**2001 North Carolina Land Use Litigation**

David W. Owens
Institute of Government
The University of North Carolina at Chapel Hill
© 2001

            Below are brief digests of cases regarding planning, land use, and related issues.  The state supreme court decisions are listed first, followed by court of appeals decisions, followed by federal cases arising in North Carolina.  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**

**Westminster Homes, Inc. v. Town of Cary Zoning Board of Adjustment**, 354 N.C. 298, 554 S.E.2d 634 (2001)
Interpretation
            Plaintiffs applied for and were granted a conditional use rezoning and concurrent conditional use permit for a single family residential development (at a density higher than allowed by the previous zoning).  One permit condition required construction of a seven foot high fence located 45 feet off the property line.  The permit required a fifty-foot natural and undisturbed buffer along the property line and included detailed specifications for the fence, with a deed disclosure to purchasers regarding the placement, integrity and maintenance of the fence.  The town issued notices of violation when home purchasers in the development subsequently installed gates in this fence.  The board of adjustment upheld the zoning officer’s determination that the permit provisions did not allow construction of gates in this fence.  The trial court reversed, but the court of appeals upheld the staff and board of adjustment’s interpretation.

            The court affirmed.  The court noted several relevant principles of statutory (and ordinance) construction:  examination of the language, spirit, and goal of the ordinance; protection of property rights by excluding limitations not clearly included within the ordinance; language dealing with a specific situation controls over provisions with more general application; and, plain and unambiguous terms should be given effect, with judicial interpretation applicable only if the language is unclear.  The court noted that the more specific terms of a conditional use permit can be and typically are used to place additional project–specific restrictions and here a close and careful reading of the permit indicated an intention to have a fence without gates to provide privacy and a wide, comprehensive buffer.  The court noted the petitioners voluntarily agreed to the buffer and could not subsequently attack it as a taking. (Note:  The Cary ordinance involved was amended shortly after this permit to require title or an easement to such buffers to be held by a homeowners association rather than being conveyed to individual lot owners.)

**North Carolina Court of Appeals**

 **Potter v. City of Hamlet**, 141 N.C. App. 714, 541 S.E.2d 233, *review denied*, 353 N.C. 379, 547 S.E.2d 814 (2001)
*Extraterritorial, Statute of limitations, Nonconformity*            The plaintiff in 1997 purchased an existing grocery store in the Hamlet extraterritorial area and subsequently applied for an ABC permit for off-premise beer sales.  The town advised the ABC Commission and the plaintiff that the store was nonconforming (it was in a heavy industry zoning district that did not allow retail uses) and that adding beer sales would be an unlawful expansion of the nonconformity. Rather than appeal this determination to the board of adjustment, plaintiff sought a rezoning, which was ultimately denied. The plaintiff then brought this action, alleging the extraterritorial boundary ordinance was invalid as it had not been recorded with the county register of deeds as required by G.S. 160A-360(b).

            The court held the plaintiff’s challenge was barred by the two-month statute of limitations. When the extraterritorial boundary ordinance was adopted in 1994, plaintiff’s predecessor in title had received mailed notice of the proposed ordinance, all published notice and hearing requirements were met, a copy of the map was filed with the city clerk, and the ordinance itself contained a metes and bounds description of the boundary. The court held this constituted “substantial compliance” with the statute and gave all persons affected sufficient notice that they were covered despite the failure to file a copy with the Register of Deeds. The court also held that since the zoning officer’s determination regarding the expansion of the nonconformity was not appealed to the board of adjustment, that issue could not be collaterally attacked on judicial review.

 **Knotts v. City of Sanford**, 142 N.C. App. 91, 541 S.E.2d 517 (2001)
*Building code, Demolition, Res judicata*
            After investigating a complaint and conducting the requisite hearing, the city in August 1997 found an apartment house owned by the plaintiff to be in such a dilapidated state the it was dangerous to life, health, and other property and constituted a public nuisance. The plaintiff was ordered to repair or demolish the structure within 90 days. Upon failure of the plaintiff to comply, the city in December 1997 passed an ordinance directing the town to repair or demolish the structure. In early 1998 the plaintiff sued to block the demolition and the parties entered a Consent Order requiring the plaintiff to have a contract for repair or demolition by March 1998 and all work to be completed by June, with the city to demolish the structure if this was not done. The plaintiff again failed to comply and the city proceeded to secure bids for demolition. The plaintiff unsuccessfully sought to have the court amend the Consent Order. When the city entered a contract for demolition in July 1999, plaintiff instituted this action alleging a taking and seeking an injunction to prevent demolition. In October 1999 the trial court dismissed the second suit on grounds of res judicata and lack of subject matter jurisdiction (but stayed demolition pending judicial appeals). The court upheld the dismissal of the second suit on res judicata grounds.

