**2007 North Carolina Land Use Litigation**

**David W. Owens
School 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**

**Robins v. Town of Hillsborough**, 361 N.C. 193, 639 S.E.2d 421 (2007)
*Vested rights, Moratoria*
The plaintiff contracted to purchase a parcel in the Hillsborough extraterritorial area and submitted a site plan for an asphalt plant on the site (this use being a permitted use subject to site plan approval). The town board of adjustment held three hearings on the site plan application. Prior to the fourth hearing, the town board adopted a moratorium on permitting for asphalt plants and other similar manufacturing operations. Prior to termination of the moratorium, the town council amended the zoning ordinance to prohibit asphalt plants throughout the town and the extraterritorial area. The board of adjustment thereafter terminated consideration of the plaintiff’s application. The trial court upheld the town action, ruling the moratorium was properly adopted and that the ordinance amendment prohibited approval of the plant. The court of appeals reversed, holding the applicant had a vested right to consideration of the application under the ordinance in effect at the time a completed application was submitted. The court of appeals also held that a total ban of a particular use raised constitutional issues of arbitrary and capricious action and a denial of equal protection.

The court held that the provision in the town ordinance that the board of adjustment “*shall* pass upon, decide, or determine” applications for site plan approval required the board to render a decision on the application and therefore the termination of consideration of the application was improper. The court held that the town could not by legislative fiat dictate the outcome of this quasi-judicial process and thus remanded the case for decision by the board under the rules in effect at the time of application. The court held that given this procedural requirement of the ordinance, it was unnecessary to address the constitutionality of the ordinance and that portion of the court of appeals decision was vacated.

 **Holly Ridge Associates, LLC v. North Carolina Department of Environment and Natural Resources**, 361 N.C. 331, 648 S.E.2d 830 (2007)
*Standing, Sedimentation, Civil penalties*
The plaintiff owned a large tract in Onslow County adjacent to Stump Sound being developed as a resort residential community. Over the years a lake was constructed on the property, some of the farmland was converted to forestry, and various residential and recreational layouts were developed. Hurricanes in 1996 damaged timber on the property and washed out several unpaved roads. Damaged timber was removed from the site in 1997. In 1998 the plaintiff undertook a substantial ditch excavation project (17 major ditches of 8 miles in length over a 34-acre area). In 1999 the Department cited the plaintiff for violations of the Sedimentation Pollution Control Act and then following the plaintiff’s failure to take corrective action, assessed a $32,100 civil penalty. In 2000, following continued failure to take corrective action, additional civil penalties totaling $118,000 were assessed. In its contested case appeal of the penalty the plaintiff for the first time asserted a forestry exemption for its work on the site.

The court of appeals held allowing intervention in the contested case appeal by the Shellfish Growers Association and the Coastal Federation was proper. Both groups adequately showed in their motions to intervene that the rights of their members may be directly affected by the outcome of the matter. The court held admission of the Department’s supplemental discovery submittal and the failure of the Administrative Law Judge to grant a continuance were not an abuse of discretion. The court held the ALJ and trial court properly interpreted the forestry exemption to be inapplicable as it applies only to those activities specifically undertaken for the production and harvesting of timber and not to drainage activities for other purposes.

The court reversed, holding Rule 24 controls whether intervention as a full party should be allowed. The court held that while the groups seeking to intervene had an interest in the underlying dispute (whether the ditching activity was within the forestry exemption), they had no interest in the property at dispute here (the civil penalty imposed), so there could be no intervention by right under Rule 24(a). The court also held permissive intervention under Rule 24(b) was inappropriate given the burden to the petitioners of an extra round of discovery. The court noted the groups had alternative means of participation available, such as participation as *amici curiae* in the contested case, filing a separate state case, or intervention as less than a full party under Rule 23(d).

