**2010 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**

**Hensley v. North Carolina Department of Environment and Natural Resources**, 364 N.C. 285, 698 S.E.2d 41 (2010)
*Sedimentation*

Plaintiffs challenged an erosion and sedimentation control variance granted to allow the expansion of a golf course adjacent to a trout stream at a development in Burnsville. The defendant had approved construction of fairways and cart paths that involved removal of the tree canopy above about a half mile of the stream and enclosing about a third of a mile of the stream in pipes and culvers. The approval included strict conditions to minimize sedimentation during the construction process. The law allowed land disturbing activities in the trout stream buffer that are ‘temporary” and “minimal.” The trial court upheld the approval, but the court of appeals held the law did not allow this permanent alteration of the buffer area.

The court held the purpose of the law was to prevent harmful sedimentation during construction, not the control of land use within the buffer. As the construction process itself was temporary and the sedimentation controls imposed would ensure minimal sedimentation, the court upheld the approval.

**North Carolina Court of Appeals**

**Bailey and Associates, Inc. v. Wilmington Board of Adjustment,** 202 N.C. App. 177, 689 S.E.2d 576 (2010)
*Intervention, Timeliness, Evidence, Estoppel, Mootness*

Plaintiffs proposed to develop a tract adjacent to Motts Creek. After a concept meeting with town staff in 2005, staff advised the plaintiff that the site was not within a conservation overlay district. When the site plan was reviewed by the city’s technical review committee in 2007, that committee determined at least part of the parcel was within that overlay district and thus subject to its waterfront setback and buffer rules. The plaintiff appealed this determination to the board of adjustment the following day. The board affirmed the determination that the parcel was within the overlay district. On appeal to superior court, neighbors were allowed to intervene, but their motion to remand the matter to the board for consideration of new evidence was denied. The trial court also refused to hold the plaintiff’s appeal to the board of adjustment was not timely. The court then reversed the board of adjustment’s decision upholding the staff interpretation.

The court of appeals first held the appeal was not mooted by the city’s subsequent repeal of the conservation overlay district and adoption of new conservation regulations, as that ordinance explicitly included provisions that the new rules were not applicable to pending litigation or site plans that had already been accepted for review.

The court held the contiguous and neighboring property owners had sufficient standing to intervene as they had alleged specific, direct loss to their properties and their use and enjoyment of the same (having alleged increased traffic, light pollution, noise, and similar harms).

The court noted that the city ordinance required appeals to the board of adjustment regarding interpretation of the ordinance to be made within ten days after issuance of an order from the city manager. This presented a mixed question of law and fact--the interpretation of the terms “issuance” and “order” being questions of law and identifying actual dates of actions taken being a question of fact. As the board of adjustment made no findings of fact or conclusions of law on this point, it was proper for the trial court to refuse to take the issue up on appeal.

The court held the question of whether new evidence should have been allowed under Rule 60(b)(2) was a de novo question of law for the trial court. However, since this issue was not presented to the board of adjustment and that board took no action on it, the record was devoid of anything for the trial court to review. The court held that a site development application alleged to have been made by the plaintiff for the same site in 2001 that purportedly acknowledged the site to be within a conservation overlay district was not presented to the board of adjustment and was thus not within the record and could not be considered by the trial court.

**Coventry Woods Neighborhood Association, Inc. v. City of Charlotte**, 202 N.C. App. 247, 688 S.E.2d 538, *review denied*, 364 N.C. 128, 695 S.E.2d 757 (2010)
*Statute of limitations, Due Process, Notice*

Neighbors challenged the city’s approval of a preliminary plat for a 72-lot subdivision on a 16-acre tract. The ordinance did not provide for notice to neighbors of a subdivision plat application or decision and no such notice was provided. The ordinance required appeals of subdivision decisions to be filed within ten days of the decision. Plaintiffs learned of the preliminary plat approval some six months after the decision and filed an appeal with the board of adjustment two months after learning of the decision. After a hearing, the board rejected the appeal. The plaintiffs then attempted an appeal to the Planning Commission, which was rejected as not being timely. The plaintiffs contended their appeal was timely and that a preliminary plat decision made without a hearing and notice to neighbors violated their due process rights.

