**2002 North Carolina Land Use Litigation**

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            Below are brief digests of reported decisions regarding planning, land use, and related issues in North Carolina. 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**

 **Good Neighbors of South Davidson v. Town of Denton**, 355 N.C. 254, 559 S.E.2d 768 (2002)
Spot zoning
            Piedmont Chemical Industries owned a fifty-acre in Davidson County on which they operated a chemical-storage facility. Upon adoption of county zoning for the property, the property was placed in a rural agricultural district and the facility became a nonconforming use. After two unsuccessful attempts to have the county rezone the property to industrial use, the town manager and county economic development officials encouraged the company to seek satellite annexation from the Town of Denton (the principal corporate limits were over two miles away). Shortly after the 1998 satellite annexation, the town zoned ten acres of the site as light industry and forty acres as heavy industry. The trail court invalidated the zoning as illegal spot and contract zoning. The court of appeals reversed and held for the town.

            The supreme court held this to be illegal spot zoning. In a footnote, the court confirmed that unlike regular rezoning, spot zoning does not enjoy a presumption of validity; a clear showing of a reasonable basis must support it. The court then applied the *Chrismon* spot zoning reasonableness analysis. The court found these factors to be persuasive:  (1) the property had been reclassified from the county’s most restrictive to the town’s least restrict district; (2) there was no evidence the town rezoning was consistent with a comprehensive plan; (3) while there were benefits of the rezoning for the owner, there were no corresponding benefits for neighbors or the surrounding community (no evidence the neighbor’s property values would be enhanced, no neighborhood support for the project or use of its products), and substantial potential negative impacts of the neighbors (noise, odor, chemical spills, increased truck traffic). Further, the court held the analysis of relative benefits and detriments of the spot zoning must include analysis of the area and persons actually affected, not just those within the rezoning government’s jurisdiction. The fact that this property was a satellite annexation and the town was politically insulated from the neighbors’ concerns led the court to be particularly sensitive to this balancing of benefits and detriments (the court characterizing the town’s action as a “caviler unreasonableness”).

 **Capital Outdoor, Inc. v. Guilford County Board of Adjustment**, 355 N.C. 269, 559 S.E.2d 547 (2002), (*per curiam, reversing* 146 N.C. App. 388, 552 S.E.2d 265 (2001)
*Interpretation, Signs*
            The Guilford County zoning ordinance prohibited billboards within 300 feet of “any residentially zoned property.”  The plaintiff applied for a permit for a sign within 300 feet of an “agricultural” zoning district, a district primarily intended to accommodate agricultural uses but which allows residences as a use of right. The staff denied the permit. The board of adjustment affirmed that interpretation of the ordinance and denied a variance. The trial court affirmed.

A divided court of remanded because it could not determine which standard of review the court applied to which portions of its judgment. The majority noted that a de novo review is proper for alleged errors of law, while a whole record review is appropriate for allegations that the decision was unsupported by the evidence or was arbitrary and capricious. The dissent contended that since the appellate court was reviewing for errors of law (the interpretation of the terms of the ordinance), it did not matter what standard of review the trial court employed.

On appeal the supreme court in a per curiam opinion adopted the dissenting opinion as to the standard of review and remanded for consideration of the proper interpretation of the ordinance.

 **Mann Media, Inc. v. Randolph County Planning Board**, 356 N.C. 1, 565 S.E.2d 9 (2002)
*Evidence, Special use permit, Telecommunications tower*            The plaintiff applied for a special use permit to construct a 1,500-foot telecommunications tower. The zoning ordinance standards for special use permits required that the planning board find the use would not materially endanger the public health or safety, that it would not substantially injure adjoining and abutting property values, and that the location and character of the use be in harmony with the area proposed for siting. On the initial judicial appeal the trial court remanded the case for a new hearing because the county did not specify its reasons for denial. On remand, the permit again denied on the grounds that it would endanger public safety, would have substantial adverse impacts on neighboring property values, and was not in harmony with the surrounding area. The trial court reversed, ruling there was not substantial, competent, and material evidence in the record to support these conclusions. The court of appeals affirmed the trial court.

The supreme court reversed and upheld the permit denial. The court noted the central issue presented was whether there was competent, substantial, and material evidence in the record to support a permit denial. The planning board’s finding relative to public safety was based on a conclusion that ice forming and falling from a tower at the proposed location would endanger the public safety due to the number and density of adjoining residences. The court held that under a whole record review this conclusion must stand unless it is arbitrary and capricious. On this point, the court held anecdotal hearsay offered by opponents was not competent to establish a hazard, but that the applicant had failed to carry his burden that the ice would not pose a safety risk (citing testimony by the applicant stating that while danger from falling ice was not likely, he could not guarantee it was not a risk). Because the applicant failed to show the public safety standard would be met, the applicant had not established a prima facie case necessary to compel competing evidence to support a denial.

