**2004 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**

 None

**North Carolina Court of Appeals**

 **Fantasy World, Inc. v. Greensboro Board of Adjustment**, 162 N.C. App. 603, 592 S.E.2d 205, *review denied*, 358 N.C. 543, 599 S.E.2d 43 (2004)
*Adult entertainment, Enforcement*
            The city tax collector denied a privilege license to the plaintiff to operate a business using a portion of a building as an adult use because another portion of the building was already in operation as another nonconforming adult use (the same business was also subject to long-running litigation regarding enforcement of the zoning ordinance minimum separation requirement and nonconforming use limitations). The tax collector's decision was appealed to the board of adjustment, which upheld the denial. The court concluded the city had adequate authority adopt an ordinance provision allowing the tax collector deny a privilege license due to noncompliance with the zoning ordinance. The court held the ordinance enforcement provisions of G.S. 160A-175 do not limit the city's compliance powers relative to administration of the privilege license tax. The court held the board of adjustment had jurisdiction to hear this appeal as the tax collector is an administrative official who is charged with assessing zoning compliance (since the ordinance required an assessment of regulatory compliance as part of the privilege license review). Previous court decisions related to injunctions for zoning compliance were held not to be res judicata for this proceeding as they raised different issues. The court also held there was sufficient evidence presented to the board of adjustment to establish that the plaintiff was not in compliance with zoning restrictions. Finally, the court held the city's tax and zoning requirements did not pose an unlawful prior restraint on protected speech as the discretion of the tax official is appropriated bounded (determining zoning compliance) and opportunity for an immediate appeal to the board of adjustment with further judicial possible provides prompt judicial review.

 **Sandy Mush Properties, Inc. v. Rutherford County**, 164 N.C. App. 162, 595 S.E.2d 233 (2004)
*Moratoria*
            On June 21, 2001 the county published a single newspaper notice of a hearing on a proposed Polluting Industries Development Ordinance that would prohibit location of new or expanded heavy industries within 2,000 feet of a church, school, or residence (the county did not have zoning). On June 26 an optionee/lessee on a tract owned by the plaintiff (which was located within 2,000 feet of a school) applied for a permit to locate a crushed stone quarry. The county informed the applicant that a set of building plans stamped by a licensed engineer must be submitted prior to consideration of the application. On July 2 the county held the advertised hearing, but decided not to adopt the proposed ordinance. The county instead on that date adopted a 120-day moratorium on building permits for initiation of heavy industry in school zones was adopted, specifying that the moratorium was adopted pursuant to its general ordinance-making authority. On August 31 the optionee submitted a completed building permit application with the requisite stamped plans. The permit was denied based on the moratorium. On September 4 the county adopted a School Zone Protective Ordinance that prohibited construction or operation of a heavy industry within 2,000 feet of a school. As with the moratorium, the county specified that this ordinance was adopted pursuant to its general ordinance-making authority (G.S. 153A-121), although the county followed all of the notice and hearing requirements for a zoning ordinance in its consideration of this permanent ordinance.

            The court held the moratorium was improperly advertised and was thus invalid. The court reasoned that the moratorium was in effect a temporary land use plan that divided the county into two areas - zones in which heavy industry was allowed and the smaller area were they were at least temporarily prohibited. This fact, along with the use of the building permit system for its enforcement, led the court to conclude the moratorium must be adopted following the procedures for land use regulations. Since those procedures require a public hearing with two published notices and that was not done here, the moratorium was held invalid.

 **Jones v. Davis**, 163 N.C. App. 628, 594 S.E.2d 235, *affirmed per curiam*, 359 N.C. 314, 608 S.E.2d 754 (2004)
*Subdivisions, Manufactured housing*
            The defendant subdivided forty-one acres in Surry County and then rented the lots to persons who placed tenant-owned manufactured homes on the lots. Neighbors challenged Surry County's approval of the subdivision plats. The court held that creation of lots for this purpose falls within the statutory and ordinance definition of a subdivision (creation of lots for the purpose of sale or building development). While zoning can regulate what use is made of the lots, the actual use is not controlling relative to plat approval. Also, since the county's manufactured home park ordinance was not applicable to this property because by its terms it only applied to unsubdivided land.

