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Special Use Permit

Pope v. Davidson County (N.C. Court of Appeals No. COA22-466, Davidson County, 1/25/23)

- Holding – A trial court's order granting petitioners a special use permit for the construction of a motocross training center was proper because the court acted appropriately pursuant to its authority under N.C. Gen. Stat. § 160D-1402 to order the Board of Adjustment to issue the special use permit, as petitioners had previously received a passing vote on their application at the prior hearing.

- Key Excerpt – The Court stated, "According to well-established North Carolina law, the local governing board 'must follow a two-step decision-making process in granting or denying an application for a [special] use permit.'" PHG Asheville, LLC, 374 N.C. at 149, 839 S.E.2d at 765 (citation omitted). Preliminarily, the local board must determine whether "an applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [special] use permit." Id. at 149, 839 S.E.2d at 765-66 (emphasis in original) (citation omitted). Where an applicant has satisfied this initial burden, then *prima facie* he is entitled to the issuance of the requested permit. Id. at 149, 839 S.E.2d at 766 (quotation marks and citation omitted). Accordingly, "an applicant for a special use permit who has met its burden of production automatically wins if no contrary evidence is offered." Dismas Charities, Inc. v. City of Fayetteville, 282 N.C. App. 29, 31, 870 S.E.2d 144, 146 (2022) (emphasis in original).

When reviewing a decision of a county board of adjustment, the trial court is responsible for: (1) reviewing the record for errors of law; (2) ensuring that procedures specified by law in both statutes and ordinances are followed; (3) ensuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and; (5) ensuring that decisions are not arbitrary or capricious. JWL Invs., Inc. v. Guilford Cnty. Bd. of Adjustment, 133 N.C. App. 426, 428-29, 515 S.E.2d 715, 717 (citations omitted), *disc. rev. denied*, 351 N.C. 357, 540 S.E.2d 349 (1999). "If a petitioner contends the Board's decision was based on an error of law, 'de novo' review is proper." Id. at 429, 515 S.E.2d at 717 (citation omitted)."

On 19 April 2021, petitioners applied for a special use permit from the Davidson County Board of Adjustment (the "Board") requesting authorization to use their 143.46-acre parcel of property to operate a motocross training center. Prior to considering the application, the Board conducted a quasi-judicial public evidentiary hearing in accordance with the Davidson County Zoning Ordinance (the "ordinance"). Prior to the hearing, the Board was misinformed as to the correct voting threshold required in order to issue a special use permit. The Board believed that in order to grant a special use permit a super-majority vote (4/5) on each standard was required. However, a change in the ordinance, which came into effect in January 2021, allowed for a special use permit to be awarded after a simple majority vote on each standard.

At the conclusion of the first hearing, the Board voted 4-1 with respect to standards one and two of the ordinance. Standard three received a 3-2 vote, and standard four was satisfied with a 5-0 vote. The Board Chair declared that standard three failed and then the Board decided to "table the application" until a subsequent hearing. At the beginning of the second hearing, due to the mistake in voting thresholds at the first hearing, the Board voted, 5-0, to rescind prior votes and reopen the hearing on the application. The Board voted and found that three standards failed and, therefore, the special use permit was denied.

Pursuant to N.C. Gen. Stat §160D-1402, petitioners filed a petition for *writ of certiorari* seeking judicial review of the Board's decision. The trial court concluded that the decision to deny the application at the first hearing and table petitioner's application until the second hearing was the result of a legal error. The trial court concluded: "But for the Board's legal error in interpreting and applying the voting thresholds in the zoning ordinance,

the petitioner's application would have been granted at the first hearing, as each standard obtained a majority vote at that time."

On appeal by intervenors, the Court concluded that the court acted properly pursuant to its authority under N.C. Gen. Stat. § 160D-1402 to order the Board to issue the special use permit as petitioners had previously received a passing vote on their application at the first hearing. Dismas Charities, Inc., 282 N.C. App. at 35, 870 S.E.2d at 148 (directing the city council to issue the special use permit upon petitioners meeting their "burden of production"); *See also* MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796 (citation omitted) ("[W]hen an applicant produces evidence which demonstrates it has complied with the ordinance, the petitioner is entitled to have the permit issued unless substantial competent evidence is introduced to support its denial."), *disc. rev. denied and appeal dismissed*, 359 N.C. 634, 616 S.E.2d 540 (2005).

