**2003 North Carolina Land Use Litigation**

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

 **Guilford Financial Services, LLC v. City of Brevard**, 356 N.C. 655, 576 S.E.2d 325 (2003) (*per curiam, adopting dissent in*150 N.C. App. 1, 563 S.E.2d 27 (2002))
*Subdivisions, Quasi-judicial, Evidence*
            Petitioner sought approval of a project to place a twenty-eight unit affordable housing project on a five-acre site. The proposal involved a preliminary plat submittal to divide the parcel into fourteen lots (with a duplex to be located on each) and a fifteenth lot for a community building. The city’s Technical Advisory Committee recommended approval of the preliminary plat. The Planning Board met twice to consider the plat. Neighbors appeared and objected, raising concerns about traffic, safety, and consistency with the land use plan and subdivision ordinance. The Planning Board eventually recommended approval of a revised sixteen-lot plat. The Town Council then held two hearings on the plat, with considerable neighborhood opposition being raised. A third revised plat was submitted in response to concerns raised, but ultimately the council denied plat approval, citing concerns about impacts on consistency with zoning requirements regarding concentration of two-family dwellings and impacts on public health and safety.

            The majority opinion in the court of appeals held that since the subdivision ordinance included discretionary standards, this preliminary plat approval was a quasi-judicial decision. The majority concluded the council’s statements of concern offered as support for its denial were too generalized for judicial review (e.g., that the development might present traffic hazards and safety concerns). Therefore the majority would have remanded for a hearing and findings consistent with the due process requirements.

            The dissent agreed that the decision was quasi-judicial in nature, but held a remand was unnecessary. The court noted that both parties were represented by counsel and had ample opportunity to present evidence. Since neither party requested that witnesses be under oath or be cross-examined and neither requested an opportunity to present rebuttal evidence, those rights are deemed waived. The dissent held the evidence relied upon by the council to support its denial was inadequate in that: (1) evidence on traffic impact showed an imperceptible impact, not a threat to public safety; (2) as a matter of law, when duplexes are allowed by right in a zoning district, a statement in the “Purposes” section of the ordinance that duplexes be “unconcentrated” can not be the basis of a denial of approval when the specific density standards for the zoning district are not violated; and (3) generalized opinions about traffic safety for children or impacts on neighbors can not be the basis for a finding. Since the applicant made a prima facie case for approval and there was no substantial evidence supporting denial, the appropriate resolution is an order directing plat approval rather than a remand.

            The supreme court reversed and adopted the dissent in a per curiam opinion.

 **Dobo v. Zoning Board of Adjustment**, 356 N.C. 656, 576 S.E.2d 324 (2003) (*per curiam, adopting dissent in* 149 N.C. App. 701, 562 S.E.2d 108 (2002))
*Constitutional challenges, Accessory uses, Evidence*
            In 1996 the petitioner bought and installed a sawmill in their backyard. The sawmill was used to produce lumber for used to construct outbuildings, walkways, and on-site furniture making. Some lumber was given away to friends and relatives, but none was sold. In 1999 the property was annexed by Wilmington. The city cited the petitioners for a zoning violation, contending the sawmill was not a lawful accessory use. The board of adjustment upheld that determination, which was affirmed by the trial court.

            The court of appeals held that the board of adjustment and the trial court correctly refused to consider the petitioners’ constitutional claims. In making a quasi-judicial review of the zoning officer’s interpretation of the ordinance, the board of adjustment could only reverse, affirm, or modify the decision and had no authority to address challenges to the validity of the ordinance (and the trial court can only review whether the decision was properly affirmed). A constitutional challenge to the validity of the ordinance can only be considered in a separate civil action, not a certiorari review of a zoning official’s determination. The court also held that if there is sufficient competent, substantial, and material evidence in the whole record to support the board’s findings, the presence of other arguably incompetent evidence does not deprive the petitioners of a fair hearing.