 **Mann Media, Inc. v. Randolph County Planning Board**, 142 N.C. App. 137, 542 S.E.2d 253, *review granted*, 547 S.E.2d 440 (2001)
*Evidence, Special use permit, Telecommunications tower*            The county denied the plaintiff’s application for a special use permit to construct a 1,500-foot telecommunications tower. On its initial judicial appeal the trial court remanded the case for a de novo hearing because the county did not specify its reasons for denial. On remand, a new hearing was held and the permit again denied on the grounds that it was not in harmony with the area and that it would have substantial adverse impacts on neighboring property values. The trial court reversed, ruling there was not substantial, competent, and material evidence in the record to support these conclusions.

            The court affirmed the decision to reverse the planning board. The court held that inclusion of a use as a “special use” within a district establishes a prima facie showing of harmony with the surrounding issues and the burden is on the challengers to establish that it is not.  Here there was no evidence of a comprehensive plan for the area and no evidence that the surrounding area was substantially different from the areas around other permitted towers. As to impacts on property values, the opponent’s witnesses (a realtor and a builder) offered only speculative opinions about values without supporting facts or examples. Since the applicant’s witness was a professional appraiser entitled to present expert opinion, the board could rely on this testimony in finding there would be no adverse impacts on neighboring property values.

 **Claremont Property Owners Association, Inc. v. Gilboy**, 142 N.C. App. 282, 542 S.E.2d 324 (2001)
*Restrictive covenants*
            At issue was interpretation of the provisions in the restrictive covenants assessing road maintenance costs to each lot on a pro rata basis. Here two lots in the original plat were later combined into a single lot by the developer and then sold and the question was whether the purchaser should be assessed road maintenance fees based on owning one or two lots. The court held the obligation to pay the fees attached to each lot when it was created and the individual lot obligations were not extinguished by a recombination; thus the owner is liable for payment for two lot shares.

 **Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem**, 142 N.C. App. 290, 542 S.E.2d 296 (2001)
*Landfill*
            This case involved a challenge to the utility commission’s selection and city approval of a site adjacent to an existing landfill for a proposed landfill expansion.  G.S. 160A-325 requires consideration of alternative sites and socioeconomic/demographic data if a proposed site is located within one mile of an existing landfill. The court held that while expansion of a landfill into an adjacent site that requires a rezoning for such is subject to this law, this decision was exempt under the terms of the statute because the city had approved the site, funds for acquisition, and a lease for management of the site prior to the effective date of these requirements.

 **Craig v. County of Chatham**, 143 N.C. App. 30, 545 S.E.2d 456, *review granted*, 354 N.C. 68, 553 S.E.2d 37 (2001)
*Preemption, Agriculture*
            This case challenged the authority of the county to adopt three ordinances regulating swine farms: (1) a swine ordinance adopted under the general police powers of the county; (2) an identical ordinance adopted as a board of health rule; and (3) zoning regulations on large hog farms.  The court held the first two regulations were preempted by state law but the zoning regulations were authorized by G.S. 153A-340(b)(3).

            The swine ordinance/board of health rules established setback distances and buffers for swine farms and waste disposal spray fields for those farms with 250 or more pigs. These requirements were more stringent than state regulations. The ordinances also required a financial guarantee for waste lagoon clean-up and violation remediation. The court held that while there was not an explicit state preemption of local regulation, the state laws on the subject provide a complete and integrated system of regulation that impliedly occupies the entire field. Factors noted as important in reaching this conclusion were inclusion of detailed permitting, inspection, setbacks, buffers, and notice requirements in the state law as well as statements of purpose in the law regarding the need for a coordinated management program that minimizes burdens on farmers.

**Northeast Concerned Citizens v. City of Hickory**, 143 N.C. App. 272, 545 S.E.2d 768, *review denied*, 253 N.C. 526, 549 S.E.2d 220 (2001)
*Standing*
            The plaintiff citizen group challenged the city’s rezoning of a 29.5 acre tract to a Planned Development Shopping Center District (which also required the concurrent approval of a Preliminary Development Concept Plan). The purpose of the rezoning was construction of a Wal-Mart on the site. The developer intervened and challenged the standing of the plaintiff nonprofit corporation.