*Note:  The groups seeking to intervene successfully brought a federal action contending the underlying activities constituted a violation of the Clean Water Act. N.C. Shellfish Growers Association v. Holly Ridge Associates, 278 F.Supp.2d 654 (E.D. N.C. 2003). A consent decree was subsequently entered in that case.*

 **Walsh v. Town of Wrightsville Beach**, 361 N.C. 348, 644 S.E.2d 224 (*per curiam*, 2007)
*Appellate procedures, Standing*
The town issued building permits for two single family beach cottages on property adjacent to the plaintiff’s property. The plaintiff appealed the permit issuance to the board of adjustment, which denied the appeal. The trial court dismissed the appeal for lack of standing and subject matter jurisdiction. The court of appeals dismissed the appeal for failure of the appeal to include clear record or transcript references for the assignment of error and a failure of the appellate brief to reference a clear assignment of error for each question presented.The court reversed and remanded for reconsideration in light of new directions for rules for application of sanctions and discretion in application of rules of appellate procedure.

**North Carolina Court of Appeals**

**Sandy Mush Properties v. Rutherford County**, 181 N.C. App. 224, 638 S.E.2d 557, *remanded by* 361 N.C. 569, 651 S.E.2d 566, *affirmed by* 187 N.C. App. 809, 654 S.E.2d 253 (2007), *review dismissed*, 363 N.C. 577, 681 S.E.2d 339 (2009)
*Vested right*
The dispute in this case revolved around the use of a 180-acre tract for a crushed rock quarry.

In 2001 the plaintiff applied for three building permits (a modular office building, an office building, and a metal building) at site of the proposed quarry. The county denied the permits based on a county-adopted moratorium on location of heavy industries near schools. The plaintiff challenged the validity of the moratorium based on procedural deficiencies in its adoption. In September 2001 the trial court enjoined enforcement of the moratorium and ordered the building permits issued. The county appealed the trial court’s determination that the moratorium was invalid, but issued the building permits. Pursuant to that permit, the plaintiff in October 2001 began construction on one of the buildings, the proposed office building. In October 2001 the contested moratorium expired and the county enacted an ordinance that made quarries a prohibited use at this site. Construction on the office building ceased in December 2001 prior to completion of the building. In 2002 the trial court upheld the moratorium. After the court of appeals in 2004 held the moratorium invalid the plaintiff in July 2004 sought to resume construction of the office building. The county contended the building permit had expired. The plaintiff contended the statute providing for expiration of a building permit if construction ceased for twelve months was tolled by the appeal regarding the validity of the moratorium. The plaintiff also contended that the building permit for the office building constituted a statutory or common law vesting for the use of the property as a quarry.

Since the acknowledged use of the building was as an office for the quarry, the court held the trial court’s order upholding a moratorium on the quarry operation effectively prohibited continuing construction of the office building under the building permit. The court thus held the trial court’s order and the subsequent appeal tolled the statutory period in which the plaintiff could resume construction and that there had not therefore been a twelve-month lapse in construction so as to cause the building permit to expire. However, the court held that the building permit only authorized construction of an office building (which by the terms of the permit could be used as offices for various uses) and did not purport to authorize any other use of the larger site. Thus the office building permit itself constituted neither a statutory vesting nor the basis for a common law vesting for the use of the site as a quarry.

On appeal, the supreme court remanded this decision for reconsideration in light of the court’s decision in *Robins v. Town of Hillsborough*. On remand the court of appeals affirmed its prior holding. The court noted that the *Robins* decision expressly stated it was not a vested rights case, but a question of town compliance with procedures mandated by its ordinance. Thus the court held *Robins* did not affect its prior holding.

 **Turik v. Town of Surf City**, 182 N.C. App. 427, 642 S.E.2d 251 (2007)
*Variance*
The town issued a building permit for a duplex based on a survey submitted by the owner. A neighbor objected to the location of the duplex and submitted another survey showing the pilings for the building had been placed 7.2 inches into a 7.5 foot side yard setback (the building itself was apparently cantilevered two feet into the setback). The town issued a stop work order and the owner then petitioned for a variance, which was granted by the board of adjustment and affirmed by the superior court.

The court upheld issuance of the variance. The court noted the applicant had relied on a licensed surveyor in establishing the building location, the amount of the variance was minimal, and there was no evidence of harm to the neighbor if the variance was granted.