- Synopsis - Appeal by intervenors from January 2022 order. Judgment affirmed in favor of petitioners. Opinion by Judge Arrowood, with Judge Collins and Judge Wood concurring.

Takings; Temporary Use Restrictions; COVID-19 Emergency Order

Blackburn v. Dare County (4th Cir. No. 20-2056, Dare County, 1/25/23, U.S. Supreme Court *certiorari denied*)

- Holding – Dare County's order restricted the Plaintiffs from using their property during an emergency order that was issued in response to COVID-19. Not every use restriction is a taking, however. Dare County's order is neither a physical appropriation, a use restriction that renders the property valueless, nor a taking under Penn Central. In this case, the effects of the order were temporary, the Plaintiffs had a chance to occupy their property before the order took effect, and while the order was operative, they could still exercise significant ownership rights over their property. The Plaintiffs' complaint, therefore, failed to state a plausible claim for relief under the Fifth Amendment's *Takings Clause*.

- Key Excerpt – In March 2020, Dare County Board of Commissioners enacted several public health restrictions to limit the spread of COVID-19. The restrictions were implemented in three phases. Phase one, which took effect immediately, declared a state of emergency and prohibited mass gatherings. Phase two, which took effect one day later, prohibited non-

resident visitors from entering the county. Phase three, which took effect four days after the restrictions were announced, prohibited non-resident property owners from entering the county. In effect, Dare County told non-resident property owners: "If you want to quarantine at your beach house, get there by March 20." This gave non-resident property owners four days to travel to the county.

The Plaintiffs, who lived in Richmond, Virginia, did not travel to their beach house by March 20, when the non-resident-property-owners ban took effect. As a result, the Plaintiffs could not access their beach house until the order was partially lifted forty-five days later. The Plaintiffs responded by suing Dare County for violating the Fifth Amendment's Takings Clause. They sought damages, both for themselves and for a putative class of other non-resident property owners, but the district court dismissed their suit for failure to state a claim, prompting their appeal to the 4th Circuit.

The Plaintiffs alleged that the order prohibiting non-resident property owners from entering Dare County meets each of the United States Supreme Court's takings tests. They claimed that the order was (1) a physical appropriation, (2) a use restriction amounting to a *per se* taking under Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), and (3) a taking under the balancing test set forth in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

The Court held that the Plaintiff's complaint failed to state a claim under any approach. The Court quickly dismissed the Plaintiff's claim that there was a physical appropriation because the order didn't require such an appropriation. The Court rejected the Plaintiff's "per se taking" claim under Lucas because the order did not deprive the Plaintiff's property of all economic value. The Plaintiffs could have lived at the house if they had chosen to arrive before the ban took effect. Furthermore, they were still able to rent or sell the property to someone within the County or certain adjoining counties.

The Penn Central balancing test requires the Court to consider three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. The Court held that first factor failed because the Plaintiffs pleaded no facts establishing a diminution in value, let alone a substation one. As to the second factor, the Court held that the order's interference with the Plaintiffs' "investment-backed expectation to personally use the beach

house for the forty-five days [the order] was in effect" was significant enough to constitute a taking. Regarding the third "character of the government action" factor, the Court stated: "Combine an ad hoc balancing test with an open-ended factor and you're left with doctrine that is a 'veritable mess.'" (citation omitted). The Court further stated: "In sum, Dare County's order is not the functional equivalent of a physical invasion or ouster. And its impact was distributed broadly. So we conclude that the third Penn Central factor cuts in Dare County's favor."

Synopsis - Appeal by Plaintiff-property owners from district court's order to dismiss their suit for failure to state a claim under the Fifth Amendment's *Takings Clause*. Affirmed in favor of Defendants. Argued before Judge Agee, Judge Richardson, and Judge Rushing. Opinion by Judge Richardson.

