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Land Use; Rezoning; Declaratory Judgment; Lack of Standing

Violette v. Town of Cornelius, 2022-NCCOA-383 (No. COA21-648, Mecklenburg– 6/7/22)

- ***Holding*– Court held that trial court did not err in order of dismissal in rezoning challenge, as plaintiffs (owners of 32 acres, with two homes, across street from phased construction residential subdivision) only supported allegations of standing with own opinion evidence of diminution in value, and allegations did not demonstrate how property was affected distinct from the community.**

- ***Key Excerpt*–** Regarding standing in the zoning context, the Court initially observed, "It has become difficult for a neighboring property owner to establish that they have standing to challenge a zoning decision. While prior law required only that the plaintiff have 'a specific personal and legal interest in the subject matter' that was 'directly and adversely affected' by a challenged ordinance, at least when the procedural vehicle for the challenge was an action for a declaratory judgment rather than a petition for certiorari to superior court from the proceedings before the relevant local governmental body, Village Creek Prop. Owners' Ass'n [v. Town of Edenton], 135 N.C. App. 482, 485, 520 S.E.2d 793, 795 (1999) (quoting Taylor v. City of Raleigh, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976)), today, neighboring property owners must suffer 'special damages' from a zoning decision to have standing to challenge it in an action for a declaratory judgment, Cherry Cmty. Org. v. City of Charlotte, 257 N.C. App. 579, 584, 809 S.E.2d 397, 401 (2018).... [T]oday, 'general allegations that a property use will impair property values in the general area [] will not confer standing[,]' Cherry v. Wiesner, 245 N.C. App. 339, 349, 781 S.E.2d 871, 878 (2016), and '[m]ere proximity to the site of the zoning action ... is insufficient to establish 'special damages[,]' Smith [v. Forsyth Cnty. Bd. of Adjust.], 186 N.C. App. [651] at 654, 652 S.E.2d [355] at 358 [(2007)]. Instead, a neighboring property owner affected by a zoning change must 'suffer special damages distinct from those [] to the public at large' to have standing to challenge the decision from which the change resulted.

Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)."

The Court continued, "[U]nder current law, general diminution of property values in the area does not confer standing on a neighboring owner to challenge a zoning decision, Mangum, 362 N.C. at 644, 669 S.E.2d at 283, and the neighbor's opinion of the diminution in value of the property the neighbor owns is not competent evidence to establish the neighbor's standing to challenge the decision, Cherry Cmty. Org., 257 N.C. App. at 589, 809 S.E.2d at 404." Applying these principles to the facts presented here and determining that the trial court did not err in granting defendants' motion, the Court concluded by stating, "Plaintiffs' complaint was not verified, and an affidavit was not attached as an exhibit to substantiate the allegations above. In responses to written discovery, Plaintiffs disclosed that they did not intend to engage any experts to prepare any reports or affidavits or testify at trial and described their damages in essentially the same way they did in the allegations quoted above. At [plaintiff's] deposition, he testified that the challenged rezoning was a drastic change from the previous zoning of the adjacent land; that the road running alongside his land and the adjacent land was already very busy and unsafe because of the addition of a new high school nearby; and that construction of the amenity center would diminish the value of his property—which he opined was worth $10 million—by $5 or $6 million because of increased noise, traffic, and light. North Carolina law no longer recognizes the right of neighboring property owners like Plaintiffs to challenge a zoning change based on allegations and testimony like Plaintiffs'. Plaintiffs have failed to make the showing required by Mangum that they 'will suffer special damages distinct from those [] to the public at large' from the challenged rezoning. 362 N.C. at 644, 669 S.E.2d at 283. Moreover, under United Community Bank, the record evidence of the diminution in value of Plaintiffs' property is not competent evidence. 369 N.C. [555] at 559-60, 799 S.E.2d [269] at 272-73 [(2017)]."

- ***Synopsis***— Appeal by plaintiffs from May 2021 order. Affirmed. Judge Jackson wrote the opinion, with Judges Dietz and Griffing concur in result only.

Constitutional Law; Red Light Cameras

Vaitovas v. City of Greenville, 2022-NCCOA-169 (No. COA20-889, Wake— 3/15/22), *disc. review denied*, *appeal dismissed*, ___ N.C. ___ (No. 108P22, 6/17/22)

- ***Holding***—**Supreme Court of North Carolina denies review of case wherein Court of Appeals unanimously decided that three-judge panel below correctly upheld local law permitting city to "enter into a contract with a contractor for the lease, lease-purchase, or purchase of" a red-light traffic camera system for the city.**

- ***Key Excerpt***— The Court of Appeals 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. On June 17, 2022, the Supreme Court of North Carolina denied plaintiff's petition for discretionary review and dismissed plaintiff's notice of appeal based upon a constitutional question.