 **Stealth Properties, LLC v. Town of Pinebluff Board of Adjustment**, 183 N.C. App. 461, 645 S.E.2d 144, *review denied*, 361 N.C. 703, 653 S.E.2d 153 (2007)
*Variance, Evidence, Record*
The petitioner mistakenly thought his property was zoned R-20, a district with a sixteen-foot side yard setback. The property was actually zoned R-30 and the correct setback was twenty-five feet. The plaintiff’s application reflected his mistaken assumption, but his permit (a certificate of zoning compliance) included the correct zoning and setback information. Nevertheless, the petitioner proceeded to place his modular home on the lot using a sixteen-foot setback, a mistake that was not discovered during the building inspections and was only identified when the town denied a certificate of occupancy. The board of adjustment denied a variance petition. There was no transcript of the board hearing available due to a malfunction of the recorder. The minutes of the hearing were originally part of the record, but were deleted at the petitioner’s request. The trial court reversed the denial due to a lack of supporting evidence. The court also construed the ordinance to require the property to be zoned R-20 as it had inadequate size for a lot in the R-30 district. The trial court then issued a variance.

The court ruled that the trial court properly found the variance denial to be unsupported by competent, substantial, and material evidence. The court held the ordinance was ambiguous due to the fact that the petitioner's lot was smaller than the minimum lot size for its district (with no discussion or mention of the concept of nonconformities). The court then held the fact that the zoning certificate issued prior to construction required a twenty-five foot setback was insufficient evidence to support a conclusion as to what the requisite setback was. Thus the court upheld the trial court ruling that there was insufficient evidence to support the variance denial. The court did hold, however, that the trial court had no authority to interpret the ordinance in this case as that issue was not properly before the board of adjustment. The court further held the appropriate disposition was a remand to the board with instructions for the board to issue the variance rather than the court issuing a variance itself.

 **Town of Green Level v. Alamance County**, 184 N.C. App. 665, 646 S.E.2d 851, *review denied*, 361 N.C. 704, 655 S.E.2d 402 (2007)
*Extraterritorial jurisdiction, Objectives*
The town in 2003 proposed to adopt an extraterritorial jurisdiction (ETJ) boundary ordinance to extend its zoning. The county contended its 1997 water supply watershed ordinance (which did not cover the physical area subject to the town’s proposed ETJ) was a “zoning ordinance and thus required the town to secure county approval of the proposed ETJ. The town disagreed and began the process to adopt an ETJ boundary ordinance. The county then quickly amended the watershed ordinance on April 19, 2004 to apply a “Rural Community District” to the disputed area. The town adopted its ETJ ordinance on April 22, 2004. The town then brought a declaratory judgment action to determine whether the town ordinance was effective. The trial court held both the 1997 and 2004 county ordinances were “zoning ordinances” that triggered the requirement in G.S. 160A-360(e) of county approval for the town ETJ ordinance.

The court reversed. The court held the watershed critical areas and balance of watershed areas depicted in the 1997 watershed area did not extend into the disputed area. Although that ordinance also spoke of ‘stream buffers,” no streams had been mapped by the county in this area and the county had not enforced any buffer requirements in the area. Thus the ordinance could not be considered county zoning of the area. The court held the county’s 2004 amendment was arbitrary and capricious in that it was adopted to block the town jurisdiction rather than promoting a legitimate health, safety or welfare purpose. The record indicated the county made no reference to a comprehensive plan in its adoption, contained no references to water quality protection, and allowed various industrial uses inconsistent with a rural community.

 **Cook v. Union County Zoning Board of Adjustment**, 185 N.C. App. 582, 649 S.E.2d 458 (2007)
*Conditional uses, Hearings, Standing*
Wal-Mart applied to the board of adjustment for a special use permit. The board held an evidentiary hearing that extended over five dates. The plaintiff neighboring property owners and the county staff participated fully in each hearing session. The board then closed the hearing and voted to approve the permit subject to numerous changes and submission of a revised site plan. At subsequent board meetings Wal-Mart presented several substantially revised site plans and answered questions regarding the revisions from the board. The neighbors and the county staff were not allowed to ask questions or present any evidence regarding the revised plans. The board eventually issued the permit based on the revised plan. The neighbors and the county challenged the permit. The trial court vacated the permit on the basis of a denial of the neighbors’ due process rights.

