**2011 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**

**Morris Communications Corp. v. City of Bessemer City Board of Adjustment,** 365 N.C. 152, 712 S.E.2d 868 (2011)
*Interpretation; Vested rights; Nonconformities*

In July 2005 the state condemned for a road-widening project a portion of the property on which the plaintiff had a lawful billboard. In August 2005 the plaintiff secured a sign permit from the city for a relocated billboard, and in November 2005 secured a building permit from the county for that work. Each permit required “work” to commence within six months. In June 2006 the county renewed the building permit. Later in June 2006 the city amended its ordinance to ban billboards. In December 2006 the plaintiff relocated the billboard, which was apparently the initial physical construction on site. The city contended that the plaintiff’s sign permit had expired after six months (in February 2006) because there was no work on site, so the county’s renewal of the building permit was in error and the city’s June 2006 billboard ban precluded issuance of a permit for the relocation. On appeal of the city’s notice of a violation of the city ordinance, the board of adjustment, trial court, and court of appeals upheld the city’s interpretation of the law.

The court reversed, noting interpretation of the ordinance is a de novo question of law. The term “work” was not defined by the ordinance or the permit. The court held that the zoning administrator and board of adjustment’s conclusion that some physical work of the nature authorized by the permit on site was required to constitute “work” under the terms of the ordinance was unreasonable. Governmental restrictions on the use of land are to be strictly construed in favor of free use of real property. Thus this “narrow and unduly restrictive interpretation” of an undefined and ambiguous term was inappropriate. The court relied on several factors to conclude “work” had commenced within the permit period. The dictionary definition of “work” includes mental efforts to achieve an objective and the record established that the plaintiff had active negotiations with the N.C. Department of Transportation and the landowner in this period. The state’s common law has also long included work beyond physical alterations on site to be considered in vested rights analysis. Further, the board of adjustment should act to prevent errors or abuse by zoning administrators and to achieve just results. Given this was an involuntary relocation of a sign to accommodate road widening and the town’s acknowledged hostility towards billboards, the “overly restrictive” interpretation of a vague ordinance should have been reversed.

**North Carolina Court of Appeals**

**Sapp v. Yadkin County, \_\_\_** N.C. App. \_\_\_, 704 S.E.2d 909 (2011)
*Plan consistency, Discovery, Conflict of interest, Conditional zoning*

The plaintiff neighbors challenged the county’s rezoning of a ten-acre parcel from a Highway-Business to a Manufacturing-Industrial Conditional zoning district to allow construction of a new jail. The trial court granted a 45-day continuance on the county’s motion for summary judgment but refused further continuances. The trial judge had also previously issued an order to the county to show cause why a writ of mandamus should not issue regarding county provision of adequate jail facilities.

The court held there was no showing that an additional period for discovery was needed and noted that a hearing on a motion for summary judgment does not close the discovery hearing. The court noted that while the trial judge had expressed an interest in prompt resolution of the jail issue, there was no evidence he had a personal interest in the matter or any preference or opinion on the location of a new jail. Thus there was no substantial evidence to support an allegation of impartiality. The court held that the facts that the planning board minutes were not presented to the board of commissioners prior to their vote and that the planning board minutes did not include a copy of their statement on plan consistency were irrelevant because the statutorily mandated written recommendation and statement on plan consistency from the planning board was itself before the board of county commissioners prior to their vote. Finally, the court held that a conditional use permit standard in the ordinance limiting correctional facilities within one mile of residential property was inapplicable as the rezoning was to a conditional zoning district that allowed this use rather than consideration of a conditional use permit.