Nota Bene (N.B.)— Other Recent Decisions of Note

Procedure; Motion for Relief; Rule 60(b)(1); Excusable Neglect; Class Action; Claims Submission Deadline Brookline Homes, LLC v. City of Mount Holly, 2022-NCCOA-419 (No. COA21-514, Gaston— 6/21/22) (***unpublished***) (Plaintiff appealed from an order denying its motion for relief from final order on the basis of excusable neglect, pursuant to N.C. R. Civ. P. Rule 60(b)(1). The Court affirmed. On appeal, plaintiff argued an abuse of discretion because plaintiff's failure to submit a claim, by the claim-form deadline as set forth in the class action settlement notice, was the result of excusable neglect. The Court disagreed, observing, "[T]he evidence in the record demonstrates that the trial court did not abuse its discretion by denying Plaintiff's motion for relief from the court's 12 October 2020 final order. Plaintiff received multiple claims notices well before the deadline, and Plaintiff's counsel was aware that Plaintiff had not yet filed a claim as of 11 December 2020, nine days before the deadline. Nevertheless, out of 'confusion' and miscommunication with counsel, Plaintiff filed its claim almost a month after the 20 December 2020 deadline had passed, and filed its Rule 60(b)(1) motion almost four months after the deadline. Additionally, the trial court entered an order preliminarily approving the [Settlement] Agreement on 21 July 2020, giving claimants months within which to submit their claims before the agreed-upon filing deadline of 20 December 2020. Because the parties negotiated the terms of the Agreement and set the deadlines themselves, there was evidence to support a determination by the trial court that Plaintiff did not have an adequate 'reason for the delay,' and that the filing of its claim was entirely 'within [Plaintiff's] reasonable control[.]' Lost Forest [Dev., L.L.C. v. Comm'r of Labor], 280 N.C. App. 174, 2021-NCCOA-587, ¶ 29 (citation omitted)." The Court further observed that at the hearing, defendant-City argued that the failure to meet the claims submission deadline did not constitute excusable neglect due to simply to inattention of plaintiff and its counsel. "Although Plaintiff's counsel asserted that Plaintiff's president misunderstood the email exchange, leading the president to believe that he 'didn't need to do anything' further with regard to the lawsuit, the trial court nonetheless could have found the City's argument persuasive based on the lack of extenuating circumstances, the four-month delay in filing the Rule 60(b)(1) motion, and the multiple notices received. As such, the trial court may have determined that Plaintiff's late claim was the result of attorney negligence, which is insufficient to establish excusable neglect, Sellers [v. FMC Corp.], 216 N.C. App. [134] at 141, 716 S.E.2d [661] at 666 [(2011), *supersedeas and disc. review denied*, 366 N.C. 250, 731 S.E.2d 429 (2012)], and the evidence in the record could sustain such a determination." (Appeal by plaintiff from May 2021 order. Affirmed. Opinion written by Judge Zachary, with Judge Collins and Judge Wood concurring.))

Torts; Law Enforcement; Immunity; Public Official Immunity: Gross Negligence Est. of Graham v. Lambert, 2022-NCCOA-161 (No. COA21-15, Cumberland—3/15/22) (Complaint held sufficient to give defendants notice that plaintiff was alleging a waiver of immunity, as it stated the action was brought pursuant to, and that defendants were liable under, G.S. 160A-485. Trial court did not err by granting summary judgment for individual capacity claims as public official immunity applied, since officer was responding to a matter within the scope of his official duties when he struck decedent and officer's conduct was neither malicious nor corrupt. In an issue resulting in a 2-1 decision, majority holds that officer's actions involving decedent were acts of discretion on his part, which might have been negligent but did not constitute gross negligence and accordingly the exemption of G.S. 20-145 applied: the majority concluded that plaintiff failed to present evidence of gross negligence and that defendants officer and City were entitled to summary judgment. Judge Jackson dissented on the gross negligence issue, finding a genuine issue of material fact regarding whether the officer was grossly negligent. "I join the majority opinion except for the portion holding that the trial court erred in denying Defendants' motion for summary judgment on the basis that there was no genuine issue of material fact whether Officer Lambert was grossly negligent when he struck Mr. Graham with his police cruiser. In my view, the record evidence presents a genuine question of whether Officer Lambert was grossly negligent as he used his computer while speeding down Raeford Road in the middle of the night … before striking and killing Mr. Graham. The majority in essence holds that Officer Lambert's conduct cannot constitute gross negligence as a matter of law." Judge Jackson observed, "[V]iewing the evidence in the light most favorable to Mr. Graham's estate, the evidence shows that (1) the accident occurred on Officer Lambert's first night shift, and first day working alone; (2) Officer Lambert did not have his blue lights activated at the time of the accident; (3) Officer Lambert was using his computer to find an address in the moments leading up to the collision; (4) Officer Lambert committed two lane violations because he was looking at his computer instead of the road ahead of him in the moments before the crash; (5) Officer Lambert leaned distinctively towards his computer three seconds before the accident; and (6) Officer Lambert collided with Mr. Graham without attempting to avoid Mr. Graham by turning or applying the cruiser's brakes to slow his vehicle down." (Appeal by defendants from July 2020 order. Reversed. Judge Gore wrote the opinion, joined by Judge Tyson. Judge Jackson concurred in part and dissented in part.))