The court first held that both the county and the neighbors had standing to challenge the permit. The court ruled that as G.S. 153A-345(b) explicitly allows the county to appeal to the board of adjustment as a category distinct from aggrieved persons, the county could similarly appeal from the board of adjustment. The court also held the neighbors had shown special damages to their property unique in character and distinct from the community at large and also had standing. The court held that neither the neighbors nor the county needed to make a formal motion to intervene at the board of adjustment hearing in order to have standing for judicial review.

The court held the board’s refusal to allow the neighbors to present evidence or testimony or to cross-examine witnesses regarding the revised site plan violated their due process rights and the requirements of the ordinance that persons be given the opportunity to present evidence and ask questions. The two revised site plans, while made in response to concerns raised at the evidentiary hearing, were substantively different (for example, substantially relocating the building, parking lot, and retention pond and changing the traffic pattern for the store). Therefore the court held the permit was properly vacated.

 **McDowell v. Randolph County**, 186 N.C. App. 17, 649 S.E.2d 920 (2007)
*Spot zoning, Enforcement, Parties*
The county in 2005 rezoned a acre portion of a larger parcel from Light Industrial and Residential-Agricultural to Heavy Industry. The rezoned land was the site of a lumber yard, saw mill, pallet-making operation, and other related mill works. Some portion of the mill existed when the zoning ordinance was adopted in 1987. The surrounding property was uniformly zoned Residential-Agricultural. The mill owner had between 2000 and 2004 expanded operations with appropriate permits from the county. The mill owner sought the rezoning when neighbors complained about the expansion, contending this was an unlawful expansion of the industrial use of the property (as neither the LI nor the RA districts permitted a saw mill). The neighbors brought this suit to (1) have the rezoning declared illegal spot zoning and (2) compel the county to enforce the ordinance provisions prohibiting the expansion of nonconformities. The trial court found the rezoning to be unlawful spot zoning but denied the mandamus request.

The court first held the county could not plead laches as a defense. While there might be some harm to the mill owner, the county itself could show no prejudice or injury due to any delay in bringing this action. The court then applied the *Chrismon* factors and found the rezoning to be illegal spot zoning. The court found the action to be contrary to the overall zoning plan and the county’s Managed Growth Plan for the area, found the newly allowed and expanded uses were inconsistent with surrounding rural and residential uses, found inadequate support in the record for purported economic benefits to the region and county, and found substantial support for the neighbors’ alleged harm due to increased noise, dust, and truck traffic. The court thus found the rezoning unreasonable. The court however, also held that mandamus could not issue as the owner of the plant, who would be significantly affected, was not a party to the suit.

 **Davidson County Broadcasting, Inc. v. Rowan County Board of Commissioners**, 186 N.C. App. 81, 649 S.E.2d 904 (2007), *review denied*, 362 N.C. 470, 666 S.E.2d 186 (2008)
*Conditional uses, Preemption*
Plaintiffs applied for a conditional use permit to construct a 1,350-foot radio broadcast tower. The key issue was whether the proposed tower violated the ordinance standard prohibiting creation of “hazardous safety conditions” with respect to users of a private airport located within five miles of the proposed tower. At the hearing on the application, plaintiffs presented a letter from the Federal Aviation Administration making a ‘Determination of No Hazard” resulting from the tower. A representative of the state Department of Transportation, numerous pilots who used the nearby private airport, and aviation experts testified the tower would pose a safety hazard given its proximity to the private airport. The county board of commissioners denied the application upon finding the tower would pose a safety risk. The trial court affirmed the denial.

The court first held the ordinance was not preempted by federal law. The court noted that the FAA letter specifically noted that federal law protects only public airports, did not consider the tower’s impact on the private airstrip, and explicitly noted the need for state and local government regulation to protect these airports. Thus the court held there was no conflict between the ordinance and the federal law. The court then held there was substantial evidence in the record to support the board’s finding that the tower would pose a safety hazard.