The court held that the two-month statute of limitations in G.S. 160A-364.1 and 1-54.1, applicable to legislative zoning decisions, does not apply to a subdivision ordinance. The court held that the three-year statute of limitation of G.S. 1-52 did not begin to run on adoption of the ordinance, but rather ran from the date the plaintiffs learned of the plat approval.

The court, however, found the plaintiffs had no property rights affected by the decision, so there could be no due process violation. The court found the plaintiffs’ contention that their rights to the use and enjoyment of their property and from diminution of the value of their property were affected was predicated on a reliance on an expectation of unchanged ordinances, the existing legal situation, and the current use of the tract in question, none of which are property rights protected by the constitution.

**Cary Creek Limited Partnership v. Town of Cary,** 203 N.C. App. 99, 690 S.E.2d 549, *review denied*, 364 N.C. 600, 703 S.E.2d 441 (2010)
*Preemption, Jurisdiction, Buffers*

The town’s development ordinance included stormwater management standards that included 100-foot riparian buffers adjacent to perennial and intermittent streams identified on USGS maps and 50-foot buffers adjacent to other surface waters. After the plaintiffs were denied a variance from the buffer requirements they brought a declaratory judgment action challenging the validity of the buffer requirements and an inverse condemnation action in the event the buffers were declared valid.

The court first held that the plaintiff’s separate certiorari proceeding challenging the variance denial did not deprive the court of subject matter jurisdiction to hear this declaratory judgment action on the validity of the ordinance, as these two legal actions must be brought separately. However, the court held that the inverse condemnation claim was premature and should have been dismissed as it was dependent on the outcome of both the declaratory judgment action and the certiorari review.

The court held the town’s buffer requirements were not preempted by state watershed protection statutes, as G.S. 143-214.5 provides for a cooperative state-local management program and explicitly allows local governments to adopt more stringent standards than the state-mandated minimum standards. The Environmental Management Commission had also issued an interbasin transfer certificate to the town that required adoption of stormwater management standards “similar to or more protective than” state rules.

**Schwarz Properties, LLC v. Town of Franklinville**, 204 N.C. App. 344, 693 S.E.2d 271 (2010)
*Statute of limitations, Manufactured homes, Costs*

Plaintiff sought a declaratory judgment to invalidate the town’s adoption of ordinances prohibiting issuance of permits for installation of manufactured homes in the jurisdiction if the homes are more than ten years old, as well as ordinances requiring capping sewer lines upon removal of a structure and setting a fee for replacement of lost trash carts. Plaintiff secured a temporary restraining order precluding denial of permits for location of manufactured homes during the litigation. Following a hearing, the trial court dissolved the TRO, allowed the town to revoke permits issued while it was in effect, dismissed the plaintiff’s claims, and awarded damages to the town for the costs of defending the matter.

The court held that the two-month statute of limitations of G.S. 160A-364.1 applied to the ordinance on location of manufactured homes, as it was part of the town’s zoning ordinance. Since the action was filed more than a year after adoption of the restriction, the claim was time-barred and properly dismissed. Since the claims on the sewer cap and trash collection are governmental functions, the plaintiff’s failure to allege a waiver of sovereign immunity was fatal and those claims were properly dismissed. Award of costs to the town for the costs of defense upon dismissal of the temporary restraining order are allowed by Rule of Civil Procedure 65 without a showing of malice or want of probable cause.