The court also noted that since the applicant’s witness on property value impacts failed to specifically address impacts on properties adjoining or abutting telecommunication towers, his testimony did not establish that the project would not harm their property value (the court of appeals had accepted his opinion as a professional real estate appraiser even though due to a lack of sales in the area he had not reviewed comparable properties adjoining or abutting the proposed tower). As with the safety issue, the court was skeptical about the use of testimony regarding property values from both the opponents (who offered testimony from a real estate agent and a contractor) and the applicant (who offered the professional appraiser), as neither had data from comparable properties adjacent to a tower.

On the question of whether the proposed tower was in harmony with the surrounding area, the court agreed that a de novo review of this question is appropriate (since such an interpretation question is an alleged error of law) and that inclusion of a use as a special or conditional use in a zoning district establishes a prima facie case that it is harmonious. However, since other standards for the permit were not met, the court declined to address the sufficiency of evidence on this particular finding.

 **Craig v. County of Chatham**, 356 N.C. 40, 565 S.E.2d 172 (2002)
*Preemption, Agriculture*
            The plaintiff challenged the county’s authority 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 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 of appeals held the first two regulations were preempted by state law but the zoning regulations were authorized by G.S. 153A-340(b)(3).

            The supreme court held that while there was not an explicit state preemption of local regulation, the state laws on the subject of hog farms provide a complete and integrated system of regulation that evidences an intent to occupy the entire field to the exclusion of local regulation. The court examined the statements of intent and purpose in the state legislation and considered the burden on farmers that would be occasioned by dual state and local regulation. Statements of purpose in the law regarding the need for a coordinated state management program that minimizes burdens on farmers were important in establishing legislative intent, as was the breadth and scope of state regulation. The court held more stringent board of health regulations could only be imposed if there are specific reasons clearly related to a local health need, and no such need beyond state Environmental Management Commission rules was established. The court noted that counties have been delegated authority to regulate some large-scale hog farms through zoning and that a restriction of such operations to specified zoning districts is acceptable. However, since this zoning ordinance made compliance with the preempted Swine Ordinance a precondition of zoning approval, it was also invalid.

 **Morris Communications Corp. v. City of Asheville**, 356 N.C. 103, 565 S.E.2d 70 (2002)
*Protest petition, Signs*
            The city council unanimously adopted a requirement that off-premise signs be limited to six square feet. The council then by a four-to-three vote adopted a seven-year amortization requirement for all nonconforming signs. The plaintiff, who owned “a vast majority” of the signs required to be amortized, had filed a protest petition objecting to this zoning text amendment.

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.”  The issue in this case is the proper delineation of this area. 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 of appeals 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 therefore held, as a minimum, all of the land zoned to allow off-premise signs must be included in the calculation. Since the protestors did not own 20% of this area (much less 20% of the entire zoning jurisdiction), the court concluded there was no valid protest.

            The supreme court reversed. The court reasoned that in this narrow circumstance the only immediate and actual effect of the amendment was the eventual removal of existing nonconforming signs, so these are the only lot owners that should be considered “included in a proposed change.”  Since the city failed to apply this calculation, it failed to meet its affirmative obligation to calculate the sufficiency of the protest petitions. Therefore the court held that since there was not a three-fourths majority in favor of the amendment, its enactment was invalid.

**North Carolina Court of Appeals**

 **Howard v. City of Kinston**, 148 N.C. App. 238, 558 S.E.2d 221 (2002)
*Conditional use permit, Evidence*
            The plaintiff’s conditional use permit application for multi-family dwellings on a proposed thirty-three-lot subdivision was denied by the city council. The denial followed a joint public hearing with the planning board (which recommended denial) and was based on a finding that the development would reduce property values, increase traffic, and endanger the public health and safety.

            The court applied a whole record test to determine if the denial was based on substantial, competent evidence. The court upheld the denial. The court held the council did not abuse its discretion by limiting the number of witnesses at the hearing. The court held the applicant (who was represented by counsel) had waived rights to sworn testimony, cross-examination, and presentation of rebuttal evidence by not requesting this at the hearing. The court also held that while letters were admitted into evidence after the hearing, there was no showing that the decision was based on such. Finally, the court held the planning director’s testimony about the anticipated number of trips that would be generated and a neighbor’s testimony regarding personal observations about the dangers of such increased traffic for children constituted substantial evidence for a finding on traffic safety impacts.

 **Deep River Citizens’ Coalition v. North Carolina Department of Environment and Natural Resources**, 149 N.C. App. 211, 560 S.E.2d 814 (2002)
*Appellate review*
            This case involves the petitioners’ challenge of water classification changes (from Class C to Class WS-IV) made by the Environmental Management Commission in association with construction of the Randleman dam on the Deep River by the Piedmont Triad Regional Water Authority. The court held it was unclear whether the trial court had employed a de novo or a whole record review and remanded with a direction for the court to characterize the issues presented and clearly delineate the standards of review employed.

 **Cain v. North Carolina Department of Transportation**, 149 N.C. App. 365, 560 S.E.2d 584 (2002)
*Signs, Permit revocation*
            Cain owned an outdoor advertising sign along Interstate 95 in Cumberland County. He leased the sign for ten years to a Florida Company, which in turn subleased the sign to an adult business in Harnett County. When vegetation in the right of way adjacent to the sign was destroyed in an apparent attempt to increase the visibility of the sign, NCDOT revoked Cain’s sign permit. The denial was appealed to the Secretary of the Department of Transportation, with both Cain and the Florida company contending the vegetative alteration was done by the subleasing adult business without their knowledge or permission. The Secretary upheld the revocation, as did the trial court on appeal.