 **Pitt County v. Deja Vue, Inc.**, 185 N.C. App. 545, 650 S.E.2d 12 (2007), *review denied*, 362 N.C. 381, 661 S.E.2d 738 (2008)
*Adult use, Enforcement*
Pitt County in 2002 adopted an adult business ordinance that required adult businesses to meet minimum separations from each other and from sensitive land uses. The ordinance included findings regarding adverse secondary impacts and a one-year amortization requirement. Technical amendments were made to the ordinance in 2004 in conjunction with county adoption of zoning. The county brought this suit seeking a declaratory judgment that the defendants were operating adult businesses in violation of the ordinance and seeking injunctive relief to compel compliance.

The court first held that an enforcement action brought under G.S. 153A-123 does not require a verified complaint. The court held that the one-year amortization period established by the 2002 ordinance was not extended or affected by the 2004 amendments to the ordinance nor did this make the ordinance an ex post facto law.

The court also held the ordinance did not violate the First Amendment. The county presented substantial evidence that reports and studies of adverse secondary impacts were reviewed by staff and there is no requirement that the elected officials personally review the studies where staff adequately briefs the board on the information and is available to answer any questions. The court also noted the sheriff directly presented information on secondary impacts to the board. The court held reasonable alternative avenues of expression were maintained, noting the testimony that the ordinance left 19% of the county’s land area available for potential adult business location. Finally, the court dismissed the equal protection claim of a person living within the separation area an adult club, noting he was being treated the same as all other persons living within such proximity of an adult business.

 **Lamar OCI South Carolina v. Stanly County,** 186 N.C. App. 44, 650 S.E.2d 37 (2007, *affirmed per curiam*, 362 N.C. 670, 669 S.E.2d 322 (2008)
*Signs, Preemption, Nonconformities*
The plaintiff owned a billboard along a state highway. The state notified the plaintiff that it planned to widen the highway and that the increased right-of-way would include the sign site, thus necessitating relocation. The plaintiff then secured state DOT approval to move the billboard back fifty feet from its same location along the highway. DOT paid for the relocation and considered the relocation to be authorized under state law and rule and to be within the previously issued state billboard permit. However, the billboard was nonconforming under the county zoning ordinance, which had been amended after the billboard was constructed to prohibit billboards in the applicable Highway Business zoning district. The county ordinance prohibited the movement or replacement of nonconforming signs. The plaintiff undertook the relocation without notice to or approval from the county. The county then issued a notice of violation to the plaintiff. The board of adjustment affirmed the county’s interpretation that the relocation resulted in the loss of legal nonconforming status for the billboard. The trial court upheld the board of adjustment.

The court of appeals held that the county ordinance was not preempted by the state’s Outdoor Advertising Control Act under G.S. 160A-174(b)(5), which applies when the statute evidences a clear legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation. However, the court held that the preemption provision of G.S. 160A-174(b)(2) was applicable in this instance. That provision preempts a local regulation that makes unlawful an act expressly made lawful by state law. In this instance, the state implementing regulations explicitly allowed relocation of a sign if it stayed within a “Sign Location/Site” that was defined by rule as within 1/100 of a mile measured laterally along the right-of-way. Therefore the court concluded that since the state regulation and permit expressly allowed this limited relocation, that preempted a local relocation prohibition. The supreme court, in a per curiam opinion, affirmed that conclusion.

 **Childress v. Yadkin County**, 186 N.C. App. 30, 650 S.E.2d 55 (2007)
*Spot zoning, Contract zoning, Findings*
Neighbors filed this declaratory judgment action seeking to invalidate the rezoning of a 51-acre tract from Rural Agricultural to Restricted Residential. Both districts had a 30,000 sq. ft. minimum lot size for residences if no public water and sewer supply is available and both allowed single-family residences. However, the RA district also allowed manufactured housing on individual lots and the RR district allowed higher densities with utilities. The planning board recommended denial and persons appeared both in support and in opposition to the rezoning at the public hearing.

The court first held that this was not spot zoning. While the size of the tract was small enough to be spot zoning and most of the immediately surrounding property was zoned RA, the court noted the two zoning districts were sufficiently similar that the rezoning did not substantially relieve or impose burdens on the rezoned property. The court went on to apply the *Chrismon* factors and concluded that even if this was spot zoning, it was reasonable. The court distinguished this modest change in zoning from a rezoning to allow commercial or industrial uses, held the rezoning was consistent with county plans and policies, noted the benefits of county regulation of the proposed subdivision, and held the general community impacts of the development were properly considered. The court held that although the landowner spoke at the hearing in some detail about the use of the property if rezoned, there was no evidence of any bilateral agreement with the county and thus no contract zoning. The court also concluded that formal findings of reasonableness are not needed in a legislative rezoning.

