

Highlights from Recent N.C. Cases

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I. Standing

Cherry Community Organization v. City of Charlotte, ___ N.C. App. ___, 808 S.E.2d 468 (2017) [Nov. 21, 2017]

The plaintiff nonprofit organization challenged the rezoning of a two-acre parcel to a mixed use district in order to construct a 119-foot tall building, a parking structure, and eight attached single-family homes. After community meetings, revised rezoning petitions were submitted and scheduled for hearing. After staff noted the maximum height limit in the proposed zoning district was 100-feet, the rezoning petition was again amended to a 106-foot building height at the time of city council consideration. The council denied the rezoning petition and the owner, before the meeting adjourned, agreed to reduce the height to 100-feet. The council then, also at the same meeting, approved a motion to reconsider the vote at its next meeting. The rezoning was then approved at the next meeting. The trial court granted summary judgment for the city.

The court held that while the plaintiff's pleadings contained an allegation of special damages sufficient to defeat a motion to dismiss, the failure to produce any evidence to support the allegation of special damages warranted summary judgment for the city. A party may not rest on mere allegations in their pleadings, but must by affidavits or otherwise set forth specific facts to support those assertions. Here, a showing they owned adjacent or nearby property in and of itself was insufficient to establish particularized harm. A concurring opinion would have upheld the summary judgment because the plaintiff failed to forecast competent evidence to support a finding of special damages, which is a justiciable issue, rather than because they had not established they were an aggrieved party.

Ring v. Moore County, ___ N.C. App. ___, ___ S.E.2d ___ (2017) [Dec. 19, 2017, <https://appellate.nccourts.org/opinions/?c=2&pdf=35353>]

Plaintiff neighboring land owners challenged the rezoning of a 108-acre tract from RA-40 to RA-20 alleging it was illegal spot zoning and that there were procedural defects in its adoption. The trial court dismissed the action for lack of standing. The court noted the plaintiff has the burden of showing they have a specific personal and legal interest that would be directly and adversely affected by the rezoning. An actual, concrete, particularized injury must be shown to establish standing. While the plaintiffs owned adjacent property (on which they operated a poultry farm), this rezoning did not change the permitted uses (rather it allowed a greater density of single-family homes). As there was no showing of an actual or imminent injury, the plaintiffs did not have standing.

II. Evidence Needed to Support Quasi-judicial Decision

Little River, LLC v. Lee County, ___ N.C. App. ___, ___ S.E.2d ___ (2017) [December 19, 2017, <https://appellate.nccourts.org/opinions/?c=2&pdf=36122>]

A mining company challenged the county's denial of a special use permit application.

The plaintiff first that the neighbors lacked standing to participate in the quasi-judicial hearings. The court disagreed, noting that G.S. 160A-388(c) allows local ordinances to specify the standards and procedures for hearing and deciding special use permits. In this case, the Lee County ordinance expressly permitted any individual to appear at a hearing and submit evidence. Moreover, the mining company had cooperated with the county at the start of the process to establish procedures for the quasi-judicial hearing and had expressly consented to neighbors intervening before superior court.

The court of appeals, however, then found that there was not sufficient evidence in the record to support a denial of the permit. The court reviewed each standard for a special use permit, noting that the mining company made a *prima facie* showing that it met the standard (regulatory standards and transportation analysis to protect public health and safety, evidence of compliance with technical standards, as well as expert testimony concerning impacts to property values and harmony with the area). The court found that the board failed to recognize the mining company's *prima facie* case and instead inappropriately relied on generalized fears and opinions from the neighbors to deny the permit.

Innovative 55, LLC v. Robeson County, ___ N.C. App. ___, 801 S.E.2d 671 (2017) [June 6, 2017, <https://appellate.nccourts.org/opinions/?c=2&pdf=35439>]

The plaintiff applied for a conditional use permit to construct a solar farm in a rural area of the county. Following two hearings, the board of county commissioners denied the permit on the grounds the project would injure the use and enjoyment of neighboring properties, would impede the normal and orderly development of the surrounding property, would adversely affect neighboring property values, and would not be in harmony with the surroundings. The trial court upheld the denial, but the court of appeals held the denial was not supported by substantial evidence.

The applicant met their burden of production by submitting substantial evidence the permit standards would be met. The opponents offered only "unsupported and highly speculative claims about their unsubstantiated fears" about traffic and property value impacts. Further, the opponents concerns about aesthetic impacts and harmony with the neighborhood related only to the general presence of the use, not its specific design and impact.

