**2000 North Carolina Land Use Litigation**

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            Below are brief digests of cases decided by North Carolina courts regarding planning, land use, and related issues.  The state supreme court decisions are listed first, followed by court of appeals decisions.  The cases are in chronological order (the more recent cases at the bottom of each list).  Index terms are included in italics for each case.

**North Carolina Supreme Court**

 **Northfield Development Co., Inc. v. City of Burlington**, 352 N.C. 671, 535 S.E.2d 32 (2000)
*Manufactured Housing, Standing, Evidence*
            The plaintiff unsuccessfully sought the rezoning of two tracts to a manufactured home overlay district.  This district was “permitted by right” in three specified residential zoning districts.  One of the tracts was sold by the plaintiffs prior to the litigation, with a provision in the sales contract that the price of the land would be increased a specified amount if the rezoning was approved by a specified date.

            The court of appeals (136 N.C. App. 272, 523 S.E.2d 743) held the plaintiffs had standing to challenge the rezoning, as the additional sales price constitutes the requisite specific personal and legal interest in the matter that directly and adversely affects the plaintiff.  The court held the denial did not violate the mandate of G.S. 160A-383.1 that municipalities not exclude manufactured housing from the jurisdiction as two other manufactured housing overlay districts had been approved by the city.  The statute does not create a mandate for a “substantial presence” of manufactured homes; rather, it prohibits a total exclusion.  The court held the decision to create the overlay district is most analogous to a quasi-judicial decision and thus the mayor is entitled to quasi-judicial testimonial privilege and could not be deposed regarding his actions, intentions, or motives regarding the decision (o any other quasi-judicial or legislative zoning decision).  The case was remanded on the questions of whether the decisions were arbitrary and capricious.  A dissenting opinion of the court of appeals contended the denials violated G.S. 160A-383 by effectively excluding manufactured housing since 1994 (the city had received twelve petitions for manufactured housing overlay districts with over 600 potential lots since the ordinance was adopted in 1989; two petitions with a total of twelve lots had been approved, none since 1994).

On appeal, the supreme court affirmed in a per curiam opinion the court of appeal’s majority opinion on the G.S. 160A-383 interpretation issue and dismissed other aspects of the appeal as improvidently allowed.

**North Carolina Court of Appeals**

 **Stephenson v. Town of Garner**, 136 N.C. App. 444, 524 S.E.2d 608, *rev. denied*, 352 N.C. 156, 544 S.E.2d 243 (2000)
*Conditional use permits, Telecommunication Towers, Liability*
            The town denied a conditional use permit for a telecommunications tower.  The trial court found the denial arbitrary and capricious, that the telecommunications company had submitted substantial evidence justifying denial, and remanded the matter to the town for “further proceedings” in accordance with the judgment.  The town held another hearing and again denied the permit.  While the second denial was on appeal the town and the telecommunications company settled the suit, with the company leasing space on an alternate site (the town water tower).  The owner of the site originally proposed for the tower brought this action alleging interference with contractual relations and unfair trade practices.

            The court held the town had not violated the initial court order, as a second hearing was within the range of “further proceedings” mandated.  The court held cities are immune from liability for unfair trade practice claims.  The court further held the town aldermen had legislative immunity regarding the interference with contract claim based on the conditional use permit denial, noting that decisions on conditional use permits are not ministerial acts as they involves substantial discretion.  The court remanded the question of whether the water tower lease constituted unlawful interference with a contract, noting that since governmental immunity does not extend to proprietary actions, a motion to dismiss was not properly granted.

 **Brown v. City of Greensboro**, 137 N.C. App. 164, 528 S.E.2d 588 (2000)
*Enforcement*
            After being denied a variance, the plaintiff alleged unlawful discrimination by the city in its enforcement of off-street parking regulations for her hair salon.  The court upheld a dismissal of the claim, noting a party alleging unlawful selective enforcement must establish a pattern of conscious and intentional discrimination done with an evil eye and an unequal hand.  Neither mere laxity of enforcement nor exemptions for lawful nonconformities constitute such unlawful discrimination.

 **Kirkpatrick v. Village of Pinehurst**, 138 N.C. App. 79, 530 S.E.2d 338 (2000)
*Nonconformities, Moratoria, Vested rights*
            The plaintiff acquired a 55-acre tract with a nonconforming 50-unit RV campground located on a 13-acre portion of the site.  The village shortly thereafter adopted a moratorium on commercial building pending an update of the comprehensive plan and development ordinance.  During the moratorium the plaintiff acquired village permits for 112 water and sewer taps.  The revised ordinance limited RV park use to 120 units and then only if a special use permit was acquired.  Plaintiff then applied for such a special use permit and the permit was denied.

