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Constitutional Law; Red Light Cameras

Vaitovas v. City of Greenville, 2022-NCCOA-169 (No. COA20-889, Wake— 3/15/22)

- ***Holding*— Court of Appeals holds that three-judge panel correctly upheld local law permitting municipality to "enter into a contract with a contractor for the lease, lease-purchase, or purchase of" a red-light traffic camera system for the municipality.**

The Court opened its opinion as follows: "Some cities and towns … have automated traffic cameras that document vehicles running red lights and record the necessary information so that the driver later can be cited for a traffic violation. But importantly, this is only in *some* cities and towns in North Carolina. The General Statutes permit these traffic cameras in Greensboro and High Point, for example, but not Winston-Salem. They are permitted in small towns across the State such as Nags Head, Pineville, and Spring Lake, but not in countless other, similar towns." (Emphasis in original.)

"The North Carolina Constitution prohibits the General Assembly from enacting 'local' laws '[r]elating to health, sanitation, and the abatement of nuisances.' N.C. Const. art. II, § 24(1)(a). Plaintiff … received a red-light camera citation from the City of Greenville, one of the cities permitted by statute [G.S. 160A-300.1(d)] to operate red-light traffic cameras. She brought a constitutional challenge under the local laws provision of our Constitution, but not against the statute authorizing Greenville to implement a red-light traffic camera program. Instead, [plaintiff] challenged a separate local law [N.C. Sess. Law 2016-64], enacted years later, that permits Greenville to 'enter into a contract with a contractor for the lease, lease-purchase, or purchase of' a red-light traffic camera system for the municipality."

"Under controlling precedent from our Supreme Court, the challenged statute is not one relating to health. In City of Asheville v. State, the Court limited the phrase 'relating to' in this portion of our Constitution to those laws with a 'material' connection to health and not those with a 'tangential or incidental connection.' 369 N.C. 80, 102–03, 794 S.E.2d 759, 776 (2016). The challenged act, which does not shift responsibility for the program (it is

Greenville's responsibility) and does not change the health-related aspects of the program (those are governed by a separate, unchallenged statute) has, at most, an incidental connection to health. Accordingly, we affirm the three-judge panel's determination that the challenged act 'providing for the funding of Greenville's red light camera program, does not relate to health.'"

As to plaintiff's arguments, the Court observed, "[O]ur Supreme Court emphasized that while the General Assembly's 'stated purpose'—a phrase implying a statement from the legislature as a whole—might be relevant to the analysis, it is the law's *effect* that is 'pertinent to, and perhaps determinative of, the required constitutional inquiry.' *Id.* at 102, 794 S.E.2d at 775. Here, the effect of the challenged act is quite different from those our Supreme Court determined are relating to health. The challenged act concerns the mechanics of how Greenville can hire and pay a private firm to assist with its red-light camera program. It does not change *who* is responsible for administering the program—it is still the City of Greenville's responsibility. And it does not change *how* the red-light traffic program operates—that is governed by a separate, unchallenged statute." (Emphasis in original.)

The Court found City of Asheville determinative. "Were we to hold that this local act relates to health, our ruling would conflict with the Supreme Court's holding in City of Asheville. There, the Court rejected the argument that 'relating to' means '[c]onnected in some way' or 'having a relationship to or with something else.' *Id.* The Court found that interpretation too broad. Instead, the Court limited the term to those local acts having a 'material' connection to health but not those with a 'tangential or incidental connection.' *Id.* at 102–03, 794 S.E.2d at 775–76."

The Court emphasized, "The challenged act falls squarely into the latter category, as a law with only an incidental effect on health. Whatever impact red-light traffic cameras have on the health of those in Greenville, that effect is governed by a separate statute and, both before and after the challenged act, Greenville remains solely responsible for administering all health-related aspects of a red-light traffic camera program as the General Assembly has instructed." Accordingly, the Court affirmed the three-judge panel's determination below that the challenged act, 'as a means of providing for the funding of Greenville's red light camera program, does not relate to health.'"

