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**Land Use; Unified Development Ordinance; Non-Conforming Use; Campsite**

85' and Sunny, LLC v. Currituck County, 2021-NCCOA-422 (No. COA20-648, Currituck– 8/17/21), *disc. review denied*, ___ N.C. ___ (No. 375P21, 12/17/21)

- ***Holding*– Non-conforming uses and structures are not favored under public policy, and zoning ordinances are construed against indefinite continuation of a non-conforming use. In appeal by campground, decision of Board of Adjustment upheld.**

- ***Key Excerpt*–** This case arose from petitioner's proposed improvements to a campground. Both respondent-County and petitioner appealed from the superior court's order reversing the Board of Adjustment's: (1) determination of the number of campsites that existed on the campground as of January 1, 2013, and (2) conclusion that the County's Unified Development Ordinance (UDO) permitted some, but not all, of petitioner's proposed improvements to the campground. On appeal, the County contended that the superior court erred by: (1) failing to articulate the standard of review applied to each issue; (2) reversing the Board's decision as to the number of campsites existing as of January 1, 2013; and (3) reversing the Board's decision that certain proposed modifications in petitioner's Plan were not permitted under the UDO. Petitioner contended that the superior court erred by affirming the Board's determination that the swimming pool was not allowed under the UDO. The Court of Appeals left the Board of Adjustment's order undisturbed.

Respondent argued that the superior court's order had to be vacated for failure to articulate the standard of review applied to each issue. The Court disagreed, determining that the superior court had articulated the proper standard of review to apply to each issue on appeal.

Turning to the merits, the Court first addressed the determination of the number of campsites. In holding in favor of the County, the Court stated, "While the court must take into account 'contradictory evidence or evidence from which conflicting inferences could be drawn[,]' '[t]he "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even

though the court could justifiably have reached a different result had the matter been before it *de novo*[.]' Thompson v. Wake Cnty. Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted)."

"Here, the Board's determination of the number of campsites was supported by substantial evidence. Although there was the evidence from which conflicting inferences could have been drawn, the superior court erred by replacing the Board's judgment with its own, even if 'the court could justifiably have reached a different result had the matter been before it *de novo*[.]' *Id.* The superior court thus incorrectly applied the whole-record test to the issue of the number of campsites at the Campground on 1 January 2013."

The Court then addressed the proposed improvements to the campground. The Court initially observed, "The resolution of this dispute turns on the proper construction of Chapter 8 of the UDO. Chapter 8 of the UDO regulates nonconforming uses. While nonconforming uses 'are allowed to continue, and are encouraged to receive routine maintenance[,]' UDO § 8.1.2., the 'purpose and intent' of Chapter 8 'is to regulate and limit the continued existence' of nonconforming uses. UDO § 8.1.1. Non-conforming uses and structures 'are not favored under the public policy of North Carolina, and zoning ordinances are construed against indefinite continuation of a non-conforming use.' Jirtle v. Bd. of Adjustment for the Town of Biscoe, 175 N.C. App. 178, 181, 622 S.E.2d 713, 715 (2005) (quotation marks and citation omitted)."

Finding it possible to construe the general provisions concerning nonconforming uses and the specific provisions concerning campgrounds harmoniously, the Court stated, "…. Petitioner's interpretation of Chapter 8 is contrary to the principle that '[a] construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language.' Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 215, 388 S.E.2d 134, 140 (1990) (*quoting* State v. Hart, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975)). Petitioner's interpretation would allow any and all improvements to a nonconforming campground so long as they do not enlarge the campground's land area or number of campsites beyond that which existed on 1 January 2013 or otherwise change the campground to another nonconforming use under section 8.2.2 [which provides that '[a] nonconforming use shall not be changed to any other nonconforming use[,]']. Under this interpretation, an owner could indefinitely extend the lifespan of a nonconforming campground by regularly upgrading the campground with new amenities. This would contradict the stated purposes of Chapter 8 to 'regulate and *limit* the continued existence' of nonconforming uses, UDO § 8.1.1. (emphasis added), and promote the continued viability of a land use that the County has deemed 'generally incompatible with the permitted uses in the district[,]' *see* UDO § 8.2.1. (defining nonconforming uses)."