            The court held that a person must have a specific personal and legal interest in the subject matter to have standing to challenge a rezoning and that a corporation must either have such an interest itself or all of its members/shareholders must have such an interest. Since the record in this case indicated that at most only twelve of the plaintiff’s 114 members had such an interest, the plaintiff corporation had no standing.

 **Devaney v. City of Burlington**, 143 N.C. App. 334, 545 S.E.2d 763, *review denied*, 353 N.C. 724, 550 S.E.2d 772 (2001)
*Rezoning, Manufactured housing*
            The court held that where a zoning ordinance’s table of uses specifies that a Manufactured Housing Overlay District is “permitted by right” in a particular district, the decision on a petition to apply that district to a particular site is properly considered using quasi-judicial rather than legislative procedures.  Wile the city council retains the discretion to approve or deny the petition, there must be a fair, evidentiary hearing with appropriate findings of fact. Since the city council here conducted a legislative hearing with substantial attention given to citizen opinion rather than factual evidence, the court remanded the matter to the city for a quasi-judicial hearing.

 **Williamson v. Town of Surf City**, 143 N.C. App. 539, 545 S.E.2d 798 (2001)
*Streets, Beach access*
            The town obtained a state grant to construct a storage and bathroom facilities on a lot it owned and used for beach access purposes.  CAMA setbacks required that part of the construction extend into the adjacent street right-of-way. The town then followed all the provisions of G.S. 160A-299 regarding notice, hearing, and findings to close a portion of the adjacent street and to use that portion for its beach access facility. The neighbor across the street objected and filed this challenge.

            The court held all proper procedures had been followed by the town, including a finding that the plaintiff would not be deprived of reasonable access and that the closing was not contrary to the public interest. The intent of the town, and its intended subsequent use of the portion of the street closed, is irrelevant.

 **Nazziola v. Landcraft Properties, Inc**., 143 N.C. App. 564, 545 S.E.2d 801 (2001)
*Subdivision, Standard of review*
            This case was brought by neighbors challenging the city’s approval of a subdivision plat on the grounds that the decision was arbitrary and capricious. The property involved was a 37-acre tract zoned for single-family residential use.

            The court held a whole record test should be applied to determine if the decision was supported by substantial evidence. If all of the technical standards of the subdivision ordinance are met, plat approval must be issued. Since this is a ministerial (or administrative) decision, no evidentiary hearing is required as part of the decision-making process and the city staff has no authority to impose or consider factors beyond the technical standards of the ordinance.

 **Coffey v. Town of Waynesville**, 143 N.C. App. 624, 547 S.E.2d 132 (2001)
*Hearing procedures, Building code, Unsafe buildings, Demolition*
            The plaintiffs owned a dilapidated building that had been a concern of the town for over twenty years. In March 1998 a city enforcement officer inspected the property and determined it to be unsafe pursuant to G.S. 160A-426 and so posted it. In April the property was re-inspected, notices were re-posted, and a notice of hearing sent to the plaintiffs. A hearing was held on May 4, where the plaintiffs contended they were unaware of the problems and wished to make repairs. However, it was established at the hearing that the property was listed in the tax office as having no value and the enforcement officer noted its long state of disrepair and the plaintiffs’ long standing record of neglect. The officer thus concluded the structure was beyond repair and entered an order of demolition (to be completed by July 6). This order was appealed to the city council. On May 26 the city council heard an appeal of this order, affirmed the demolition order, and set July 17 as a deadline for action. The council’s order was appealed to the courts, so demolition was stayed. Upon stipulation of the parties, the city council held a second evidentiary hearing on the demolition appeal in June 1999 in order to establish a record for judicial review. In August 1999 the trial court affirmed the demolition order.

            The court held the city council, when acting on a demolition order appeal, sits in a quasi-judicial capacity, similar to its role in deciding a special or conditional use permit. Further, a trial court reviewing this decision sits as an appellate court, much as when reviewing other quasi-judicial land use decisions by a local government board. Since the plaintiffs’ essentially argued an error of law had been made (contending improper procedures had been followed and insufficient time given for repairs), the trial court properly conducted a de novo review of the demolition order.

