**2009 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**

**State v. Town of Kill Devil Hills,** 194 N.C. App. 561, 670 S.E.2d 341, *aff’d per curiam*, 363 N.C. 739, 686 S.E.2d 151 (2009)
*Utilities, Preemption, Exhaustion of remedies*

Dominion Power owns a 115 kV transmission line running along the west side (sound side) of the town. The company proposed adding a second 115 kV transmission line to run in a new corridor along the main highway through the town, which is located on the east side of town. The town adopted an ordinance requiring above-ground transmission lines to be built in a single corridor. Dominion filed a complaint with the state Utilities Commission seeking to preempt the ordinance and allow use of the second corridor. The Commission issued an order pursuant to G.S. 62-42 directing Dominion to complete its improvements in the second corridor. The town objected, contending that since G.S. 62-106 preempts local ordinances regarding siting of transmission lines of 161 kV or higher, there was by negative inference no preemption of local ordinances affecting smaller transmission lines.

The court rejected the contention that G.S. 62-106 divested the Commission of jurisdiction to hear disputes on the location of smaller transmission lines. The court held there was no requirement for Dominion to seek a variance or other administrative relief from the town as the Utilities Commission was specifically empowered to order expansion or improvements in electrical distribution services. As the Commission found there was insufficient space in the existing utility corridor for a second line and that underground lines or an alternate route around the town were excessively costly, the Commission had the authority to order use of the second corridor proposed corridor and that order preempts town regulations to the contrary.

**Five C’s, Inc. v. County of Pasquotank,** 195 N.C. App. 410, 672 S.E.2d 737 (2009)
*Manufactured housing, Preemption*

The county adopted an ordinance under its general police powers to prohibit bringing manufactured homes into the county that were more than ten years old at the time of setup. The rationale offered by the county was protection of the county tax base, noting that manufactured homes rapidly decline in value and at the ten year point have little more value than a motor vehicle and thus provide insufficient tax revenue to support the needs for county services that they generated.

The court held the plain meaning of G.S. 160A-383.1 limiting regulation of manufactured housing to appearance and dimensional criteria prohibits regulation based solely on the age or value of the unit. The fact that the county used its general ordinance-making power rather than the zoning power cannot be used to circumvent this clear legislative limitation on regulatory authority.

**Town of Pinebluff v. Marts**, 195 N.C. App. 659, 673 S.E.2d 740 (2009)
*Enforcement, Injunctions, Takings*

The town conditioned its approval of a subdivision being developed in three phases upon installation of a mini-park prior to final approval of the third phase of the development. The owner also agreed to establish a homeowners’ association that would maintain the park. The owner accepted the conditions and, in order to secure final approval of the plat for the third phase prior to installation of the mini-park, posted a letter of credit to assure its construction. After the letter of credit expired and the park was still not installed, the town sought injunctive relief to compel its installation. The owner challenged the validity of the ordinance establishing the requirement, contended the town was estopped from enforcing it, contended injunctive relief was inappropriate, and contended the requirement was unconstitutional as being retroactive, an unlawful impairment of contract, and a taking.

The court held the owner cannot collaterally attack the validity of the ordinance in an enforcement action. If the owner fails to challenge imposition of the condition or to seek administrative relief through a variance, the challenge may not be initiated when an enforcement action is brought. The court held equitable estoppel cannot apply to a municipality enforcing a zoning ordinance. The court held injunctive relief is explicitly allowed and that while the question of whether the court must balance the equities in deciding whether to issue an injunction is an open question in this state, the only balancing questions the owner raised related to the policy in the ordinance, not to the injunction. The court dismissed the allegation of impairment of contract, noting approval of the first phase of the project created no contractual rights relative to subsequent phases of the development. Finally, the court held the requirement of installation of a mini-park to serve needs created by the development was not a taking.