"The Board's determination that '[t]he new facilities proposed by [Petitioner] qualify as an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted' was in accordance with law, consistent with the purpose and intent of UDO Chapter 8 regulating and limiting the continued existence of nonconforming uses, and properly preserved the legislative body's intent. The trial court did not err by affirming the Board's conclusion that the pool was not a permissible proposed improvement. However, the trial court erred by reversing the

Board's conclusion that the remainder of the new facilities proposed by Petitioner are an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted."

The Court concluded its opinion by stating, "The superior court incorrectly applied the whole record test to the Board's determination of the number of campsites on Petitioner's campground as of 1 January 2013 as the Board's decision concerning the number of campsites on the Campground was supported by substantial, competent evidence in view of the entire record. The superior court correctly applied *de novo* review and properly affirmed the Board's conclusion that Petitioner's proposed swimming pool is an impermissible expansion, enlargement, and intensification of a nonconforming use and is not permitted under the UDO. The superior court incorrectly applied *de novo* review and erred by reversing the Board's conclusion that the remaining new facilities proposed by Petitioner are an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted. Accordingly, we affirm the portion of the superior court's order that affirms the Board's conclusion regarding the pool. We reverse the remainder of the superior court's order and remand this matter to the superior court to affirm the remainder of the Board's order. The net result is that the Board's order [is] affirmed."

- ***Synopsis***— Appeal by respondent-County and cross-appeal by petitioner from March 2020 order. Affirmed in part; Reversed and remanded in part. Opinion by Judge Collins, with Chief Judge Stroud and Judge Wood concurring. On December 17, 2021, the Supreme Court of North Carolina denied petitioner's petition for discretionary review.

**Civil Procedure; Motion to Dismiss; Public Enterprises; Capacity Fees**

Bill Clark Homes of Raleigh, LLC v. Town of Fuquay-Varina, 2021-NCCOA-688 (No. COA21-79, Wake— 12/21/21)

- ***Holding***— **In appeal by plaintiff in matter arising from 2014 development agreement, order dismissing claim seeking recovery of capacity fees reversed and remanded. Court emphasizes that no opinion was provided as to the validity of plaintiff's claim at this stage of the litigation and that it was anticipated that the development through discovery of a more fulsome record would provide the trial court with the requisite evidence to determine whether such claim had merit.**

- ***Key Excerpt***— Plaintiff argued that the trial court erred in granting the Town's Rule 12(b)(6) motion to dismiss plaintiff's complaint by "incorrectly adopt[ing] the Town's argument that the statute governing development agreements, [G.S.] 160A-400.20, allowed the Town to charge capacity fees, as long as it did so by contract." Therein, plaintiff noted that, pursuant to G.S. 160A-400.20(b) (2019), "a local government may not exercise any authority or make any commitment not authorized by general or local act and may not impose any tax or fee not authorized by otherwise applicable law." Plaintiff contended that (1) because "[t]he Town's capacity fee ordinance was unlawful" under Quality Built Homes I [v. Town of Carthage, 369 N.C. 15, 789 S.E.2d 454 (2016)]; (2) "the Town had no authority to assess fees for future water and sewer services"; (3) the Town could not contract for capacity fees; thus, (4) the 2014 Development and Infrastructure Agreement's provision for the payment of capacity fees was unenforceable. (The Court observed in a footnote that "Plaintiff clarified

that it does not argue that the Ordinance is unlawful in its entirety, but rather that the portion of the Ordinance that authorizes capacity fees for potential future services or expansion costs is unlawful under Quality Built Homes I."