 **Clark Stone Company, Inc. v. Department of Environment and Natural Resources**, 164 N.C. App. 24, 594 S.E.2d 832, *review denied*, 359 N.C. 322, 603 S.E.2d 878 (2004)
*Mining permits, Revocation, Vested rights*
            Plaintiff secured a mining permit for a tract in Avery County. When land preparation for the mine began, neighboring citizens and interest groups complained to the defendant that the site was clearly visible from the Appalachian Trail (which was about two miles from the mine site) and noise from the mining operation would significantly impact users on the Trail. Neither of these considerations was known by the defendant at the time of permit issuance. After a local public hearing, the defendant issued notice of an intent to revoke the permit because of these significant adverse impacts. The plaintiff submitted a landscape and screening plan, but the defendant rejected them as inadequate and revoked the mining permit.

            The court applied whole record test to the issue of whether there was substantial evidence in the record to support the finding of significant adverse impact and held that there was (citing testimony from department staff and three consultants it hired). That being so, the court must defer to the agency decision. The court applied a de novo review on the question of statutory authority for permit revocation. Since the statute gives the department authority to modify the terms and conditions of a permit as it deems appropriate, the department has the authority to revoke a permit if it follows the proper procedures and concludes the mining operation would otherwise violate the requirements of the Mining Act. The court held that since the permit was mistakenly issued, the plaintiff could claim no vested rights based on it.

 **McCormick v. Hanson Aggregates Southeast, Inc.**, 164 N.C. App. 459, 596 S.E.2d 431, review denied, 359 N.C. 69, 603 S.E.2d 131 (2004)
*Enforcement, Public records*
            The city of Raleigh issued a notice of zoning violation to the defendant for activities at its quarry. Prior to the board of adjustment consideration of an appeal of this notice, the defendant sought to obtain copies of city documents relative to the matter. The city contended these were not public records as they were related to a potential criminal investigation and were further protected by attorney-client and work product privileges.

            The court held that the city attorney's office was a "public law enforcement agency" for purposes of the Public Records Act. Since zoning violations are violations of the law, the city can invoke the criminal investigation exception to the public records law for closed and future investigations relative to zoning violations. The city must produce the records for the judge to make an in camera review to determine if they are protected under this exception. However, the court also noted the statutory protection for information protected under the Public Records Act is narrower than the traditional common law attorney-client privilege and that there is not a work product exemption to the Public Records Act.

 **Knight v. Town of Knightdale**, 164 N.C. App. 766, 596 S.E.2d 881 (2004)
*Interpretation, Manufactured housing*
            The plaintiffs challenged the town council's denial of site plan approval for their modular home. The ordinance required site plans to protect other properties from "adverse effect expected from the development, including without limitation, stormwater, noise, odor, on and off-street parking, dust, light, smoke, and vibration." The denial was based on harm to neighboring property values. The court reviewed the city council's site plan approval as a quasi-judicial decision. The court held the decision was not based on a permissible ground for denial under the ordinance. All of the factors listed were physical in nature, so consideration of property value impacts was held to be beyond the scope and intent of the ordinance.

 **Northfield Development Co., Inc. v. City of Burlington**, 165 N.C. App. 885, 599 S.E.2d 921, *review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004)
*Judicial review, Conditional uses, Cemeteries*
            The plaintiff applied for a special use permit for location and operation of a cemetery on a fifty-acre tract in the city's extraterritorial zoning jurisdiction. The applicant refused a request by city staff to submit additional information and a site plan. The council then denied the permit without a hearing. The plaintiff initiated this action as a civil action to compel the city to issue the permit and seeking monetary damages. After substantial discovery, the superior court granted summary judgment for the city and the plaintiff appealed. The court held the trial court had no subject matter jurisdiction to hear this matter in this fashion. An appeal of a special use permit decision must be brought by petition for certiorari and that was not done here. The trial court can only review the matter in an appellate capacity based on the record established in the administrative hearing and had no authority to take new evidence in this matter. Since the initial judicial appeal was not brought as a petition for certiorari, it must be dismissed.