            The court of appeals, however, split on the question of whether the board’s decision should be upheld. The majority opinion was that there was substantial, competent, and material evidence in the record to support the board’s decision that a sawmill of this size is not customarily incidental and subordinate to the primary residential use of the property, regardless of whether there were commercial sales of its products. The dissent contended that the actual use of the sawmill was the critical inquiry rather than its size and potential use. In this respect, since all of the evidence was that no actual commercial or industrial use had been made, the sawmill was a legitimate accessory use.

            The supreme court adopted the position of the dissent in a per curiam opinion.

 **North Carolina Forestry Association v. North Carolina Department of Environment and Natural Resources**, 357 N.C. 640, 588 S.E.2d 880 (2003)
*Standing*
            In 1998 the Division of Water Quality in the defendant department issued a general NPDES permit for stormwater discharges associated with industrial activities. Unlike a previous general permit, this general permit excluded new or expanding wood chip mills from its coverage, requiring these to undergo a more lengthy individual permit review. The plaintiff non-profit trade association, whose members engage in wood chip mills, petitioned for a contested case hearing to challenge this determination. While an administrative law judge recommended finding the plaintiff had standing as a “person aggrieved,” the final order adopted by the Environmental Management Commission held the association did not have standing. The trial court ruled the group did have standing, but the court of appeals reversed, finding no standing.

The court held that while neither the association nor any of its members had applied for a permit, the decision to exclude wood chip mills from the general permit adversely affected the plaintiff and its members as a result of the change in required permitting processes. Therefore the plaintiff was a “person aggrieved” with standing to bring a contested case hearing.

**North Carolina Court of Appeals**

 **Tabor v. County of Orange**, 156 N.C. App. 88, 575 S.E.2d 540 (2003)
*Immunity, Septic tanks*
            The plaintiffs applied for a septic tank improvement permit on land they proposed to subdivide in order to place a mobile home on the property for their parents. The plaintiffs alleged the county’s environmental health specialist negligently represented the permit would be approved (while the county contended he advised them additional information was needed). After the plaintiffs constructed a road and bought a mobile home, the septic tank permit was denied. The court held that of approving or denying septic tank permit is a governmental function and sovereign immunity bars a suit for negligence absent county waiver of immunity (which was not alleged here).

 **Sarda v. City/County of Durham Board of Adjustment**, 156 N.C. App. 213, 575 S.E.2d 829 (2003)
*Standing, Special Use Permits*
            The plaintiffs sought judicial review of a special use permit issued for a paintball playing field in rural Durham County. Plaintiffs, who owned a residential tract some 400 yards from the permitted site, appeared before the board of adjustment to oppose permit issuance. Upon permit issuance, the plaintiffs appealed to superior court and the trial court reversed the board on the grounds that there was inadequate evidence in the record to support a conclusion that the operation would not injure neighboring property values. The court held the petitioners had merely alleged that they owned property in the immediate vicinity of the proposed project and that this is insufficient to establish that the petitioners would suffer the requisite special damages to make them an aggrieved person with standing for judicial review. Absent such an allegation, the superior court lacked subject matter jurisdiction to hear the appeal. The court thus vacated the order and reinstated the board’s permit issuance.

 **Lambeth v. Town of Kure Beach**, 157 N.C. App. 349, 578 S.E.2d 688 (2003)
*Interpretation, Mootness, Vested Rights, Driveways*
            The town’s zoning ordinances limited driveway width to twenty-four feet and total impervious surface coverage on a lot to 65%. Plaintiff had previously constructed a nineteen-foot wide driveway and a five-foot wide concrete sidewalk across a town right-of-way. Plaintiff sought to expand his driveway by five feet to provide easier wheelchair access for his handicapped daughter. The permit was denied on the basis that the expansion would violate the twenty-four feet limit (interpreting it to apply to the combined width of the existing driveway and sidewalk). The board of adjustment upheld this determination. While this decision was on appeal to the superior court, the town amended the ordinance to clarify that a total of twenty-four feet of impervious surface for access across a town right of way and thereafter the superior court dismissed the plaintiff’s action.