The Court observed that for purposes of this appeal, the merits of plaintiff's claim need not be determined; rather, the Court's task was to ascertain whether the trial court's dismissal of plaintiff's complaint was error. The Court further observed that dismissal "'is proper (1) when the complaint on its face reveals that no law supports the plaintiff's claim; (2) when the complaint reveals on its face the absence of facts sufficient to make a claim; or (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim.' Broad St. Clinic Found. v. Weeks, 273 N.C. App. 1, 5, 848 S.E.2d 224, 228 (citation and internal quotation marks omitted), *disc. review denied*, 376 N.C. 550, 851 S.E.2d 614 (2020)." The Court held that, upon review of the complaint on its face in the light most favorable to plaintiff and construing the complaint liberally with all allegations therein taken as true, none of the foregoing standards had been met.

In so holding, the Court stated, "Assuming, as we must on review of a motion to dismiss, that the Town assessed fees for services 'to be furnished,' [Quality Built Homes v. Town of Carthage (Quality Built Homes I), 369 N.C. 15, 789 S.E.2d 454 (2016)], supports Plaintiff's claim that the fees were unlawful. The Ordinance plainly provides for the payment prior to plat approval of capacity fees 'to build capital reserve funds for future investment in water and sewer collection, distribution and treatment facilities.' As the Town conceded at oral argument, a portion of the Ordinance is unlawful under Quality Built Homes I. Nevertheless, the Town maintains that although the Fees were standard and not negotiated, the Fees are lawful because they were not assessed pursuant to the Public Enterprise Statutes, but rather as part of the parties' bargained-for exchange, as memorialized in the Agreement. However, liberally construing Plaintiff's complaint, for the purpose of our review, we must accept as true Plaintiff's allegation that the Town assessed the Fees pursuant to the Ordinance. Accordingly, the complaint on its face finds support in Quality Built Homes I."

"Similarly, we cannot conclude that the complaint, on its face, lacks sufficient facts to state a claim for relief or contains any facts that necessarily defeat Plaintiff's claims. Plaintiff alleged that the Town assessed the Fees for future services pursuant to the Ordinance, and that under Quality Built Homes I, such assessment is impermissible. Although the Town contends that the Fees were not assessed for future services, when pressed at oral argument for record evidence supporting that contention, the Town asserted that the Agreement—which Plaintiff attached as an exhibit to its complaint—represents the bargained-for exchange between the parties and does not indicate that the Fees were assessed for future services. Indeed, in its appellate brief, the Town argues that the Agreement 'concerns only provision of current infrastructure and services that are very specifically described ... and does not require Plaintiff to contribute toward "future discretionary spending."' The Town further maintains that the Agreement 'does not describe any obligations for future maintenance or upgrades, any kind of system-wide expansion, or "future discretionary spending."' However, construing the complaint liberally and taking the allegations therein as true, we conclude that the Agreement's terms do not rise to the level of 'some fact disclosed in the complaint [that] necessarily defeats ...

[P]laintiff's claim.' *Id*. (citation omitted). The Agreement does not indicate whether the Fees were, in fact, assessed for past, current, or future services. Such evidence would presumably be the subject of discovery on remand."

The Court also held that defendant-Town's alternative argument as to the action being time-barred was specifically foreclosed by Quality Built Homes v. Town of Carthage, 371 N.C. 60, 813 S.E.2d 218 (2018) (Quality Built Homes II) and provided no additional support for the trial court's order. On appeal, the Town contended that this action was time-barred by G.S. 160A-393.1 in the event that the Court determined that the Fees were assessed pursuant to the Ordinance, rather than the Agreement. The Court observed, "While the Town disagrees with Plaintiff's allegation that the Fees were unlawful capacity fees, the Town maintains that even assuming, *arguendo*, that Plaintiff is correct, 'Plaintiff's claim is time-barred because it was brought more than one year after the regulation was applied to Plaintiff.' The Town asserts that former [G.S.] 160A-393.1's one-year statute of limitations applies to this case because 'the nature of Plaintiff's challenge and relief sought is to a development regulation.' However, in Quality Built Homes II, our Supreme Court considered, *inter alia*, whether the plaintiffs' claims against the Town of Carthage—first addressed in Quality Built Homes I—were time-barred 'by the one-, two-, three-, or ten-year statute[s] of limitations[,]' and if so, which one applied. 371 N.C. at 61, 813 S.E.2d at 220. Our Supreme Court noted that 'the essence of [Quality Built Homes I] was that the Town had acted unlawfully by assessing a water and sewer impact fee not authorized' by the Public Enterprise Statutes, and concluded that 'the claim recognized in [Quality Built Homes I] was, when viewed realistically, one resting upon an alleged statutory violation that resulted in the exaction of an unlawful payment which [the] plaintiffs had an inherent right to recoup.' *Id*. at 73, 813 S.E.2d at 228. Accordingly, our Supreme Court concluded that [G.S.] 1-52(2)'s three-year statute of limitations for liabilities applied in that case. *Id.* at 74, 813 S.E.2d at 228."