Discretionary Review Improvidently Allowed

Mole' v. City of Durham (N.C. Supreme Court No. 394PA21, Durham County, 4/6/23)

- Holding – On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 279 N.C. App. 583, 866 S.E.2d 773 (2021), affirming the trial court's dismissal of plaintiff's Article I, Section 19 claims and reversing the trial court's dismissal of plaintiff's Article I, Section 1 claim, a majority of the Supreme Court, *per curiam*, held that discretionary review was improvidently allowed. Therefore, the decision of the Court of Appeals is left undisturbed but stands without precedential value.

- Key Excerpt – Justice Deitz, concurring, discussed the "unpublishing" of a Court of Appeals opinion as follows: "How do courts of last resort, exercising discretionary review, avoid creating these sorts of messy rulings with no majority holding? They can dismiss a case by announcing that their discretionary decision to review it was improvident. Again, this practice is hardly unprecedented. This Court has done so well over 100 times, including several times last year."

  In June 2016, the Durham Police Department (DPD) dispatched officers to an apartment complex to serve an arrest warrant on Julius Smoot. Smoot had barricaded himself in an upstairs bedroom and claimed to be armed with a firearm. He represented that he would kill himself unless he was allowed to see his wife and son within ten minutes. The officers contacted their supervising officers to request assistance from a hostage negotiator.

Plaintiff was the only hostage negotiator on duty when the request for a hostage negotiator was made. Although plaintiff had received hostage negotiation training in May 2014, he had not ever participated in a barricaded subject or hostage situation until this event occurred. Upon arrival, plaintiff began talking with Smoot in an effort primarily to keep Smoot alive and to extend Smoot's stated deadlines to meet Smoot's demands. In the course of his interactions with Smoot, plaintiff heard the sound of a gunshot come from the interior of Smoot's apartment, at which point Smoot assured plaintiff that the gunshot was accidental.

After the negotiations had proceeded for about two hours, during which time Smoot became "highly agitated," Smoot told plaintiff that Smoot had a "blunt" and intended to smoke it. Plaintiff asked Smoot to refrain from smoking the marijuana cigarette and, in return, plaintiff would allow Smoot to smoke the "blunt" if Smoot would peacefully surrender himself and the firearm. After agreeing to plaintiff's proposal, Smoot handcuffed himself, left the gun in the bedroom of the apartment, and surrendered to plaintiff while still in the apartment. As Smoot waited in the living room of the apartment to meet with his son, Smoot asked for Smoot's lighter and pack of cigarettes, which plaintiff placed on the table in front of Smoot. Smoot then removed the marijuana cigarette from behind his ear, lit it with his lighter, and smoked about half of it prior to his son's arrival. Following this event, DPD initiated an internal investigation into plaintiff's actions. Plaintiff received written notice that a pre-disciplinary hearing would take place. After the hearing, plaintiff's immediate supervisors recommended that plaintiff be demoted. However, defendant City of Durham terminated plaintiff's employment for "conduct unbecoming" of a municipal employee based upon the manner in which he secured Smoot's surrender. Plaintiff filed a complaint alleging that the City violated his constitutional rights to due process, equal protection, and the fruits of his labor. The City answered and filed a motion to dismiss, which the trial court granted, prompting plaintiff's appeal to the Court of Appeals.

Justice Morgan, dissenting, responded in pertinent part: "It is always within this Court's discretion to deny review where no appeal may be had as a matter of right. Likewise, it is within this Court's discretion to determine that it would be improvident to exercise our discretionary review over a matter previously evaluated as being appropriate for such review. However, I believe that a greater improvidence is flaunted when this Court leaves constitutional questions of such jurisprudential import as those presented here without any guiding appellate authority, either from this Court or in the form of a published opinion of the Court of Appeals,

due to clear and convenient unwillingness to engage with the issues at hand."

Justice Earls, dissenting, responded in pertinent part: "[T]aking from the Court of Appeals the ability to decide which of its opinions have precedential value without otherwise disturbing anything in the opinion is a disingenuous sleight of hand and a dangerous threat to the fair application of the laws to all citizens. Therefore, I dissent."

- Synopsis - On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 279 N.C. App. 583, 866 S.E.2d 773 (2021), affirming the trial court's dismissal of plaintiff's Article I, Section 19 claims and reversing the trial court's dismissal of plaintiff's Article I, Section 1 claim. Per Curiam decision. Justice Deitz concurring. Justice Berger joined in concurring opinion. Justice Morgan dissenting, joined by Justice Earls. Justice Earls dissenting, joined by Justice Morgan.