            In order to revoke a sign permit, the NCDOT must clearly identify persons who committed a violation for which revocation is permissible and show a sufficient connection between those persons and the permittee. The trial court concluded that the improper vegetation removal was conducted by either the Florida company or the adult business; the court of appeals held that the lease and sublease established a sufficient connection between the permittee and these persons to warrant revocation.

 **Hopkins v. Nash County**, 149 N.C. App. 446, 560 S.E.2d 592 (2002)
*Special use permits*
            The plaintiffs applied for and were denied a special use permit for a land clearing and inert debris landfill (termed a “stump dump” by the court) proposed for a clay borrow pit. The court held the trial court properly applied a whole record review in concluding the decision was adequately supported by substantial evidence. The court noted that inclusion of a use as a special or conditional use in a zoning district creates a prima facie case that the use is compatible with the surrounding area, but this case can be (and in this case was) rebutted by evidence presented at the hearing. Evidence presented showed this once-rural portion of the county was now predominately residential, that many homes were close to the proposed landfill, and that extensive truck traffic would disrupt the neighborhood. The court found this to be substantial evidence that the landfill would not be in harmony with the surrounding area.

 **Summers v. City of Charlotte**, 149 N.C. App. 509, 562 S.E.2d 18, *review denied*, 355 N.C. 758, 566 S.E.2d 482 (2002)
*Conditional zoning*
            This case involved neighbors’ challenges to two Charlotte rezonings. The first rezoned 11.6 acres from an Office district to a Mixed Use Development district allowing office, retail, multi-family residential, and a hotel. The second rezoned the 95.6 acre site of SouthPark Mall from Shopping Center and Office Districts to a Commercial Center District. Both rezoning petitions included site plans, specifications of proposed uses, and proposed development guidelines. After a series of public meetings and a legislative hearing, the city adopted both rezonings. In each rezoning the council specified that the general zoning ordinance provisions for the respective districts, the site plans, and the additional individualized proposed regulations and conditions all constituted the binding zoning regulations for each property.

            The court held the adoption of a rezoning, even with individualized conditions is a legislative rather than a quasi-judicial decision. The community meetings and legislative hearing provided in the course of the rezoning process afforded the neighbors adequate procedural due process. The court held the rezonings were not arbitrary and capricious as they were based on fair and careful consideration of the planning board’s review, technical staff reports, and public comments. The court noted the rezonings were consistent with adopted small area plans for the affected area and there was no showing of bad faith or undue discrimination. As a spot zoning allegation was not argued on appeal, the court deemed that issue abandoned by the plaintiffs.

 **Carolina Holdings, Inc. v. Housing Appeals Board**, 149 N.C. App. 579, 561 S.E.2d 541, *review denied*, 356 N.C. 298, 570 S.E.2d 499 (2002)
*Housing code, Estoppel*
            The petitioner owned an apartment complex (which had been constructed in the 1940s as a motel) in Charlotte. After inspections conducted in June and July 1998, the petitioner was cited for numerous housing code violations. After a hearing, the inspector confirmed the violations, found the units could not be repaired at a cost less than 65% of the value of each dwelling, and therefore ordered the structures demolished. The petitioner appealed to the city’s Housing Appeals Board, which held a series of hearings on the matter. At the initial hearing in March 1999 the board requested that the petitioner continue recently initiated repairs and continued the appeal. In April 1999 the board ordered most of the violations to be repaired by July 1999, with the more serious (and costly) light, ventilation, and space violations to be repaired by December 1999. In August 1999 a third hearing was held, with a progress report being made on repair and no additional board action. In October 1999 the board held its fourth hearing on the case and, without making written findings, ordered the buildings demolished within 90 days. In April 2000 the board held its fifth hearing and, on the advice of counsel, made written findings that the units were unfit for human habitation and ordered 39 units to be repaired and 15 units demolished within 60 days. After a hearing in September 2000 the trial court affirmed the board’s order.

            The court of appeals affirmed. The court held it was not improper for the board to meet in closed session to discuss the case with its attorney (which had been done at both the fourth and fifth hearing) as the matters discussed were within the attorney-client privilege and all actions by the board were taken in open session. The court held that based on a review of the whole record, the board’s determination of the condition of the buildings and costs of repairs were supported by competent, substantial, and material evidence. The city is not estopped from enforcement due to the fact that the space, use, light, and ventilation violations had existed for years without citation.

 **State v. Nance**, 149 N.C. App. 734, 562 S.E.2d 557 (2002)
*Searches*
            Animal control officers received a complaint regarding horses being maltreated. The officers viewed the horses (who were in a leased open pasture) from a public place on the day the complaint was received (a Friday) and determined they were seriously malnourished. On the following Monday morning they seized several of the horses in the worst condition for removal and veterinary treatment. As the horses were being removed the defendant appeared and objected to their removal. No warrant had been obtained for the removal.