 **Casper v. Chatham County**, 186 N.C. App. 456, 651 S.E.2d 299 (2007)
*Standing, Conditional uses*
The county adopted a conditional use district rezoning and approved a conditional use permit for a retail use on the site. Adjacent landowners challenged the issuance of the conditional use permit. The trial court dismissed the appeal for lack of standing.

The court held the plaintiff neighboring land owners did not have standing as persons aggrieved. To have standing, mere proximity of ownership is inadequate. The plaintiffs must also claim special damages distinct from the rest of the community, with a particular emphasis on reduction in property value. The plaintiff also has the burden of alleging the facts on which the claim of special damages is based. Here the plaintiffs only claimed proximity and no special damages, so they had no standing and thus the trial court had no subject matter jurisdiction to hear their substantive claim.

 **Smith v. Forsyth County Board of Adjustment**, 186 N.C. App. 651, 652 S.E.2d 355 (2007)
*Standing*
The county zoning officer issued a permit for a new church and associated athletic fields. The plaintiff neighboring property owner appealed the officer’s interpretation of several ordinance provisions to the board of adjustment. The plaintiff contended the proposed church should have been classified as a “community church” rather than a “neighborhood church” (the ordinance distinguished the two based on seating capacities over or under 600 persons), that a buffer should have been required around the athletic field, and that grading requirements were misinterpreted. The board of adjustment upheld the zoning officer on the church definition and buffer issues and found for the plaintiff on the grading issue. The trial court dismissed the plaintiff’s appeal for lack of standing.

The court held the plaintiff had failed to establish that she was a “person aggrieved” with standing to appeal to the board of adjustment. The court held that an allegation of mere proximity, absent a credible allegation of special damages distinct from the community, was insufficient to establish standing under both the state statutes and the 1947 local enabling act for Forsyth County zoning. Without standing to appeal to the board of adjustment, the question of standing for judicial review is moot.

 **Marriott v. Chatham County**, 187 N.C. App. 491, 654 S.E.2d 13 (2007), *review denied*, 362 N.C. 472, 666 S.E.2d 122 (2008)
*Environmental impact statements, Standing*

The Chatham County subdivision ordinance contained a provision that allowed the planning board to require an environmental impact statement pursuant to Chapter 113A of the General Statutes if the development exceeded two acres in size and if the board deemed the statement “necessary for responsible review” due to the nature of the land or peculiarities in the proposed layout of the development. The plaintiffs brought this action when the county approved several large developments on tracts adjacent to parcels they owned without requiring an environmental impact statement. The plaintiffs sought to enjoin development of the property until the county amended its ordinance to provide minimum criteria for when an impact statement would be required and sought a writ of mandamus to compel the county to make these amendments.

The court held that in order to have standing, the plaintiffs must show injury in fact, that the injury is fairly traceable to the challenged action, and that it is likely the injury will be redressed by a favorable decision. The court held that it had no authority to compel the county to adopt or amend an ordinance. The court noted that G.S. 113A-8 clearly requires a local ordinance requiring environmental impact statements to include minimum criteria to determine when statements are required. While a county has discretion as to whether to require statements and has discretion in defining minimum criteria for when statements are required, it does not have the discretion to have no minimum criteria. It was undisputed that the Chatham County ordinance had no such criteria. Thus if the ordinance allowing an impact statement is invalid as written and the court has no authority to order the ordinance amended, there is no likelihood the plaintiff’s injury could be redressed by a favorable decision. Therefore the court held the trial court properly dismissed the action for lack of standing.