            The court concluded all of the statutory procedures to condemn the building as unsafe had been complied with by the city. The court held the decision to order demolition rather than repair was supported by the evidence and that the plaintiff had reasonable opportunities to commence repairs and had failed to do so, thus the order to demolish was not in error.

 **Greene Citizens for Responsible Growth, Inc. v. Greene County**, 143 N.C. App. 702, 547 S.E.2d 480, *review denied*, 553 S.E.2d 413(2001)
*Landfill*
            The plaintiff citizen group alleged the county did not follow the requirements of G.S. 153A-136(c) when decided to locate a new landfill on a site adjacent to the existing landfill (which was being closed). The statute requires the county to consider alternative sites and socioeconomic and demographic data prior to selecting a site within a mile of an existing landfill. Plaintiffs established the county had secured an option on the expansion site prior to the hearing and that all alternatives listed were in areas previously deemed excluded from consideration.

            The court held the plain meaning of “consider” requires a careful and thoughtful examination and “alternatives” require that there be two or more sites to choose between. The court further held that while the county is entitled to a presumption that it considered alternative sites, there was no evidence in the record to make a conclusion that such had been done. The case was therefore remanded.

 **Williams v. North Carolina Department of Environment and Natural Resources**, 144 N.C. App. 479, 548 S.E.2d 793 (2001)
*CAMA, Variances*
            The petitioner was denied a CAMA permit to construct a freezer, storage building and bulkhead on a canal-front lot in Englehard. There had been two residences on the lot previously, which were removed some years prior to the application, and wetland species had re-emerged on the property.  The petitioner was then denied a variance to construct the structures. On appeal the trial court held the variance denial was unsupported by material evidence, was arbitrary and capricious, and the court issued a variance.

            The court applied the whole record test and upheld the determination that the variance denial was unsupported by material evidence. In determining “unnecessary hardship,” the critical issue is whether the petitioner can make reasonable use of the property without a variance. Pecuniary loss alone does not constitute unnecessary hardship, but it is a factor to be considered. The fact that the petitioner has other lands nearby is irrelevant as the inquiry must focus on the property involved in the petition. The court also found the record devoid of specific evidence regarding how peculiar or unique the situation on the petitioner’s property is (wetlands emerging on a previously disturbed site) and the extent to which this situation had been considered in adopting the regulations (both being mandatory statutory standards for a CAMA variance). The court held, however, that the trial court had no authority to issue a variance, but rather should have remanded the matter for further proceedings consistent with its ruling.

 **Durham Video & News, Inc. v. Durham Board of Adjustment**, 144 N.C. App. 236, 550 S.E.2d 212, *review denied*, 354 N.C. 361, 556 S.E.2d 299 (2001)
*Inspections , Adult uses*
            This case turned on whether the establishment operated by the plaintiff was an adult business (which was not allowed in the general commercial zoning district in which the store was located). City zoning officers twice visited the store and briefly viewed its merchandise. Based on these visits, the officers sought and obtained an administrative search warrant. Pursuant to the warrant, the officers returned to the store and conducted a more thorough inspection, including recording a forty minute video of the merchandise, viewing several videos offered for sale, and making measurements of the store.

            The court held that while a zoning officer can enter a commercial establishment and view everything as a normal customer would without a warrant, a more intrusive detailed inspection must be conducted pursuant to a valid search warrant. In this instance, the initial inspections were within the bounds of a warrentless inspection and in fact properly served as the basis for securing a warrant. The court also held it was permissible for the staff and board of adjustment to base a finding that a preponderance of the merchandise offered for sale was adult material based on a review of titles and pictures on covers (rejecting the plaintiff’s contention that the entirety of all publications and videos must be reviewed).

The court also held that the city’s failure to comply with city rules to provide the petitioner with a copy of the written staff report being provided to the board of adjustment ten days prior to the hearing (it was provided two days in advance) did not prejudice the plaintiff as the staff report included only information previously available to the plaintiff or that was already a matter of public record (copies of the notice of violation, plaintiff’s appeals, a site plan, relevant sections of the ordinance, and summaries of court cases on adult entertainment regulation).