**Four Seasons Management Services, Inc. v. Town of Wrightsville Beach**, 205 N.C. App. 65, 695 S.E.2d 456 (2010)
*Interpretation, Nonconformities, Conditional uses*

The plaintiffs own the Blockade Runner, a multistory hotel that was a lawful nonconformity under the town zoning ordinance. The structure did not comply with various setbacks, off-street parking, and landscaping requirements. Since the hotel was built prior to the adoption of town zoning, it did not secure a conditional use permit as is required for hotels in this zoning district. However, the plaintiff sought and obtained a conditional use permit for improvements to the hotel and had twice sought and obtained amendments to that permit for additional improvements. The plaintiff sought to construct a four-story parking structure on the site of its existing surface parking lot without an amendment to its conditional use permit. The town contended a permit amendment was required and construction of the deck otherwise would be an unlawful expansion of a nonconformity. The plaintiff contended the deck was an “accessory use” permitted by right and that as they were reducing the extent of the parking noncompliance, this was not an expansion of a nonconformity. The board of adjustment upheld the town’s interpretation.

The court first held that construction of the parking structure required an amendment to the conditional use permit. The town ordinance clearly distinguished “accessory structures” and “accessory buildings” from “accessory uses.” The proposed work was clearly a structure and not a use alone, so the authorization of accessory uses was not relevant to the issue of whether a permit was required under the terms of the ordinance. The clear intent of the ordinance was to subject hotels and substantial construction in this zoning district to the “considerable scrutiny” of a conditional use permit process. The court also agreed that the proposed parking structure would be an impermissible expansion of a nonconformity as defined by the town ordinance, in that it would still have an inadequate number of parking spaces and would not comply with landscaping and sprinkler requirements. The ordinance provision allowing changes in degree but not changes in kind is inapplicable as it is expressly limited to changes in “equipment or processes,” not this type of structural addition.

**Land v. Village of Wesley Chapel**, 206 N.C. App. 123, 697 S.E.2d 458 (2010)
*Nonconformities, Interpretation*

The plaintiff purchased a lot in Union County in 1991 and established a shooting range that occupied two-thirds of the lot. The cost of improvements for the range was $2,000. In response to adjacent residential development, he reoriented the range in 1999 at a cost of $1,000. The lot was then annexed by Wesley Chapel. The town advised the plaintiff in 2007 that shooting ranges were not allowed in this residential zoning district. In 2007-08 the plaintiff improved the range at a cost of $15,000. In 2008 the town issued a notice of zoning violation, contending the use was not lawfully established under the prior county zoning and was thus not a lawful nonconformity. Alternatively, the town contended that even if it were a lawful nonconformity, the 2008 improvements constituted an impermissible material alteration of the nonconformity. The board of adjustment upheld the zoning administrator’s determination, but the trial court reversed.

The court held the shooting range was a lawful nonconformity. The county ordinance did not specifically list “shooting ranges” as a regulated use. The ordinance provided that the list of uses should be liberally interpreted to include other uses with similar impacts and that unlisted uses that did not have similar impacts are prohibited. The town contended that the most nearly similar listed use was “privately-owned outdoor recreational facility.” Since that use required a special use permit and plaintiff did not secure such a permit from the county, the town contended the use was not lawfully established and thus was not a lawful nonconformity. The court rejected the presumption that unlisted uses were prohibited, citing the common law principle that ambiguity should be resolved in favor of free use of property. The court held that since the ordinance did not expressly prohibit shooting ranges in this district, they should be presumed permitted.

The court also held the 2007-08 improvements not to be a material alteration of the shooting range. The ordinance defined “material alteration” to be a change of more than 50% of the replacement cost at the time of the alteration (considering the improvement costs of $15,000 to an improvement that originally cost $3,000). The court held the town erred in only considering the construction costs of the shooting range and that the calculation should have included the value of the land occupied by the range.