**Thrash Limited Partnership v. County of Buncombe**, 195 N.C. App. 678, 673 S.E.2d 706 (2009)
*Amendments, Procedures, Notice*

The county adopted its initial zoning ordinance in the 1970s but only applied it to two townships within the county. In 2007 the county undertook a process to extend its zoning ordinance countywide. The county ordinance required that the notice of hearing be published at least 15 days prior to the hearing (and state law requires it to be published at ten days prior to the hearing). The initial notice was published 14 days prior to the hearing. The proposed zoning map was submitted to the Planning Board for comment, but changes requested by property owners were subsequently incorporated into the map up until the day before the public hearing.

As in the companion case challenging the multi-family dwelling ordinance, the court first held the plaintiff had standing even though the plaintiff had not filed an application to develop. The court reasoned in a facial challenge to the procedures by which the ordinance was adopted, ownership of land that was subject to the regulations is sufficient. The court then held the ordinance invalid due to failure to meet the ordinance and state requirements for notice of the hearing. This conclusion was based on the fact that some map amendments were made after the planning board comments were submitted. The court also noted that the maps used at the board of commissioners’ hearing were not in existence, and thus not available for review and comment, at the time notice of the hearing was given.

**Thrash Limited Partnership v. County of Buncombe**, 195 N.C. App. 727, 673 S.E.2d 689 (2009)
*Standing, Procedure*

The county adopted a regulation on multi-family dwellings that established differential standards depending on the elevation of the property involved, with no requirements for land with an elevation under 2,500 feet, one set of rules for land with elevation between 2,500 and 3,000 feet, and a different set of rules for land over 3,000 feet. The rules (among other things) limited density, the height of buildings, parking standards, road construction, and the area of land disturbance. The county did not follow the mandatory hearing and notice provisions for zoning in adopting this ordinance, contending this was a general police power ordinance.

The court first held the plaintiff, who had not filed an application to develop, had standing to bring a facial challenge to the procedures by which the ordinance was adopted. The fact that the plaintiff owned land that was subject to the regulations was sufficient for a facial challenge, while a particular application would be needed for an “as applied” challenge. The court then held the ordinance invalid on the grounds that the zoning procedures were not observed in its adoption. The court held the subject matter of the ordinance addressed issues within the authority delegated to counties under Article 18 of Chapter 153A of the General Statutes, the Article on development regulation. As these regulations substantially affected the plaintiff’s use of its property, the county could not evade the mandatory notice and hearing requirements by characterizing the ordinance as general police power ordinance rather than a development regulation.

**State v. Maynard**, 195 N.C. App. 757, 673 S.E.2d 877, *review denied*, 363 N.C. 259, 677 S.E.2d 165 (2009)
*Animals*

The town of Nashville adopted an ordinance limiting the number of dogs that could be kept on property within town to no more than three dogs over the age of five months (and to two dogs if the lot was 30,000 sq. ft. or less). The court held the ordinance was reasonably related to the legitimate governmental objectives of reducing noise and odor problems in the city.

**North Iredell Neighbors for Rural Life v. Iredell County**, 196 N.C. App. 68, 674 S.E.2d 436, *review denied*, 363 N.C. 582, 682 S.E.2d 385 (2009)
*Standing, Agricultural use, Injunction*

An unincorporated association and several adjacent neighbors challenged the county’s rezoning of a 7.88 acre portion of a 218 acre tract from a single-family residential to a heavy manufacturing conditional use district. The rezoning was done to accommodate a proposed biodiesel operation intended to produce 500,000 gallons of fuel per year.

The court first held that the unincorporated association of opponents to the rezoning did not have standing as there was not the requisite demonstration that it had proper legal existence. The group had failed to affirmatively state its location of recordation or that it was a nonprofit unincorporated association under Chapter 59B of the General Statutes.

The court next held the proposed biodiesel production facility was an industrial use not covered within the bona fide farm exemption from county zoning. Key factors in this determination included the fact that the operation was not self-contained – some of the seeds used in production would be produced off-site and the operation would produce 500,000 gallons per year while the farm operation could only use 100,000 gallons per year (with the excess being sold to neighboring farmers).

The court held the trial court had not abused its discretion in refusing to grant a preliminary injunction pending resolution of the case. The court applied a two-step test to determine whether a preliminary injunction is appropriate, considering:  (1) the likelihood of success on the merits; and (2) the likelihood of irreparable harm without the injunction.

