**2005 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**

 **Nash-Rocky Mount Board of Education v. Rocky Mount Board of Adjustment**, 169 N.C. App. 587, 610 S.E.2d 255 (2005)
*Government uses*
The plaintiff proposed construction of a school bus parking lot at an existing high school. The plaintiff secured a driveway and fence permit from the city and built the lot. After complaints from adjacent neighbors, the city informed the school board a special use permit would be required for continued use of the permit. The board of adjustment then denied the special use permit. The court held that G.S. 160A-393 only extends zoning jurisdiction for governmental uses to situations involving the "erection, construction, and use of buildings." The court held the plain meaning of the word "building" in this context does not include a parking lot.

[*Note: Subsequent to the board of adjustment decision in this case, G.S. 160A-393 was amended in 2004 to extend zoning jurisdiction to the use of land and well as the use of buildings. The comparable county statute was not amended. However, this 2004 amendment was repealed in 2005, returning the statute to its pre-2004 form*.]

 **MCC Outdoor, LLC v. Town of Franklinton**, 169 N.C. App. 809, 610 S.E.2d 794, *review denied*, 359 N.C. 634, 616 S.E.2d 539 (2005)
*Signs, Conditional uses, Evidence*
The plaintiff appealed denial of special use permits for two billboards. The court reversed the denial on several grounds. First, several of the findings supporting the denial stated reasons for denial unrelated to the standards for approval set forth in the ordinance. Second, there was not competent evidence in the record to support a finding that the signs would be incompatible with the surrounding neighborhood. Simple visibility for residences is insufficient support for a finding of incompatibility (given that inclusion of off-premise advertising as a special use created a presumption of compatibility. Third, rather than deny the permit based on it being too close to a stream under state regulations, the board should have conditioned the permit on relocation (it needed to be moved seven feet and the plaintiff had agreed to do so) consistent with state regulation.

 **State v. Campbell**, 169 N.C. App. 829, 610 S.E.2d 799 (2005)
*Nuisance*
The city of Salisbury brought this nuisance abatement action, contending alleged drug trafficking activities and breaches of the peace at the rental duplex constituted a public nuisance under G.S. 19-1 and 19-1.2. The court held that three arrests of tenants for drug activity over a three-year period did not establish that the property was being leased for the purpose of illegal drug sales. The court also held that two dozen police calls to the site over the same period did not constitute a "breach of the peace" under the article as most of the calls did not disturbing the public order (seven were to serve warrants and six were for domestic disturbances).

 **Granville Farms, Inc. v. County of Granville**, 170 N.C. App. 109, 612 S.E.2d 156 (2005)
*Preemption*
The court held that state regulations of disposal of sludge from waste treatment facilities preempt county ordinances imposing more stringent regulations on land application of biosolids (the residual sludge resulting from treatment of domestic sewage in wastewater treatment plants). The court held the state had established a complete and integrated regulatory scheme on the disposal of these materials.

 **Harding v. Board of Adjustment of Davie County**, 170 N.C. App. 392, 612 S.E.2d 431 (2005)
*Conditional uses, Evidence*
Neighbors challenged the issuance of a special use permit for a go-cart track on a 134-acre tract in a rural portion of the county. The proposed track was adjacent to a non-conforming dragstrip that was also owned and operated by the permit applicant. The ordinance required the board to find the use "will not adversely affect the health or safety" of neighbors. While the trial court cited the Woodhouse rule that the burden of production and persuasion is on the challenger for general permit standards, the court held the board making the permit decision had in fact placed the burden for this standard on the applicant. The court also held there was substantial evidence in the record to support the board's findings relative to noise impacts. In the course of four nights of hearings on the application, a civil engineer testified for the applicant regarding expected noise levels at the property line and the impacts of mitigating features (a berm and vegetation). Although not qualified as an expert witness, the engineer submitted reports and was available for cross-examination. The neighbors did not challenge his testimony nor did they offer any rebuttal evidence on noise.

 **Coleman v. Town of Hillsborough**, 173 N.C. App. 560, 619 S.E.2d 555 (2005)
*Conditional uses; Protest petition*
Plaintiffs sought a conditional use district rezoning and conditional use permit in order to construct a retirement community on a forty-acre tract in the Hillsborough extraterritorial area. Neighbors filed various written protests. The town staff determined these constituted a qualified protest petition. After the hearing the plaintiff submitted a redesigned project with fewer units, reduced density, and increased buffers. The town advertised a second hearing, but noted there was an outstanding valid protest petition and protestors need not renew their objection. After this hearing the rezoning was approved by a 3-2 vote and a special use permit was issued. Upon being advised that the rezoning had failed due to the lack of the requisite supermajority for protest petitions, the council revoted on the special use permit and denied it based solely on the belief that the rezoning had failed.