- ***Synopsis***— Appeal by plaintiff from June 2019 judgment and October 2020 order. Affirmed. Opinion by Judge Dietz, with Judge Gore and Judge Griffin concurring.

Constitutional Law; Fines & Forfeitures Clause; Clear Proceeds; Red Light Camera Enforcement Program; Interlocal Agreement

Fearrington v. City of Greenville, 2022-NCCOA-158 (No. COA20-877, Pitt— 3/15/22)

- ***Holding***— **In plaintiffs' challenge under the Fines and Forfeitures Clause (N.C. Const. Art. IX, § 7) to funding framework for red light camera program, Court of Appeals reverses trial court's dismissal of plaintiffs' claim and remands for summary judgment in plaintiffs' favor.**

- ***Key Excerpt***— Plaintiffs appealed from orders denying their motion for summary judgment and granting the motions to dismiss of defendants City and Pitt County Board of Education. Plaintiffs argued that aspects of the City's Red Light Camera Enforcement Program ("RLCEP") were illegal

and unconstitutional. The Court of Appeals held that the funding framework of the RLCEP violated the Fines and Forfeitures Clause, N.C. Const. Art. IX, § 7: the Court reversed the dismissal of that claim and remanded for entry of summary judgment in plaintiffs' favor. (The Court otherwise affirmed the trial court's orders and held that plaintiffs failed to preserve for appellate review an argument that the trial court erroneously considered the affidavit of an unqualified expert, having never obtained a ruling on that motion below.)

Initially addressing matters of jurisdiction, the Court rejected defendants' arguments that: (1) plaintiffs' claims must be dismissed for failure to exhaust administrative remedies; (2) an adequate state remedy existed to redress plaintiffs' injury, thus barring constitutional claims; and 3) plaintiffs lacked standing to bring their claim under N.C. Const. Art. IX, Sec 7. Concluding that plaintiffs' appeal was properly before the Court, the Court proceeded to address the merits of their arguments.

Turning to its analysis of the merits, the Court noted that plaintiffs argued that the trial court erred in denying their motion for summary judgment because the City's RLCEP violated: (1) G.S. Chapter 89C (2) procedural due process; (3) substantive due process; and (4) the Fines and Forfeitures Clause, N.C. Const. Art. IX, § 7. The Court held that plaintiffs were entitled to summary judgment as to their claim under the Fines and Forfeitures Clause, and otherwise affirmed the trial court's orders.

As to the Fines and Forfeitures Clause, plaintiffs argued that the RLCEP, as applied, violated Art. IX, § 7 due to the funding scheme adopted by the interlocal agreement between the City and the School Board. Plaintiffs contended that, because the School Board received less than the "clear proceeds" of the civil penalties collected, the RLCEP violated the Fines and Forfeitures Clause. The Court agreed, reversing the order as to this claim, and remanded for entry of summary judgment in plaintiffs' favor.

The Court initially observed, "'Article IX, Section 7 'is not self-executing'; therefore, the General Assembly may 'specify[] how the provision's goals are to be implemented.'" Shavitz [v. City of High Point], 177 N.C. App. [465] at 482, 630 S.E.2d [4] at 16 [(2006)] (quoting N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 512, 614 S.E.2d 504, 527 (2005)). To that end, and not inconsistent with caselaw limiting deductible costs to 'costs of collection,' Moore, 359 N.C. at 527, 614 S.E.2d at 512; Cauble [v. City of Asheville], 314 N.C. [598] at 606, 336 S.E.2d [59] at 64 [(1985)], the General Assembly has defined 'clear proceeds' as 'the full amount of all penalties, forfeitures or fines collected under authority conferred by the State, *diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected*.' [G.S.] 115C-437 (2019) (emphasis added)."