 **Kerik v. Davidson County**, 145 N.C. App. 222, 551 S.E.2d 186 (2001)
*Contract zoning, Conditions*
            Davidson County rezoned some 140 acres tract consisting of seven separate parcels to commercial, industrial, and office districts (most of the property was previously zoned for residential use, with some industrial zoning).  All of the new zoning districts were general use districts.  The petitioner for the rezoning submitted a memo outlining the proposed uses of each parcel, various conditions that would be imposed on each (including buffers), and how an existing nonconformity would be relocated.  The petitioner also sent a memo to each governing board member stating an intent to offer land to the county for a park and to provide sewer to these parcels.  The staff and planning board recommended approval.  The governing board then approved the rezoning, but added a condition that a 100 foot buffer be added to one of the parcels.  On appeal by neighbors, the trial court invalidated the rezoning as illegal contract zoning.

            The court held the rezoning was a legislative decision and the standard for judicial review was a whole record review to determine whether the decision was arbitrary and capricious (and that it was inappropriate for the trial court to consider the matter de novo).  However, rather than remand, the court addressed the merits of the contract zoning claim in the interest of judicial economy given that the whole record was before the court.  The court held there was no bilateral agreement between the county and the petitioner in that all of the representations of the petitioner were unilateral and the county’s imposition of the buffer was unilateral, there be no reciprocal assurances in either instance.  The court noted the county explicitly considered all potential uses of the proposed zoning districts, not just those proposed by the petitioner, and the planning board and governing board discussed the potential land use impacts of the rezoning (compatibility with surrounding uses, traffic concerns, and economic impacts).  However, the court held the imposition of an additional 100 foot buffer requirement violated the uniformity requirement, was separable from the balance of the rezoning, and was invalid.

 **Massey v. City of Charlotte**, 145 N.C. App. 345, 550 S.E.2d 838, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001)
*Rezoning, Conditional zoning*
            Neighbors challenged a rezoning of 42 acres from residential to commercial in order to construct a shopping center.  The petitioner submitted a site plan and list of proposed conditions for development of the site as part of the rezoning request.  The city approved a conditional use district rezoning and concurrently issued a conditional use permit for the project, but conducted the entire proceeding as a legislative rezoning.  The trial court invalidated the rezoning, holding state law requires a two-step process (CUD rezoning and CUP permit) and this necessitates a quasi-judicial proceeding for at least the permit aspect of the decision.

            The court reversed and held the city has authority to engage in a purely legislative conditional zoning without the necessity of an accompanying conditional use permit.  The petitioner’s submission of detailed plans for site development does not constitute illegal contract zoning because this is a unilateral promise from petitioner, not a bilateral agreement.

 **Morris Communications Corp. v. City of Asheville**, 145 N.C. App. 597, 551 S.E.2d 508, *review granted*, 354 N.C. 364, 556 S.E.2d 574 (2001)
*Protest petition, Signs*
            The plaintiff filed a protest petition objecting to the city’s proposed text amendment to its development ordinance regarding off-premise advertising signs.  The city unanimously adopted a requirement that off-premise signs be limited to six square feet and then by a four-to-three vote adopted a seven year amortization requirement for all nonconforming signs.  The plaintiff owned “a vast majority” of the signs required to be amortized.

            The court held the protest petition provisions of G.S. 160A-385 apply to text amendments as well as zoning map amendments.  To be valid, a protest petition must be signed by the owners of 20% of the “area of the lots included in a proposed change.”  Here the city determined there were existing off-premise signs on 244 acres, there were 4,928 acres in the city zoned to allow off-premise signs, and the entire city zoning jurisdiction was 32,700 acres.  The plaintiff contended the 20% calculation should be based on 244 acres, the city contended 32,700 acres was the proper denominator for the calculation.  The court held that since the amortization requirement explicitly applied to all off-premise signs made nonconforming by subsequent text or map amendments to the ordinance, it would be improper to limit the calculation to only the area of the lots immediately affected because they contain an existing nonconforming sign.  The court held, as a minimum, all of the land zoned to allow off-premise signs must be included in the calculation.

 **Councill v. Town of Boone Board of Adjustment**, 146 N.C. App. 103, 551 S.E.2d 907, *review denied*, 354 N.C. 360, 560 S.E.2d 130 (2001)
*Intervention, Appellate procedure, Standing*
            The plaintiff was denied a conditional use permit to develop a large single-family project in Boone and appealed that denial to superior court.  Neighbors who opposed the project sought to intervene in the appeal, alleged the town intended to settle the suit by issuing a permit, and sought to have the denial upheld.  The trial court dismissed the motion to intervene upon finding the neighbors did not have special damages distinct from the rest of the community.  The trial court then entered a consent judgment remanding the matter to the board for issuance of the permit.