            The court held the case was not moot as the ordinance in effect at the time the plaintiff’s application was decided was controlling, not the subsequent amendment. The court then held that the plain meaning of the ordinance was that a driveway width (not a driveway plus a separate sidewalk) could not exceed twenty-four feet, thus the denial was in error.

 **Monroe v. City of New Bern**, 156 N.C. App. 275, 580 S.E.2d 372 (2003)
*Demolition, Damages, Housing Code*
            Plaintiff owned a seriously dilapidated, abandoned residence. After it had been boarded up for three years, the town proceeded to demolish it without notice or hearing and placed a lien on the property for demolition costs. The plaintiff alleged a due process violation and common law trespass. The trial court entered summary judgment for the city.

            The court the city’s authority to summarily demolish the house under G.S. 160A-193 (allowing summary abatement of a public nuisance) is limited to situations where the structure poses an imminent threat to public health or safety so as to constitute an emergency situation (such as being on the verge of falling on a public sidewalk or where necessary to control a large fire). In a non-emergency situation the city must follow the notice and hearing requirements of G.S. 160A-441 to 160A-450. The court remanded the case for a hearing on the issue of damages.

 **City of Charlotte v. King**, 158 N.C. App. 304, 580 S.E.2d 380 (2003)
*Enforcement, Civil Penalties, Housing Code*
            The city imposed a civil penalty of $5,500 on the defendant, a non-occupant owner of a residential structure, for failure to comply with an order to repair or demolish the structure. The ordinance exempted owners who occupied the structure as their principal residence from civil penalties. The court held the terms of the exemption were clear and unambiguous and did not apply to the defendant.

 **Kennedy v. Haywood County**, 158 N.C. App. 526, 581 S.E.2d 119 (2003)
*Immunity, Inspections*
            The plaintiff alleged the county was negligent in its building inspections and issuance of a certificate of compliance for a residential structure. The court held sovereign immunity barred such a suit against the county unless the county had waived such immunity. The county had purchased liability insurance for law enforcement officers. The court held building inspectors were not “law enforcement officers” as they have no authority to issue arrest warrants, are not certified law enforcement officers, and are not charged with providing police protection. Further, the county insurance policy specifically excluded coverage for property damage. Thus there was no waiver of immunity for building inspection purposes.

 **Capital Outdoor, Inc. v. Tolson**, 159 N.C. App. 55, 582 S.E.2d 717, *review denied*, 357 N.C. 504, 587 S.E.2d 662 (2003)
*Billboards, Interpretation, Due Process, Laches*
            Plaintiff sign companies challenged a state administrative rule limiting the height of signs to fifty feet, measured vertically from the adjacent edge of the pavement of the main traveled way. The rule went into effect in December 1990 but was not enforced by the state Department of Transportation until 1998. In 2000 the Department revoked the sign permits for all billboards that were more than fifty feet tall. The trial court upheld the revocations.

            The court affirmed that summary judgment for the state was appropriate. The only issue was one of statutory interpretation. The court held that the terms “height” and “sign structure” should be assigned their common or ordinary meaning as there was no indication the rule intended otherwise. The Department’s interpretation that this meant the top of the sign face must not be more fifty feet high is reasonable and correct. As for the challenge that the regulation violated substantive due process, the court held construction of billboards is not a fundamental right, so the rule must meet only a standard that it has a rational basis. The court found the regulation rationally related to the governmental interests in safety and aesthetics. The court held laches did not apply to preclude enforcement because the Department never gave plaintiffs any assurances that the taller signs complied with the regulation and the plaintiffs offered no specific facts to show how they were wrongly prejudiced by the delay in enforcement.

 **Slavin v. Town of Oak Island**, 160 N.C. App. 57, 584 S.E.2d 100, *review denied*, 357 N.C. 659, 590 S.E.2d 271 (2003)
*Beach access, Jurisdiction*
            As part of a beach nourishment project carried out by the federal government, the town developed a program to protect the sand dunes and sea turtle habitat areas created by depositing sand seaward of the previous high water mark. Part of this program involved placement of sand fences along the landward side of the newly created dunes, with access points at regular intervals. Oceanfront property owners contended the town had no authority to enact an access plan because the fences were located on state property and that each landowner had a vested right to direct, unrestricted access to the ocean that could not be limited without compensation.