 **Macon County v. Town of Highlands**, 187 N.C. App. 752, 654 S.E.2d 17 (2007)
*Extraterritorial jurisdiction, Parties*
The town adopted extraterritorial jurisdiction. G.S. 160A-362 provides that extraterritorial members must be appointed to the town planning board and board of adjustment, with the number of extraterritorial members being proportional to the town residents based on the respective populations of the town and its extraterritorial area. The town provided for two members of the town planning board from the Macon County portion of the extraterritorial area. The county and the members of the county board of commissioners sued, seeking to have the court declare how many members should be appointed to the town planning board.

The court determined that neither the county nor the commissioners as individuals were proper parties to the suit. The determinative issue was how the town calculated the population of the extraterritorial area in order to secure proportional representation on the planning board. As for the means of securing proportional representation, the court noted that the statute did not specify how that was to be done, so this is left largely to the judgment and discretion of the town unless their action is “manifestly unreasonable and oppressive.”

 **Habitat for Humanity of Moore County, Inc. v. Board of Commissioners of the Town of Pinebluff**, 187 N.C. App. 764, 653 S.E.2d 886 (2007)
*Conditional use, Standing*
The plaintiff applied for a conditional use permit to build a 75 lot subdivision on property they had an option to purchase. The town council found the application to be complete and that the standards of the zoning district would be met, but denied the application on the ground that it would not be harmonious with the surrounding area. On appeal the trial court reversed the denial and remanded the matter to the town for issuance of the permit.

The court first held that the plaintiff’s had standing to make the application for the conditional use permit. The ordinance specifically allowed conditional use permit applications and subdivision plats to be submitted by land owners, their agents, or persons who have contracted to purchase the property. While the ordinance provided that the zoning administrator may require the applicant to submit proof of authority to submit an application, that proof was not mandatory. In this instance the plaintiff’s director testified at the permit hearing that they had an option to purchase and the council found the application to be complete. The court held this sufficient to establish standing for the plaintiff to file the application.

The court then noted that inclusion of a use as a conditional use in a district establishes a prima facie case of harmony with the area and a finding that it is not in harmony must be supported by substantial, competent, material evidence in the record. Here the testimony against the development was general and related to virtually any development or subdivision of the site. The court held this insufficient to rebut a prima facie showing of harmony.

**Federal Cases**

**MLC Automotive, LLC v. Town of Southern Pines I,** 2007 WL 128945 (M.D. N.C. 2007)
*Evidence, Public records*
The plaintiff challenged a rezoning that blocked their plans to use a 21-acre site for multiple automobile sales facilities. The plaintiff also contended the town intentionally delayed the permit approval process in order to allow time for the rezoning. The town sought to compel discovery of email between the plaintiff’s engineer (who was responsible for site evaluation and site design) and attorney in order to show the delay was due to plaintiff’s own conduct. The plaintiff sought to depose town council members and discover communications between council members and the town attorney. This action dealt with those discovery issues.

The court held most of the communications between the plaintiff’s engineer and attorney were protected by the attorney-client privilege. The court found the communications from the engineer to the attorney were made while the engineer was acting as an agent for the plaintiff to supply information for the attorney’s use in the permit applications. The court also issued a protective order preventing deposition of the town council members. The court held that legislative immunity bars inquiries regarding their motives or intentions regarding the rezoning and that the Architectural Compliance Permit was sufficiently similar to a quasi-judicial determination (even though the town did not follow quasi-judicial procedures in deciding it) that judicial immunity bars inquired of the members about it. The court held that while the plaintiff could not discover communications from the town attorney to the town, communications from the town and its employees to the attorney were public records and discoverable.

 **Y. K. Enterprises v. City of Greensboro**, 2007 WL 2781706 (M.D. N.C.)
*Adult uses*
A number of adult businesses sought to enjoin Greensboro’s enforcement of an amortization provision requiring the relocation of nonconforming businesses. The court held there were unresolved factual issues regarding the studies supporting the city’s justification for the ordinance, the range of available alternative avenues for expression, and the rationale for differing amortization requirements for different types of adult businesses. Therefore the court did not issue a preliminary injunction, but ordered an expedited consolidated hearing on that matter and the merits of the case. The court noted the city had voluntarily delayed enforcement during the litigation and encouraged that to continue while this case remained pending.