            The court held the matter was not moot due to the subsequent issuance of the permit on remand.  Here the neighbors not only appealed the denial of their motion to intervene, they also contended any settlement was illegal, thus the issue is not moot.  The court held that Rule 24 (rather than an “aggrieved” party analysis) governs the right to intervene in all civil actions, including appeals pursuant to G.S. 160A-388 (e).  Here the neighbors undisputed allegations that dramatically increased traffic volume would affect their property value and safety are sufficient to establish that they are interested parties; the fact that the board intended to settle and issue the permit satisfied the requirements that there be a practical impairment and inadequate representation of their interests absent intervention.  The case was remanded for further proceedings on the merits of the neighbors’ complaints regarding permit issuance.

 **County of Durham v. Roberts**, 145 N.C. App. 665, 551 S.E.2d 494 (2001)
*Agricultural uses*
            The defendant owned a 113 acre tract in Falls-Jordan watershed in northern Durham County.  The property was in a Rural zoning district that prohibits resource extraction.  The defendant wanted to operate a recreational horse farm on the site. The soil on much of the property was of negligible nutritional value and would not support a pasture for the horse farm and several small ponds on the site were inadequate for that proposed use as well.  In order to address these site problems, the defendant proceeded to excavate two ponds and to excavate about three feet of clay overlaying the site (with the clay sold to the excavation contractor and removed from the site).  The county contended this was unlawful resource extraction and issued five citations to the defendant for zoning violation and secured a temporary restraining order to halt the work (about half of which had been completed).  Adjoining neighbors intervened.

            The court held the activity in question to be within the G.S. 153A-340 exemption from county zoning for bona fide farm purposes.  That statute defines farming to include activity relating to and incidental to the production of livestock.  The court held that horses are “livestock,” that breeding horses for the enjoyment of one’s family is the “production” of livestock even if no commercial sales or use of the horses is involved, and that the excavation for pasturing and water purposes was incidental to this production.

 **Guilford County v. Eller**, 146 N.C. App. 579, 553 S.E.2d 235 (2001)
*Enforcement*
            The defendant husband and wife were cited for numerous zoning violations for maintaining junked motor vehicles on several properties not zoned for such.  By the time of hearing at superior court the civil penalties involved had reached $300,000.  The husband and the attorney for the husband and wife appeared at the hearing and entered a handwritten memorandum of judgment.  The husband testified under oath that he understood and agreed to the consent judgment, all persons present signed the agreement, which was later formalized by the county attorney and entered by the judge.

            On appeal the defendants contend the judgment was not effective since the wife, a named party, was not present and had not signed the consent judgment.  The court held that the attorney present represented both husband and wife.  There is a presumption that an attorney acts within his or her authority and with the consent of the client.  Since no evidence was presented to rebut that presumption, the attorney’s signature is binding on the wife.

 **PNE AOA Media, LLC v. Jackson County**, 146 N.C. App. 470, 554 S.E.2d 657 (2001)
*Moratoria, Vested rights, Signs*
            In July 1999 the plaintiff contacted Jackson County regarding a proposal to erect a billboard in the county and was advised the county had no zoning and no permits were required.  On August 13-14 the plaintiff erected a steel monopole for the billboard.  On August 18 the county exercised its general ordinance-making authority to adopt a sixty-day moratorium on new billboards (with no published notice and no public hearing on the moratorium ordinance).  On August 20 the plaintiff applied for a state DOT permit for the billboard (it had not applied earlier because it first had to acquire and remove another preexisting billboard located within 300 feet of its new billboard).  DOT denied the permit on the basis of the county moratorium.  The trial court upheld the denial and ordered the sign removed.

            The court held the county had authority to adopt the moratorium and such was not preempted by state sign regulations.  The court noted that since the county explicitly used the general police power rather than zoning authority for its moratorium, the procedural requirements of notice and hearing under the zoning enabling authority are not applicable.  The court held the plaintiff had no common law vested right to the billboard because their expenditures were not in good faith (they were made prior to securing the state permit they knew was required, which was well outside the normal business practices of the plaintiff) and not in reliance on required permits (even though no county permits were required at the time of expenditure, the state permit was).  The court held that since the moratorium was not adopted under the zoning authority, the statutory site specific development plan vesting of GS 153A-344.1 was inapplicable.  Since there was no vested property right, there was no taking and no deprivation of protected property without due process (and the court noted that in any event due process does not require published notice and hearing prior to adoption of an ordinance under the general police power).