Ecoplexus Inc. v. County of Currituck, ___ N.C. App. ___, ___ S.E.2d ___ (2017) [December 19, 2017, <https://appellate.nccourts.org/opinions/?c=2&pdf=36181>]

The plaintiff applied for a special use permit for a solar farm on an abandoned golf course. The board of county commissioners denied the application and the trial court upheld the denial. However, court of appeals reversed, ruling that the applicant had made its *prima facie*

case to obtain the permit and that the opponents failed to provide evidence sufficient to support a denial.

The court offered a reminder about the “material” and “substantial” evidence needed to support any quasi-judicial decision: Material evidence is [e]vidence having some logical connection with the facts of consequence or the issues; substantial evidence is evidence a reasonable mind might accept as adequate to support a conclusion.

In this case the relevant standards were that the proposed project: (1) will not endanger public health or safety; (2) will not harm neighboring property values and is in harmony with the area; (3) conforms with adopted plans; and (4) has adequate public facilities.

A representative of the company testified regarding the design of the proposed solar farm; an engineer specializing in solar energy testified about the safety of the proposed solar farm; an appraiser testified as his study regarding impacts on property values and harmony with the area; and a stormwater engineer testified as to drainage. For the opposing neighbors, a professor of engineering testified about the ills of energy policy in general and the oversight of this solar farm in particular; a professor of soil and environmental science testified about the role of holding ponds for containing pesticide and herbicide runoff; an appraiser testified that single-family homes, not a solar farm, would be the highest and best use of the site and questioned the analysis of the solar company’s appraiser (but did not produce a study of his own); a neighbor expressed concern about stormwater run-off and argued that solar farms should be treated as an industrial use; and another neighbor testified about current drainage problems on the site.

The court of appeals found that the applicant made a *prima facie* case, the board failed to consider properly all of the evidence, and the board improperly relied upon speculative and lay opinions to support its denial. With regard to public safety, the board ignored the applicant’s stormwater expert and based its decision on unsubstantiated claims about pesticides that might be used to control vegetation on the site. With regard to property values, the board again ignored the applicant’s expert and based its decision on unsubstantiated opinions by the opponent appraiser. The board also erroneously equated “highest and best use” with “harmonious use.” The court found no evidence to support the finding that the solar farm was an incompatible use. Finally, the court found no evidence to support the board’s finding that the solar farm is not in conformity with adopted plans. While the board pointed to policy language in the county plan about “energy producing facilities,” the court found that particular policy addressed extractive facilities such as oil and gas production, not alternative energy such as solar.

III. Ordinance and Statutory Interpretation

Thompson v. Town of White Lake, ___ N.C. App. ___, 797 S.E.2d 346 (2017) [March 7, 2017, <https://appellate.nccourts.org/opinions/?c=2&pdf=34354>]

The plaintiff secured a permit for a metal accessory storage structure on her residentially zoned lot. During construction the inspector found the building was being built with four doors on each side and a center dividing wall, while permit application had shown four doors, all facing away from the street. A stop work order and notice of violation was issued, based on the structure being an unlawful commercial structure, varying from approved plans, and not located

behind the principal structure on the lot. On appeal the board of adjustment found the structure was commercial in nature, but that the evidence did not support the other two grounds for violation. The trial court affirmed.

The court reversed. On the allegation that the structure was commercial, the petitioner contended this was not supported by the evidence and was thus arbitrary and capricious. This allegation requires a whole record review, where the court examines whether there was substantial evidence to support the decision. Here the trial court deemed this an interpretation of the ordinance, a question of law, and thus incorrectly applied a de novo review and made new findings of fact. Rather than remand for application of the proper standard, however, the record was clear that there was no evidence presented that the structure was being devoted to a commercial use. The fact that it could be converted to such is not relevant to the question of its actual use. As that was the sole ground for denial by the board of adjustment, the trial court erred by substituting its own justification for the decision where the issue is the adequacy of the evidence before the board.

NCJS, LLC v. City of Charlotte, ___ N.C. App. ___, 803 S.E.2d 684 (2017) [Aug. 15, 2017, <https://appellate.nccourts.org/opinions/?c=2&pdf=35481>]

Plaintiffs owned a warehouse that was built in 1970. The warehouse included two unscreened dumpsters. The city in 1984 adopted a dumpster-screening requirement to be applied when property is developed or redeveloped. Based on photographs showing the dumpsters had been relocated on the site, the city issued a notice of zoning violation. That interpretation was upheld by the board of adjustment, which held the dumpsters lost their nonconforming status when they were moved. The trial court affirmed.

The court held the interpretation of the nonconformities provisions in the ordinance is a question of law subject to de novo review. The city staff failed to assert any activity on the property constituted “redevelopment” so as to trigger loss of nonconforming status for the unscreened dumpsters. As the dumpsters were permitted accessory uses to the warehouses, they were not “nonconforming structures” in and of themselves. The relocation of the dumpsters was not redevelopment of the land or structures and thus the screening requirement was not triggered.