The Court held that "the interlocal agreement between Greenville and the School Board does not meet the minimum requirements of Article IX, Section 7 or [G.S.] 115C-437. According to Greenville's responses to interrogatories, the RLCEP generated $2,495,380.46 in total revenue from 2017 through June 2019. The School Board paid Greenville $706,986.65 in program expenses during the same period, which included $581,986.65 in fees invoiced by ATS [the City's contractor]. Ultimately, the School Board received $1,788,393.81 in net revenue during the period, which is only 71.66% of the total amount of fines and fees collected by Greenville. [G.S.] 115C-437 provides that, at a minimum, school boards must receive 90% of the total fines and fees collected."

The Court further observed, "[F]ines and fees may be 'diminished only by the actual costs of collection,' [G.S.] 115C-437, and 'the costs of collection do not include the costs associated with enforcing the ordinance but are limited to the administrative costs of collecting the funds.' Cauble, 314 N.C. at 606, 336 S.E.2d at 64. Pursuant to the interlocal agreement, Greenville invoices the School Board for the salary and benefits of a law enforcement officer as well as for all fees invoiced to Greenville by ATS [the City's contractor]. This Court has previously held that the salary and benefits of law enforcement officers are enforcement costs and are thus not deductible from the clear proceeds. Shavitz, 177 N.C. App. at 482, 630 S.E.2d at 16 (stating that 'the costs of employing police and judges are not deducted to determine the clear proceeds of a penalty'). Also, the contract between ATS and Greenville provides that Greenville pay ATS $31.85 in fees for every $100.00 paid citation, in addition to other miscellaneous fees associated with ATS services. The contract states that '[t]his fee will cover the services set out in Article 2' of the contract, wherein 'collections' is only one of ten services included in the $31.85 fee. The fee also includes 'enforcement' costs, which may not be deducted from clear proceeds. Cauble, 314 N.C. at 606, 336 S.E.2d at 64. Even assuming that the entirety of the $31.85 fee was for collection costs, Greenville is only permitted to deduct $10 from every $100 paid citation to offset the costs of collection. [G.S.] 115C-437."

The Court rejected the City's argument *inter alia* that the program was constitutional as the City collected all its RLCEP expenses from the School Board *after* forwarding the fines to the School Board. "This argument asks us to not only frustrate the clear intent of the people in ratifying Article IX, Section 7, it also contravenes the plain language of the Fines and Forfeitures Clause, which provides that 'the clear proceeds ... *shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free and public schools*.' N.C. Const. Art. IX, § 7 (emphasis added). We disagree that the School Board receives the 'clear proceeds' of the fines collected simply because Greenville initially forwards the fines to the School Board and collects its expenses at a later date. The School Board does not receive the 'clear' proceeds of fines in any real sense when Greenville forwards the fines to the School Board and subsequently takes 30% of the money back for costs which are not deductible to begin with. Moreover, the clear purpose of the people in mandating that the clear proceeds of such fines be '*faithfully* appropriated' to the public schools cannot be circumvented by the elaborate diversion of funds or cleverly drafted contracts. *Id.* (emphasis added)."

The Court emphasized, "Even if we were to accept Defendants' argument that the School Board does receive the clear proceeds at least initially, the clear proceeds must then 'be used exclusively for maintaining free and public schools' and thus may not be used to reimburse Greenville for its RLCEP expenses to ATS. *Id.* Moreover, by stating that the clear proceeds are to 'remain in the several counties,' it is clear that the framers did not intend for $31.85 of every $100.00 paid fine to go to private companies such as ATS, a for-profit corporation located in Arizona. *Id.*"

- ***Synopsis***— Appeal by plaintiffs from April 2020 and July 2020 orders. Dismissed in part; Affirmed in part; Reversed and remanded in part. Opinion by Judge Griffin, with Judge Dietz and Judge Gore concurring.