**Amward Homes, Inc. v. Town of Cary**, 206 N.C. App. 38, 698 S.E.2d 404 (2010), *aff’d per curiam by evenly divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011) **[stands without precedential value]**
*Impact fees, Statute of limitations*

The town in 1999 adopted an Adequate Public School Facilities Ordinance (APSFO). As a condition for approval of new residential developments, the ordinance required a certificate of adequate school capacity to serve the proposed development or a specified exemption from that requirement allowed for building in a low population density area or construction of affordable housing. The town subsequently approved several developments that included conditions requiring payment of a specified fee to the town for each building permit in order to comply with the APSFO. In 2003 the town amended the APSFO to explicitly allow payment of fees for APSFO compliance. The amended APSFO was repealed in 2004, but the repeal required continued payments for within those developments approved subject to the ordinance. The plaintiff builders in one of the developments subject to the fee requirement brought this action in 2007 seeking to have the APSFO declared beyond the town’s delegated authority and unconstitutional, a refund of the over $600,000 in fees paid, and attorney fees and costs. The trial court held for the plaintiffs on all counts, ordered the fees refunded, and awarded fees and costs of $368,000.

The court held the imposition of the school impact fee was beyond the scope of power delegated to the town. The town had no authority to impose or accept the fees. The fact they were imposed by a condition on the approval rather than directly by ordinance provision is irrelevant.

On jurisdictional issues, the court held the town’s repeal of the APSFO did not moot these claims as the plaintiffs sought refund of fees paid and an injunction prohibiting continued fee charges. The court rejected the contention that the builders did not have standing because the fees were accepted by the developer as a condition of rezoning and subdivision approval for the development, noting that once accepted by the town the condition was imposed on the plaintiff builders. The court held the two-month statute of limitations for challenging zoning ordinances did not apply because the ASPFO was part of the subdivision ordinance rather than the zoning ordinance. The court held the three year statute of limitations for personal injuries applied to the claims brought under 42 U.S.C. § 1983 for alleged U.S. Constitutional violations. However, the court held that this period did not begin to run until the fee was paid (rather than when the ordinance was adopted) and that each fee payment acceptance constituted a continuing wrong by the town, so the fee recovery could date back three-years from the filing of the § 1983 claim. The court also concluded that claims for violation of the state constitution had no adequate state remedy or shorter statutory period of limitation, so the ten-year statute of limitations of G.S. 1-56 is applicable and the plaintiffs were thus entitled to recoupment of all fees paid.

The court rejected the contention that the developer’s acceptance of the permit condition and the benefits of the development approval barred this challenge on estoppel grounds. The court concluded the benefits of the approval ran to the developer, not the plaintiff individual builders who acquired lots from the developer.

The court concluded the collection of school impact fees violated substantive due process since ultra vires acts are by definition unrelated to a valid state objective and violated equal protection as differential fees were applied to different developments and the plaintiffs had to continue paying fees not charged to similar developers after the ordinance was repealed. Given the constitutional violations, awarding attorney fees was appropriate under § 1983.

**Meier v. City of Charlotte**, 206 N.C. App. 471, 698 S.E.2d 704 (2010)
*Interpretations, Statute of limitatio*ns

Plaintiff challenged the city’s interpretation of height limits and setbacks as applied to a residence being constructed on an adjacent lot. The Charlotte ordinance had a 40-foot height limit in the zoning district, specified how the height measurement is to be made, and allowed the maximum height to be exceeded if the side and rear yard setbacks were increased by one foot for each foot of building above 40-feet. When the plaintiff questioned compliance with these regulations, the zoning staff met on site during the construction with representatives of the builder and the plaintiff to review the work and discuss how the zoning height limits would be applied. The builder provided site plans and architectural drawings for the project. The zoning administrator then mailed a letter on February 28 to the plaintiff’s attorney and the builder stating his interpretation of the height limit and how it applied to this project. The letter concluded that the height involved, with the proposed setback additions, would comply with the zoning ordinance. The letter also required a sealed survey be submitted prior to issuance of a certificate of occupancy to confirm final construction compliance with the plans. The plaintiff acknowledged receipt of the letter in early March. In May the sealed survey was submitted. The staff confirmed on May 20 the structure was in zoning compliance. On May 23 the plaintiff appealed the interpretation to the board of adjustment. The board refused to hear the appeal, ruling the February 28 letter was a formal determination by the staff and the ordinance required appeals to the board to be made within thirty days of receipt of that letter. The plaintiff contended the thirty day period did not begin to run until receipt and review of the survey.