**Mangum v. Raleigh Board of Adjustment II**, 196 N.C. App. 249, 674 S.E.2d 742 (2009)
*Interpretation, Conditions, Evidence*

The plaintiffs challenged the issuance of a special use permit by the board of adjustment for an adult entertainment facility (a prior suit addressed standing for this appeal). The court first interpreted the 2,000 feet separation requirement in the ordinance as applied to a karate school. The court noted the definitions in the ordinance required a measurement from the “entire property” of the adult business to the “place of regular activities” of the school. As the karate school was conducted entirely within a building and that building was more than 2,000 feet from the lot line of the adult business (and even further from parking or other areas of the lot actually used for the business), the court interpreted the separation requirement as met. The court held that imposition of a permit condition that the project conform to city parking and stormwater requirements was not an unlawful delegation of the board’s authority. The court held there was competent substantial evidence in the record to support the board’s findings that the project would comply with city standards and not adversely affect the interests enumerated in the ordinance (parking, traffic, police, noise, light, stormwater, and pedestrian circulation). Given the presence of sufficient evidence in the record, the trial court could not make a de novo review of the evidence to reach contrary findings.

**Murdock v. Chatham County**, 198 N.C. App. 309, 679 S.E.2d 850 (2009), *review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010)
*Rezoning, Standing, Interpretation*

Owners of a sixty-acre tract sought a rezoning to a conditional use district and a conditional use permit in order to construct a commercial complex with a home improvement center and commercial businesses. A portion of the site had been rezoned for general business in 1974 and the residual area was zoned Residential-Agricultural. The county took three actions as a result. First, the county planning director adjusted the zoning map to increase the size of the area zoned as general business based on a conclusion that the original metes and bounds description of the area in the 1974 rezoning application encompassed a larger area than had been shown on the zoning map and its subsequent re-adoptions. Second, the county approved the rezoning to a conditional use district. Third, the county approved a conditional use permit for the project. Plaintiffs (neighboring land owners) challenged all three decisions, appealing the first and third to the board of adjustment initially.

The court first held that the plaintiffs had standing to challenge the interpretation of the zoning map. The plaintiffs alleged in their complaint that they owned adjoining land to the larger tract and presented testimony at the hearing about the adverse impacts on their property from the lights, noise, and stormwater runoff from the site should the project be built. The court held this was sufficient to establish the requisite special damages.

The court then held the zoning administrator had no authority to adjust the zoning maps to increase the area zoned as general business from twenty to thirty acres. While the board of adjustment can interpret the ordinance, such an extension of zoning district boundaries requires a zoning amendment (noting that even if there had been some original error in mapping the boundary, subsequent ordinances had adopted the boundary shown on the zoning map).

The court then invalided the rezoning. The ordinance specifically required that there be a thirty day period between filing an application for amendment and the public hearing on that application or petition. Since the 30-day period before the hearing that was held fell on a Saturday, the county set a deadline of the following Monday for receipt of applications to be considered at this hearing (and this application was filed on that Monday). The court applied Rule 6(a) of the Rules of Civil Procedure to hold that if the 30-day deadline fell on Saturday, an application would have had to be filed by the preceding Friday. As the county had no authority to waive the procedural requirements of its ordinance, the rezoning was invalid. As the rezoning to a conditional use district was invalidated, there could be no conditional use permit so the court did not address those issues.

**Moores v. Greensboro Minimum Housing Standards Commission**, 198 N.C. App. 384, 679 S.E. 2d 480 (2009)
*Enforcement, Preemption*

The Greensboro code provided that appeals of a housing inspector’s order to repair or demolish a dilapidated dwelling were to be made to a minimum housing standards commission, with that commission being delegated authority to issue a final order in the matter. The court held that G.S. 160A-443(5), which provides that orders for demolition or repair are not to be exercised until the “governing body” orders such, does not require action by the city council or board of county commissioners. A housing code can delegate the authority to hear appeals and enter orders to a housing appeals commission.

