**2013 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**

**INT, Inc. v. City of Lumberton**, 366 N.C. 456, 738 S.E.2d 156 (2013)

*Internet sweepstakes; Privilege license fee*

Plaintiff internet sweepstakes café operators challenged the city’s privilege license tax imposed on these businesses.  The fee charged was applicable to businesses using electronic machines to conduct games of chance.  The annual fee was $5,000 per business plus $2,500 per gaming machine or terminal.  The court of appeals concluded the internet sweepstakes were games of chance, the fee was a permissible business license tax, the tax was uniform in that it applied to all cyber-gambling establishments, and that it is lawful to exempt the state lottery machines.  As there was no evidence presented that the amount of the tax was prohibitive, the presumption of reasonableness was not rebutted.  The supreme court reversed.

The court held that a privilege license fee is a tax and that it must be just and equitable under Art. V of the state Constitution.  The court noted the very substantial increase in the fee (from $12.50 per machine to a minimum fee of $7,500) resulted in fees for the plaintiff businesses ranging from $75,000 to $137,500 per year.  The second highest fees charged were orders of magnitude smaller.  The “Just and Equitable” clause is a substantive limitation on taxation, prohibiting unjust taxation while preserving legislative taxation authority.  In this instance, an increase of at least 59,900% was an abuse of discretion and thus an unlawful tax.

**Applewood Properties, LLC v. New South Properties, LLC**, 366 N.C. 518, 742 S.E.2d 776 (2013)

*Sedimentation control; Standing; Interpretation*

The plaintiffs owned and operated a golf course adjacent to the defendant’s residential development.  During construction the defendant was issued a notice of noncompliance with the Sedimentation Pollution Control Act (SPCA) and ordered to take corrective action.  Subsequent inspections showed the corrective actions had been taken, but additional corrective actions were ordered. The next month a dam on the project failed and the plaintiff’s property was flooded and damaged as a result.  An additional notices of noncompliance were issued after the dam failure. No notice of violation was issued.  The plaintiffs claimed negligence, nuisance, trespass, intentional misconduct, and a violation of the SPCA.  The trial court dismissed the SPCA claim. The jury awarded the plaintiffs $675,000 in damages on the nuisance claim.  The plaintiff appealed the SPCA claim dismissal, which was affirmed by a divided court of appeals.

The court noted that G.S. 113A-66 provides for a private civil action when there has been a “violation” of the SPCA, a relevant ordinance or order, or of a sedimentation control plan.  The court interpreted this provision to allow a private cause of action only when a defendant has been cited for a violation of the statute. A “notice of noncompliance” is insufficient to confer standing, as this specific defendant was not cited with a notice of violation.  The only formal notice of violation was issued after the suit was filed and was issued to a different party than the defendant in this action.

**North Carolina Court of Appeals**

**Fairway Outdoor Advertising, LLC v. Town of Cary**, \_\_\_ N.C. App. \_\_\_, 739 S.E.2d 579 (2013)

*Signs; Interpretation; Appeal process; Enforcement*

The Cary Land Development Ordinance (LDO) required nonconforming pole signs to be removed at the end of an amortization period.  The town staff sent the plaintiff a notice that the provision applied to a particular sign and that it must be removed.  The plaintiff appealed this determination to the board of adjustment, which held that the appeal to the board was timely, but that the sign was violation, that it must be removed, and upheld civil penalties that had been imposed.  The trial court upheld the timeliness of the appeal to the BOA, but reversed the board’s conclusion that the sign was in violation of the LDO.

While both the “Sign” and the Violations and Enforcement” sections of the LDO had specific provisions regarding administrative appeals, the ordinance provision specifically involved in this case did not make cross-reference to those sections.  Therefore the ordinance provisions on “general appeals” was applicable, not the provisions in those more specific sections.  The general appeals section allows appeals to the BOA within 30 days after “the contested action.” Since the appeal to the BOA was not filed until a year after receipt of official notice that the sign was in violation (and there were indications the plaintiff had earlier notice of the staff position regarding their sign), the appeal was not timely.  The court thus held it was improper to vacate the civil penalties.  The court also held that since the ordinance provided the planning director “may” approve an unlisted use and the there was no evidence of abuse of that discretion, it was improper for the trial court to order the sign approved as an unlisted use.

**Hillsboro Partners, LLC v. City of Fayetteville**, \_\_\_ N.C. App. \_\_\_, 738 S.E.2d 819, *review denied*, \_\_\_ N.C. \_\_\_, 748 S.E.2d 544 (2013)

*Unsafe structure; Collateral estoppel; Enforcement; Takings*

The plaintiff purchased property that included a building that had been damaged by a fire. The city notified that plaintiff that the building was unsafe. After a hearing, which the plaintiff did not attend, the city ordered the structure repaired or demolished. The city subsequently adopted an ordinance ordering demolition. The plaintiff then sought a permit for demolition.  Some seven months after the hearing and four months after adoption of the demolition ordinance, the plaintiff contended new inspections showed the building to be safe. The city nonetheless proceeded to demolish the structure.

