**2006 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**

 **Ward v. New Hanover County**, 175 N.C. App. 671, 625 S.E.2d 598 (2006)
*Exhaustion of administrative remedies, Special use permits*
In 2002 the plaintiffs sought county approval to use a forklift to move boats at their commercial marina. The county planning staff determined that would be inconsistent with the 1971 special use permit for a boat ramp at the site. The plaintiff in 2003 submitted a request for permit modification that would allow the forklift, withdrew that request, and in 2004 submitted a second site plan and proposed permit modification. The county planning staff then sent the plaintiff a letter stating they believed this would be a substantial modification of the permit requiring board approval rather than a minor modification that could be approved by staff. After meeting with the staff, the plaintiff’s attorney responded that all agreed the county’s letter was not a finding or determination subject to appeal. The plaintiffs then filed this declaratory judgment action seeking a determination that use of the forklift was lawful.

The court held that county staff had not yet issued a formal decision on the proposed use and that the issue was subject to ongoing discussion among the parties. Since the plaintiff had not secured a formal determination of their rights from the county staff, they failed to exhaust their administrative remedies and this action was properly dismissed.

 **Keith v. Town of White Lake**, 175 N.C. App. 789, 625 S.E.2d 587 (2006)
*Adoption, Rezoning*
The town planning board recommended rezoning of two lots owned by the plaintiff in the town’s extraterritorial jurisdiction in order to bring the zoning into compliance with a newly adopted land use plan. The town’s governing board, after proper notice and hearing, adopted the proposed rezoning.

The plaintiff contended that the rezoning was invalid for failure to follow the zoning ordinance provisions setting out a procedure for “any person or organization” to petition the town board for a zoning amendment (specifying the contents of the petition, timing of its submission, and providing planning board review). The court held the statutory and ordinance provisions authorizing the planning board to make recommendations for zoning text and map changes obviated the need for a formal petition when the planning board initiates a recommended amendment.

 **Woodlief v. Mecklenburg County**, 176 N.C. App. 205, 625 S.E.2d 904, *review denied*, 360 N.C. 492, 632 S.E.2d 775 (2006)
*Interpretation, Vested rights*
Neighbors challenged a floodlands development permit issued for a residential subdivision. The owners secured a permit in March 2003. In May 2003 Charlotte adopted revised and more restrictive floodway regulations that affected this site. In May 2004 the staff discovered the permit had been mistakenly issued, revoked the permit, and directed the owner to revise its application. A revised permit application, with a new flood study, was submitted in June 2004. The staff applied the rules in effect at the time of the original application; the neighbor contended the updated regulations in effect at the time of “reissuance” should have been used. The board of adjustment and trial court affirmed the staff decision.

The court applied a de novo review to an interpretation of the ordinance as to which version of the regulations was applicable. Both the original and revised ordinance were silent on this issue. However, the staff advised the owner that the matter would be considered a “revised” rather than a new application and the staff had a long-standing prior pattern and practice of considering revisions under the rules in effect at the time of the original decision unless the regulations specifically provide otherwise. The court affirmed use of the original ordinance and held that is was properly applied in approving the project.

 **Broadbent v. Allison**, 176 N.C. App. 359, 626 S.E.2d 758, *review denied*, 361 N.C. 350, 644 S.E.2d 4 (2006)
*Nuisance, Airport*
The defendant constructed an airstrip on land adjacent to the plaintiffs’ property. The defendant’s property had previously been farmland. The plaintiff contended low flying planes over their house, barn, and riding ring (along with two plane crashes on their property) constituted a nuisance. The case began in federal court but was remanded to state court [155 F.Supp.2d 520 (W.D. N.C. 2001)]. The trial court upheld the jury’s finding of a nuisance, upheld an award of $358,000 compensatory damages, but refused to enjoin the airport use and awarded the defendant an avigation easement.

The court held the trial court instruction on the nuisance issue (the plaintiff must show substantial and unreasonable interference with the use and enjoyment of property) was correct and the finding of a private nuisance was adequately established in the record. Because it was not clear whether the monetary damages awarded were for permanent damages, temporary damages, or both, the issue of damages and injunctive relief were remanded.

 **Wright v. Town of Matthews**, 177 N.C. App. 1, 627 S.E.2d 650 (2006)
*Interpretation, Streets*
The plaintiff challenged the town’s determination that the street fronting their property was a public street under the zoning ordinance. The staff and board of adjustment concluded the sixty-foot right of way was a public street, based on state maintenance of the street from about 1979 to 1985, its addition to the town street system in 1985 and town maintenance of the street subsequent to 1985, including its pavement in 1991.

The court held there was insufficient evidence to show the contested right of way was a public street by express dedication. Nor was there sufficient evidence on acquisition by prescription, as the evidence of state maintenance was inconclusive and the town maintenance was just under the requisite twenty years. The court remanded the case for findings regarding an implied dedication of the right of way. The court expressly noted the case only addressed whether the right of way was a “public street” for zoning purposes and not any private rights of access for the owner or adjacent owners.

 **DurhamLand Owners Association v. County of Durham**, 177 N.C. App. 629, 630 S.E.2d 200, *review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006)
*Impact fees*
Plaintiffs challenged the county’s statutory authority to adopt a school impact fee ($2,000 per single-family home; $1,155 per multi-family unit).

The court held the county did not have statutory authority to impose the fee. The court held the authorization in G.S. 153A-102 to fix fees “charged by officers and employees for performing services or duties permitted or required by law” did not authorize this impact fee. The court reasoned that provision of schools is a general governmental obligation of the county itself, not a service provided by an employee. The court likewise held that while permit application and review fees were implicitly authorized by the statutory authorization of general ordinances and zoning ordinances, that does not authorize fees to fund basic governmental services such as school construction.