Governmental immunity; Proprietary or Governmental Mission or Purpose of Employee

Torres v. City of Raleigh (N.C. Court of Appeals No. COA22-447, Wake County, 5/2/23)

- Holding - In an action arising out of a vehicle collision between Plaintiff and Defendant City employee, the trial court did not err in finding that it had personal jurisdiction over defendants, the City and the employee, and refusing to dismiss the case based on governmental immunity, because the evidence showed that the employee's sole duty on the morning of the accident was to repair a city-owned water main line, a proprietary purpose for which defendants were not immune from suit.

- Key Excerpt – Ordinarily, "[w]hen this Court reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.'" Banc of Am. Sec., LLC, 169 N.C. App. at 694, 611 S.E.2d at 183 (citation omitted). However, "[q]uestions of law regarding the applicability of sovereign or governmental immunity are reviewed *de novo*," Irving v. Charlotte-Mecklenburg Bd. of Educ., 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citations omitted), and we review the trial court's decision as to personal jurisdiction de novo, as well, when it turns solely on the question of governmental immunity, see Farmer v. Troy Univ., 382 N.C. 366, 370, 879 S.E.2d 124, 127 (2022)."

In January 2018, a City employee was initially responding to a report of a broken water main. After he saw that the water main was not leaking, he saw water leaking from a ruptured backflow prevention valve on the opposite side of the highway. He made an abrupt U-turn while Plaintiff was traveling in the lane to his left. City employee's vehicle collided with the side of Plaintiff's vehicle. Plaintiff suffered injuries to her brain and her left arm as a result of the accident. Plaintiff sued the City and the employee in his individual capacity. In denying City's motion to dismiss, the trial court specified, based on "the pleadings, competent matters of record, memorandums of law, and oral arguments of counsel, the [c]ourt finds that [Hall] was engaged in the performance of a proprietary function . . . at the time of the vehicular collision in question." Defendants appealed.

Defendants conceded that the City dispatched Hall to conduct a proprietary task—repairing a water main used to sell water for private consumption by its citizens. Further, Defendants did not dispute that, at all times up and until the moments just prior to the accident, the City employee's assigned mission was to repair a ruptured water main pipe. Defendants consistently represented to the courts, however, that the employee's purpose became governmental just before the accident, when he realized the water was coming from a backflow prevention valve and attempted the U-turn in order to cut the water off for the safety of the public on the freezing winter morning.

Relying on the Court's opinion in Jones v. Kearns, 120 N.C. App. 301, 462 S.E.2d 245 (1995), Defendants argued that the mission of the City's employee, out of which the alleged injury to the plaintiff arose, is the determining factor, not what such employee was called upon to do at other times and places. The Court disagreed, noting that the "particular time and place alleged" in Jones was a police officer's actions as a safety officer to an emergency during her assignment at a proprietary fair. The Court in Jones ruled that the officer's mission at the time of the tortious conduct was governmental because she was generally assigned to police the fair as a safety officer, despite the proprietary nature of the fair. In this case, the Court concluded, "Regardless of whether the service was performed or needed, the evidence showed that [the employee's] sole duty on the morning of January 2 was to repair a City-owned water main line - a proprietary purpose for which Defendants are not immune from suit."

- Synopsis - Appeal by Defendant from November 2021 order. Affirmed in favor of Plaintiff. The trial court did not err in denying defendants' motion to dismiss on grounds that City employee was performing a proprietary

function and, therefore, governmental immunity did not apply. Opinion by Judge Griffin, with Judge Murphy and Judge Carpenter concurring.

Relocation of Monument; Summary Judgment; Standing; Declaratory Judgment

Edwards v. Town of Louisburg, (N.C. Court of Appeals No. COA22-668, Franklin County, 8/15/23)

- Holding – Disputed ownership of a monument of a Confederate soldier was not a genuine issue of material fact precluding summary judgment. Plaintiffs failed to show some proprietary or contractual interest in the monument, i.e., a legally protected interest invaded by Town's conduct. Each plaintiff either denied they had an ownership interest in the monument or admitted they did not own the monument. Even if plaintiffs had obtained their requested relief, a declaration that the actions of the town council regarding relocation of the monument were null and void, this ruling could not have any practical effect on the existing controversy. Thus, this issue presented only an abstract proposition of law for determination and was, therefore, also moot.