**CLRP Durham, LLP v. Durham City/County Board of Adjustment**, **\_\_\_** N.C. App. \_\_\_, 706 S.E.2d 317,*review denied*, 365 N.C. 348, 717 S.E.2d 744 (2011)
*Interpretation, Record*

In 2000 the county rezoned a 71 acre parcel and approved its split into two parcels (one with a multi-family zoning and the other with a office-institutional zoning). The rezoning included a development plan (a mandatory part of the Durham rezoning) that included a cross-access connection provision that traffic from the office parcel be allowed to cross a portion of the muli-family parcel. The approved development plan included detailed designs for development of the multi-family parcel but only “future office development” for the second parcel. Later in 2000 the owner filed an access agreement limiting the cross-access to the second parcel to office use only. In 2005 the plaintiff purchased the multi-family parcel (including a completed apartment building); at that time the office parcel was still vacant. In 2007 the subsequent purchaser of the office parcel submitted a site plan to the county to secure approval for an apartment complex on the property. The plaintiff objected. The staff ruled that apartments were a permitted use in the applicable office zoning for this parcel and that the “office” designation on the approved development plan was suggestive of a future use, but not a binding element of the approved development plan. The staff further held that precluding cross-access to the proposed apartments pursuant to the access agreement would be inconsistent with the approved development plan. The board of adjustment upheld this staff interpretation. The trial court affirmed this decision.

The court noted that while the rezoning and development plan was approved under the ordinance in effect in 2000, that ordinance was replaced in 2006 by a unified development ordinance. While the general rule is that the board of adjustment should apply the ordinance in effect at the time of its decision, the record did not include the two ordinances and left it unclear whether the 2006 ordinance completely superseded the prior ordinance or left the prior ordinance applicable for those projects approved when it was in effect. As the record was void of evidence as to which ordinance was applicable, the court concluded it was unable to examine the question of law as to the interpretation of the ordinance and thus dismissed the appeal.

**APAC-Atlantic v. City of Salisbury**, **\_\_\_** N.C. App. \_\_\_, 709 S.E.2d 390 (2011)
*Nonconformities*

The plaintiff proposed in 2007 to renovate its asphalt plant. The site of the plant had, however, been rezoned in 2001 and was nonconforming under the now applicable zoning. The renovations involved shifting to new equipment that would allow for increased capacity from 180 tons per hour to 300 tons per hour, allow for expanded use of recycled asphalt, and reduce future operating costs. The zoning administrator denied site plan approval for the renovation on the grounds that the renovation would be the impermissible change, enlargement, or expansion of the nonconformity. The board of adjustment upheld this determination and the trial court affirmed.

The court held than an increase in the scope, scale, or extent of a nonconforming use was an impermissible “enlargement” and the increased plant capacity was thus a proper ground for denial of the site plan. The record also supported a conclusion that the renovation would improperly enlarge the commercial viability of the plant by reducing future operating costs. The court noted that as one of the functions of the board of adjustment is to interpret the zoning ordinance, some deference to the board’s interpretation of its own code was appropriate.

**S. T. Wooten Corp. v. Board of Adjustment**, \_\_\_ N.C. App. \_\_\_, 711 S.E.2d 158 (2011)
*Interpretation*

The plaintiff operated a concrete plant on a 63-acre parcel in Zebulon’s extraterritorial jurisdiction. The company wanted to add an asphalt plant at this site. The land was zoned “Heavy Industry,” but the list of permitted uses for the district did not mention asphalt plants. The company requested a zoning determination letter and the zoning administrator issued a letter stating that an asphalt plant fell within that permitted uses described for the zoning district or was similar enough to be grouped with them. The company then secured necessary air quality, driveway, and sedimentation permits and a building permit and opened a portable asphalt plant on the site. Eight years after getting its initial zoning determination, the plaintiff notified the town that it intended to place a permanent asphalt plant on the site. The town responded that an asphalt plant was not specifically listed as a permitted use in this zoning district and that since it would have similar but greater impacts than those uses that were listed, the ordinance required a special use permit. The plaintiff contended the town’s initial determination that the use was permitted was binding and precluded a subsequent determination that a special use permit was required. The board of adjustment and the trial court held the initial determination was not binding.