 **Ocean Hill Joint Venture v. Currituck County**, 178 N.C. App. 182, 630 S.E.2d 714, *review granted*, 360 N.C. 648, 636 S.E.2d 808 (2006), *review improvidently granted*, 361 N.C. 228, 641 S.E.2d 302 (2007)
*Streets*
When the plaintiff developer’s residential subdivision was approved, the plat dedicated all streets to “public or private use as noted,” but the plat failed to identify which streets were private and which public. The developer subsequently transferred title of the street to the home owners association, which paid for road maintenance thereafter. When the plaintiff developer’s subsequent adjacent subdivision led to increased traffic, the home owners association petitioned the county to withdraw the developer’s dedication of the road and close them to the public. The county approved the closure pursuant to G.S. 153A-241. The developer appealed. At trial the jury concluded the road closure was contrary to the public interest.

The court held that the statute mandates a de novo review of the proposed street closing by the trial court. Thus there was no presumption in favor of the county board of commissioner’s decision and the burden of proof at trial remains on the party requesting the change in the road’s status (here the property owners association).

 **Koenig v. Town of Kure Beach**, 178 N.C. App. 500, 631 S.E.2d 884 (2006)
*Beach access, Standing*
The deed to the plaintiff’s oceanfront property referenced a ten-foot wide public access easement along the property’s northern boundary. When the town proposed to build a walkway and dune crossover on this easement, the plaintiff brought suit alleging the easement had not been dedicated to nor accepted by the town. Adjacent upland property owners intervened in the suit, claiming a prescriptive easement over the accessway. The trial court granted summary judgment against the intervenors and the town.

The court affirmed on the basis the intervenors had not established the requisite elements for a prescriptive easement: (1) use is adverse or under claim of right; (2) use is open and notorious: (3) use is continuous and uninterrupted for twenty years: and (4) there is substantial identity of the easement claimed for the requisite period. The court held there was no evidence that the use was without the owner’s permission. Further, most of the intervenors failed to establish they had used the accessway for more than a few years. The court further held a court could allow permissible intervention in a case and later find the intervenors did not have standing to bring additional claims regarding a public prescriptive easement.

 **Litvak v. Smith**, 180 N.C. App. 202, 636 S.E.2d 327 (2006), *review denied*, 362 N.C. 87, 655 S.E.2d 839 (2007)
*Sales contract, Protest petition*
The plaintiff contracted in May 2004 to purchase a five acre vacant parcel in North Topsail Beach that was zoned for commercial use. The sale was conditioned on obtaining a “nonappealable final approval to rezone” the property to residential use, with the buyer to “use all reasonable diligence” in securing the rezoning. In July 2004 the plaintiff filed a petition for the rezoning, which was rejected by the town’s planning board in August 2004. In September 2004 the town staff recommended approval of a revised rezoning proposal. In October 2004 a valid protest petition was filed. One of the town’s five council members was recused for a conflict of interest. In November 2004 the council voted 3-1 in favor of the rezoning. The town held the rezoning had been adopted and the defendant notified the plaintiff of an expected closing within sixty days. However, in December 2004 the town announced it had reconsidered the vote calculation and decided the recused member should have been included in the calculation of the requisite supermajority and therefore the rezoning had not been approved and the rezoning was void *ab initio*. Upon reconfirmation of this decision by the town council on December 20, 2004, the defendant on December 21 terminated the sales contract based on rejection of the rezoning. On December 28 the plaintiff sued the town on the rezoning vote calculation.

The court held that since the sales contract did not have a specific time limitation nor a “time is of the essence” clause, the plaintiff must be given a reasonable time to complete the rezoning contingency. The court noted the litigation on the rezoning would likely take an indefinite but protracted time to complete and that the plaintiff had failed to waive the contingency and proceed with the purchase without the rezoning. Thus the court held it was unreasonable to require the defendant to keep the sales contract open pending resolution of uncertain and indefinite litigation.

 **Cumulus Broadcasting, LLC v. Hoke County**, 180 N.C. App. 424, 638 S.E.2d 12 (2006)
*Conditional use permit, Evidence*
The plaintiff applied for a conditional use permit to construct a 499-foot high radio tower. The owner of a nearby private airport and a pilot appeared at the hearing and expressed a view that the tower would interfere with aviation in the area. A letter of approval from the Federal Aviation Administration was included in the record. The county denied the permit. On appeal the trial court held the applicant had presented sufficient evidence to show the permit standards were met and that the opposing evidence was “anecdotal, conclusory, and without a demonstrated factual basis.” The court thus vacated the denial and remanded the matter for issuance of the permit.

The court affirmed. The court held that while the opposing testimony was not speculative, mere expressions of opinion, nor generalized fear, it was insufficient to rebut the evidence presented by the applicant. It was based solely on personal knowledge and observations and did not rebut the quantitative data and other evidence presented in support of the application. In the absence of such, the permit must be issued and the remand with that direction was appropriate.

**Federal Cases**

**Giovani Carandola, Ltd. v. Fox,** 470 F.3d 1074 (4th Cir. 2006)
*Adult use*
In response to judicial invalidation of statutes limiting adult entertainment in facilities with ABC licenses, the state amended its statutes and rules regarding sexual performances at these facilities. The statute, G.S. 18B-1005.1, prohibited actual or simulated specified sex acts and the fondling of specified erogenous zones of the body. The statute excluded application to performances in theaters, concert halls, art centers, museums, or similar establishments devoted to the arts when presenting performances of serious literary, artistic, scientific, or political value. The court held these prohibition of these specified acts were not impermissibly vague or facially overbroad.