**Lawyer v. City of Elizabeth City**, 199 N.C. App. 304, 681 S.E.2d 415 (2009)
*Notice, Housing code, Enforcement*

Plaintiffs acquired title in October, 2003 to a vacant house at a tax sale. The plaintiffs requested that property tax notices and bills and forwarded to them. Although a Sheriff’s Deed was prepared at this time, the plaintiffs did not record it. In September 2004 the city inspected the house and found it to be unfit for habitation (it had apparently been vacant since 1999). Notices of that were sent to the previous owners, who were still listed as record owners. Upon receipt of the notice, the prior owner notified the city that the property had been sold at auction. The city subsequently made several inquires of the county tax office and register of deeds as to ownership and were informed that those records indicated the prior owners were still the owners of record. The city did not engage an attorney to conduct a title search. The city continued to mail notices of its condemnation actions to the record owners. In early November the plaintiffs recorded their tax deed. In late November 2004 the city council approved an ordinance under G.S. 160A-441 condemning the structure and posted notice of that action on the site in early December. In January 2005 the city demolished the structure.

The court held that reasonable persons could differ as to whether the city’s actions to ascertain to whom it should send notices in its condemnation action were adequate. Therefore it was inappropriate for the trial court to grant summary judgment for the city.

**Coucoulas/Knight Properties v. Town of Hillsborough**, 199 N.C. App. 455, 683 S.E.2d 228 (2009), *aff’d per curiam*, 364 N.C. 127, 691 S.E.2d 441 (2010)
*Amendments, Plan consistency, Equal protection*

The town denied the plaintiff’s petition to rezone 2.16 acres from primarily low-density residential into an “Entranceway Special Use” district. The property was located within a historic district and within an area designated by an adopted corridor plan as a “district gateway.” The town council approved the rezoning by a 3-2 vote, but since a valid protest petition had been filed the rezoning failed as it did not secure the requisite three-fourths supermajority. The trial court held the refusal to rezone to be arbitrary and capricious and violative of equal protection as the town had placed property at the opposite end of its downtown area into this zoning district.

The court held a “whole record” review should be applied in address a claim the decision was arbitrary and capricious. The court noted there was no evidence, much less substantial evidence, that prior decisions of the board involved similarly situated properties, as this property was within the town’s historic district and other rezonings were not (and also considering the size, proposed use, density, and other factors related to entryway districts). The court noted that the finding the rezoning would be consistent with the comprehensive plan does not mean the existing zoning (which was retained given the refusal to rezone) was inconsistent with the plan. Also, the fact that the ordinance specifically allowed denial of rezoning petitions that are deemed not to be in the public interest did not require the board to make a finding that the proposal was not in the public interest.

**Tonter Investments, Inc., v. Pasquotank County**, 199 N.C. App. 579, 681 S.E.2d 536, *review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009)
*Purposes, Agriculture, Subdivision*

The county amended its zoning ordinance to prohibit residential uses in the A-2 Agricultural zoning district and to prohibit buildings in the A-1 Agricultural zoning district unless the lot has 25-feet of frontage on a state road (or road approved under the county subdivision ordinance) and was within 1,000 feet of a public water supply. The plaintiff owned three large tracts (all over 25 acres) that were in these two zoning districts. They alleged these zoning amendments were ultra vires because the state subdivision enabling statute exempts lots greater than ten acres from county subdivision regulation.

The court upheld the county ordinances, noting the ten-acre exemption applies to subdivision ordinances, not to zoning ordinances. The court held the county requirements of road and water access for buildable lots were reasonably related to legitimate public objectives such as provision of essential county services to residences and safety issues related to aerial spraying of pesticides in the remote and largely unpopulated A-2 zoning district (there was testimony that only five residences existed in the entire A-2 zoning district). The court also noted that while residences are allowed in many zoning districts, there is no state requirement that they be allowed in all zoning districts.

**McMillan v. Town of Tryon**, 200 N.C. App. 228, 683 S.E.2d 747 (2009)
*Conditional zoning, Standard of review, Procedures*

The plaintiffs challenged the town’s rezoning of 126 acres within a country club from open space and single family residential zoning districts to a residential conditional use district that would allow single-family homes, duplexes, and a tennis/swimming complex. The town ordinance required the rezoning to the conditional use district and the accompanying conditional use permit be heard and decided in a single quasi-judicial hearing.