 **Mickelsen v. Warren County**, 2007 WL 4245848 (E.D. N.C.)
*Notice, Adoption*
The plaintiffs sought a rezoning from a residential to a neighborhood business zoning district. After a positive recommendation from the planning board and a duly advertised hearing, the county commissioners voted in favor of the rezoning. After the plaintiffs left the meeting, but before the meeting adjourned, one of the commissioners who had supported the rezoning made a motion to reconsider the rezoning vote, which passed. Upon reconsideration, the rezoning motion failed.

The court rejected a variety of challenges to county’s failure to rezone. First, the court held that the county’s rules of procedure expressly provide for a motion to reconsider if made in the same meeting as the original vote and by a member of the prevailing side and that this is not inconsistent with state law. Second, the court held additional notice, hearing, and planning board referral was not required for the second vote because under the county ordinance, the property is not actually rezoned until the change in entered on the official zoning map, a step that had not been taken prior to the second vote. Third, the court held there were policies in the county’s comprehensive plan supporting either zoning of this property, so there was no plan inconsistency or arbitrary and capricious action by the board. Fourth, the court held there could be no vested right to the briefly approved rezoning because it never took effect and there were no expenditures in reliance on it between the first and second votes. Finally, the court held there was no Equal Protection violation because the plaintiff had not established that they were treated differently from others who were similarly situated and, even if they had, there was no showing of purposeful discrimination.

 **Giovanni Carandola, Ltd. V. City of Greensboro**, 258 Fed.Appx. 512, 2007 WL 4322196 (4th Cir. 2007), *affirming* 457 F.Supp.2d 615 (M.D.N.C. 2006) and 2007 WL 703333 (M.D NC 2007)
*Attorney fees, Adult uses, Mootness*
When Greensboro amended its regulations on adult business in 2001 to increase minimum separations, several existing businesses became nonconforming and would be required to close or relocate. After the U.S. district court held the ordinance did not prohibit the continuation of businesses already in existence, the city amended the ordinance to clearly prohibit continuation of nonconforming adult businesses.

The court held the city’s subsequent amendment of the ordinance made the question of interpretation of the ordinance as originally written moot. The court also held the plaintiffs were not entitled to attorney fees since they had prevailed on the question of statutory interpretation (for which attorney fees are not available). Since the court did not reach the constitutional claims, the plaintiff had not prevailed on a 42 U.S.C. § 1983 claim and thus could not be awarded attorney fees.

 **Adams v. Village of Wesley Chapel**, 259 Fed. Appx. 545, 2007 WL 4322321 (4th Cir. 2007)
*Taking, Due process, Equal protection*
Plaintiffs acquired 184-acre tract in Union County in 1964 for $56,500. In 1999 the mayor of the village discussed potential voluntary annexation with the plaintiff and advised the plaintiff that their zoning would not change if this happened. He also noted that annexation would protect the owners from any attempted involuntary annexation by another municipality. The plaintiffs then submitted an annexation petition to the village and were annexed in 1999. At that time the village did not have a zoning ordinance so the property remained subject to county zoning. A year later the village adopted its own zoning ordinance and, while leaving the property in the same R-40 district as had been the case with the county, changed the density standard for the district in manners that resulted in 35 fewer potential residential lots on the property. The plaintiff sold the land in 2004 for $3.7 million, but alleged the village zoning had reduced its value by $1.59 million.

The court held that the sale of the land had not mooted the plaintiffs’ constitutional claims. However, the court then found for the village on all of those claims. The court applied a *Penn Central* balancing test to the takings claim. The court noted the plaintiff could make a reasonable return on their investment, just not as much as they hoped, and that the character of the governmental action was “garden-variety zoning” intended to control growth, preserve a small-town atmosphere, and maintain a low tax rate, all legitimate governmental objectives. The substantive due process claim failed as the village regulations were reasonably related to these legitimate objectives. The plaintiffs were not misled by governmental misconduct, as even if the mayor’s promise that the zoning would not change is accepted, the zoning did not change for a year and the village honored all vested rights that had been established under county zoning (and the plaintiff had not established any vested rights to a particular development plan). There was no equal protection violation in that the plaintiff did not show different treatment from those who are similarly situated as those with vested rights to higher densities under the county ordinance are not similarly situated