 **Williams v. North Carolina Department of Environment and Natural Resources**, 166 N.C. App. 86, 601 S.E.2d 231 (2004)
*CAMA, Attorney fees, Costs*
            The plaintiff was denied a permit to fill land to construct a freezer. This decision was affirmed on a contested case appeal by the Coastal Resources Commission, but ultimately overturned in court. The plaintiff then sought and was awarded attorney's fees under G.S. 6-19.1 for the judicial review of the case and under Rule 37(c) of the Rules of Civil Procedure for the administrative portion of the case. The court held it was improper to award attorney fees for the judicial review portion of the case because the state had not acted "without substantial justification" in its initial permit decision. The court noted that there was conflicting evidence and a difficult factual determination at issue in the case. Even though the court eventually concluded otherwise, a reasonable person could have agreed with the agency, so their decision was not without substantial justification. The court likewise found attorney fees for the administrative portion of the case were not warranted. An agency can only be sanctioned in this manner for a failure to admit the truth of a matter in discovery if it had no reasonable grounds to believe it might prevail on this contested factual matter. The court noted that in awarding costs to the plaintiff, the trial court improperly included meals and travel expenses. Finally, the court held the plaintiff had waived appellate consideration of the trial court's failure to grant attorney fees for its takings claim by failing to file a cross-appeal on this issue.

 **Sanco of Wilmington Service Corp. v. New Hanover County**, 166 N.C. App. 471, 601 S.E.2d 889 (2004)
*Subdivision, Quasi-judicial*
            The plaintiff received preliminary plat approval from the county's Technical Review Committee (TRC) for a 427-unit condominium project. Neighbors then petitioned the county board of commissioners for a hearing on the approval. After conducting this hearing, the commissioners voted to amend the prior approval to allow only 213 units. The court invalidated the commissioners' action. By the terms of the county ordinance only the petitioner had a right to appeal the TRC decision to the county board of commissioners. Thus the neighbors had no standing to bring an appeal and the commissioners had no jurisdiction to hear it. Also, the standards for plat approval in the county subdivision ordinance were entirely objective, so this was a ministerial decision. Once it is established by the applicant that those standards are met, the applicant is entitled to plat approval as a matter of law.

 **Ward v. Inscoe,** 166 N.C. App. 586, 603 S.E.2d 393 (2004)
*Conditional uses*
            The plaintiff neighbors challenged a conditional use permit issued by the city of Henderson board of adjustment. The permit was for a bank with four drive-through lanes. The trial court ruled that the board had failed to make findings, but substantial evidence in the record supported permit issuance. The court of appeal, in an earlier unpublished decision, vacated that decision and ordered a remand to the board so that the board could make the requisite findings. On remand, the board met at regularly scheduled meeting times to consider the matter, did not provide personal notice to the plaintiff neighbors, took no additional evidence, adopted findings based on the previous hearing record, and issued the permit.

            The court held this process did not violate the due process rights of the neighbors. Since the board did not take any new evidence and only adopted findings to correct its omissions from the initial consideration of the matter, notice and the right to present or rebut evidence was not required. Since there was substantial evidence in the hearing record to support the board's decision, the permit was properly issued.

 **Robertson v. Zoning Board of Adjustment**, 167 N.C. App. 531, 605 S.E.2d 723 (2004), *review denied*, 359 N.C. 322, 611 S.E.2d 417\_\_\_ (2005)
*Findings, Variances*
            The petitioners constructed a fence with the front yard setback area of their property that exceeded the height limit set in the Charlotte zoning ordinance. Substantial portions of the fence were eight feet high while the ordinance only allowed fences five feet above grade. The violation was discovered when the city zoning inspectors visited the site in response to the petitioners' complaint about a neighbor's alleged zoning violation. The board granted a variance for a portion of the fence, but denied the variance for the remainder. On judicial review, the trial court remanded the case for additional findings of fact. The board made additional findings based on the evidence collected at its initial hearing of the case.

            The court applied a whole record review to conclude that the decision was not arbitrary and was based on substantial evidence. The court held that testimony, reports, photographs, and surveys in the record regarding the site topography, fence location and height sufficiently supported the board's findings on these matters and conclusions that the fence height constituted a traffic safety problem (among other problems). The court applied a de novo review to alleged errors of law. The court upheld the board's conclusion that a height variance of sixty percent in the front yard and thirty-three percent in the side yard would be contrary to the purpose of the ordinance and thus impermissible. The court also noted the board's conclusions that the alleged hardship was self-created, personal in nature (arising from a dispute with a neighbor), and would create a nuisance.

**Federal Cases Arising in North Carolina**

**Hyatt v. Town of Lake Lure II**, 314 F. Supp. 2d 562 (W.D.N.C. 2003), *aff’d,* 114 F.App’x 72 (4th Cir. 2004)
*Vagueness*
The court held that the definition of lake shoreline used here by defendant the town (based on elevations and contours) was not impermissibly vague. The disagreement regarding shoreline location was not based on confusion in the definition but, rather, on the plaintiff’s total disregard or lack of consideration of the definition. The court found that at each step of the enforcement proceedings the plaintiff was given notice of the violation; had an opportunity to appear before the town council, was able to present an 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 plaintiff’s boathouse on the town-owned lake) without prejudice.