In concluding this portion of its opinion, the Court stated that "[n]otwithstanding the Town's arguments on appeal, we are unable to distinguish the nature of the claim in Quality Built Homes I from the claims that Plaintiff raises here. As in that case, 'the essence' of Plaintiff's claims is 'that the Town ... acted unlawfully by assessing a water and sewer impact fee not authorized' by the Public Enterprise Statutes. [Quality Built Homes II] at 73, 813 S.E.2d at 228. These claims are thus 'resting upon an alleged statutory violation that resulted in the exaction of an unlawful payment which [Plaintiff] ha[s] an inherent right to recoup.' *Id*. We conclude that the reasoning of Quality Built Homes II applies with equal force to the case before us, and the Town's argument in the alternative is overruled."

The Court closed its opinion by stating that the trial court's order was reversed and remanded for further proceedings. The Court emphasized that no opinion was provided as to the validity of plaintiff's claim at this stage of the litigation and that it was anticipated that the development through discovery of a more fulsome record would provide the trial court with the requisite evidence to determine whether such claim had merit.

- ***Synopsis***— Appeal by plaintiff from October 2020 order. Reversed and remanded. Opinion by Judge Zachary, with Judge Inman and Judge Collins concurring.

## *Nota Bene* (N.B.)— Other Recent Decision of Note

**Procedure; Appellate Court Mandate; Binding; Error on Remand** Miller v. Graham County II, 2021-NCCOA-713 (No. COA21-81, Graham— 12/21/21) (***unpublished***) (This case examines the principle that "[i]t is well established that the mandate of an appellate court is binding upon the trial court and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered." In re S.M.M., 374 N.C. 911, 914, 845 S.E.2d 8, 11 (2020) (marks omitted). Here, plaintiff-Miller appealed from the trial court's order granting in part her "Motion for Entry of Summary Judgment on Remand" and awarding her the return of money held in escrow by defendant-County pending resolution of the property tax dispute (at issue in Miller v. Graham County I, 268 N.C. App. 466, 834 S.E.2d 450 (No. COA18-1310, 2019) (***unpublished***)). On remand, the trial court returned plaintiff's escrowed funds, less the amount of outstanding property taxes owed defendant-County and interest thereon. On appeal, plaintiff argued error in the failure to award her interest (purportedly required by statute) on the amount returned from escrow; whereas defendant-County argued that the trial court properly deducted outstanding taxes with interest from the amount to be returned. The Court stated that it need not examine the merits of either argument. Emphasizing the unambiguous instruction from Miller I to the trial court that plaintiff was "entitled to summary judgment and the return of her escrowed funds" *id.*, the Court stated, "Any deviation from that holding on remand constitutes error. In re S.M.M., 374 N.C. at 914, 845 S.E.2d at 11. Our holding does not preclude Graham County from using other legitimate channels to collect any outstanding taxes Miller may still owe for 2013, 2014, 2015, and 2016; the trial court may not, however, contravene our prior decision in the name of judicial efficiency. Similarly, Miller may not now seek from the trial court an amount in excess of that specified in Miller I." The Court closed its opinion by emphasizing that the trial court could not deviate from the holding in Miller I: accordingly, plaintiff-Miller was entitled to the full return of the amount held in escrow. (Appeal by plaintiff from September 2020 order. Affirmed in part; Reversed and remanded in part. Opinion by Judge Murphy, with Judge Griffin and Judge Jackson concurring.))