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§ 1-298. Procedure after determination of appeal.

In civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first session after the receipt of the certificate from the Appellate Division. (1887, c. 192, s. 2; Rev., s. 1526; C.S., s. 659; 1969, c. 44, s. 11; 1971, c. 268, s. 13.)

Rule 55. Default.

(a) Entry. - When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

(b) Judgment. - Judgment by default may be entered as follows:

(1) By the Clerk. - When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales."

(2) By the Judge. -

a. In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as the judge deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina. If the plaintiff seeks to establish paternity under Article 3 of Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default.

b. A motion for judgment by default may be decided by the court without a hearing if:

1. The motion specifically provides that the court will decide the motion for judgment by default without a hearing if the party against whom judgment is sought fails to serve a written response, stating the grounds for opposing the motion, within 30 days of service of the motion; and

2. The party against whom judgment is sought fails to serve the response in accordance with this sub-subdivision.

(c) Service by publication. - When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclose mortgages thereon or in actions in which

the State of North Carolina or a county or municipality thereof is the plaintiff such bond shall not be required.

(d) Setting aside default. - For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

(e) Plaintiffs, counterclaimants, cross claimants. - The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(f) Judgment against the State of North Carolina. - No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence. (1967, c. 954, s. 1; 1971, cc. 542, 1101; 1977, c. 675; 1991, c. 278, s. 1; 1993 (Reg. Sess., 1994), c. 733, s. 3; 1999-187, s. 1.)

§ 153A-344.1. Vesting rights.

(a) The General Assembly finds and declares that it is necessary and desirable, as a matter of public policy, to provide for the establishment of certain vested rights in order to ensure reasonable certainty, stability, and fairness in the land-use planning process, secure the reasonable expectations of landowners, and foster cooperation between the public and private sectors in the area of land-use planning. Furthermore, the General Assembly recognizes that county approval of land-use development typically follows significant landowner investment in site evaluation, planning, development costs, consultant fees, and related expenses.

The ability of a landowner to obtain a vested right after county approval of a site specific development plan or a phased development plan will preserve the prerogatives and authority of local elected officials with respect to land-use matters. There will be ample opportunities for public participation and the public interest will be served. These provisions will strike an appropriate balance between private expectations and the public interest, while scrupulously protecting the public health, safety, and welfare.

(b) Definitions.

(1) "Landowner" means any owner of a legal or equitable interest in real property, including the heirs, devisees, successors, assigns, and personal representative of such owner. The landowner may allow a person holding a valid option to purchase to act as his agent or representative for purposes of submitting a proposed site specific development plan or a phased development plan under this section, in the manner allowed by ordinance.

(2) "County" shall have the same meaning as set forth in G.S. 153A-1(3).

(3) "Phased development plan" means a plan which has been submitted to a county by a landowner for phased development which shows the type and intensity of use for a specific parcel or parcels with a lesser degree of certainty than the plan determined by the county to be a site specific development plan.

(4) "Property" means all real property subject to zoning regulations and restrictions and zone boundaries by a county.

(5) "Site specific development plan" means a plan which has been submitted to a county by a landowner describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property. Such plan may be in the form of, but not be limited to, any of the following plans or approvals: A planned unit development plan, a subdivision plat, a preliminary or general development plan, a conditional or special use permit, a conditional or special use district zoning plan, or any other land-use approval designation as may be utilized by a county. Unless otherwise expressly provided by the county such a plan shall include the approximate boundaries of the site; significant topographical and other natural features effecting development of the site; the approximate location on the site of the proposed buildings, structures, and other improvements; the approximate dimensions, including height, of the proposed buildings and other structures; and the approximate location of all existing and proposed infrastructure on the site, including water, sewer, roads, and pedestrian walkways. What constitutes a site specific development plan under this section that would trigger a vested right shall be finally determined by the county pursuant to an ordinance, and the document that triggers such vesting shall be so identified at the time of its approval. However, at a minimum, the ordinance to be adopted by the county shall designate a vesting point earlier than the

issuance of a building permit. A variance shall not constitute a site specific development plan, and approval of a site specific development plan with the condition that a variance be obtained shall not confer a vested right unless and until the necessary variance is obtained. Neither a sketch plan nor any other document which fails to describe with reasonable certainty the type and intensity of use for a specified parcel or parcels or property may constitute a site specific development plan.

(6) "Vested right" means the right to undertake and complete the development and use of property under the terms and conditions of an approved site specific development plan or an approved phased development plan.

(c) Establishment of vested right.