- Key Excerpt –On 13 May 1914, the Joseph J. Davis Chapter of the United Daughters of the Confederacy dedicated the monument of a Confederate soldier (the "Monument") in memory of Franklin's Confederate dead. The Monument was located on North Main Street in Louisburg, North Carolina, on a right-of-way owned by the State. The State does not claim ownership of the Monument itself.

  In June 2020, following protests and demonstrations in the Town of Louisburg, an emergency meeting of the Louisburg Town Council was held using the Zoom video conferencing platform and the Town Council voted to remove and relocate the Monument. The Town Council meeting was well attended and citizens were permitted to participate by submitting comments via Zoom and via email. Following the Council's decision, protests diminished and the soldier on top of the Monument was removed and put into storage. In July 2020, the Town Council voted to ratify its prior decision to remove and relocate the Monument, which was later moved to a section of the Town's cemetery where Confederate veterans are buried.

  Plaintiffs filed a lawsuit seeking a temporary restraining order, preliminary injunction, and declaratory judgment regarding the respective rights and obligations of the parties concerning the Monument. Defendant Town of Louisburg filed a motion to dismiss, which the trial court denied. Instead,

the trial court entered a separate order denying plaintiffs' motion for preliminary injunction. The Town filed a Rule 56 motion for summary judgment and the trial court entered an order granting summary judgment in favor of the Town on all claims. Plaintiffs appealed.

On appeal, Plaintiffs assert "ownership of the Monument itself" is a disputed issue of material fact precluding summary judgment. The Court stated: "Through their responses to requests for admissions and in their depositions, each plaintiff party to this action either denies they have an ownership interest in the Monument or admits they do not own the Monument. Plaintiffs offer no alternative argument that they maintain the requisite standing to pursue a claim for declaratory relief on this basis." Having determined that the Town was entitled to summary judgment on the ground that plaintiffs lacked standing, the Court did not address plaintiffs' additional assignments of error.

The Town argued that any deficiency in the procedures around the Council's actions at its June 2020 emergency meeting due to alleged improper notice were cured and made moot by the Council's unanimous decision to approve the removal and relocation of the Monument at its July 2020 regular meeting. The Court agreed, citing the fact that the Plaintiffs never brought an independent challenge to the July 2020 regular meeting and they never amended their complaint to challenge the same regular meeting. The Court affirmed the trial court's order granting summary judgment in favor of the Town. On dissent, citing United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem, 383 N.C. 612, 650, 881 S.E.2d 32, 60 (2022), Judge Tyson opined that the proper mandate is to reverse on remand with instructions for the trial court to enter dismissal of Plaintiffs' complaint or summary judgment for lack of standing without prejudice.

- Synopsis - Appeal by Plaintiffs from Mary 2022 order. Affirmed in favor of Defendant. Opinion by Judge Gore, with Judge Zachary concurring. Judge Tyson dissented by separate opinion.

Preaudit Certificate; Contract; Void; Sovereign immunity

Town of Rural Hall v Garner, (N.C. Court of Appeals No. COA23-185, Forsyth County, 9/5/23) *(unpublished)*

- Holding - Because a settlement agreement lacked a preaudit certification, and because the issue of whether the lack of preaudit certification under N.C. Gen. Stat. § 159-28 is, in itself, a question of law, there existed no

material fact which could have affected the trial court's ability to rule on the pleadings. Furthermore, sovereign immunity cannot be waived as a matter of contract where the contract at issue is deemed invalid for lack of a preaudit certification.

- Key Excerpt – Under N.C. Gen. Stat. § 159-28(a), "[n]o obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation[.]" Where the obligation is reduced to writing in a contract or agreement requiring the payment of money, the written contract or agreement "shall include on its face a certificate stating that the instrument has been preaudited[.]" Id. § 159-28(a1). Where these requirements have not been met, there is no valid contract, and any claim based upon such contract must fail. Data Gen. Corp. v. Cnty. of Durham, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247 (2001) (citations omitted).