            The court first held the plain meaning of the ordinance did not allow the geographic area devoted to a nonconforming use to be enlarged, thus expansion of the park beyond the 13-acre portion of the site would be an unlawful expansion.  Second the court held that an increase beyond the 50 pre-existing sites would constitute an enlargement of the nonconformity, not a permissible intensification of the use.  Finally, the court held that since all expenditures by the plaintiff were made with knowledge that the use was nonconforming, there could be no requisite good faith necessary to establish any common law vested rights to an expansion.

 **McKillop v. Onslow County**, 139 N.C. App. 53, 532 S.E.2d 594 (2000)
*Adult businesses, Enforcement, Evidence*
            The plaintiff had previously been ordered by a court not to operate an adult business in violation of county ordinances.  Upon resumption of such a business, the plaintiff was again cited for violation and the trial court entered a finding of civil contempt and order of abatement.  The court upheld the order based on the plaintiff’s willful operation of an adult business in violation of the county’s adult business ordinance (which required such businesses to be 1,000 feet from residences, while the plaintiff’s business was located some 70 feet from a residence).  The plaintiff’s invocation of the Fifth Amendment is permissible, but in a civil action such as this the trier of fact may use that invocation to infer that truthful testimony would have been unfavorable to the plaintiff.

 **Pisgah Oil Company, Inc. v. Western North Carolina Regional Air Pollution Control Agency**, 139 N.C. App. 402, 533 S.E.2d 290, *review denied*, 353 N.C. 268, 546 S.E.2d 111 (2000)
*Civil penalties, Hearings*
            Plaintiff’s employee was observed by the Agency’s inspector unloading fuel from a tanker truck into two storage tanks without using the required vapor recovery equipment.  Upon being approached by the inspector, the employee acknowledged the violation and hooked up the equipment as he had just started filling the second tank.  A civil penalty of $5,000 was assessed related to the first tank and $2,500 regarding the second tank.  On administrative appeal, the $2,500 portion of the penalty was dropped and the $5,000 upheld.  The plaintiff contested the civil penalty as arbitrary and capricious.

            The court held the trial court correctly applied a whole record test in its review and upheld the penalty assessment.  The court also held the agency was not required to conduct a formal evidentiary hearing to review the penalty assessment and there was adequate documentation provided in the detailed minutes of the proceedings to provide an adequate record for judicial review.

 **Sun Suites Holdings, LLC v. Town of Garner**, 139 N.C. App. 269, 533 S.E.2d 525, *review denied*, 546 S.E.2d 397 (2000)
*Conditional use permit, Evidence*
            The town council denied the plaintiff’s conditional use permit for an extended stay hotel on the grounds that the project would materially endanger public safety and would substantially injure the value of adjoining property.  The court held that a whole record review established that this finding was not supported by substantial evidence.  General expressions of a fear of potential increases in crime in the vicinity of any hotel are insufficient to establish a threat to public safety.  Similarly, a recitation of crime statistics with reference to another extended stay hotel in the town, without any foundation as to the how those relate to the subject project, was held inadequate to support a denial.  Speculative comments by a neighbor and a realtor about impacts on property values were likewise held insubstantial evidence on the property value issue.

 **Procter v. City of Raleigh Board of Adjustment**, 140 N.C. App. 784, 538 S.E.2d 621 (2000)
*Interpretation*
            The petitioner proposed to build several duplexes with varying front yard setbacks.  The city staff interpreted the zoning ordinance to require both a minimum and a maximum setback.  The board of adjustment upheld this determination; the trial court reversed and neighboring intervenors brought this appeal (see 514 S.E.2d 745 (1999) for previous litigation on this case regarding the right of the neighbors to intervene).  The court conducted a de novo review and held the plain terms of the ordinance established only a minimum setback.  The requirement for a common setback applies only when there are other buildings on the block’s face and there were no other existing buildings on this block.  Given the lack of any ambiguity in the ordinance, it was error for the board of adjustment to look beyond the language of the ordinance.

 **SBA, Inc. v. City of Asheville**, 141 N.C. App. 19, 539 S.E.2d 18 (2000)
*Conditional use permit, Telecommunications towers*
            Plaintiff appealed the city council’s denial of a conditional use permit for a 175-foot telecommunications tower.  The trial court upheld the denial.  While the proposal met all the technical standards of the ordinance, the court held there was substantial evidence in the record to support conclusions that several general standards were not met. Evidence establishing the tower would be far taller than average building height in the area and would be clearly visible from surrounding residences addressed the standard requiring compatibility with the neighborhood.  Lack of evidence presented by the applicant regarding the feasibility of alternate sites or stealth technology (and that significant coverage gaps would remain even with this tower) supported a conclusion that it had not been established that the use was reasonably necessary.  The lack of data on property value impacts in the immediate vicinity of the towers supported a conclusion that the applicant had not met its burden under the ordinance of demonstrating the absence of harm to neighboring property values.  The court further held the process used for conditional use permit decisions more than met the standards for permit denials under the federal Telecommunications Act (substantial evidence in the record and written findings).