The court noted that while advisory letters are not binding, formal determinations are. The court held that the initial letter was a binding determination rather than an advisory letter. The ordinance specially authorized the zoning administrator to make interpretations of the ordinance. The letter addressed a specific question of interpretation and included a clear interpretation that an asphalt plant was a permitted use. The fact that the letter included superfluous advice (that a site plan and building permit would be required prior to construction) did not render the interpretation any less binding on the question of whether the proposed use was permitted or not. The ordinance provided that appeals of the administrator’s determinations go to the board of adjustment and specified that appeals to the board must be made within thirty days of the date of the decision. Therefore the court concluded the town’s first determination that the asphalt plant was a permitted use was a binding and appealable zoning determination. As that determination was not appealed by the town, the town was bound by it and precluded from latter making the different interpretation that a special use permit was required.

**Sanchez v. Town of Beaufort**, \_\_\_ N.C. App. \_\_\_, 710 S.E.2d 350,*review denied*, 365 N.C. 349, 718 S.E.2d 152 (2011)
*Historic preservation, Standing*

A property owner in the Beaufort historic district proposed to demolish a small cottage and replace it with a two-story residence. After several denials and mediation, the owner and the historic preservation commission agreed to review a one-and-one half story structure. The plaintiff, who resided across the street, objected to the height of the proposed structure, contending it would block her views of the water and reduce her property value by at least $100,000. The plaintiff agree to reduce the height from the proposed 29 feet to 27 feet, but contended anything less would not allow reasonable use of the property (considering minimum flood elevations and ceiling heights). The commission concluded the maximum height should be 24 feet and therefore denied the certificate of appropriateness. On appeal the board of adjustment determined there was no substantial evidence in the record to support the 24-foot height limit and ordered the approval issued. The superior court upheld the board of adjustment’s decision.

The court of appeals affirmed. The court first held that the plaintiff had alleged sufficient special damages to have standing as she lived directly across the street, had contended approval would be inconsistent with the historic commission guidelines, and would injure the value of her property due to the lost vista. The court held there was insufficient evidence for the board to determine that a 24-foot height limit was necessary to assure congruity with structures in the district. The commission must determine congruity contextually, considering the entire historic district. The evidence showed residences closest to this site were 26 to 35 feet high. Further, the transcripts showed that members reached the 24-foot requirement based on various calculations of what members considered feasible rather than upon any principle set by the guidelines. Thus the imposition of the 24-foot height limit was arbitrary. As there was agreement that the public vista at street level would be obstructed by any structure over 16-feet height, the guideline regarding vista protection was clearly not a factor in the commission’s decision and thus could not support the denial.

**Wilson v. City of Mebane Board of Adjustment**, \_\_\_ N.C. App. \_\_\_, 710 S.E.2d 403 (2011)
*Vested rights*

The plaintiff challenged the approval of a site plan and building permit for a commercial development adjacent to his residentially zoned lot, alleging the approvals did not mandate a 50-foot vegetated buffer as required by the town’s unified development ordinance. The city and builder contended the buffer was not required. The developer began discussions with the city about a commercial development on the site in late 2006. The developer submitted a site plan for approval in January 2008, with revised plans submitted in May, June, and November of 2008. The staff advised the developer during the permit review that a waiver of the buffer would be granted. However, the city adopted a new unified development ordinance (UDO) in February of 2008 that made no provision for waiver of the buffer. The site plan and building permit were approved in February 2009 without a buffer requirement. The city and developer contended that the developer had a common law vested right that did not include a buffer. The board of adjustment upheld the staff determination, as did the trial court.

The court held the developer did not have a vested right and that the permit was void as it did not include a requirement for the mandated buffer. To establish a common law vested right, a developer has the burden of establishing that they have made substantial expenditures in good faith reliance on a valid permit and would suffer detriment if required to comply with the amended ordinance. Here the facts established that expenditures made prior to the adoption of the UDO were clearly made prior to site plan approval and were thus not made in reliance on a valid approval. As the site plan and permit approvals that were issued were in error, they were void ab initio and any expenditures in reliance on them could not serve as the basis of a vested right. Reliance also could not be made on town staff assurances that a waiver would be forthcoming, as such assurance or letter is not a formal determination or mandatory approval that can give rise to a vested right. The fact that the city may have subsequently amended the UDO in ways that would make the project permittable does not moot this case, as the evidence showed the only approvals actually issued were made in error.