The court held the demolition notice, hearing, and ordinance adoption process mandated by state law and followed by the city was quasi-judicial in nature rather than administrative.  That process resulted in a substantive decision that the structure was unsafe and that determination was not appealed.  That determination is the identical issue raised in the current appeal, was actually litigated in the quasi-judicial process, the plaintiff had a full and fair opportunity to contest it at that time, and a final order that could have been appeal was made.  As the underlying facts are unchanged, plaintiff cannot use its own failure to inadequately inspect the property to avoid the prior determination.

Since the determination that the building was unsafe is binding, the building was a nuisance threatening public health and safety and its removal was a proper exercise of the police power and thus no compensation under the Takings Clause is required.

**Russell v. N.C. Department of Environment and Natural Resources**, \_\_\_ N.C. App. \_\_\_, 742 S.E.2d 329 (2013)

*Septic tanks; Liability; Evidence*

Staff from the Carteret County Health Department inspected two adjacent lots and in 1998 issued permits for septic tanks on them.  In 2002 the lots were sold for $17,500 and the purchaser requested issuance of a new septic tank permit for a single residence on the combined lot.  An inspector revisited the site and made a visual inspection, did not conduct new soil tests, and issued a new permit.  The owners installed a modular home and septic system on the site.  The system immediately failed.  Despite adding fill dirt, the system continued to fail.  A re-inspection in 2005 determined the actual soil conditions on the site were inconsistent with those noted in the original inspection and were in fact unsuitable for septic systems.

The court concluded expert testimony was not required to show that the initial inspection breached the professional standard of care in this negligence action.  The evidence clearly showed the inspector either performed the soil tests inaccurately (there was no soil of the type indicated in the report on the subject property) or that he incorrectly tested the adjacent lot, where such soil was present.  This failure is within the “common knowledge of laypersons” regarding the standard of care required.  The court upheld a damage award based on the cost of replacement lots less the remaining value of the current property.

**Izydore v. City of Durham**, \_\_\_ N.C. App. \_\_\_, 746 S.E.2d 324, *review denied*, \_\_\_ N.C. \_\_\_, 749 S.E.2d 851 (2013)

*Attorney fees*

Plaintiff successfully challenged the city’s decision to permit his neighbor to divide her lot into two lots and secure building permits for two residents.  The plaintiff then sought an award of attorney fees under G.S. 6-19.1.  That statute allows for the discretionary award of attorney fees when a party successfully challenges an “agency” decision if the court finds the “State action” was taken without substantial justification.  The term agency was not defined by the statute, but it includes multiple references to the state Administrative Procedure Act (APA).  The court noted the provision for attorney fees is in derogation of the common law and thus must be strictly construed.  The APA explicitly excludes local units of government from its definition of an “agency” subject to the law.  Both the statute and prior case law support an interpretation that G.S. 6-19.1 is applicable only to state government agencies, not to cities and counties.  G.S. 6-21.7, which allows for awarding attorney fees if a city or county acts outside its scope of authority, supports the conclusion that G.S. 6-19.1 is not applicable to cities and counties.

**Myers Park Homeowners Association, Inc. v. City of Charlotte**, \_\_\_ N.C. App. \_\_\_, 747 S.E.2d 338 (2013)

*Interpretation*

Queens University proposed construction of two additional buildings on their campus in the Meyers Park area of Charlotte – a seven-story building consisting of five stories for a parking deck topped by two residential floors and a three story athletic facility.  The campus was in a residential zoning district that allowed universities as a permitted use provided that the primary vehicular access to campus is not provided by a Class VI local street.  The ordinance also imposed a maximum floor area ratio for nonresidential buildings.  The city staff ruled the athletic facility was a permissible accessory use, the campus was served by a Class V collector street and that the floor area ratio restriction was met.  Neighbors appealed.  The Board of Adjustment upheld the interpretations, as did the trial court.

The court held the trial court properly applied a de novo review to alleged errors of law and a whole record review concerning issues of fact.  Two expert witnesses testified before the BOA regarding the street’s function, traffic volume, and speeds, the distinctions used to define street classifications in the ordinance.  One, a transportation expert and Charlotte DOT employee presented facts on these factors and opined this to be a collector street and that it was so classed by city.  The other, a planning and regulatory development expert, offered facts to support a finding that it was a local street.  The court there was sufficient evidence to support the BOA finding that it was a collector street.  The court made a de novo review of the interpretation question regarding the floor area ratio, though noting the record was not clear when notice of that interpretation had been provided to the neighbors and the time for appeal initiated.  The court held that under the ordinance, the floor area ratio calculation is to be based on nonresidential buildings and dormitories should not be considered as they are properly deemed residential.  Finally, the court held the trial court in a certiorari review is acting in an appellate capacity and is thus not to issue its own findings of fact and conclusions of law.