The court held the letter from the zoning administrator was a final determination on interpretation of the ordinance that could be appealed to the board of adjustment. It was made at the request of affected persons, made by the person authorized by the ordinance to make official interpretations, it explained how the ordinance would be interpreted, and included a conclusion that if the project was built in accordance with the plans submitted it would be in compliance with the ordinance. The letter was definitive and authoritative and was thus appealable. The as-built survey that was submitted later was to demonstrate compliance with this interpretation and was not, in and of itself, an interpretation of the ordinance. Thus the time for appeal of the interpretation began to run upon receipt of the letter. Since the appeal was not timely under the ordinance, the board had no subject matter jurisdiction to hear it.

**Carolina Marina and Yacht Club v. New Hanover County Board of Commissioners**, 207 N.C. App. 250, 699 S.E.2d 646 (2010),*review denied*, 706 S.E.2d 253 (2011)
*Mootness*

The plaintiff applied for a special use permit to modify an existing commercial marina in a residential zoning district by adding a dry-stack storage facility. The county denied the special use permit but on appeal the superior court overturned that decision and ordered the permit issued. A neighbor who opposed the project and had intervened in the judicial review appealed that decision to the court of appeals. The county did not join in the appeal. The neighbor unsuccessfully sought a stay of the trial court’s order and an injunction to prohibit permit issuance while she pursued the appeal. The county subsequently issued the special use permit. The court held the issuance of the permit mooted the appeal. Since the only issue on this appeal was the validity of the county’s permit denial, subsequent issuance of the permit resolved that matter and made this appeal moot.

**Cary Creek Limited Partnership v. Town of Cary**, 207 N.C. App. 339, 700 S.E.2d 80, *review denied*, 365 N.C. 193, 707 S.E.2d 241 (2010)
*Findings, Variance*

The plaintiff challenged the denial of variances that would have allowed intermittent streams subject to the town’s riparian buffer requirements to be filled. The court held that while a superior court undertaking review in the nature of certiorari may not make new findings of fact, the court may recite and synthesize the findings made by the decision-making board. The court should not review the evidence that may have supported a contrary finding, as the inquiry is limited to ascertaining whether there was substantial evidence to support the finding that was made. The court held the findings set forth in the decision-making board’s minutes (some eight paragraphs) were sufficient. Finally, as one of the standards for a variance is preserving substantial justice, it was appropriate for the board to consider the precedent that would be established by granting a variance and the fairness to those who have complied with the ordinance requirements.

**MLC Automotive, LLC v. Town of Southern Pines**, 207 N.C. App. 555, 702 S.E.2d 68, *review denied*, 710 S.E.2d 23 (2010)
*Vested rights*

The plaintiffs were interested in developing an automotive sales park with multiple dealerships on a 21-acre parcel in the town. They inquired as to the zoning of the property and were advised by the town that automobile sales were a permitted use on the property, provided all requisite permits were obtained. The plaintiffs then acquired the property, entered into a contract with an automobile company for a franchise on the site, and began to prepare site plans and applications. After the initial application (an “architectural compliance permit”) was submitted, the town made comments and the plaintiff had revisions and discussions with neighbors underway. At this point citizens submitted a petition to rezone the property to a district that did not allow automobile sales as a permitted use. The plaintiff later submitted an application for an erosion control permit and requested the town treat a proposed site plan as a “zoning application.” The town regulations and practice, however, provided for a “zoning permit” only as a unified permit approved concurrently with a building permit. Subsequently the town approved the architectural plans, but denied the erosion control application. The town had also not acted on required water and sewer permit, driveway permit, or any site plan or building permits. At this point the town approved the rezoning petition and took no further action on pending applications as the use was no longer permitted in the newly applicable Office Services zoning district. As a result, the plaintiff’s contract for the automobile dealership lapsed. The plaintiff contended that purchase of the property after receipt of letters from the town that the proposed use was permittable created a vested right. The plaintiff also contended the town’s actions leading to loss of the automobile franchise constituted tortious interference with contract.