 **Block v. County of Person**, 141 N.C. App. 273, 540 S.E.2d 415 (2000)
*Sanitarians, Liability*
            In 1994 the county staff approved a 1.37 acre residential building lot as suitable for a conventional septic system. Plaintiffs purchased the lot in 1995 and built a house with a conventional septic system, which was approved by the county in 1996.  The system failed a year later.  Investigation revealed there was no site on the lot with suitable soils for a conventional system, so plaintiff was forced to install a low-pressure system (and buy an additional .33 acres for a future repair area).  The county staff initially advised plaintiff that the county would pay for the new system, but later refused to do so (after it was determined the cost would be nearly $9,000).

            The court upheld the trial court’s denial of the county’s motion to dismiss.  The court held the Environmental Health Specialist and the Environmental Health Supervisor could be (and were) sued in both an individual and official capacity.  The court held these two persons were “employees” rather than “officers” because the positions are not defined or created by statute and the persons exercise ministerial rather than discretionary duties (and reiterated that while officers can not be held individually liable for negligence, employees can).  The court further held the public duty doctrine is inapplicable and does not bar an action against the county or the health department.

 **Piland v. Hertford County Board of Commissioners**, 141 N.C. App. 293, 539 S.E.2d 669 (2000)
*Appellate procedure, Parties*
            This case involved a challenge to the county’s rezoning of 1,600 acres to a heavy industry zoning district in association with a proposed steel mill and recycling facility.  The complaint named the board of commissioners as the defendant.  The county moved to dismiss, contending Hertford County was the proper defendant, not the board of commissioners, and that the two-month statute of limitations had run so the complaint could not be amended to add the county as a defendant. The plaintiffs then moved to substitute the county as defendant and both parties moved for summary judgment.  The trial court denied the motion to dismiss and found for the defendants on summary judgment.  The court held the case should have been dismissed for failure to name the county as a defendant as the motion to amend to add the county as the proper defendant (which could be granted in the trial judge’s discretion) could not relate back (as this was adding a party, not just correcting a misnomer) and was thus barred by the statute of limitations.

 **Buckland v. Town of Haw River**, 141 N.C. App. 460, 541 S.E.2d 497 (2000)
*Subdivisions*
            In 1956 plaintiff’s predecessor in title recorded a plat that included a U-shaped road within the subdivision, with both ends of the road connecting to a state highway. The right of way for the U-shaped road was dedicated to the State Highway Commission. The two prongs of the road were constructed, but the back portion (parallel to the state road) was not constructed.  The plaintiff subsequently acquired the large undeveloped lot along the backside of the unimproved road and proposed a further subdivision of that lot into eleven additional lots.  The town conditioned subdivision approval upon the plaintiff constructing the road, curb, and gutter on the previously dedicated right of way.  The trial court upheld the town.

            The court of appeals reversed.  The court interpreted the subdivision enabling statute, G.S. 160A-372, as only allowing requirements relative to provision of streets within the subdivision.  Since the unpaved right of way was adjacent to rather than within the subdivision, the court held the city had no authority to compel its improvement.  The court noted the statute allows a requirement for payment of a fee in lieu of construction for necessary roads both within and outside of the subdivision, but since the requirement here was for developer construction rather than payment of a fee, the plat denial was improper.  The court remanded the issue of the adequacy of the city’s maintenance of the portion of the roads that had been previously improved.

 **Davis v. Town of Stallings Board of Adjustment**, 141 N.C. App. 489, 541 S.E.2d 183 (2000)
*Adult entertainment, Evidence*
            The plaintiff obtained a permit to operate a video store with an adult video room.  The permit contained an explicitly condition that a majority of all videos must not be adult videos.  Upon subsequently determining the facility was selling adult magazines and novelty items, the town concluded the facility was an unpermitted “adult establishment.”  The zoning ordinance used the definition of adult establishments included in G.S. 14-202.10.  At the board of adjustment hearing the town staff presented evidence that a substantial number of adult videos, magazines, CD’s, and novelty items present.  The plaintiff invoked the Fifth Amendment and did not testify at the hearing.  The board then held the facility violated the provisions of the permit limiting the store to trade in videos only and that it constituted an adult establishment.  The trial court affirmed.

            The court upheld the decision.  The court held that while the plaintiff could invoke the Fifth Amendment, the board could infer in this civil matter that failure to refute damaging evidence meant the plaintiff was running an unlawful adult establishment.