**Lipinski v. Town of Summerfield**, \_\_\_ N.C. App. \_\_\_, 750 S.E.2d 46 (2013)

*Interpretation; Enforcement; Due Process*

Plaintiff constructed a chain-link fence in accordance with the town ordinance, but six months later attached red and blue tarps to the fence.  Over time some of the tarps blew away and others were torn.  The town concluded the fence violated the ordinance prohibition of fences constructed in whole or in part of “flammable material such as paper, cloth or canvas.”  The board of adjustment upheld the zoning administrator’s determination attaching the tarps to the fence amounted to “construction” of a fence with prohibited materials.

The court first held that the plaintiff’s due process rights were not violated.  While he had a property interest in a permissible fence, the town’s procedures provided him an opportunity to be heard at a meaningful time and in a meaningful manner.  He was present at the hearing, fully understood the issues involved, and was allowed to testify and ask questions.  The court then interpreted the ordinance.  The court held the fence itself was constructed of permissible materials as it was a chain-link fence.  The town’s interpretation that materials could not thereafter be attached to the fence added a prohibition not included in the ordinance.  Thus there was error in interpretation of the ordinance.

**Busik v. N.C. Coastal Resources Commission**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2013) [2013 WL 5911529]

*Interpretation; CAMA*

Plaintiff appealed a decision interpreting the Coastal Area Management Act oceanfront setback rule.  The applicable setback was 60-feet landward of the vegetation line for structures with less than 5,000 sq. feet and 120-feet for structures between 5,000 and 10,000 sq. ft.  The plaintiff’s neighbor proposed development on an oceanfront on Bald Head Island with four components:  a single-family residence, a garage/apartment, an elevated mechanical platform, and a raised deck parking area.  None of the individual structures were over 5,000 sq. ft. floor area, but the combined floor area for all four was 5,828 sq. ft. The permit officer applied the 60-foot setback to each structure, while the neighbor contended the setback should be based upon the aggregate square footage for the development.  The court held the rule explicitly provided that the setback was based on the size of “a building or structure” rather than the size of “a development,” so a plain reading of the rule supports the interpretation made by the staff and upheld by the Coastal Resources Commission.  Such an interpretation was also deemed consistent with goals of the statute.

**Blair Investments, LLC v. Roanoke Rapids City Council**, \_\_\_ N.C. App. \_\_\_, 752 S.E.2d 524 (2013)

*Special use permit; Evidence*

The plaintiff applied for a special use permit for a telecommunication tower in an industrially zoned area. The staff recommended approval and several neighbors objected.  The city council denied the permit on the grounds that it more probably than not would endanger public health and safety and would not be in harmony with the surrounding area.  The trial court affirmed the denial.

The court found the application and submissions from the applicant, along with the staff analysis and testimony, established a prima facie case that the standards for the special use permit had been met.  The six neighbors who testified in opposition primarily stated concerns about maintenance of an existing building on the lot, which is unrelated to the proposed tower.  Their other concerns about health impacts were speculative and unsupported by any documentary or testimonial evidence.  Neighbors’ “concerns” are not substantial, competent, and material evidence, so the court reversed and remanded with instructions to grant the permit.

**Federal Cases**

**Brown v. Town of Cary**, 706 F.3d 294 (4th Cir. 2013)

*Signs; First Amendment*

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 regulation exempted several types of signs from its coverage or this size limit. The exemptions included holiday decorations, public art, and temporary signs advertising town-recognized events. The district court held this made the ordinance content-based rather than content-neutral, applied a strict scrutiny review, and invalidated the regulation.  The court of appeals reversed.

The court rejected an absolutist view of content neutrality, adopting instead a three-part test, finding a regulation is not content-based if: (1) it regulates the place some speech may take place; (2) it was not adopted in response to disagreement with the message; and (3) the government’s interests are unrelated to the content of the affected speech.  If the regulation is justified without reference to the content of the regulated speech, it is content neutral.  With this test the court upholds distinctions such as on-premise/off-premise and commercial/noncommercial as content neutral. Here there is a reasonable fit between the legitimate interests in traffic safety and aesthetics and the exemption provided for public art and holiday decorations, given that these likely enhance rather than harm aesthetics and seasonal holiday displays have only a temporary traffic impact.  There is not a requirement for an optimal fit, only a reasonable one. The ordinance was upheld as meeting substantial interests in aesthetics and traffic safety, was narrowly tailored to meet those interests, was a content neutral reasonable time, place, and manner restriction, and had sufficient definitions for exempted displays to avoid undue vagueness.