Land Use; Permits; Office & Industrial District; Halfway House

Dismas Charities v. City of Fayetteville, 2022-NCCOA-124 (No. COA20-914, Cumberland—3/1/22)

- ***Holding*— Trial court erred in affirming denial of application for special use permit where petitioner met its burden of production and no competent, material, substantial evidence was offered to counter such evidence.**

- ***Key Excerpt***— Petitioner appealed from an order affirming the decision of Respondent-City which denied issuance of a special use permit for construction of a halfway house. (Petitioner owned a vacant lot in an "Office and Industrial" ("O&I") zoning district: it sought a special use permit to construct a halfway house—a residential facility for recently released prisoners transitioning back into society—and the City's zoning commission recommended approval of the permit. The matter was then brought before the City Council for a final determination.) The City denied the permit 5-4 based on a conclusion that petitioner failed to meet its burden of production to show that its use met a certain standard in the ordinance ("Standard 7"), which requires a showing that the special use sought "allows for the protection of property values and the ability of neighboring lands to develop the uses permitted in the zoning district." The Court of Appeals concluded that (1) the trial court should have conducted a *de novo* review, rather than applying the whole record test, to determine whether petitioner met its burden of production; (2) based on the Court's *de novo* review, petitioner satisfied its burden of production; (3) there was no competent, material, substantial evidence offered to counter petitioner's evidence; and accordingly (4) the City Council was required to approve petitioner's permit application.

The City argued that Standard 7's language should be construed similarly to cases such as Kenan v. Board of Adjustments, 13 N.C. App. 688, 187 S.E.2d 496 (1972), which requires that the proposed special use not "substantially injure the value of adjoining or abutting property." By contrast, the Court of Appeals observed that the Supreme Court of North Carolina instructed recently in PHG Asheville v. City of Asheville, 374 N.C. 133, 839 S.E.2d 755 (2020) that this "substantially injure" language requires a showing that the proposed use not cause the values of nearby properties to *decrease* substantially. *Id.*, at 155, 839 S.E.2d at 770.

The Court of Appeals emphasized, "[T]he phrase 'allows for the protection of property values' found in Standard 7 differs from the 'substantially injure adjoining or abutting property' language found in other ordinances in at least two ways. First, whereas Kenan-type ordinances are concerned specifically with the impact on values of '*adjoining or abutting* properties,' Standard 7 is concerned with 'property values' generally. *See, e.g.*, State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982) (stating that an ordinance requiring a degree of aesthetics in a development may be valid where it provides 'corollary benefits *to the general community* such as protection of property values' (emphasis added)). The only specific concern regarding *nearby* properties in Standard 7 is the impact the proposed special use will have on the ability of the nearby property owners to use their properties consistent with their zoning." (Emphasis in original.) The Court further observed, "Standard 7 does not contain the 'substantially injure' language, but merely requires the applicant to show that its use 'allows for the protection of' property values. Our Supreme Court has held that aesthetics-type development

ordinances, such as ordinances dealing with 'environmental protection, control of pollution, and prevention of unsightliness' provide for the 'protection of property values.' *Id*. at 529-30, 290 S.E.2d at 680. And our Court has held that an ordinance prohibiting a certain type of lower quality construction allows for the 'protection of property values.' Duggins v. Walnut, 63 N.C. App. 684, 688, 306 S.E.2d 186, 189 (1983)."

The Court concluded that Standard 7's language "does *not* require an applicant to show that its special use will not cause nearby property values to decrease significantly. Rather, Standard 7 requires that an applicant show that it has incorporated 'reasonable" elements in its planned special use which provide the benefit of the protection of property values generally. *See* Jones, 305 N.C. at 530-31, 290 S.E.2d at 681 (holding an ordinance requiring certain aesthetics considerations to be satisfied is valid where the ordinance is 'reasonable')." (Emphasis in original.) The Court held that petitioner met its burden of production regarding Standard 7, observing that the record before the Council contained evidence of elements that would be incorporated in the Facility which appellate courts have held provide for the protection of property values.