The court held that the statutes require protests to be filed two full working days prior to the day of the hearing (here by the close of business on Thursday for a hearing to be held the following Tuesday). The city staff had interpreted the statute to include the day of the hearing as one of the two working days needed to verify the protest and therefore presumed the deadline for filing was the close of business on Friday. The city was unable to verify which of the petitions had been received by the close of business on Thursday. The town was also unable to submit evidence on how it calculated whether the necessary land area was included within the protest nor whether petitions signed by one owner of co-owned properties were valid. The court held that the town had failed to meet its affirmative obligation to verify the petitions, so the protest was invalid and only a simple majority vote was required and the rezoning had been successfully adopted. The court further held it was therefore appropriate for the trial court to order the conditional use permit issued (as it had originally been approved and was only denied on the erroneous belief that the rezoning had failed).

 **321 News & Video, Inc. v. Zoning Board of Adjustment for Gastonia**, 174 N.C. App. 186, 619 S.E.2d 885 (2005)
*Adult uses; Scope of review, Variance*
The plaintiff was denied a variance from the ordinance requirement that adult businesses be located at least 500 feet from specified sensitive land uses. The ordinance allowed a variance upon showing that man-made or natural features (such as an interstate highway) would otherwise adequately buffer the protected uses from adverse secondary impacts of proximity to an adult use. The court held the plaintiff had stipulated there was substantial, competent, and material evidence in the record to support the boards findings that no such alternate buffering factors were present. The court further held that the constitutionality of the standards could not be challenged before the board of adjustment or in a judicial appeal of the board's decision.

 **Elliott v. Muehlbach**, 173 N.C. App. 709, 620 S.E.2d 266 (2005)
*Nuisance, Evidence*
he plaintiffs contended defendant's use of a three-acre parcel in Chatham County for a dirt ATV racetrack constituted a nuisance. The court held that to constitute a nuisance in fact the use must unreasonably interfere with the use and enjoyment of the plaintiff's property and thereby cause substantial injury. The reasonableness of the action is to be determined impartially and objectively by reasonable persons generally and in consideration of the whole situation. Since the trial court findings only addressed reasonableness from the plaintiffs' standpoint rather than from reasonable persons in general, the court remanded the matter for further findings on this point. The court held there was sufficient evidence in the record to support a finding that the use caused substantial injury to the plaintiff and that an expert witness's testimony on noise impacts need not be based on actual onsite measurements of the sound generated.

 **Fabrikantv. Currituck County**, 174 N.C. App. 30, 621 S.E.2d 19 (2005)
*Coastal Area Management Act, Public trust doctrine*
Plaintiffs sued the county, various state agencies, and the developer of oceanfront property in Currituck County. Among numerous other claims, the plaintiffs sought: (1) a declaratory judgment that the state and public have no rights to use of the dry sand beach (the area between the vegetation line and the mean high water line); (2) to enjoin the state from taking actions to encourage public use of the beach; (3) to have G.S. 77-20 regarding public use of the dry sand beach declared unconstitutional; and (4) to find an unconstitutional taking if the statute was not invalidated.

The court held the claims to quiet title in the dry sand beach and to enjoin the state from interfering with the plaintiff's use of the area were barred by sovereign immunity. The state had not waived immunity under G.S. 41-10.1 because that statute only address state claims to property ownership made on the same basis as would be available to a private party. The rights asserted by the state were under the public trust doctrine, rights that can only be asserted by the sovereign. The court also held that since the state had not taken any concrete actions against the plaintiffs regarding public use of the dry sand beach, there was no justiciable controversy on this matter, so the declaratory judgment action was properly dismissed.

 **BellSouth Carolinas PCS, L.P. v. Henderson County Zoning Board of Adjustment**, 174 N.C. App. 574, 621 S.E.2d 270 (2005)
*Interpretation, Telecommunication towers*
The plaintiff secured a permit for a cellular telephone tower in a residential zoning district. The district allowed "public utility stations" as a permitted use in this district, provided setback, fencing, and vegetative buffering requirements were met. The ordinance did not define a "public utility" or "public utility station." After the permit was issued by staff and the tower erected, neighbors appealed. The board of adjustment held the tower was not a public utility station and vacated the permit.