**Wake Forest Golf & Country Club, Inc. v. Town of Wake Forest**, \_\_\_ N.C. App. \_\_\_, 711 S.E.2d 816, *review denied*, 365 N.C. 359, 719 S.E.2d 21 (2011)
*Open space; Estoppel*

The plaintiff owned and operated a golf course on a 166-acre tract. The zoning for the tract allowed one home per acre. In 1998 they contracted to sell a 16 acre portion of the tract to a developer contingent upon approval of a planned unit development (PUD) with 30 townhomes, six single-family homes, and a commercial area. In order to secure approval for the higher proposed density and to meet the mandated 25 percent open space requirement for PUDs, the plaintiff elected to designate the entire 149 acre golf course as open space in their 1999 special use permit application for PUD approval. The permit was approved with the express condition that the entire property was subject to the permit and its conditions. The townhouses were subsequently built, but the commercial area was not. Some years later the golf course experienced financial difficulties. In 2007 the plaintiff proposed converting the golf course to residential development and entered a contract for sale contingent upon approval of a development plan. Purchasers of townhouses within the PUD and neighbors sued the plaintiff, contending the proposal would violate promises to maintain a golf course on the site. A year after that suit was voluntarily dismissed, the plaintiff applied for a modification to the 1999 special use permit to remove that portion of the property (approximately 120 of the 166 acres) not required to meet the density, open space, and other requirements of the ordinance related to the development in the PUD. The town board elected not to hear or consider the proposal to amend the special use permit. The plaintiff brought suit to compel town action of the proposed special use permit modification. The trial court granted the town’s motion for summary judgment.

The court of appeals upheld the town’s refusal to consider and act upon the application. Following the rule established in *River Birch Associates v. City of Raleigh*, the court held a city may refuse to consider a proposal to modify an approved permit when the permitee has taken advantage of the benefits secured by voluntarily depicting an area as open space in its plans. Here the plaintiff voluntarily designated the entire golf course as open space even though that substantially exceeded the ordinance’s minimum open space requirements and secured higher densities for its PUD. After building at these higher densities, the plaintiff is estopped from attacking a condition it proposed and the town accepted. The town has the discretion to refuse to process an application for modification of the permit.

**Premier Plastic Surgery Center, PLLC v. Board of Adjustment**, \_\_\_ N.C. App. \_\_\_, 713 S.E.2d 511 (2011)
*Variance; Signs*

Plaintiff operated a medical facility on a four-lot site in Matthews that included multiple businesses. When the lots were originally developed, there was a single drive into the property. A monument sign adjacent to the drive listed the tenants in the development. Later a second drive adjacent to the plaintiff’s building was added. This drive was some 500 feet away from the initial drive and sign and around a curve. The initial monument sign was also full. The plaintiff sought a permit for a second monument sign adjacent to the second drive. After being advised by the town staff that such a sign would not be permitted, the plaintiff engaged a sign contractor. The sign contractor secured a permit from the county staff, who administered the town ordinance, and erected the sign. One week after construction, the county staff revoked the permit due to inconsistency with the town ordinance. Plaintiff appealed the revocation to the town board of adjustment. The board denied the appeal in November 2007 and advised the plaintiff they could appeal to superior court or seek a text amendment to allow such a second sign. The plaintiff sought a text amendment, which was denied in April 2008. The plaintiff then sought a variance for the sign, which was also denied in July 2008. The plaintiff appealed the variance denial. The trial court upheld the variance denial.

The court of appeals held that granting a variance in this situation would not be contrary to the spirit and purpose of the ordinance. The statement of purpose of the town’s sign code noted the need to protect the appearance of commercial properties, promote traffic safety, and to allow for adequate and effective signage. The fact that the ordinance only allowed one sign for multi-tenant properties did create a per se rule that a variance could never in any circumstances be allowed for a second sign. Similarly, this variance is properly viewed as an area variance (amount of signage allowed) rather than a prohibited use variance. The court next held the findings to support the denial were insufficient. Several were conclusory statements and the remainder were mere conjecture unsupported by any evidence. Finally, the court held the petitioner had no vested rights to the sign based on the initial permit. The petitioner did not appeal the determination that the permit was issued in error, so that finding is the law of the case. No vested rights can be established based on an erroneously issued permit that has been revoked and the town was not estopped or barred by laches from the revocation. The matter was thus remanded to the board of adjustment for further proceedings consistent with the decision.