The Court concluded its opinion by stating, "The City's zoning ordinance allows Dismas to use its O&I tract as a hospital, a community center, a fraternity house, a motel, a fire station, or a police station, among other uses without a special use permit. The neighboring property owners were on notice of these use rights. The ordinance also allows Dismas to use its property as a halfway house, provided that Dismas shows that this use meets eight standards set forth in the ordinance. The City Council denied Dismas a special use permit to develop the Facility, solely on the basis that Dismas did not meet its burden of production regarding Standard 7. The superior court erred in applying the whole record test in evaluating the City Council's determination and should have reviewed the matter *de novo*. Based on our *de novo* review, we conclude that Dismas did meet its burden of production. We further conclude that no competent, material, substantial evidence was offered to counter Dismas' evidence." The Court reversed the superior court's order and remanded with instructions to remand the matter to the City Council for the issuance of the special use permit.

- ***Synopsis***— Appeal by petitioner from order entered August 2020. Reversed and remanded. Opinion by Judge Dillon, with Judge Collins and Judge Wood concurring.

Real Property; Plat Map; Easement; Dedication to Public Use; Clear and Unmistakable Intent

Hovey v. Sand Dollar Shores Homeowner's Ass'n & Town of Duck, 2021 NCCOA 91, 857 S.E.2d 358 (No. COA20-423, Dare— 4/6/21), *disc. review denied,* ___ N.C. ____ (No. 159P21, 3/11/22)

- ***Holding***— **In matter wherein Court of Appeals held that plat map failed to show an unambiguous intention to dedicate the easement at issue to public use, Supreme Court of North Carolina denies plaintiffs' petition for discretionary review.**

- ***Key Excerpt***— The Town, incorporated in 2002, is a seaside resort community with no public beach access: oceanfront lots there are privately owned, and have been, since before the date of incorporation. Although the public is entitled to walk on the beach, wade, and otherwise use the natural resources abutting the property boundaries, the land between the beach and public streets and highways belongs to private

landowners. Two Town residents, who do not own such oceanfront property, filed a complaint asserting a public right of access to a pedestrian walkway providing convenient beach access from a public street to members of Sand Dollar Shores Homeowner's Association (defendant-Association).

Defendant-Association appealed from a summary judgment order declaring that the walkway maintained by and titled to defendant-Association has been dedicated to the public. Defendant-Association argued that a public dedication of private property requires a clear and unmistakable intent by the landowner to dedicate the land to public use: here, the plat map stated an intention only to dedicate "all roads, alleys, walks, parks, and other sites to public or private use as noted," and the document contained no note dedicating the easement as for public use. On the other hand, plaintiffs asserted that the plat map language adequately reflected a public dedication. Holding that the plat map failed to show an unambiguous intention to dedicate the easement to public use, the Court of Appeals reversed the trial court's judgment and remanded with instructions for entry of summary judgment for Defendant-Association.

Regarding the law of public dedication, the Court initially observed, "'The evidence in support of the intent of an owner to dedicate an easement should be "'clear and unmistakable.'"' Wright v. Town of Matthews, 177 N.C. App. 1, 11, 627 S.E.2d 650, 658 (2006) (quoting Green v. Barbee, 238 N.C. 77, 81, 76 S.E.2d 307, 310 (1953)). In other words: 'The intention of the owner to set apart land for the use of the public is the foundation and very life of every dedication.... The acts and declarations of the landowner indicating the intent to dedicate his land to the public use, must be unmistakable in their purpose and decisive in their character to have that effect.' Nicholas v. Salisbury Hardware & Furniture Co., 248 N.C. 462, 468, 103 S.E.2d 837, 842 (1958) (citations and quotation marks omitted). Intention alone is not adequate to accomplish a dedication; a public authority must also accept the offer. *See, e.g.,* Tower Development Partners v. Zell, 120 N.C. App. 136, 140, 461 S.E.2d 17, 20 (1995) ('Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply.' (citation omitted)). Acceptance, too, may be express or implied. Kraft [v. Town of Mount Olive], 183 N.C. App. [415] at 420, 645 S.E.2d [132] at 137 [(2007)]. A public authority expressly accepts a dedication by proper adoption or execution of an official act, including 'a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council's vote of approval, or the signing of a written instrument by proper authorities.' Bumgarner v. Reneau, 105 N.C. App. 362, 366-67, 413 S.E. 2d 565, 569, *aff'd as modified*, 332 N.C. 624, 422 S.E.2d 686 (1992). Acceptance may be implied when the offered land is 'generally used by the public and ... the proper authorities have asserted control [over it] for the period of twenty years or more.' Scott v. Shackelford, 241 N.C. 738, 743, 86 S.E.2d 453, 457 (1955) (citation and quotation marks omitted). The burden of proving both an offer and acceptance of dedication falls on the party propounding the dedication's existence. *See, e.g.,* Town of Lumberton v. Branch, 180 N.C. 249, 250, 104 S.E. 460, 461 (1920) (holding, in a town's action asserting possession by public dedication, that '[t]he burden was on the plaintiff to show that the land in controversy, and now in possession of the defendant, is a public street of Lumberton.'). This is not a low burden…."

