold that the trial court erred in affirming the Board's decision to uphold the denial of Appalachian's permit application." (Citation omitted.) (Appeal by petitioner from September 2017 order. Reversed and remanded. Opinion written by Judge Davis, with Judge Elmore concurring. Judge Dillon concurring in result only by separate opinion.))

Land Use; Permits; Hotel; Central Business District PHG Asheville, LLC v. City of Asheville, ___ N.C. App. ___ (No. COA18-251, Buncombe – 11/6/18) (Court of Appeals affirms where respondent-City appealed from a trial court order reversing the City's denial of petitioner's conditional use permit for the construction of an eight-story, 178,412 square foot hotel, with 185 rooms and on-site parking structure, to be built upon a 2.05 acre parcel located downtown, in area zoned "Central Business District," ("CBD"), which included hotels as a permitted use. "Applying *de novo* review, the trial court properly concluded Petitioner had pre-

sented a *prima facie* showing of entitlement to a CUP to construct their hotel as a permitted use in the CBD zone. Petitioner satisfied its burden of production and, in the absence of competent, material, and substantial evidence to the contrary, is entitled to issuance of the CUP as a matter of law. *See* Dellinger [v. Lincoln Cty.,] ___ N.C. App. at ___, 789 S.E.2d [21] at 27 [(2016)] [('When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record.')]. The City Council's denial of the application was not based upon any competent, material, and substantial evidence *contra* to rebut the Petitioner's *prima facie* showing. Once the superior court made the initial *de novo* determination that Petitioner had presented competent, material, and substantial evidence to establish a *prima facie* case, and no competent, material, and substantial evidence *contra* was presented in opposition or rebuttal to Petitioner's evidence, the superior court properly reversed and remanded for issuance of the CUP as a matter of law. *See id*…. The superior court's order reversing the City's denial of Petitioner's application and remanding for issuance of the CUP is affirmed. This cause is remanded to the superior court for further remand to the City to issue the CUP to Petitioner." (Appeal by respondent-City from November 2017 order. Affirmed. Opinion written by Judge Tyson, with Judge Inman and Judge Berger concurring.))

Torts; Immunity; Governmental Immunity; Public Official Immunity; Public Safety Building Hudson v. Pasquotank Cty., ___ N.C. App. ___ (No. COA18-115, Pasquotank– 11/6/18) (***unpublished***) "Defendants [County] … and former County Manager [collectively 'defendants') … appeal from the denial of a motion to dismiss [plaintiff's] complaint, arguing that they are entitled to governmental immunity from suit under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Plaintiff cross-appeals the dismissal of his complaint against [the former County Manager] in his individual capacity. After careful review of the record and applicable law, we reverse the trial court's denial of Defendants' motion and affirm the dismissal as to [the former County Manager] in his individual capacity. This appeal arises from facts and legal issues substantially similar to those addressed in Phifer v. Pasquotank County, No. COA17-1155, ___ N.C. App. ___, 817 S.E.2d 508, 2018 WL 3734855, 2018 N.C. App. LEXIS 728 (Aug. 7, 2018) (unpublished) ('Pasquotank I'). Both appeals arise from lawsuits brought by former Elizabeth City police officers alleging medical injury from exposure to toxic mold in the County's Public Safety Building (the 'PSB'), and both turn on the application of governmental immunity to defeat the plaintiffs' respective claims." As to defendants' appeal, Court states, "Plaintiff admitted that Defendants operated the PSB for a governmental purpose…. Plaintiff's remaining arguments are substantially identical to those made and rejected in Pasquotank I. 2018 WL 3734855 at *2-4, 2018 N.C. App. LEXIS 728 at *4-8. Consistent with our decision in that case, we hold that the trial court erred in concluding it possessed personal jurisdiction over Defendants." As to plaintiff's cross-appeal, Court states, "Plaintiff argues that the trial court erred in dismissing his complaint against [the former County Manager] in his individual capacity. Defendants counter, asserting that public official immunity insulates [the former County Manager] from individual liability for the claims as pled in the verified complaint. We agree that public official immunity defeats Plaintiff's claim and affirm the trial court's 12(b)(6) order." (Appeal by defendants and cross-appeal by plaintiff from May 2017 orders. Reversed and remanded in part; affirmed in part. Opinion written by Judge Tyson, with Judge Dillon and Judge Zachary concurring.))

Land Use; Permits; Conditional Use Permit; Video Gaming Machines Gieseking v. Town of Grover, ___ N.C. App. ___ (No. COA18-441,

Cleveland– 11/20/18 (***unpublished***) (Petitioners applied for a conditional use permit to operate Crazie Goose in a local shopping center in the Town. (Crazie Goose is based on the "Crazie Overstock Business Model," in which the retailer sells items, and also awards cash prizes, to customers who use "reward points" from their purchases to participate and win in an in-store video-gaming "dexterity test" (which is optional and otherwise requires the participant to stop a virtual "pointer" at a certain spot to convert the "points" into cash). The sought after property is zoned "General Business," with several other businesses operating in its vicinity. According to the Unified Development Ordinance, "Gambling and Video Gaming Machine(s)" are amongst types of industries required to obtain a conditional use permit. After a June 2017 public hearing, the Board of Adjustment unanimously denied petitioners' permit, concluding that Crazie Goose would not be in harmony with the surrounding businesses. Petitioners appealed, and the trial court affirmed the Board's determination. The Court of Appeals reversed the trial court's order and remanded for entry of an order reversing the Board's decision. "The record before this Court does not reflect that competent, material, and substantial evidence showing a lack of harmony was presented to the Board. None of the Board's sixteen findings of fact addressed why Crazie Goose would not be in harmony within the surrounding area. During the public hearing, Board members referred to certain businesses in the vicinity of Crazie Gooses's desired location—a tattoo shop, antique shop, thrift store, post office, restaurant, and a church. However, no witness presented evidence regarding those surrounding businesses and their potential relationship to Crazie Goose's presence. Moreover, while one could assume after reading the hearing minutes that the Board was worried about the optics of a quasi-gambling establishment operating in that location, no evidence validated its concern. Because the Board's 'conclusions [were] unsupported by factual data or background,' its decision to deny Petitioners' conditional use permit was 'incompetent and insufficient to support [its] findings.' Humane Soc'y of Moore Cnty., Inc. v. Town of S. Pines, 161 N.C. App. 625, 632, 589 S.E.2d 162, 167 (2003) (quotations and citation omitted)." In a footnote, the Court observed, "The legality of Petitioner's business model is disputed in pending litigation, but is irrelevant for the purposes of this appeal." (Appeal by petitioners from February 2018 order. Reversed and remanded. Opinion written by Judge Inman, with Judge Bryant and Judge Dietz concurring.))