  In July 2021, Defendant Megan Garner began serving as town manager of Rural Hall. Defendant made a confidential report of a hostile work environment, which later became public. Through her own counsel, Defendant agreed to and signed a settlement agreement to exit her position as town manager. In October 2021, the town council voted for and accepted the settlement agreement by majority vote, then three council members and the town attorney resigned. The newly elected town council failed to adopt a budget amendment to fund Defendant's settlement agreement. In November 2021, the town filed a complaint seeking declaratory relief with respect to the settlement agreement asserting that it did not comply with N.C. Gen. Stat. § 159-28. Both parties filed additional motions and pleadings, including Plaintiff's motion for a judgment on the pleadings. In October 2022, the trial court entered an order granting the Plaintiff's motion for judgment on the pleadings as the settlement agreement was void as a matter of law for failure to comply with N.C. Gen. Stat. § 159-28. Defendant appealed.

  Defendant conceded that the settlement agreement was not stamped with a preaudit certification as required by statute. Relying on the Court's opinion in Lee v. Wake Cnty., 165 N.C. App. 154, 598 S.E.2d 427 (2004), Defendant argued that under certain circumstances the absence of a preaudit certificate pursuant does not render a settlement void. The Court disagreed, noting that the action on appeal in Lee was for specific performance of a memorandum of agreement, which did not require a preaudit certificate. In contrast, the settlement agreement in this matter

was for the payment of money, which therefore required a preaudit certificate.

- Synopsis - Appeal by Defendant from October 2022 order. Affirmed in favor of Plaintiff. The trial court did not err in granting Plaintiff's motion for judgment on the pleadings. Opinion by Judge Griffin, with Judge Stroud and Judge Arrowood concurring.

Public Records Act; Third-Party Possession; Constructive Possession; Attorney Fees

Gray Media Group, Inc., v. City of Charlotte (N.C. Court of Appeals No. COA23-154, Mecklenburg County, 9/12/23)

- Holding - Public records created or received by a government entity, even when stored or held by a third party, are subject to disclosure under the Public Records Act, N.C. Gen. Stat. § 132 *et seq*. The government agency must exercise its right to possession of the records to allow the requestor to inspect or examine the records. The General Assembly modified the Public Records Act in 2010 to award attorneys' fees to the party that "substantially prevails" rather than simply the prevailing party.

- Key Excerpt – After trial court declared issue of whether records held by a third party are subject to the Public Records Act to be moot because the City voluntarily produced the documents, Plaintiff appealed the court's ruling and sought declaratory relief. Plaintiff also appealed trial court's denial of attorneys' fees.

  In April 2020, the City executed a service contract (Contract) with Ernst and Young (EY). The Contract provided that the City would "have exclusive ownership of all reports, documents, designs, ideas, materials, concepts, plans, creative works, software, data, programming code, and other work product developed for or provided to the City in connection with this Contract…" Furthermore, the Contract states that work product, excluding confidential information of EY, shall be treated as public records under North Carolina law. Pursuant to the Contract, EY sent an email to each City Council member's work email address with a unique hyperlink to access and fill out a survey focused on transformative leadership and high-performing council topics.

  In March 2021, WBTV reporter David Hodges, an employee of Gray Media, requested the survey form and City Council member responses. The City denied his request via email and then via letter, which stated that the City

Attorney's Office had "determined that documents that are solely in EY's possession are not subject to the Public Records Law."

Gray Media (Plaintiff) filed a complaint and petition for writ of mandamus. The City filed a motion to dismiss, motion to strike, and request for a protective order. The trial court entered an order granting the City's motion to dismiss in part and denying the motion in part. Plaintiff filed an amended complaint requesting relief declaring the documents were public records and a writ of mandamus requiring the City to comply with the Public Record Act. In response, the City argued, *inter alia*, that the requested records were not public records. The trial court found, *inter alia*, that Plaintiff's request for declaratory and injunctive relief is moot because the City voluntarily provided the survey responses before Plaintiff filed its motion for summary judgment. The trial court also denied Plaintiff's motion for attorneys' fees. On appeal, the Court of Appeals concluded that the issue is not moot because the trial court did not reach the merits of the declaratory judgment action and, therefore, did not afford the precise relief request by Gray Media.