            The court rejected both contentions. The court held that while title to the renourished beach belonged to the state, that does not limit the town’s general police power to enact regulations to protect a public beach within city limits. Further, the court held that while a littoral owner has a right of access to adjacent waters, that is a qualified right and is subject to reasonable regulation.

 **Butler v. City Council of Clinton**, 160 N.C. App. 68, 584 S.E.2d 103, *review denied*, 357 N.C. 504, 587 S.E.2d 661 (2003)
*Conditional use permit, Crematories*
            The city council denied a conditional use permit for location of a crematory in an office and institutional district on the grounds that the use failed to meet three of eight standards in the ordinance for conditional use permits, including that that the use will not be detrimental to the public health, safety, morals, or general welfare.

            The court held there was sufficient evidence in the record to justify a denial on the public safety ground. The court noted that the standard requires a finding that the use “will not” endanger public safety. The applicant’s evidence showed only that the use “likely would not” harm public safety. Further, neighboring opponents presented contrary evidence of potential health impacts and adverse psychological impacts. Thus there was sufficient competent, substantial, and material evidence in the record to support permit denial.

 **Welter v. Rowan County**, 160 N.C. App. 358, 585 S.E.2d 472 (2003)
*Nonconformities, Standard of review*
            The plaintiff owned a nonconforming go-kart track located in an R-A zoning district. The ordinance provided that if a nonconforming use was discontinued for a 360 day period it could not be resumed (with “discontinued” defined as stopping or ceasing the use). In the spring of 1999 the tenant of the track left the premises damaged and unoccupied. The site was not leased for the summer of 1999. In the fall of 1999 a tenant agreed to lease the property provided repairs were made. Between the fall of 1999 and the fall of 2000 some $30,000 in repairs were made. The plaintiff testified that some practice use of the track was made in this period, but no events open to the public were held between the spring of 1999 and early 2001. Upon petition of neighbors that the nonconforming status had been lost, the zoning administrator ruled that since the track had discontinued its regular use as a public go-kart track for over a year, it could no longer be used as a “public speedway.” The board of adjustment upheld the determination, as did the trial court.

            The court held the trial court should have conducted a de novo review, as interpretation of the terms of the ordinance is a question of law. Even though the trial court incorrectly applied a whole record review, the appeals court can address the dispositive issues on appeal without necessity of remand. However, in this instance the court held two problems precluded such. First, relevant portions of the ordinance were not in the record. Second, key facts regarding the exact nature of the use that did take place were not clearly resolved. Thus the case was remanded.

 **Eason v. Union County**, 160 N.C. App. 388, 585 S.E.2d 452 (2003)
*Building inspections*
            Plaintiff purchased a house in Union County. The purchase was contingent upon an independent inspection. That inspection revealed several defects. The plaintiff closed on the house with knowledge that the defects had not yet been remedied (relying on a promise from the builder that they soon would be). The county issued a certificate of occupancy after closing. The builder did not subsequently correct the defects. The plaintiff alleged negligent inspection by the county. The trial court granted summary judgment for the county.

            The court held that any negligence by the county was not the proximate cause of the plaintiff’s injury, as there was a closing prior to issuance of the certificate of occupancy, thus there was no reliance on county action. Further, the plaintiff’s visits to the sites and knowledge of the unrepaired defects at the time of closing constitute contributory negligence.

 **Cox v. Hancock**, 160 N.C. App. 473, 586 S.E.2d 500 (2003)
*Special use permit, Change in membership, Bias*
            The defendants applied for a special use permit for construction of a 130-unit apartment building on a 13.1 acre tract in the Oxford extraterritorial area. The board of adjustment held two hearings on the application and two members who were absent at the initial hearing attended and voted at the second hearing (and one member resigned between the two hearings). Upon approval of the application, plaintiff adjacent owners appealed issuance of the permit and the trial court affirmed.