Holding that plaintiffs had not shown a clear and unmistakable intent by the developers to publicly dedicate the easement, the Court observed, 'The dedication on the face of the plat provides that the developer 'dedicate[d] all roads, alleys, walks, parks, and other sites *to public or private use as noted*,' (emphasis added), meaning dedications of any walks 'for public ... use' and 'private use' would be 'noted' on the plat. Only the 'streets and roads are noted as for public use. Given the qualified language of the dedication that only items noted 'for public ... use' would be dedicated to the public, and in light of the dedication of the streets in such a manner, the failure to designate the Easement as public creates, at best, an ambiguity as to whether the Easement was offered for dedication. *Cf.* Ocean Hill Joint Venture v. Currituck Cnty. Bd. of Comm'rs., 178 N.C. App. 182, 184, 630 S.E.2d 714, 716 (2006) (describing a failure to designate a road as either public or private under dedication language practically identical to that at issue here as an 'ambiguity'). Because an offer of public dedication must be shown by evidence indicating a 'clear and unmistakable' intent, Wright, 177 N.C. App. at 11, 627 S.E.2d at 658 (citation and quotation marks omitted), and no such unambiguous intention is present on the face of the Sand Dollar Shores plat, the trial court erred in entering summary judgment for Plaintiffs and their claim should have been dismissed."

The Court closed by emphasizing, "Plaintiffs' remaining arguments seek to interpret and apply various statutes that have no bearing on whether the developer of Sand Dollar Shores intended to dedicate the Easement to the public, namely: (1) [G.S.] 136-102.6 … (2) the legislative findings section of the Coastal Area Management Act, [G.S.] 113A-134.1(b) (2019), which simply discloses the legislature's desire to establish public accessways to the State's beaches; and (3) [G.S.] 136-66.1, [G.S.] 160A-299, and [G.S.] 160A-301 (2019), which allow towns to spend funds on road improvements, close public roads and walks, and regulate parking. None of those statutes abrogates the common law of dedication. Plaintiffs also rely on Dare County ordinances in effect at the time the plat map was recorded to assert the Easement was dedicated to the public as a matter of law upon recordation. But, as conceded at oral argument, those ordinances expressly provided that both public and private easements could be recorded. *See* Dare County Code § 18-2 (1975) (defining 'Easement' as '[a] grant by the property owner for use by the public *or any person* of a strip of land for specified purposes' (emphasis added)). We acknowledge that our holding means that the Town of Duck, as an incorporated municipality, lacks public beach access. The subdivision, Easement, and Defendant association predate the incorporation of the Town. The Town has not sought to establish a public beach access and generally maintains that all of the beach access locations within the town limits of Duck are located on private property. This Court must uphold these private property rights under the law. Though we hold their suit must be dismissed, Plaintiffs are not barred from the beach. They may … negotiate for access with Defendant or, failing that, drive to nearby municipalities or any unincorporated areas in the county to the north and south that maintain public beach accesses."

- ***Synopsis***— Appeal by defendant Sand Dollar Shores Homeowner's Association, Inc., from February 2020 judgment. Reversed and remanded. Opinion by Judge Inman, joined by Judge Tyson and Judge Hampson. On March 11, 2022, the Supreme Court of North Carolina denied plaintiffs' petition for discretionary review.