Because the Contract required EY to "promptly provide the Contract data to the City in machine-readable format upon the City's request", the Court concluded that the City maintained "constructive possession" of the records requested by Plaintiff. The Court also held that the two-part analysis used in Womack Newspapers, Inc. v. Town of Kitty Hawk, 181 N.C. App. at 12, 639 S.E.2nd at 104; and clarified in Durham Herald Co. v. Low-Level Radioactive Waste Mgmt. Auth., 110 N.C. App. 607, 610-11, 430 S.E.2d 441, 444 (1993) is not applicable here because the requested records were not made and kept by contractors. Instead, the requested survey responses were created by City Council members in the course of City business. The Court concluded that the City did not reasonably rely upon Womack and Durham Herald Co. and, therefore, the Plaintiff was entitled to an award of attorneys' fees under N.C. Gen. Stat. §132-9.

- Synopsis - Appeal by Plaintiff from October 2022 order. Reversed and remanded for summary judgment in favor of Plaintiff and additional factfinding to determine attorneys' fees. Opinion by Judge Riggs, with Judge Zachary and Judge Collins concurring.

Development Ordinance; Council Authorization to Bring Suit; Standing

Town of Midland v. Harrell (N.C. Supreme Court No. 120A22, Cabarrus County, 10/20/23)

- Holding – N.C. Gen. Stat. §160A-12 allows the Town Council to act "by ordinance or resolution". The Midland Development Ordinance (MDO) authorized the Town to file suit against the developer without first obtaining approval of the Town Council. Therefore, by following the MDO, the Town satisfied procedural requirements of state law and had standing to bring a civil lawsuit against a developer over its failure to repair certain streets in a subdivision.

- Key Excerpt – The Court summarized the case as follows: "The primary issue in this case is whether the Town of Midland satisfied certain procedural requirements of state law and its own ordinances in filing a lawsuit against defendant developers over their failure to repair the streets in a subdivision located within the Town's corporate limits. We hold that the Town complied with the relevant provisions, and we therefore affirm the judgment of the Court of Appeals."

  Defendants, who are developers of a residential subdivision located in the Town of Midland, challenged a notice of violation (NOV) issued by the Town's zoning administrator. Per the NOV, the developer violated the MDO, which required the developer to maintain streets until acceptance by adoption of a resolution accepting the street(s) for public maintenance. Defendants sought review by the Town's board of adjustment, which upheld the NOV. After an appeal to the Superior Court, Cabarrus County, resulting in an order affirming the board's decisions, defendants took their case to the Court of Appeals.

  While the appeal was pending, the Town's zoning administrator issued civil citations to defendants. After the defendants failed to respond, the Town filed suit against defendants in Superior Court, Cabarrus County, seeking a mandatory injunction and an order of abatement requiring defendants to repair the subdivision roads. Before the trial court ruled on motions filed by both parties, defendants filed a motion to dismiss the Town's complaint for lack of subject matter jurisdiction because the Town Council had not voted to authorize the lawsuits against defendants. The trial court denied defendant's motion and defendants filed another notice of appeal to the Court of Appeals.

  In March 2022, a divided Court of Appeals rejected defendant's argument that the trial court lacked subject matter jurisdiction. Under the majority's reading of the MDO, the "Town Council was not required to adopt a resolution before the Town filed its complaint." The dissenting judge at the Court of Appeals would have held that the Town lacked standing because the Town Council did not adopt its resolution authorizing the

lawsuit before the complaint was filed. In April 2022, defendants filed a notice of appeal with the Supreme Court based on the dissent in the Court of Appeals.

The Supreme Court noted: "In arguing that N.C.G.S. § 160A-12 required the Town Council to adopt a resolution approving the lawsuit against defendants, both the dissent in the Court of Appeals and defendants cite State ex rel. City of Albemarle v. Nance, 266 N.C. App. 353, 831 S.E.2d 605 (2019). There is a private attorney claiming to represent the city filed a lawsuit against the defendants alleging that their hotel constituted a public nuisance under Chapter 19 of the General Statutes. City of Albemarle, 266 N.C. App. at 354." The Court further stated: "This Court is not bound by City of Albemarle, but we do not read that decision to hold that a municipality's elected governing board must always act by resolution to authorize a lawsuit. Section 160A-12 allows the board to act "*by ordinance or resolution.*" The Court applied rules of statutory construction to the MDO and concluded that the MDO authorized the Town to file suit against defendants without first obtaining approval of the Town Council. The Court also affirmed the Court of Appeals holding that the defendants were responsible for maintaining the roads in the subdivision as issue.