The court held the plaintiffs had not established a common law vested right. The court confirmed that reliance on the existing zoning is not sufficient to establish a vested right. Here the town had zoning and a variety of specific required permits. Reliance must be on those specific approvals, not a letter from the town staff explaining the existing regulations. As none of the expenditures here were made in reliance on any of the required permits, there could be no common law vested right.

Also, there was no tortious interference with contract as there was no showing that the rezoning of the property was “without justification.” The public objections to the proposed project and requested rezoning were based on the question of whether an intensive commercial use was appropriate for a site that was surrounded by residential uses on three sides and fronted a conservation area across the street on the fourth side. Consideration of the character of the district and the suitability and appropriateness of the site for particular uses is explicitly authorized as a reasonable consideration for zoning

**Templeton v. Town of Boone**, 208 N.C. App. 50, 701 S.E.2d 709 (2010)
*Standing, Statute of Limitations*

Two property owners challenged the town’s adoption of steep slope and viewshed protection ordinances as portions of the town’s unified development ordinance. The trial court granted the town’s motion to dismiss.

In order to establish standing to bring a constitutional challenge to an ordinance a plaintiff must show an injury in fact or an immediate danger of injury as a result of enforcement of the challenged ordinance. As there was no allegation of any actual enforcement and only an allegation that property owned by the plaintiffs was affected by the ordinance, the dismissal of the constitutional claims for lack of standing was upheld. [One judge, concurring in part and dissenting in part, would have held an allegation of actual or threatened enforcement is only required for an as applied constitutional challenge and not for a facial constitutional challenge.]

The plaintiffs also brought a statutory claim regarding alleged improper procedures in adoption of the ordinances (including alleged changes to the map of affected areas after the notice of hearing, substantial changes in the text after the hearing, and a failure to analyze conformity with the comprehensive plan). The steep slope provisions of the ordinance are only applicable to properties with a slope value of 30% or more. The complaint included no allegation that either plaintiff’s property had such a slope. Therefore those statutory challenges were also properly dismissed for lack of standing. The viewshed protection provisions are only applicable to properties more than 100 feet above the nearest major traffic corridor and visible from such a corridor. One of the two plaintiffs did allege that their property was subject to the viewshed protection provisions. This was sufficient to establish that that property of that plaintiff is directly and adversely affected by the ordinance, so that plaintiff had standing to make a statutory challenge of the viewshed ordinance.

The plaintiff who had standing to challenge the viewshed ordinance, however, did not join the complaint until more than two years after adoption of the ordinance. She alleged she did not have notice that ordinance was applicable to her until that time. The court held the two month statute of limitations in G.S. 160A-364.1 was applicable even if the defendant failed to properly notify the plaintiff, so this complaint was properly dismissed.

**Federal Cases**

**Dixon v. Town of Coats**, 2010 WL 2347506 (E.D.N.C. June 9, 2010)
*Religious use; Standing*

Plaintiff owned a small building in downtown Coats that had previously been used for various retail uses, a residence, and a church. The town rezoned the entire six-block downtown areas to a “Mixed Use Village District.” Churches were not a permitted use in the district. At the time of the rezoning plaintiff’s structure had been vacant several months. Some six months later the plaintiff leased the building to a person who proposed using it for a church. The town informed the tenant that the use was not permitted and that prior church use did not have nonconforming status as that use had been discontinued more than ninety days. Nonetheless, the town allowed the tenant to open a church on site, but advised them this was a “one time” approval and once the church closed, another religious use would not be approved. The church operated briefly, closed, and the plaintiff then leased the property to another church. The town staff denied zoning approval and the denial was upheld by the Board of Adjustment.