A vested right shall be deemed established with respect to any property upon the valid approval, or conditional approval, of a site specific development plan or a phased development plan, following notice and public hearing by the county with jurisdiction over the property. Such vested right shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan or the phased development plan including any amendments thereto. A county may approve a site specific development plan or a phased development plan upon such terms and conditions as may reasonably be necessary to protect the public health, safety, and welfare. Such conditional approval shall result in a vested right, although failure to abide by such terms and conditions will result in a forfeiture of vested rights. A county shall not require a landowner to waive his vested rights as a condition of developmental approval. A site specific development plan or a phased development plan shall be deemed approved upon the effective date of the county's action or ordinance relating thereto.

(d) Duration and termination of vested right.

(1) A right which has been vested as provided for in this section shall remain vested for a period of two years. This vesting shall not be extended by any amendments or modifications to a site specific development plan unless expressly provided by the county.

(2) Notwithstanding the provisions of subsection (d)(1), a county may provide that rights shall be vested for a period exceeding two years but not exceeding five years where warranted in light of all relevant circumstances, including, but not limited to, the size and phasing of development, the level of investment, the need for the development, economic cycles, and market conditions. These determinations shall be in the sound discretion of the county.

(3) Notwithstanding the provisions of (d)(1) and (d)(2), the county may provide by ordinance that approval by a county of a phased development plan shall vest the zoning classification or classifications so approved for a period not to exceed five years. The document that triggers such vesting shall be so identified at the time of its approval. The county still may require the landowner to submit a site specific development plan for approval by the county with respect to each phase or phases in order to obtain final approval to develop within the restrictions of the vested zoning classification or classifications. Nothing in this section shall be construed to require a county to adopt an ordinance providing for vesting of rights upon approval of a phased development plan.

(4) Following approval or conditional approval of a site specific development plan or a phased development plan, nothing in this section shall exempt such

a plan from subsequent reviews and approvals by the county to ensure compliance with the terms and conditions of the original approval, provided that such reviews and approvals are not inconsistent with said original approval. Nothing in this section shall prohibit the county from revoking the original approval for failure to comply with applicable terms and conditions of the approval or the zoning ordinance.

(5) Upon issuance of a building permit, the provisions of G.S. 153A-358 and G.S. 153A-362 shall apply, except that a permit shall not expire or be revoked because of the running of time while a vested right under this section is outstanding.

(6) A right which has been vested as provided in this section shall terminate at the end of the applicable vesting period with respect to buildings and uses for which no valid building permit applications have been filed.

(e) Subsequent changes prohibited; exceptions.

(1) A vested right, once established as provided for in this section, precludes any zoning action by a county which would change, alter, impair, prevent, diminish, or otherwise delay the development or use of the property as set forth in an approved site specific development plan or an approved phased development plan, except:

a. With the written consent of the affected landowner;

b. Upon findings, by ordinance after notice and a public hearing, that natural or man-made hazards on or in the immediate vicinity of the property, if uncorrected, would pose a serious threat to the public health, safety, and welfare if the project were to proceed as contemplated in the site specific development plan or the phased development plan;

c. To the extent that the affected landowner receives compensation for all costs, expenses, and other losses incurred by the landowner, including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultant's fees incurred after approval by the county, together with interest thereon at the legal rate until paid. Compensation shall not include any diminution in the value of the property which is caused by such action;

d. Upon findings, by ordinance after notice and a hearing, that the landowner or his representative intentionally supplied inaccurate information or made material misrepresentations which made a difference in the approval by the county of the site specific development plan or the phased development plan; or

e. Upon the enactment or promulgation of a State or federal law or regulation which precludes development as contemplated in the site specific development plan or the phased development plan, in which case the county may modify the affected provisions, upon a finding that the change in State or federal law has a fundamental effect on the plan, by ordinance after notice and a hearing.

(2) The establishment of a vested right shall not preclude the application of overlay zoning which imposes additional requirements but does not affect the allowable type or intensity of use, or ordinances or regulations which are general in nature and are applicable to all property subject to land-use

regulation by a county, including, but not limited to, building, fire, plumbing, electrical, and mechanical codes. Otherwise applicable new regulations shall become effective with respect to property which is subject to a site specific development plan or a phased development plan upon the expiration or termination of the vesting rights period provided for in this section.

(3) Notwithstanding any provision of this section, the establishment of a vested right shall not preclude, change or impair the authority of a county to adopt and enforce zoning ordinance provisions governing nonconforming situations or uses.

(f) Miscellaneous provisions.

(1) A vested right obtained under this section is not a personal right, but shall attach to and run with the applicable property. After approval of a site specific development plan or a phased development plan, all successors to the original landowner shall be entitled to exercise such rights.

(2) Nothing in this section shall preclude judicial determination, based on common-law principles or other statutory provisions, that a vested right exists in a particular case or that a compensable taking has occurred. Except as expressly provided in this section, nothing in this section shall be construed to alter the existing common law.