            The court held that generally an open field is not entitled to Fourth Amendment privacy protection as it is outside the home and curtilage. Observation of the horses from the public way and the neighbor’s property in the open field does not require a warrant. However, seizure of the horses (which could be considered evidence of a crime) required consent or a warrant as the horses were not on public property and there were not exigent circumstances (given the three day delay between initial observation and seizure of the horses).

 **Town of Cameron v. Woodell**, 150 N.C. App. 174, 563 S.E.2d 198 (2002)
*Laches*
            Prior to entering a contract to purchase a site to be used as a flea market and used car lot, the defendants informed town officials of their plan and were correctly advised that the property involved was not subject to town zoning. Several weeks after the contract to purchase was executed and necessary permits for the business obtained from the county, the town adopted zoning applicable to the site. The town’s zoning required a conditional use permit for uses such as the defendants. Defendants then acquired title several weeks after the town’s zoning of the property, subsequently secured business licenses, and opened a flea market and car lot on the site. Some three years later the town discovered the property was indeed inside the city’s jurisdiction and issued a notice of violation. The defendant then applied for a conditional use permit to continue the business, which was denied. The town sought to enjoin future operation of the businesses. The trial court found the town was aware of the flea market plans and their failure to take action for nearly four years barred this action; however, no town assurances had been made regarding automobile sales, so the ordinance could be applied to that portion of the use.

            The court held laches precludes enforcement of the town ordinance as applied to both aspects of the business. The court held the evidence supported a conclusion that the town was aware of the defendant’s plans for both businesses, advised the defendant there was no town jurisdiction, the defendant relied on that assurance and materially changed their condition as a result, and that the town’s unreasonable delay in enforcement had prejudiced the defendants.

 **Eastern Outdoor, Inc. v. Board of Adjustment**, \_\_\_ N.C. App. \_\_\_, 564 S.E.2d 78, *review granted*,  (2002)
*Billboards, Permit revocation, Vested rights*
            Johnston County staff issued petitioner two permits for construction of billboards in an agricultural/residential zoning district. Petitioner began construction. However, some seven weeks after issuing the permits the county revoked them on the grounds that outdoor advertising was not allowed in this zoning district. The revocations were appealed to the board of adjustment, which held billboards were not allowed in this district, that the permits had been issued under a mistake of law, and therefore the permits could be revoked. This decision was upheld by trial court.

            The court held the dispositive issue was the interpretation of the ordinance. Since this involves an alleged error of law, a de novo review is appropriate and the trial court clearly conducted such a review on this issue. The court held the terms of the ordinance were correctly interpreted as prohibiting billboards in this zoning district and that G.S. 153A-362 provides a mistakenly issued building permit may be revoked. The fact that the petitioner had made substantial investments in the property is immaterial if the permit is properly revoked, as one cannot acquire a vested right to violate an ordinance.

 **Transylvania County v. Moody**, 151 N.C. App. 389, 565 S.E.2d 720 (2002)
*Signs, Enforcement, Civil penalties*
            Transylvania County adopted a sign ordinance under its general ordinance-making authority (the county did not have a zoning ordinance). The defendant constructed two single-post sign structures without seeking a sign permit from the county. The county Inspections Department issued two stop work orders, then a written notice of violation was sent from the county attorney, and finally a suit was initiated to compel compliance. The trial court entered an order of abatement to dismantle the signs, ordered the defendant to comply with the sign ordinance in the future, and upheld a $22,300 civil penalty.

            The court of appeals upheld the abatement order and injunction for compliance, but set aside the civil penalty. The court held the county has the option of adopting a sign ordinance under either its zoning authority or its general ordinance-making authority (and if the latter is chosen, the notice and hearing requirements for zoning do not apply). The court held the ordinance was reasonably related to protection of legitimate governmental objectives (protection of safety and aesthetics) and its restrictions were neither arbitrary nor unreasonable. The court likewise found no equal protection violation. However, the court found the county had not followed the procedures set forth in the ordinance regarding the assessment of civil penalties (the initial stop work orders did not set out the required time to come into compliance and the notice of violation had not mentioned civil penalties). Since the procedural safeguards in the ordinance are binding on the county, failure to observe them voids the civil penalty assessment.

 **Capital Outdoor, Inc. v. Guildford County Board of Adjustment II,** 152 N.C. App. 474, 567 S.E.2d 440, *review denied*, 356 N.C. 611, 574 S.E.2d 676 (2002)
*Signs, Interpretation*
            On remand from a reversal in the supreme court, the court addressed interpretation of a zoning ordinance requirement that billboards not be located within 300 feet of “residentially zoned property.”  The court held this restriction applied to the “Single-Family Residential” and the “Multi-Family Residential” zoning districts, but not to the “Agricultural” zoning district (even though residences are a permitted use in the Agricultural district.