The court held an appeal regarding interpretation of the ordinance is an alleged error of law, so a de novo review is to be applied. The court examined dictionary definitions of a public utility, Black's Law Dictionary, and rulings on the question around the country. The court concluded a variety of factors should be considered in defining a public utility, including the lack of competition in the marketplace, the type of good or service provided, and the existence of regulation by the government. The court concluded telecommunication service provision is a 'public utility" within the intent of this zoning ordinance, noting telephone service is traditionally considered a utility and the extensive state and federal regulation involved.

 **Darbo v. Old Keller Farm Property Owners' Association**, 174 N.C. App. 591, 621 S.E.2d 281 (2005)
*Easement, Subdivision*
Plaintiff acquired title to two lots, one within a subdivision and an adjacent 8.9-acre tract, both depicted on a prior subdivision. The subdivided lot was served by a forty-five foot right of way designated at a "private drive" on the plat (which connected to a sixty-foot wide road another section of the subdivision). When plaintiff proposed to subdivide the 8.9-acre parcel into five lots to be served by this right of way, the defendant objected to plat approval. Watauga County advised the parties it would not process the plat until the parties resolved the dispute over whether the "private right of way" could be converted to a required "county standard road."

The court held that where there were no restrictive covenants restricting use of this right of way to a specified number of users and common practice in the county was to reserve such easements for potential future road use, the trial court properly interpreted the plat restriction to allow conversion of the easement to a broader accessway. The court also held that the planning board's long-standing interpretation of the subdivision ordinance to allow conversion of forty-five foot private rights of way to improved accessways serving a larger number of lots was entitled to considerable deference.

 **MMR Holdings, LLC v. City of Charlotte**, 174 N.C. App. 540, 621 S.E.2d 210 (2005)
*Interpretation, Signs*
The plaintiff had a nonconforming sign located on a large canopy running along the entire width of the front of the building. The canopy was 40-feet deep and eight-foot high. The ordinance required removal of the nonconforming sign if there were structural or nonstructural alterations of the façade of the principal building that exceeded 50 percent of the façade area. In a renovation the plaintiff replaced all of the Plexiglas enclosing the canopy area with paneling. The city interpreted "façade" to mean the facing of the canopy area, which constituted a false face for that portion of the building. Since the alteration affected all of this face, the city contended this triggered loss of the nonconforming status. The board of adjustment agreed and the trial court upheld that determination.

The court held interpretation of the term "façade" is a question of law subject to de novo judicial review. Since the term was not defined in the ordinance, the court applied its plain and ordinary meaning. The board of adjustment cited both the first and second meaning from the dictionary, with the second noting an artificial or false front as critical to the board's determination. The court held that since the first meaning was specific to architecture, while the second used a more metaphoric rather than physical sense of the word. Thus it was error to assign that second meaning to the term since the ordinance clearly used the term in an architectural sense. The board should have considered the entire front of the building to be its "façade" and not just the eight-foot high portion enclosed by the canopy. The court did defer to the board's interpretation that only the front of the building, rather than its entire exterior, should be considered as its "façade."

 **Jirtle v. Board of Adjustment for the Town of Biscoe**, 175 N.C. App. 178, 622 S.E.2d 713 (2005)
*Accessory use, Interpretation, Nonconforming use*
A church operated a food distribution program for the poor from the basement of its education building. The church then acquired an adjacent lot and proposed to construct a small building on it and to move its food pantry program to the new building. The church was located in a residential zoning district and was nonconforming due to a lack of adequate onsite parking. The town issued a permit for the new building and a neighbor objected. The board of adjustment and trial court upheld the zoning administrator's determination that the food pantry was an accessory use of the church and that it did not constitute an unlawful expansion of a nonconformity.

The court held this was not an unlawful expansion. The parking requirement was based on the number of seats in the largest assembly room on site. Since the sanctuary would be the largest assembly room both before and after construction of the new food pantry, there would be no change in the off-street parking requirement and thus no increase in the degree of nonconformity. The court also affirmed the holding that the food pantry was a legitimate accessory use, noting both that it was physically smaller than the principal use (1,000 sq. ft. for the pantry compared to over 9,000 sq. ft. in the existing buildings) and the service mission of the pantry was incidental and subordinate to the church's main purpose of worship.