(3) In the event a county fails to adopt an ordinance setting forth what constitutes a site specific development plan triggering a vested right, a landowner may establish a vested right with respect to property upon the approval of a zoning permit, or otherwise may seek appropriate relief from the Superior Court Division of the General Court of Justice. (1989 (Reg. Sess., 1990), c. 996, s. 6.)

Carlton S. ASHBY, Jr., Cora B. Ashby, and Ashby Furniture Galleries, Plaintiffs-Appellants

v.

The TOWN OF CARY, Defendant-Appellee.

No. COA03-203.

Court of Appeals of North Carolina.

Dec. 2, 2003.

Property owners filed declaratory-judgment action against town, asserting that town's denial of application to rezone property from residential to commercial was contrary to law. The Superior Court, Wake County, Abraham Penn Jones, J., granted town's motion for summary judgment. Property owners appealed. The Court of Appeals, Wynn, J., held that town had plausible basis for denying application.

Affirmed.

1. Zoning and Planning ⟹168

Town had plausible basis for denying property owners' application to rezone property from residential to commercial for purpose of constructing furniture store; town's concern about minimal increase in traffic in heavily congested area bore a substantial relation to public safety.

2. Zoning and Planning ⟹617

Court reviewing grant or denial of rezoning request is not free to substitute its opinion for that of legislative body so long as there is some plausible basis for conclusion reached by that body.

3. Zoning and Planning ⟹641

Property owners were not entitled to introduce affidavits from zoning expert and traffic engineer in owners' action challenging town's denial of rezoning application, since affidavits were not presented to town council when it made its decision to deny application.

4. Zoning and Planning ⟹601, 728

Courts may not interfere with or control municipality's zoning power or direct zoning ordinances to be repealed, enacted, or amended.

Appeal by plaintiff from judgment entered 2 December 2002 by Judge Abraham Penn Jones, Superior Court, Wake County. Heard in the Court of Appeals 18 November 2003.

Morgan, Reeves & Gilchrist, by C. Winston Gilchrist, Lillington, for plaintiff-appellants.

The Brough Law Firm, by G. Nicholas Herman, Chapel Hill, for defendant-appellee.

WYNN, Judge.

By this appeal, Carlton S. Ashby and his wife, Cora B. Ashby, d/b/a Ashby Furniture Galleries ("the Ashbys"), challenge the trial court's summary judgment upholding the Town of Cary's denial of their rezoning application. After careful review, we affirm.

The underlying facts show that in 2000, the Ashbys owned a lot of approximately one acre on Walnut Street outside of the Town of Cary's jurisdiction. The Ashbys wanted to build a new furniture store on this lot but needed additional land. Adjacent to the lot, the Town of Cary owned a lot consisting of less than one acre. The Town of Cary and the Ashbys negotiated a deal in which the Ashbys acquired the Town of Cary's lot and in exchange the Town of Cary obtained frontage from the Ashby lot necessary for the widening of Walnut Street.

In December 2000, pursuant to an annexation petition filed by the Ashbys, the Town of Cary annexed the Ashby property. The Ashbys contend that throughout the land exchange negotiations and the annexation process, the Town of Cary knew they intended to use their land for the construction of a furniture store. However, the Town of Cary contends the town council only knew the Ashbys were interested in developing the property in some unspecified way.

The two tracts of land total 1.99 acres located in an area commonly referred to as

the "Walnut Street Corridor." The area consists of two major retail malls, a variety of commercial and retail developments, a movie theater, two auto dealerships, several office complexes and a 776–unit multi-family residential complex. Contiguous to the Ashby property is the Centrum Shopping Center, which consists of more than 750,000 square feet of retail and restaurant space.

Notwithstanding the abundance of commercial and retail establishments in this area, the Ashby tracts were zoned R–30 (Residential 30), for low-density residential purposes. Thus, in September 2001, the Ashbys filed an application with the Town of Cary to rezone the property from R–30 to B–2 (Business–2 Commercial) Conditional Use district classification and also submitted an application for a conditional use permit. In their applications, the Ashbys proposed several conditions on the use of their property such as the property would be used only for a furniture store; the store would be no larger than 19,000 square feet; the traffic generated would not exceed 100 peak hour trips and 1000 average daily trips; and no certificate of occupancy for the store would be issued before the completion of the Town of Cary's project to widen and realign Walnut Street. The Ashbys included with their application a letter from an engineering firm, which stated that during a typical weekday the store would generate 51 additional car trips per day on Walnut Street. However, the letter did not address the amount of additional traffic the store would generate on weekends.