The court first upheld the trial court’s denial of plaintiff’s motion to amend their complaint a second time to add conflict of interest and bias allegations regarding one of the council members. That motion was filed nearly a year after the initial complaint and a week after defendant’s motion for summary judgment with supporting affidavits. The court noted that even if defendant’s motion added new information about the details of the case, the plaintiff’s failure to undertake any discovery until that point should not burden the defendants. Thus the court held the trial court did not abuse its discretion in denying the motion to amend the complaint.

The court noted that local governments have a choice of adopting purely legislative conditional zoning or combined legislative/quasi-judicial conditional use district zoning with a concurrent conditional use permit. Here the town chose the latter option. Therefore the trial court must, in addition to reviewing the legislative aspects of the decision, also conduct a review of the quasi-judicial dimension (reviewing for errors of law, proper application of required procedures, due process protections observed, adequate evidence in the record, and no arbitrary or capricious action). Since the record did not show this review, the case was remanded for imposition of the proper standard of review.

**McMillan v. Town of Tryon**, 200 N.C. App. 282, 683 S.E.2d 743 (2009)
*Standing*

The plaintiffs challenged the town’s rezoning of 126 acres within a country club from open space and single family residential zoning districts to a residential conditional use district that would allow single-family homes, duplexes, and a tennis/swimming complex and the issuance of a conditional use permit for the project (this case involved the conditional use permit; a companion case addressed the rezoning). The trial court dismissed the appeal for lack of standing.

The court conducted a de novo review of the plaintiffs’ standing. All had alleged they were adjacent or nearby property owners. One had testified at the hearing on the permit about potential negative impacts of the project due to a narrow road serving as access (with children walking and biking on it), noise, stormwater runoff increases, and an unsuitable site for septic tanks. The court held a de novo review of standing must view the plaintiffs’ allegations as true and view them in the light most favorable to them. Given that standard, the allegations of proximity to the site and the testimony regarding special damages were sufficient as a matter of law to confer standing.

**Musi v. Town of Shallotte**, 200 N.C. App. 379, 684 S.E.2d 892 (2009)
*Spot zoning, Contract zoning, Standing*

The plaintiff neighbors filed a declaratory judgment action to challenge the rezoning of an area consisting of fifteen tracts with six different owners. The subject property had been subject to county low-density residential zoning. The town approved a satellite annexation and rezoning to a higher density that would accommodate multifamily condominiums.

The court first held that the plaintiffs had standing to challenge the rezoning. The court in a de novo review noted the neighbors had alleged a specific personal and legal interest in the subject matter, which is similar to but not the same as the requirement to show special damages as an aggrieved party with a writ of certiorari (and thus were not required to show a reduction in their property values).

The court held the rezoning was not spot zoning for two reasons. First, the property was not owned by a single entity. The fact that the six owners may have been part of an extended family or had common interests did not affect this determination. Second, the area was not surrounded by a larger uniformly zoned area as there were more than five other town and county zoning districts within a mile of the property. The court also held that the fact that town council was aware of a specific plan to build multifamily condominiums on the site did not in and of itself indicate the council was unaware of other uses that could be undertaken under the new zoning. The court noted the range of uses allowed was similar to that allowed in the prior county zoning and each council member testified in depositions that they had considered the full range of permitted uses at the time of the rezoning.

**Northwest Property Group, LLC v. Town of Carrboro**, 201 N.C. App. 449, 687 S.E.2d 1 (2009)
*Conditional use permit, Conditions*

The plaintiff applied for a conditional use permit to develop a grocery store and other commercial establishments on a 7.1 acre site. The site fronted a major street and had a side street that accessed a residential neighborhood. While a traffic impact analysis indicated the increase in traffic from the project would not meet NCDOT standards for a signal or other intersection improvements, neighbors expressed concerns about traffic impacts. The plaintiff agreed to reserve land for a future roundabout at the intersection, to pay for traffic signals should NCDOT approve such, and to limit delivery vehicle use of the side entry. The town council issued the permit, but also imposed a condition that the side entrance be limited to emergency vehicles. The plaintiff contested imposition of that condition.