The court first held the plaintiff had standing to bring a claim under the Religious Land Use and Institutionalized Persons Act even though he had not made nor proposed to make any personal religious use of the site. Plaintiff’s potential financial loss as a lessor prohibited from leasing to a religious user of his property was sufficient to establish standing. The court dismissed his “equal terms” claim, however, as the plaintiff was not a religious assembly or institution. The court held the exclusion of places of worship from a relatively small area was not a “substantial burden” as it did not render religious exercise effectively impractical within the town as a whole.

**United States v. Town of Garner,** 720 F.Supp.2d 721 (E.D. N.C. 2010)
*Group homes; Ripeness*

Oxford House opened a group home for eight occupants in a single family residential zoning district in late 2003. After receiving a neighbor’s complaint, the town issued a notice of violation in late 2004. Oxford House appealed, contending the occupants were a “family” under the ordinance and alternatively requesting reasonable accommodation of their use. In response, the town amended its ordinance to create a new use for “handicapped and disable homes”  that allows up to six persons with a disability to reside in a single family home and to limit a “family” to no more than four unrelated individuals. In early 2006 the board of adjustment upheld the staff determination that the occupants of the facility did not the meet the ordinance definition of a “family” under either the original or revised ordinance. The board also held it had no authority to issue a use variance. Oxford House did not appeal, but did submit a letter asking that it be allowed to retain eight residents and have relief from the minimum separation requirements. The town responded that the market rental value of the house was substantially less than Oxford House claimed and requested studies to document Oxford House’s claim that its therapeutic model required eight residents. After a year passed without response, the town notified Oxford House that they were in violation and sent a similar notice to the landlord. Oxford House again requested reasonable accommodation and submitted an expert report on it need for eight residents. The Department of Justice then advised the town of a complaint from Oxford House regarding a failure to make reasonable accommodation and subsequently brought this action alleging the town’s failure to establish a process by which requests for reasonable accommodation can be made violated the federal Fair Housing Act.

The court first held the claim was ripe for judicial review once the town had considered and rejected a reasonable accommodation request. After three requests to the town, the plaintiff need not submit a particular text amendment or wait for a vote on such. An indeterminate delay by the town has the same effect as an outright denial. The court held that res judicata and collateral estoppel did not apply based on the unappealed board of adjustment decision as the federal government was not a party to or participant in that action. Oxford House is, however, precluded from relitigating issues that were actually before the board and that were both critical and necessary for the board’s decision (particularly, whether their use met the ordinance definition of a “family” or some other permitted use).

**FC Summers Walk, LLC v. Town of Davidson,** No. 3:09-CV-266-GCM, 2010 WL 4366287 (W.D. N.C. Oct. 28, 2010)
*Abstention; Adequate Public Facilities*

The town adopted an adequate public facilities ordinance as a part of its unified development ordinance. The regulations set requirements for the availability of law enforcement, fire protection, and parks to support proposed development. The ordinance required staff review of the timing of proposed developments, impacts on service availability, and recommendations for governing board action. Plaintiff submitted four applications and received staff determinations on each that services were inadequate and that plaintiff could wait until services were available or pay its pro rata share of the costs to advance the deficient services. The first of these staff determinations was approved by the town board and not appealed by the plaintiff. The second and third determinations were appealed, but the fourth, which labeled a “final determination,” was not appealed. The plaintiff posted bonds to cover the costs indentified in the second and third determinations and brought this action contending the town’s actions violated state and federal constitutional protections.

The court previously held there was inadequate information in the record to support the town’s motion to dismiss for failure to exhaust administrative remedies given the lack of clarity about appeals of the staff determination to the town board and that it was unclear that the two-month zoning statute of limitations was applicable to an as-applied challenge of the adequate public facilities ordinance. 2010 WL 323769 (W.D. N.C., Jan. 20, 2010). The court concluded that while state law was relatively settled regarding school impact fees, the state law on adequate public facility requirements for the public safety and parks requirements at issue here were important and unsettled. The court therefore held *Burford* abstention was appropriate. In order to avoid statute of limitations issues (as there was no parallel state case pending), the court did not dismiss the case but remanded it to state court for continuation.