**McCrann v. Village of Pinehurst**, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 667 (2011)
*Statute of limitations; Special use permit*

Neighbors challenged a special use permit issued for a ‘learning center.” The town council voted to issue the permit on August 24. The following day the neighbor left a voice mail message with the town asking for a copy of the decision. The permit was formally issued by written order on August 30. A copy was faxed and mailed to the neighbor on that date. The neighbors filed a suit challenging the permit on September 30.

The court held the appeal was not timely. The appeal was filed 31 days after the order granting the permit was filed. The petitioner had not made a written request for a copy of the decision at the time of the hearing under G.S. 160A-388(e2), so the deadline for filing for judicial review was 30 days from the date of filing the order. The fact that the city professionally and courteously responded to the plaintiff’s voice mail does not waive the statutory requirement for a timely appeal.

**High Rock Lake Partners, LLC v. North Carolina Department of Transportation**, \_\_\_ N.C. App. \_\_\_, 720 S.E.2d 706 (2011), *review granted*, 724 S.E.2d 516
*Driveway permits*

The plaintiff proposed a 60 lot single-family home subdivision on a 188-acre parcel that is a peninsula extended into High Rock Lake. A state road extended down the peninsula, crossing a railroad near the top of the peninsula. A preliminary plat for the development was submitted to Davidson County for approval, which was denied by the planning board but approved on appeal by the board of commissioners. The plaintiff applied for a driveway permit from NCDOT to connect to the state road about one-quarter mile below the railroad crossing. The NCDOT district engineer denied the permit, but on appeal the division engineer issued the permit conditioned upon (1) expanding the state road at the rail crossing to a width sufficient to accommodate two lanes of traffic and rail crossing gates and flashers and (2) secure required licenses and approvals from the owning and operating railroads and install required crossing improvements so as to retain the “sealed corridor” level of safety. The railroad then concluded any crossing that did not include a grade separation was unacceptable.

The court of appeals held NCDOT had acted within the scope of its authority. The court held that G.S. 136-18(29) addresses the design of the actual driveway connection to a state road, while G.S. 136-18(5) and 136-93 provide more general authority to exercise complete control over roads and highways and to make rules and regulations for the use of state highways. The court noted that the proposed development would increase the average daily traffic county at the rail crossing from 32 to approximately 600 trips and that it was reasonable to NCDOT to defer to the rail line owners as to the necessary safety improvements at the crossing. The case is pending before the supreme court.

**Federal Cases**

**Marsh v. Black**, No. 3:10cv547, 2011 WL 4747897 (W.D. N.C. Oct. 7, 2011)
*Equal Protection*

Plaintiff obtained a special use permit from Union County to conduct rodeos on his 300-acre farm. The permit limited the plaintiff to conducting four rodeos in 2007. The county subsequently revoked the special use permit for conducting more than four rodeo events. The revocation was upheld by the trial court and the N.C. Court of Appeals. In this federal action the plaintiff contended the county’s action was based on community opposition to his predominately Hispanic clientele for the rodeos, that failure to require other similar events to secure a special use permit violated equal protection, and that the county has hidden or destroyed a citizen petition opposing his rodeos that was circulated during the pendency of his permit application.

The court granted summary judgment to the county. The burden was on the plaintiff to submit admissible evidence that there were similarly situated persons were treated differently. In this instance the allegations in the complaint were unsupported by affidavits, depositions, or any admissible evidence. Further the alleged conduct by the county as a matter of law did not rise to the level of extreme and outrageous conduct necessary for a claim of intentional infliction of emotional distress. As for the petition, in addition to no admissible evidence of its existence and regardless of whether the alleged petition is a “public record,” there is no legally cognizable claim for “concealment” or “destruction” of public records.