 **Hemphill-Nolan v. Town of Weddington**, 153 N.C. App. 144, 568 S.E.2d 887 (2002)
*Variances, Appeals, Subdivision*
            The town’s subdivision ordinance provided that permanent dead-end streets could not exceed a length of 600 feet unless necessitated by topography or property accessibility. The plaintiff, in the process of subdividing a twenty-nine acre tract, sought a variance from this subdivision ordinance requirement in order to construct a 785-feet long cul-de-sac. Upon denial of the variance by the town council, the plaintiff sought judicial review in the nature of certiorari. The trial court dismissed the appeal because it was not filed within the thirty day period set by G.S. 160A-388(e).

            The court held the dismissal was improper. G.S. 160A-388 applies only to appeals of decisions made under the zoning ordinance and no specific time for appeals is set in the subdivision enabling statute. The court held that while the subdivision statutes make no explicit provision for judicial review, the superior court has discretion to grant writs of certiorari “in proper cases” and subdivision decisions are such a case. The court held the appeal must be filed within “a reasonable time” rather than the thirty-day period set by statute for zoning appeals. The case was remanded for a determination of whether the appeal was filed within such a reasonable period and, if so, for consideration of the merits of the petition.

 **Huntington Properties, LLC v. Currituck County**, 153 N.C. App. 218, 569 S.E.2d 695 (2002)
*Nonconformities, Vested rights, Preemption*
            The plaintiffs acquired a nonconforming 90-acre mobile home park. When originally constructed in 1972, the park had 440 rental spaces. However, due to increasingly strict environmental regulations, by 1987 the park’s wastewater treatment system could only accommodate about 140 units. The county adopted a unified development ordinance in 1992 that had various limitations on the expansion of nonconformities. In 1995 the plaintiff’s predecessor in interest purchased the park and hired an engineer to design, upgrade, and obtain permits for a wastewater treatment system that would serve all of the original 440 units. The county in 1996 adopted an amendment to the nonconformities section of its ordinance to explicitly provide that improvements to water and sewer systems to increase the number of units in a mobile home park was a prohibited expansion of a nonconformity, while improvements to better protect public health without increasing the number of units in the park were permitted.

            The court noted that nonconformities are not favored by the law and held that expansion of treatment capacity to expand the number of units in the park beyond the number lawfully present when it became nonconforming was not allowed under the original ordinance or the amended version. The court held that no permits for expansion had been issued at the time the expansion became contrary to the ordinance, so there was no vested right to such. The court also held these limitations were legitimate zoning restrictions on the use of land and were in no way preempted by state regulation of wastewater treatment facilities.

 **In re Appeal of the Society for the Preservation of Historic Oakwood and Mozelle Jones**, 153 N.C. App. 737, 571 S.E.2d 588 (2002)
*Jurisdiction, Appeals*
The Raleigh zoning ordinance allowed “multi-family housing” as a permitted use in the applicable zoning district issue, but “transitional housing” was not permitted The Raleigh Rescue Mission proposed building a shelter, which it termed multi-family housing. When the plaintiff neighbors objected, the deputy city attorney asked the zoning administrator for an opinion on this issue. The zoning administrator issued a memorandum in response stating that the structure proposed was permitted, but the proposed use may not be. The neighbors appealed this determination to the board of adjustment (and while the appeal was pending the city council approved the project while noting the pending appeal).

The court held the zoning administrator’s decision was not an “order, requirement, decision, or determination” that could be appealed to the board pursuant to G.S. 160A-388(b. The order must have some binding force or effect for there to be a right of appeal. Where the decision has no binding effect and is not authoritative or a conclusion as to future action, it is merely the view, opinion, or belief of the administrative official and thus the board of adjustment has not jurisdiction to hear an appeal of it.

 **North Carolina Forestry Association v. North Carolina Department of Environment and Natural Resources**, \_\_\_ N.C. App. \_\_\_, 571 S.E.2d 602 (2002)
*Standing*
            The court held the plaintiff was not a “person aggrieved” so as to have standing to appeal a determination that new or expanding wood chip mills were excluded from coverage under a general timber products industry permit. Neither the association nor any of its members had applied for a permit and the association had no entitlement to a general permit

 **Piedmont Triad Regional Water Authority v. Unger**, \_\_\_ N.C. App. \_\_\_, 572 S.E.2d 832 (2002)
*Condemnation valuation, Watershed protection*
            A portion of defendants’ property was condemned as part of the Randleman Lake project. The court held the application of the watershed protection restrictions were caused by the construction of the dam project since the new lake was to be used as a public water supply. Thus defendants were entitled under G.S. 40A-65(a) to present evidence of the value of their property prior to imposition of the watershed protection regulations in this condemnation action.

 **Hewett v. County of Brunswick**, 155 N.C. App. 138, 573 S.E.2d 688 (2002)
*Special use permit, Enforcement, Mining*
            The plaintiff in 1997 obtained a special use permit for a five-acre sand mining operation. The permit included a condition that if any conditions of the permit were held invalid the entire permit would be void and advised the plaintiff by letter that any changes in the permit would void the entire permit. After this operation commenced, the plaintiff discovered a marl deposit on site and in July 2000 secured an amendment to his state mining permit to operate a twenty-acre marl mining operation on the site, with a crusher on site to process the marl. The plaintiff in July 2000 applied for an electrical hookup for the crusher, which was the county’s initial notice of the proposed change in operation. Upon learning of this change, the county required the plaintiff to seek either a modification of the original special use permit or a new permit. On October 2, 2000 the zoning ordinance was amended to prohibit mines with processing on site in the zoning district in which this property was located. On December 1, 2000 the board of adjustment held the original permit was void due to the change in operation and denied the application for a new permit. The trial court reversed.