**Oxford House, Inc. v. City of Wilmington,** No. 7:07-CV-61-F, 2010 WL 4484523 (E.D. N.C., Oct. 28, 2010)
*Group homes*

In 2002 the city formed a task force to study and update its zoning regulations for group homes and other care facilities for the disabled. Over the course of nine months the city held eight public meetings on the topic and in 2003 adopted regulations that set locational standards for small (six or fewer residents), medium (seven or eight residents), and large (nine to twelve residents) group homes. The rules also included a half-mile separation requirement for all group homes. The plaintiff had two group homes that did not meet the updated regulations as they had nine rather than the maximum eight residents allowed for those sites. These two homes were also within a half-mile of other existing group homes (where there were multiple group homes within the prescribed radius, the city a random drawing to determine which homes would be permitted to remain as sited). The plaintiff brought this action contending the city’s subsequent enforcement action violated the Fair Housing Act, the Americans with Disabilities Act, and the Rehabilitation Act.

The court held the plaintiff failed to meet its burden of establishing that its proposed accommodation was necessary or that the accommodation would be reasonable. The court found no evidence in the record that nine residents rather than eight residents was necessary rather than simply preferred and less costly. The court found there was no showing that the city’s balancing the neighborhood concerns about traffic, parking, and law enforcement with the treatment needs of the residents to be unreasonable.

**Peterson v. City of Hickory**, No. 5:07-CV-00074-RLV, 2010 WL 4791901 (W.D. N.C. Nov. 17, 2010)
*Enforcement*

The city issued a notice of violation regarding junk vehicles being stored on a property and tenants working on a race car on the site at night to the disturbance of neighbors. The notice gave the plaintiff four weeks to remedy the violation or face fines. At the end of the period the site was inspected and it was determined the violation had been remedied. The court held that as no fines were imposed, there was no property deprivation to raise due process concerns. Even if there had been fines, the graduated fines would not have been a substantial deprivation, the process provided was adequate (notice of violation, an opportunity to remedy, and appeal possibilities).

**Bowden v. Town of Cary,** 754 F.Supp.2d 794 (E.D. N.C. 2010). *appeal pending, sub nom.* Brown v. Town of Cary
*Signs*

The plaintiff and city engaged in an extended dispute after the city widened a street adjacent to his home. The plaintiff contended the road project devalued his property and caused flooding problems. The city made a number of improvements to address drainage issues, but refused the plaintiff’s demand that his lot be purchased for 130 percent of its tax value. In response the plaintiff had “Screwed by the Town of Cary” painted in large letters across the front of his home. The city cited him for a violation of its sign ordinance, primarily on the grounds that the “sign” was approximately 48 sq. ft., well in excess of the maximum five sq. ft. allowed in this residential zoning district.

The court held the sign regulation violated the First Amendment and enjoined the town from its enforcement. The regulation exempted several types of signs from its coverage or this size limit. The exemptions included holiday decorations (the court noting that a sign of the same size reading “Merry Christmas to the Town of Cary” would be exempt), public art, and temporary signs advertising town-recognized events. The court held this made the ordinance content-based rather than content-neutral. The court noted that even though there was no intent on the part of the town to suppress some content and the town’s objectives (aesthetics and traffic safety) were content neutral, the ordinance required a “searching inquiry” to determine if it was regulated and then distinguished its regulatory coverage based on that inquiry, thus making it content based. The court therefore applied strict scrutiny and invalided the regulation as not supporting compelling governmental interests and not being narrowly drawn (as, for example, a giant flashing Christmas sign that would be more distracting to motorists would be exempt).