Hampton v. Cumberland County, ___ N.C. App. ___, ___ S.E.2d ___ (2017) [Dec. 5, 2017, <https://appellate.nccourts.org/opinions/?c=2&pdf=35010>]

Plaintiffs in 2011 acquired a 74-acre tract zoned as rural residential with an intent to build a home, running trail, and firing ranges. Shortly after acquisition the plaintiffs obtained a USDA farm identification number. At that time shooting ranges were not specifically addressed in the county zoning ordinance. In 2011 the ordinance stated that any unlisted uses must meet the standards applicable to the listed use most nearly similar in land use impacts. In 2012 the plaintiffs built a 25-yard firing range and began instructing students there. The range was expanded to 40-yards in 2013. The county amended the ordinance in 2014 to set standards and require a permit for outdoor firing ranges. Among the standards was a minimum 200-acre site size. This amendment also provided the use must be considered a principal use (not an incidental or accessory use), contained several exemptions (occasional target practice, sighting

of weapons for hunting, and temporary turkey shoots), and exempted ranges in existence as of 2005. In 2014 the plaintiffs added a 100-yard range adjacent to the initial range where additional instruction was provided. No residential or use of the property other than as a shooting range was in place. In 2015 the county issued a notice of violation and ordered the shooting ranges be razed. On appeal the board of adjustment held affirmed the finding of a zoning violation and modified the corrective action required to ceasing to use the firing range as it conflicts with the ordinance. The superior court reversed and held non-commercial use of the firing range for target shooting and weapons siting was a legal use of the property and that the firing range was incidental to the principal use of the property for a residence and farming operations.

The court held that securing a farm identification number does not as a matter of law exempt any and all activity on the property from county zoning. While G.S. 153A-340(b) provides that a farm number is sufficient evidence the property is being used for bona fide farm properties, that statute also says that nonfarm use of farm property is not exempt from county zoning. While the farm number is “sufficient evidence” of farm use, it is not “conclusive evidence” of such. [*Note: In 2017 the General Assembly repealed the provision allowing use of a USDA farm number as qualifying evidence regarding farm use.*]

The court found the trial court improperly made new findings of fact and that the board of adjustment had failed to make critical findings of fact, such as whether the actual use of the property fell within any of the exempted uses of a firing range or whether commercial uses of the ranges were involved. The court noted these are mixed questions of law and fact and remanded the case to the board of adjustment to make findings and in its discretion take such new evidence and argument as it deems appropriate.

160A-393. Appeals in the nature of certiorari.

(k) *Scope of Review.* –

(1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:

- a. In violation of constitutional provisions, including those protecting procedural due process rights.
- b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
- c. Inconsistent with applicable procedures specified by statute or ordinance.
- d. Affected by other error of law.
- e. Unsupported by substantial competent evidence in view of the entire record.
- f. Arbitrary or capricious.

(2) When the issue before the court is whether the decision-making board erred in interpreting an ordinance, the court shall review that issue *de novo*. The court shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate.

(3) The term "competent evidence," as used in this subsection, shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection G.S. 160A-393 or (ii) the evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it. The term "competent evidence," as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to any of the following:

- a. The use of property in a particular way would affect the value of other property.
- b. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
- c. Matters about which only expert testimony would generally be admissible under the rules of evidence.

(l) *Decision of the Court.* – Following its review of the decision-making board in accordance with subsection (k) of this section, the court may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings. If the court does not affirm the decision below in its entirety, then the court shall be guided by the following in determining what relief should be granted to the petitioners:

- (1) If the court concludes that the error committed by the decision-making board is procedural only, the court may remand the case for further proceedings to correct the procedural error.
- (2) If the court concludes that the decision-making board has erred by failing to make findings of fact such that the court cannot properly perform its function, then the court may remand the case with appropriate instructions so long as the record contains substantial competent evidence that could support the decision below with appropriate findings of fact. However, findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law.
- (3) If the court concludes that the decision by the decision-making board is not supported by substantial competent evidence in the record or is based upon an error of law, then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error. Specifically:
 - a. If the court concludes that a permit was wrongfully denied because the denial was not based on

substantial competent evidence or was otherwise based on an error of law, the court may remand with instructions that the permit be issued, subject to reasonable and appropriate conditions.

- b. If the court concludes that a permit was wrongfully issued because the issuance was not based on substantial competent evidence or was otherwise based on an error of law, the court may remand with instructions that the permit be revoked.