            The court concluded it was error for the board of adjustment to void the original permit. The court held that ordinance in effect at the time the original permit was issued included no standards relative to project alternation and the permit itself had no such explicit condition (and the court expressed some doubt about the statutory authority to do so). Since the applicant presented as part of his permit modification request sufficient evidence to show all terms of the ordinance had been met, and there was no evidence in the record to the contrary, the permit modification must be approved.

 **County of Wake v. North Carolina Department of Environment and Natural Resources**, 155 N.C. App. \_\_\_, 573 S.E.2d 572 (2002), *review denied*, 357 N.C. 579, 579 S.E.2d 386 (2003)
*Landfills, Standing, Estoppel*
            Wake County obtained a state permit to expand a landfill and commenced land acquisition for it, part of which was completed. The Town of Holly Springs, in which part of the expansion was to take place, endorsed the project (which was required as part of the state permitting process). The town and county entered interlocal agreements to finance treatment of wastewater from the landfill. Some four years later the town revoked its prior approval. The final state permit was then issued by defendant staff. Upon a contested case appeal of that permit decision, the defendant withdrew the permit and this action was brought to contest the withdrawal.

            The court held the individual neighbors who initiated the appeal of the permit issuance were aggrieved persons with standing to challenge the permit (they had alleged noise, pollution, landscape changes, and other negative environmental consequences that would interfere with the use and enjoyment of their property), as was the town (due to the impacts on its tax base and planning jurisdiction). The court held as a matter of law that the town was equitably estopped from withdrawing its prior approval due to its multiple acts of ratification (entering into contracts and accepting payment from wastewater treatment and approval of long-range waste disposal plans).

 **In re Request for Declaratory Ruling by the Environmental Management Commission**, 155 N.C. App. 408, 573 S.E.2d 732 (2002), *review denied*, 357 N.C. 579, 579 S.E.2d 392 (2003)
*Wetlands, Scope of Authority*
            The court upheld the authority of the Environmental Management Commission to regulate wetlands. The court held wetlands were “waters” as defined by the statutes (as that includes any “other body or accumulation of water, whether surface or underground”). Considering the language and spirit of the statutes and its purposes (and similar long-standing federal interpretations of “waters of the United States” to include wetlands), wetlands are appropriately defined to be included.

 **Lamar Outdoor Advertising, Inc. v. City of Hendersonville Zoning Board of Adjustment**, 155 N.C. App. 516, 573 S.E.2d 637 (2002)
*Nonconformities, Signs, Preemption, Evidence*
            The plaintiff owned a nonconforming billboard that was damaged in a storm. The zoning administrator denied a permit for repair on the grounds that the cost of repairs would exceed the maximum allowed under the zoning ordinance (sixty percent of the replacement cost of a comparable sign). The board of adjustment and superior court upheld this determination.

            The court held in a de novo review that as a matter of law the state Outdoor Advertising Control Act did not preempt local zoning regulation of signs, as the state statues do not expressly do so (and in fact they expressly recognize a local role in sign regulation) nor do the state statutes provide a complete and integrated regulatory scheme so as to justify an implied preemption. The court then applied a whole record review to conclude that the board’s findings regarding the repair costs of the sign were supported by the record. The zoning ordinance placed the burden of proving the costs of repair were within the ordinance limits upon the applicant. The record showed that the estimated costs of repair submitted to the board were less than the amount originally submitted to staff and that the applicant’s own witness testified the estimate omitted several essential components of reconstruction costs

 **Showcase Realty and Construction Co. v. City of Fayetteville**, 155 N.C. App. 548, 573 S.E.2d 737 (2002)
*Variances, Evidence, Findings*
            The city issued a special use permit for a mini-storage facility with a required front setback of fifty feet and a side setback of thirty feet. During the course of construction a question arose as to whether the required setbacks were being observed. Construction was halted and a survey revealed the concrete slab for the buildings were placed with only a twenty-five foot front setback and a twenty-nine foot side setback. The owner then petitioned for a variance. The owner testified at the variance hearing that he thought the setback was to be measured from the road rather than the right-of-way, that he relied on the contractor and inspections staff to properly site the structure, and that he had expended all of his funds on the improperly located structure and could not afford its relocation. The staff testified that an incorrect measurement could have been made due to road construction underway at the time the structure was located on the site. The plaintiff, the adjoining landowner, testified that if the building were completed as located it block views of his undeveloped commercial property, reduce the value of his business, and force stormwater drainage onto his property. The board issued a variance and the trial court upheld this decision.