 **Michael Weinman Associates General Partnership v. Town of Huntersville**, 147 N.C. App. 231, 555 S.E.2d 342 (2001)
*Vested rights, Conditional Use Districts*
            In 1991 plaintiff secured a conditional use district rezoning and site-specific development plan approval for a mixed use development on a 168-acre parcel in Mecklenburg County.  The development included single and multi-family housing, a school, and a shopping center.  In 1997 the town extended its extraterritorial zoning jurisdiction to the site and adopted conditional use district zones for the site that allowed all of the uses previously permitted by the county.  Plaintiff sold the residential and school portions of the site and retained the commercially zoned property.  In 1999 the town rezoned the commercial site to “neighborhood residential.”

            The town zoning ordinance specifically provided that a conditional use district rezoning constitutes a site-specific development plan under G.S. 160A-385.1 and such vests a right to develop for three years.  Thus the court held the plaintiff had secured a statutory vested right.  The court did note that the vested right did not preclude the town from enforcing newly enacted requirements regarding building specifications, location of utilities, street layout, and other details required by the town’s permitting process.

 **Tucker v. Mecklenburg County Zoning Board of Adjustment**, 148 N.C. App. 52, 557 S.E.2d 631 (2001), *aff'd in part*, 356 N.C. 658, 576 S.E.2d 324 (2003)
*Interpretation, Accessory uses, Kennel*
            The respondents operated a non-profit kennel on their three-acre residential lot.  The operation involved the rescue of stray and unwanted dogs.  Ten to fifteen dogs were kept and cared for in pens adjacent to the respondents’ home.  The animals were offered for adoption, with a contract for appropriate care of the animal being required upon adoption (voluntary donations were also accepted).  Upon complaint by neighbors, the zoning staff ruled the facility a commercial kennel not permitted in this multi-family residential zoning district.  The board of adjustment reversed, deeming the kennel an acceptable accessory use rather than a commercial kennel.  The neighbors appealed and the trial court agreed this was a commercial kennel and not allowed.

            The court reviewed the alleged error of law regarding interpretation of the terms “commercial kennel,” “private kennel,” and the principal/accessory use distinction.  The court noted that although this legal question was subject to de novo review, some deference should be given the board of adjustment’s determination and it should be overturned by a court only if the board acted arbitrarily, oppressively, manifestly abused its authority, or committed error of law.  Given there was no breeding, selling, grooming, training, or overnight boarding of animals, the court upheld the board’s determination that this constituted a permissible private kennel and an accessory use.

 **MMR Holdings, LLC v. City of Charlotte**,148\_ N.C. App. 208, 558 S.E.2d 197 (2001)
*Laches, Enforcement*
            The plaintiff automobile dealer contended the city’s delay in enforcing provisions of its sign regulations regarding balloons, pennants and other decorations precluded this enforcement action.  The board of adjustment and trial court upheld the enforcement action.  The court made a de novo review of the alleged error of law and affirmed.  The court noted that to establish a defense of laches, the plaintiff must show an unreasonable delay that worked to the plaintiff’s disadvantage.  Mere passage of time alone is insufficient.  Here there was no evidence the city ever told the plaintiff the signs were in compliance (and in fact a warning citation was issued early in the dispute) and there was no evidence the plaintiff spent any money based on city assurances.

***Selected Federal Cases Arising in North Carolina***

**American Legion Post No. 7 v. City of Durham**, 239 F.3d 601 (4th Cir. 2001)
*First Amendment, Flags*
            The court upheld a Durham ordinance regulating the size of all flags (including U.S. flag) as a reasonable time, place and manner restriction of speech that preserved adequate alternative avenues for expression and was supported by the city’s substantial aesthetic interests.  The regulation limited the height and number of flag poles and the number and maximum size of all flags.  In nonresidential districts flagpoles were limited to a maximum height of seventy feet and flags to 216 sq. ft.; in residential districts the limits were twenty-five feet high for flagpoles and forty sq. ft. for flags.  There was also a limit of three flagpoles per property and two flags per flagpole and setback requirements.