- Synopsis - Appeal pursuant to G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, affirming in part and reversing in part orders entered on 17 August 2020 and 18 December 2020 by Judge Martin B. McGee in the Cabarrus County Superior Court, and remanding the case. Affirmed in favor of Plaintiff Town of Midland. Opinion by Justice Allen. Justice Riggs did not participate in the consideration or decision of this case.

N.C. Gen. Stat. § 160A-299; Standing; Persons aggrieved

Thomas v. Bald Head Island (N.C. Court of Appeals No. COA23-242, Brunswick County, 10/3/23)

- Holding – Plaintiffs failed to establish a factual basis demonstrating they are "person[s] aggrieved" under N.C. Gen. Stat. § 160A-299. Therefore, they failed to establish standing to contest Village's decision to close the road in question.

- Key Excerpt – In May 2021, Defendant Village of Bald Head Island (the "Village") received a petition and request from various parties seeking closure of a portion of Lighthouse Wynd (the "Road"). On 18 March 2022,

the Village adopted resolution number 2022-0304 (the "Resolution"), whereby the Village declared its intent to consider closing the Road. In the Resolution, the Village also set the public hearing on the considered Road closing. The Village's notice of hearing informed the abutting property owners of the subject property and included the process by which interested parties could participate in the public hearing (in person or via email). Village staff also posted the subject parcel with two signs indicating that the property is subject to a Public Hearing with instructions to contact the Development Services Department via phone or email. The Village also filed a copy of the notice that was published in the local newspaper.

In April 2022, during the Village Council's regularly scheduled meeting, the Village Council held a hearing on the closure of the Road. The record on appeal shows that one of the plaintiffs phoned in to the hearing to speak remotely, and he expressed several concerns regarding closure of the Road. Thereafter, the Village Council unanimously voted to adopt order number 2022-0402 (the "Order") to permanently close the Road.

In May 2022, plaintiffs filed a Petition to Vacate and Notice of Appeal from the Order (the "Initial Petition"). Plaintiffs later filed an Amended Petition (the "Amended Petition") in order to add more petitioners to the action. The Amended Petition did not add any allegations or circumstances unique to any Plaintiffs. Defendants filed a Rule 12(b)6) Motion to Dismiss the Amended Petition. In September 2022, the trial court held a hearing on Defendants' motion to dismiss. At the hearing, Plaintiffs made an oral motion to amend the Amended Petition via affidavits by each of the Plaintiffs. The trial court denied Plaintiffs' motion and declined to consider the affidavits, and then entered an order granting Defendants' motion to dismiss. Plaintiffs filed written notice of appeal.

On appeal, the Court stated: "To show standing to challenge a road closing under N.C. Gen. Stat. § 160A-299, a plaintiff must provide a 'factual basis to support the argument that he is an aggrieved person in this case.' Cox v. Town of Oriental, 234 N.C. App. 675, 680, 759 S.E.2d 388, 391 (2014). This Court has defined an 'aggrieved party' under N.C. Gen. Stat. § 160A-299 as 'one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community, amounting to a reduction in the value of his property.' In re Granting of Variance by Town of Franklin, 131 N.C. App. 846, 849, 508 S.E.2d 841, 843 (1998) (citation omitted)."

The Court ultimately concluded that the Plaintiffs in this matter failed to establish a factual basis demonstrating that that are "person[s] aggrieved" under N.C. Gen. Stat. § 160A-299. Therefore, they lacked standing. In affirming the trial court's decision to grant Defendants' motion to dismiss, the Court did not consider any other allegations raised on appeal by the Plaintiffs.

- Synopsis - Appeal by Plaintiffs from September 2022 order. Affirmed in favor of Defendant Bald Head Island. Opinion by Judge Flood, with Chief Judge Stroud and Judge Stading concurring.