            The court conducted a whole record review and invalidated the variance as unsupported by adequate evidence in the record. Here the ordinance amplified on the statutory language requiring a showing of “practical difficulties or unnecessary hardships” to specify the board must find the owner could “secure no reasonable return from, or make no reasonable use of, his property.” The court held there were only conclusory statements in the record. Financial hardship alone is insufficient to establish an “unnecessary” hardship; rather, evidence that no reasonable use or return could be made without a variance is necessary. The ordinance also required a showing that the variance would not impair an adequate supply of light and air to surrounding properties and would not impair their established property values. The court similarly found there was a lack of evidence in the record to support findings on these standards.

 **Malloy v. Zoning Board of Adjustment**, 155 N.C. App. 548, 573 S.E.2d 760 (2002)
*Nonconformities, Interpretation*
            The plaintiffs operated a nonconforming welding and gas supply business in a multi-family residential district in Asheville. The plaintiffs replaced a 3,000 gallon above-ground liquid oxygen storage tank with a new 9,000 gallon tank. Upon complaint from neighbors, the city investigated, determined this to be an unlawful expansion of a nonconforming use. The board of adjustment and superior court upheld this determination.

            The court applied a de novo review to hold as a matter of law that the storage tank is a “structure” regulated by the ordinance. The court held the plain meaning of the ordinance definition of a structure as “that which is built or constructed” clearly includes a storage tank affixed to a large specially prepared concrete pad. The court further concluded that the new tank physically enlarged the structure and was thus a prohibited “enlargement” of the nonconformity.

 **Neuse River Foundation, Inc. v. Smithfield Foods, Inc.,** \_\_\_ N.C. App. \_\_\_, 574 S.E.2d 48 (2002), *review denied*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2003)
*Standing, Aesthetics, Nuisances*
            Various plaintiffs brought an action seeking to compel defendant to establish a fund to remediated damage allegedly caused to various rivers from swine operations and for injunctive relief prohibiting swine lagoons and spray fields.

            The court upheld dismissal of the action due to a lack of standing by any of the plaintiffs. The court noted the burden of proving the elements of standing rest with the plaintiffs. The court held the plaintiffs must allege injury in fact to a protected interest that cannot be considered merged in the general public right, causation, and a proper or individualized form of relief. The court held injury to aesthetic or recreational interests alone cannot confer standing on an environmental plaintiff. Also, since the downstream riparian owners, commercial fishermen, and marina operators did not seek individual compensation or individualized relief, they did not have standing.

 **Overton v. Camden County I**, 155 N.C. App. 100, 574 S.E.2d 150 (2002)
*Special use permits, Nonconformities*
            The petitioner operated a nonconforming house moving and storage business. The county had expressed the view that the business was an eyesore and had told the petitioner to clean it up. Four years later the petitioners sought a conditional use permit to expand the business to a separate lot across the street from the existing business. Immediately prior to the board of adjustment hearing on the special use permit application, the county board of commissioners purported to “revoke” the right to operate the business on the original lot. The board of adjustment subsequently issued a conditional use permit for the business and included as conditions to the permit: (1) that the business on the original lot across the street be discontinued within a specified time; and (2) that a previously issued conditional use permit for a third party on a neighboring lot be amended to reflect the relocation of this business.

            On appeal the county conceded that there was no permit issued or required for continuation of a lawful nonconformity and that the county board’s purported revocation of such was a nullity. The court acknowledged that individual conditions can be imposed on conditional use permits, provided those conditions are properly related to standards in the ordinance. The court held that while the county may regulate and limit lawful nonconformities, the application for a new permit for a separate lot must be on its own merits and can not be used to imposed conditions on a separate lot (nor could such conditions go beyond the requirements for nonconformities set out in the ordinance). The court also held that a third party’s conditional use permit may not be modified in the fashion undertaken here (the ordinance itself specified the circumstances under which a conditional use permit can be modified, none of which applied here). The court held it was proper for the court to order the permit reissued without the invalid conditions (rather than remanding the case to the board) because the board had already resolved and made findings on all relevant issues and the course directed by the court would be the only possible result on remand.

 **Overton v. Camden County II,** 155 N.C. App. 391, 574 S.E.2d 157 (2002)
*Enforcement, Nonconformities, Manufactured housing*
            Petitioner placed a mobile home on his property in 1972. The county zoning ordinance applicable to the property was effective in 1993. In 1995 the petitioner replaced the manufactured home without securing a building permit or the required conditional use permit. In 1998 the county zoning ordinance was replaced with a unified development ordinance. In 2000 the petitioner was cited for a zoning violation. On appeal the board of adjustment held the petitioner in violation but allowed the manufactured home to remain in place upon payment of a fine and meeting several specified conditions (not more than one person to reside in the home, it be removed if vacated for more than sixty days, and it not be a unit manufactured prior to 1976).

            The court held that where there has been an ordinance amendment between the date of the alleged violation and the date of the enforcement action, the board of adjustment is to apply the ordinance in effect at the time of its decision. The court held the manufactured home was not a lawful nonconforming use under the 1998 ordinance because appropriate permits were not secured when the unit was placed in 1995. Since the use was not lawful at the time of inception, it was not lawful under the revised ordinance. The ordinance in effect at the time of the board’s decision on the enforcement appeal required a conditional use permit for a manufactured home on this site. The conditions imposed by the board could legitimately be imposed on the requisite conditional use permit and were thus lawful here.