**Sansotta v. Town of Nags Head**, 724 F.3d 533 (4th Cir. 2013)

*Nuisance; Beach access*

Plaintiff’s oceanfront beach cottage was one of six adjacent cottages severely damaged in a November 2009 storm. The property involved had experienced serious erosion, averaging eight feet per year over the past several decades.  As a result the structures since 2001 had been located on the beach itself, with the vegetation line being landward of the cottages and sandbags around the structures.  During the storm the plaintiff hired contractors to bulldoze sand around the cottages in an effort to minimize damage.  The road in front of the cottages was damaged in the storm, so the town barricaded the road as a safety hazard and required the contractors to stop their work. Several weeks after the storm the town declared the structures a nuisance and ordered them demolished.

The court held the town did not violate the procedural due process rights of the plaintiff.  Assessing a fine, as distinct from collecting payment of it, is not a deprivation of property.  Also, since an owner has no right to use property in a way that constitutes a nuisance, an action to abate a nuisance is a reasonable use of the police power, even if the nuisance action is later determined to be mistaken and even if the cottages were rendered valueless.

The court held the town decision to declare some but not all cottages on the beach after the storm was not an equal protection violation.  Testimony established that the cottages cited were closer to the ocean than others and posed the most severe and continuous obstruction of the beach.  This difference established a rational basis for the town’s differential treatment.

The court ruled that the plaintiff’s takings claim should not have been dismissed on ripeness grounds (based on a failure to pursue a state compensation claim).  Here the plaintiff did file in state court and made both a taking and an inverse condemnation compensation claim.  The town’s action to remove the case to federal court effectively waives the state-litigation requirement to seek compensation first in order to be ripe for federal litigation on the takings claim.  Thus the takings claim was ripe.  The court remanded, noting the district court could decide the claim on its merits, invoke abstention, or take some other approach.

**Town of Nags Head v. Toloczko**, 728 F.3d 391 (4th Cir. 2013)

*Ripeness; Abstention*

The defendant owned an oceanfront beach cottage that was severely damaged in a November 2009 storm.  The property involved had experienced serious erosion over the years, with the vegetation line landward of the cottages and sandbags around the structures.  The storm left the structure on the beach with an exposed septic tank.  Several weeks after the storm the town declared the structures a nuisance and ordered them demolished.  The town later cited the defendants for violation of an ordinance requiring permits prior to any development on the beach public trust area.  [Other property owners in the area litigated similar issues in the *Sansotta* case digested above.]  The case was removed to federal court by the plaintiffs.  The defendants contended the nuisance ordinance was invalid and alleged due process, equal protection, and takings violations.  Given the unsettled, important policy issues raised relative to state law, as the court noted is often the case with complex land use law cases, the district court abstained and declined to exercise jurisdiction over the various claims and counterclaims.

The appeals court reversed and remanded.  The court held that after the district court decision, the North Carolina courts had conclusively determined the town did not have jurisdiction to protect public trust rights in the ocean beach area (see *Town of Nags Head v. Cherry*, 723 S.E.2d 156 (2012)).  Since the town did not have jurisdiction, the unsettled state law issues regarding the geographical reach of the public trust doctrine are no longer applicable to this dispute.  Therefore since the grounds for a *Burford* abstention are no longer present, so the court remanded.  The court also held that since the plaintiff had removed the case to federal court, the state-litigation requirement would generally render their takings claim unripe.  However, in the interest of fairness and judicial economy, the court suspended that requirement and remanded that claim as well.

**Fenner v. City of Durham**, No. 1:10cv383, Feb. 26, 2013, 2013 WL 704324 (M.D. N.C. 2013)

*Res judicata*

Plaintiff contended the city permitted an illegal nightclub to operate to the detriment of his property.  As the same claim had previously been subject to state litigation, with a judgment on the merits for the city, this federal claim is barred by the doctrine of res judicata.

**Hellbender, Inc. v. Town of Boone**, No. 6:12CV45-RLV, March 31, 2013, 2013 WL 1349286 W.D. N.C. 2013)

*Noise; First Amendment*

Plaintiffs challenged a town ordinance that limited the level of sound generated by commercial establishments and live music venues in specified zoning districts.  The court held the ordinance affected protected speech (music) in a traditional public forum (the zoning districts included the downtown area of plaintiff’s business).  The court held limited exemptions for high school and college and non-recurring community events were not based on an attempt to restrict the content of the speech and the ordinance remained content neutral with these reasonable classifications. The ordinance advanced a legitimate governmental objective (protecting the character of the affected area and preventing undue intrusion into residential areas).  It was narrowly tailored by limiting the level of noise (higher levels being allowed in daytime, higher levels allowed in non-residential areas, higher levels on weekends). As the type and manner of entertainment that can be offered is unaffected, only the level of sound generated being regulated, adequate alternative avenues of expression were retained.  Thus the ordinance does not violate First Amendment protections.