The ordinance was structured to require the council to make three votes on the application, determining successively that the application was complete, that it complied with all applicable portions of the ordinance, and that specified conditions were to be applied. The plaintiff contended that conditions could only be imposed if the second of these motions – that the application complied with the ordinance – failed in that conditions could only be imposed to bring the project into compliance with the ordinance. While the dissent accepted this interpretation of the ordinance, the majority held that the ordinance contemplated successive votes and that conditions consistent with the standards for conditions set out in the ordinance could be imposed even with approval of the second motion. However, the court held the council had made no findings to support imposition of the challenged condition and therefore remanded to case to the council for reconsideration and adoption of findings to support any conditions that they might impose in that reconsideration. The dissent contended that there was no substantial, competent, material evidence in the record to support the contested condition so the remand should have been to issue the permit without the contested condition.

**Union Land Owners Association v. County of Union**, 201 N.C. App. 374, 689 S.E.2d 504 (2009), *review denied*, 364 N.C. 442, 703 S.E.2d 148 (2010)
*Adequate public facilities, Impact fees*

Union County adopted an adequate public facilities (APFO) section within a land use ordinance that included a calculation of a proposed development’s impact on school capacity. If the development’s impact would overburden school capacity, the ordinance provided several options, including reducing the scale of the proposed development, phasing its construction to match school construction schedules, or having the developer provide funding or construction to address the school capacity issues. The county also adopted a resolution establishing a procedure to calculate the “voluntary mitigation payment” that the developer could pay to offset school capacity deficiencies. Plaintiff developers challenged the county’s authority to adopt such a regulatory scheme.

The court held the county lacked express or implied authority to adopt this ordinance under its general police power, zoning, or subdivision regulation authority. The court held that since the zoning and subdivision statutes directly address real estate development, the general ordinance making authority does not provide an independent source of authority for an adequate public facilities ordinance. The court noted that consideration of development impacts on the efficient and adequate provision of public services (including schools) is expressly within the permissible objectives of a zoning ordinance. However, local governments may only employ the tools provided within the statute to address this objective. The court held that the tools enumerated within the statute (size of buildings, lot sizes, setbacks, density, land uses, etc.) was not sufficiently broad to include the tools used in this APFO. Similarly, while the APFO’s objectives are within those that can be addressed by a subdivision ordinance, the tools authorized there do not include a requirement for developers to address school facility needs by payments, land donation, or school construction. Therefore the court held inclusion of a “voluntary mitigation payment” and other similar measures rendered the APFO beyond the scope of the county’s delegated authority. The court held this was an improper indirect attempt to impose a school impact fee, which could clearly not be done directly.

**Federal Cases**

**Independence News, Inc. v. City of Charlotte**, 568 F.3d 148 (4th Cir. 2008), *cert. denied*, 130 S.Ct. 507 (2009)
*Adult use, Amortization, Variance*

The city adopted an adult use regulation in 1994 that required minimum separations between adult uses and sensitive land uses and between each other. The regulation had an eight-year amortization period. It also allowed a variance to the separation requirement upon showing man-made or natural features provided sufficient separation to prevent harmful secondary impacts. The plaintiff challenged the application of the amortization requirement, contending evidence in the eight years since adoption showed this particular adult use had no adverse secondary impacts. The plaintiff also made a facial challenge to the variance standards, contending they must provide an opportunity to show a lack of adverse secondary impacts in fact at a particular location.

The court held for the city on both challenges. The court held the ordinance to be a legitimate, content-neutral time, place, and manner regulation. The city was required to consider adverse secondary impacts at the time of enactment, but has no obligation to make a post-enactment study of actual impacts at particular locations. The city’s consideration in enactment is properly focused on the overall problem to be addressed, not on its application to a particular case. As for documentation of adverse secondary impacts in a variance application, the rules are designed to prevent future adverse impacts before they occur, so consideration of actual past impacts in a particular location is not constitutionally required.