 **Bessemer City Express, Inc. v. City of Kings Mountain**, 155 N.C. App. 637, 573 S.E.2d 712 (2002), *review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003)
*Appeals*
The city adopted a zoning amendment restricting the location, design, and use of video gaming machines, requiring a conditional use permit for them, and amortizing nonconforming operations after a six month grace period. The plaintiff operators of video game arcades, filed a declaratory judgment action contesting the validity of the ordinance. The plaintiffs sought and were denied a preliminary injunction to enjoin enforcement. The court held an appeal of the denial of the preliminary injunction was an impermissible interlocutory appeal because the order did not affect a substantial right (at the time of appeal the ordinance requiring removal had not taken effect) and in any event the plaintiff’s overall business could continue in operation pending resolution of the case of the merits.

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

**Tri-County Paving, Inc. v. Ashe County**, 281 F.3d 430 (4th Cir. 2002)
*Moratoria, Vested rights*
            The plaintiff unsuccessfully sought county approval to build an asphalt plant. The court upheld a one-year moratorium on such plants and a subsequently adopted Polluting Industries Development Ordinance. Since the plaintiff had only applied for a permit and had not obtained a building permit or any other county approval prior to the adoption of these ordinances, the plaintiff had no vested right to construct the plant. The court held the moratorium was rationally related to a legitimate public objective of protecting the health, safety and well being of county citizens.

**Southern Blasting Services, Inc. v. Wilkes County**, 288 F.3d 584 (4th Cir. 2002)
*Due process; Preemption*
The plaintiff challenged county ordinances regulating explosives operations and the storage and use of explosives. The court held that federal law on the manufacture, distribution, and storage of explosives did not preempt local regulation, noting an express congressional intent not to preempt the field in 18 U.S.C. § 848 and pointing out that the county regulations were not in direct and positive conflict with federal provisions simply because they were more stringent in some respects. Since the county regulations addressed legitimate governmental interests and were rationally related to these objectives, they were found to meet substantive due process requirements. Since the plaintiff had not applied for a county permit, there was no standing to raise a procedural due process claim (and the court noted that, in any event, the standards and process to be followed by the county fire marshal met procedural due process requirements).

 **Giovani Carandola, Ltd. v. Bason**, 303 F.3d 507 (4th Cir. 2002)
*Adult use*
The plaintiff operated a bar that offered adult entertainment in Greensboro. The state Alcoholic Beverage Control (ABC) Commission cited the plaintiff for violation of state statutes prohibiting simulation of sexual intercourse or masturbation at facilities with ABC licenses. The court held that the state rules limiting the nature of erotic dancing were legitimate content-neutral rules designed to prevent adverse secondary impacts and were thus subject to intermediate rather than strict scrutiny review. The court found that since the rules applied not only to bars and clubs but also to theaters offering ballet, plays, and other serious literary work for which no adverse secondary impact had or could be produced, they (and the state statutes) were impermissibly overly broad.

 **Sunkler v. Town of Nags Head,** No. 2:01-CV-22-H(2), 2002 WL 32395571 (E.D.N.C.) .), *aff’d*, 50 Fed.Appx. 116 (4th Cir. 2002)
*Inspections; Liability*
The plaintiffs alleged that a building inspection pursuant to an administrative inspection warrant constituted an unreasonable search and that the town’s building code and zoning enforcement were negligent. The inspection was made to check for alleged unauthorized work to convert approved residential storage space to unapproved habitable space. The fact that the inspector had personal knowledge of plaintiff’s plans to do this work and objective indicators of work underway in that portion of the building provided reasonable grounds for the warrant and search. Given the reasonableness of the search, the inspector has qualified immunity from personal damages while performing a discretionary act. The town likewise has immunity for a reasonable search. Without an appeal of the enforcement action to the board of adjustment, the plaintiff cannot bring a claim of negligence against the town.

 **Eberhart v. Gettys,** 215 F.Supp. 666 (M.D. N.C. 2002)
*Enforcement; Liability*
Plaintiffs alleged that the defendants selectively enforced town ordinances regarding a nightclub, boarding house, and rental properties against them because of their race. The court refused to dismiss the claim, noting there was a genuine issue of material fact as to whether the nightclub, which had been subject to repeated warnings and citations regarding excessive noise, was treated differently from similarly situated businesses. The court held an allegation that the mayor made at least one racially biased statement, along with other circumstantial evidence of racial discrimination that was alleged, created a genuine issue of material fact on this allegation as well. The court held the allegation of racial animus on the part of the mayor, if established, voided the qualified immunity he would have in his individual capacity; however as no such personal animus was alleged regarding the defendant police officer and zoning enforcement officer, those defendants retained immunity in their individual capacities. As a question of fact existed as to whether the alleged discrimination was pursuant to a municipal policy or by a final policy maker, summary judgment on town liability was not proper.