 **Fourth Quarter Properties IV, Inc. v. City of Concord,** No. 1:02CV00908, 2004 WL 231303 (M.D.N.C. Jan. 22, 2004)
*Takings; Jurisdicion*
The plaintiff engaged in extended discussions with the city regarding a proposed shopping center to be developed adjacent to the Concord Regional Airport. The discussions were complicated by potential revisions to the city’s ordinances regarding restrictions on the height and location of buildings adjacent to the airport, potential runway expansion proposals, utility easement arrangements, and economic incentive agreements. As a result portions of the proposed development were not approved (even though objections were not raised during preliminary reviews), plans were required to be revised, and other approvals delayed. The court held a federal takings claim was not ripe because their state inverse condemnation claim was pending. The court granted the city’s motion to stay the state claims, as those claims involve important matters of state zoning law more properly heard in state court, thus making federal abstention under *Burford* appropriate.

 **Molamphy v. Town of Southern Pines**, No. 1:02CV00720, 2004 WL 419789 (M.D.N.C. Mar. 8, 2004)
*Adoption; Liability*
The plaintiff approached the defendant town regarding a proposed convenience store and was advised to present an informal concept plan for staff review. After this information was submitted, the town council began consideration of a zoning text amendment to remove convenience stores as a permitted use in the highway corridor overlay district, a designation that included the subject property. In subsequent meetings with the plaintiff, inconsistencies in his plan regarding the current ordinance were identified, but the proposed text amendment was not mentioned. The town subsequently held a hearing to effectuate this text amendment. The two published notices of the town council hearing were published in the same week, rather than in separate weeks as required by state law. Also, the published notice simply noted a proposed amendment to a particular section of the ordinance, with no indication of the subject matter or content of the amendment. The plaintiff attended the hearing and objected to the proposed amendment.

The court held that the ordinance amendment was invalid due to the town’s failure to strictly comply with both statutory and ordinance requirements for published notice (both on the basis that the notice was not timely and that it was so sparse as to fail to apprise persons of the nature and character of the action proposed). The fact that the plaintiff had actual notice of the hearing was legally irrelevant. The court noted that the violation of state statutory procedural requirements is not per se a constitutional violation. The facts that the plaintiff had actual notice of the hearing and that the plaintiff had no vested legal right to build a convenience store led to dismissal of federal due process claims.

**Molamphy v. Town of Southern Pines**, \_\_\_ F.Supp.2d \_\_\_ (M.D. N.C. 2004)

*Liability, Adoption*

            The plaintiff approached the town regarding a proposed convenience store and was advised to present an informal concept plan for staff review. After this information was submitted, the town council began consideration of a zoning text amendment to remove convenience stores as a permitted use in the highway corridor overlay district, a designation that included the subject property. In subsequent meetings with the plaintiff inconsistencies in his plan regarding the current ordinance were identified (and the plaintiff undertook plan revisions to address them), but the proposed text amendment was not mentioned. The town subsequently held a hearing to effectuate this text amendment, but the two notices of the town council hearing were published in the same week. Also, the published notice simply noted a proposed amendment to a particular section of the ordinance, with no indication of the subject matter or content of the amendment. The plaintiff did attend the hearing and objected to the proposed amendment. After this litigation was filed, the state DOT advised the plaintiff that it was proposing to acquire a substantial portion of the lot in question for a road-widening project.

            The court held the DOT action did not make the plaintiff's claim moot as acquisition had not yet taken place and the development regulations applicable to the property could be relevant to the value of the property should acquisition proceed. The court held the ordinance amendment to be invalid due to the town's failure to comply with both statutory and ordinance requirements for published notice (both on the basis that the notice was not timely and that it was so sparse as to fail to apprise persons of the nature and character of the action proposed). The fact that the plaintiff had actual notice of the hearing is legally irrelevant if the required published notice is inadequate. The court noted the individual town council members have legislative immunity from suit in their individual capacities and the town staff members were acting within the scope of their authority and were also immune from suit in their individual capacities. The court also noted that the violation of state statutory procedural requirements is not a per se constitutional violation. The facts that the plaintiff had actual notice of the hearing and that the plaintiff had no vested legal right to build a convenience store led to dismissal of federal due process claims.