            The court held that a prospective vendee (as well as the record owner) could properly apply for a special use permit. The court held an apartment building could properly be considered within the “unified housing development” allowed as a potential special use in this zoning district. The court held the application, exhibits, oral testimony presented and extensive board discussion (the initial hearing ran four hours, the second hearing an additional two hours) provided sufficient competent, substantial, and material evidence that the specific and general standards for this special use had been met. The court held that there was no due process violation created by a change in membership in the board given that written minutes of the first hearing were available prior to the second hearing, all exhibits presented at the initial hearing were available for review in the planning office between the two hearings, and there was extensive discussion and cross-examination at the second hearing. Finally, the court held the familial relationship of a board member (the owner of the property being sold for the development was married to the aunt of a board member) did not present a per se conflict of interest and the burden is on the party claiming a bias to show that bias existed, which was not done in this case.

 **William Brewster Co., Inc. v. Town of Huntersville**, 161 N.C. App. 132, 588 S.E.2d 16 (2003)
*Subdivision*
            The plaintiff submitted a sketch plan for a 145 lot single-family subdivision on a 58.51 acre tract. Lot sizes were proposed at approximately 6,000 square feet. The tract was near another development in preliminary plat stage of development that had 20,000 square foot lots. The plan was denied on the basis that it failed to meet two standards in the subdivision ordinance: (1) that it did not conform to with most recently adopted public plans and policies for the area; and (2) in an area with established development, that it did not “protect and enhance the stability, environment, health, and character of neighboring areas.” The plaintiff appealed and the trial court upheld the denial.

            The court held that the trial court properly applied a whole record test to determine whether there was substantial, competent, and material evidence in the record to support plan denial. The court held that the plaintiff had submitted adequate evidence that all of the zoning and subdivision requirements had been met, so there was an entitlement to approval absent adequate contrary evidence in the record. The court found there was not such evidence. The court concluded there were no adopted plans and policies for any areas within a mile of the proposed development, so the consistency requirement could not support a denial. Since the proposed nearby large lot development had not yet been built, it could not be considered “existing development” and there was no other evidence in the record that the proposal did not conform to surrounding conditions. Thus the denial was overturned.

 **Prewitt v. Town of Wrightsville Beach**, 161 N.C. App. 481, 595 S.E.2d 442 (2003)
*Preemption, Enforcement*
            In 1998 the town issued plaintiff a permit to build an oceanfront structure, with a required setback of 7.5 feet from an eastern reference line established by 1939 legislation. Upon completion of the structure, the town requested a new as built survey prior to issuing a certificate of occupancy. The new survey revealed the structure had, without any modification in plans being approved by the town, located 1.5 feet from the eastern reference line, with stairs extending past the reference line and several other unpermitted modifications (additional decks, bathrooms, attic space, and windows). The plaintiff appealed the denial of certificate of occupancy to the board of adjustment and, in the alternative should the appeal be denied, for a variance from the setback requirement. The board denied both and the board’s decision was affirmed by the trial court.

            The court held the 1939 legislation did not preempt the town’s rear yard setback regulations. The legislation, which dealt with artificially created lands along the oceanfront, ceded title to the created land to the adjacent upland owner for those lands west of the reference line and to the town for those lands east of the reference line. Since this reference line was termed the “building line” in the 1939 legislation, the plaintiff contended as a matter of law this was an implied preemption of the town setback. The court held that 1981 legislation amending the 1939 act to change the terminology from “building line” to “property line,” along with the authorization to regulate the size of yards and location of buildings in the zoning enabling act, provided the town valid authority to establish this rear yard setback requirement. The court also dismissed a claim of selective enforcement, noting the plaintiff has the burden of showing the ordinance had been implemented with “an evil eye and uneven hand” and the record was devoid of any evidence of conscious and intentional discrimination.

 **Ashby v. Town of Cary**, 161 N.C. App. 499, 588 S.E.2d 572 (2003)
*Rezoning*
            The plaintiffs challenged a refusal of Cary to rezone a parcel in an existing commercial area along Walnut Street from low-density residential to a business conditional use district. The plaintiffs had secured a portion of the lot in question from the town in exchange for property needed for widening of the street and subsequently sought voluntary annexation. The proposed zoning was consistent with the small area plan applicable to the area when the land was acquired, the property annexed, and the rezoning petition submitted. However, concurrent with receipt of this rezoning petition, the town received preliminary recommendations from a new corridor plan for the area. Based on concerns with traffic congestion raised in the new planning report, the town denied the rezoning (despite a planning board recommendation for approval and the approval of another rezoning for commercial use the same evening in the same general area). The plaintiff contended that denial was arbitrary and capricious.

            The court affirmed that a conditional use district rezoning decision is a purely legislative decision and is to be overturned only if the record before the town council at the time of decision demonstrates the decision had no foundation in reason and bore no substantial relationship to the public health, safety, morals, or welfare. If there is any plausible basis for the decision that has a basis in reason and relation to public safety, the decision must be affirmed. Here, the council’s stated concern about even minimal increase in traffic in a heavily congested area meets that standard of review.

 **Humane Society of Moore County, Inc. v. Town of Southern Pines**, 161 N.C. App. 625, 589 S.E.2d 162 (2003)
*Special use permit, Evidence, Remand*
            The plaintiff proposed to build a facility on a 12.5 acre tract in a “Planned Development” zoning district. The ordinance allowed “Veterinarian, Animal Clinic, Outside Kennel” as a conditional use in this district. The conditional use permit was denied on the grounds that the use was primarily an animal shelter and adoption facility and thus not permitted, that the use did not front a public road, that the use would substantially injure the value of adjoining property, and that it would not be in harmony with the surrounding area. On appeal, the superior court found the denial arbitrary and capricious, not supported by competent, substantial, and material evidence, and remanded with an order to issue the permit.

            The court held a whole record review was appropriate for these allegations and affirmed the trial court order. The court concluded the evidence submitted established that the services to be offered (vaccination, testing, treatment, euthanasia, and adoption of animals) included those uses common to a veterinarian clinic and there was no evidence in the record to support a conclusion that adoption services would be the principal use of the facility. The court held the ordinance requirements that a project front on a public road were applicable only to a “subdivision” and this development was not a subdivision. The court held the evidence on property value impacts submitted by the town’s expert witness, an appraiser, was inadequate. The expert had testified that there was inadequate data regarding actual comparable value impacts of animal care facilities on adjoining properties, so case studies of other uses and opinions of kennel operators and neighbors were used. The court held these were speculative opinions and not the proper foundation for a finding on impacts on property values. The court held the evidence offered on harmony with the surrounding area (two landscape architects’ opinion regarding noise and odor) was similarly speculative and failed to take into consideration the proposed facility’s proximity to the county airport, mini-warehouses, and an existing animal hospital. Finally, the court held the order to issue the permit on remand did not deprive the town of the opportunity to impose conditions on the permit as the matter had been before the town board twice and the applicant had in fact consented to several modifications in the project to ameliorate its impacts.

**Federal Cases arising in North Carolina**

**Hyatt v. Town of Lake Lure**, 314 F.Supp.2d 562 (W.D. N.C. 2003)
*Vagueness*
            In this case the court reached the merits of the issues described in Hyatt I. The court held the definition of the lake shoreline used by the town (based on elevations and contours) was not impermissibly vague. The disagreement regarding location was not based on confusion in the definition but on the plaintiff's either total disregard or without any consideration of the definition. The court held that at each step of the enforcement proceedings the plaintiff was given notice of the violation, an opportunity to appear before the town council, to present argument and evidence at the hearings, and had counsel present at all hearings. The court granted summary judgment to the town on these issues and dismissed the town's trespass claim (based on improper encroachment of the boathouse on the town-owned lake) without prejudice.