During the same time period in which the Ashbys submitted their applications, the Town of Cary began reconsidering the Southeast Gateway Area Plan, which was adopted in 1998 by the town council to address land use and transportation issues in the Walnut Street Corridor and the area surrounding the Crossroads Plaza Shopping Center. It was adopted as a reference guide to direct growth when rezoning, annexation, subdivision, and site plans are considered and had a goal of alleviating and mitigating existing and future traffic movement within the area. Under this plan, the proposed conditional use of the Ashbys property would meet the criteria of commercial low intensity land use, which was one of the three uses recommended for the area in which the Ashbys property is located. However, in April 2001, the town council approved funding for a new land use study to be called the "Walnut Street Land Use/Transportation Plan." Thus, at the time the Ashbys submitted their applications in September 2001, the Town of Cary was in the process of reviewing land uses in the Walnut Street corridor.

After following the requisite procedures for considering rezoning applications, the Ashbys' applications were placed on the town council's agenda for a final decision on 10 January 2002. On this same date, the town council had a work session to discuss the status and preliminary recommendations of the new "Revised Walnut Street Land Use/Transportation Plan." During the work session, the council members discussed traffic congestion on weekends and during peak hours and had extensive discussions about the differences between the Southeast Gateway Plan and the proposals set forth in the new plan. In particular, the town council discussed whether the Walnut Street area should be permitted to accommodate additional retail and commercial uses or should be zoned for more office and institutional uses that would reduce traffic congestion.

That evening, the town council voted, 5–2, to deny the Ashbys application. The town council expressed a concern that even with the widening and realignment of Walnut Street, the weekend traffic congestion in the area could not accommodate additional retail or commercial uses. Thereafter, the town council voted to waive the restriction that prohibits a landowner from submitting a new application within 12 months after a denial. Thus, the Ashbys were permitted to submit a new application at any time.

Notwithstanding the town council's concerns about traffic congestion, on the same evening the town council considered and approved a rezoning application by Crossroads Ford, an automobile dealership, which rezoned 14.11 acres from Office and Institutional to B–2 Conditional Use for a parking lot storage facility for inventory.

After denial of their rezoning request, the Ashbys filed a declaratory judgment action seeking a declaration that the Town of Cary's denial of their rezoning application was null and void and contrary to law. After summary judgment was entered in favor of the Town of Cary, the Ashbys appealed.

On appeal, the Ashbys contend the trial court erroneously entered summary judgment in the Town of Cary's favor because genuine issues of material fact exist as to whether the council's decision was arbitrary and capricious. We disagree.

"Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Martin Architectural Products v. Meridian Construction*, 155 N.C.App. 176, 180, 574 S.E.2d 189, 191 (2002). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "An issue is genuine if it can be proven by substantial evidence." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "The movant has the burden of showing that summary judgment is appropriate. Furthermore, in considering summary judgment motions, we review the record in the light most favorable to the nonmovant." *Hayes v. Turner*, 98 N.C.App. 451, 456, 391 S.E.2d 513, 516 (1990).

[1, 2] The Ashbys contend the town council's decision was arbitrary and capricious because (1) the Town of Cary entered into the land-exchange transaction with knowledge that the Ashbys wished to acquire the property for the sole purpose of a furniture store, (2) the furniture store would generate low traffic, (3) the rezoning request complied with the Southeast Gateway Plan, the zoning plan in effect at the time of the request, (4) the Planning Board recommended the proposed rezoning by a unanimous vote, and (5) the town council approved Crossroads Ford's rezoning request. It is well established that the grant or denial of a rezoning request is purely a legislative decision which will be deemed arbitrary and capricious if "the record demonstrates that it had no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Graham v. Raleigh*, 55 N.C.App. 107, 110, 284 S.E.2d 742, 744 (1981). A reviewing court is "not free to substitute [its] opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body." *Id.*

[3] As an initial matter, we note that the Ashbys sought the introduction of evidence in the trial court that was not presented to the town council. Specifically, the Ashbys offered affidavits from a zoning expert and a traffic engineer. However, as indicated in *Graham v. Raleigh*, this Court considers the record before the legislative body in assessing the validity of a zoning action. *See id.* (stating "a zoning ordinance will be declared invalid only where *the record* demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense"). As stated, in reviewing rezoning decisions, this Court is not free to substitute our opinion for that of the legislative body so long as there is some plausible basis for the conclusions reached by that body. *See id.*

During the 10 January 2002 meeting, the town council members expressed some concern about the traffic increase that would be generated by the furniture store. Even though the traffic increase would be minimal, a majority of the council members felt that even a minimal increase in traffic would exacerbate the traffic congestion in the Walnut Street corridor. Moreover, council members felt it was inappropriate to approve the rezoning request on the same day that the council approved a $10–20 million dollar expenditure to investigate how to alleviate the traffic problems in that area. As one council member stated: "I cannot, in good conscious, tell a resident when they ask me, 'What are you doing to fix the area?' 'Well, we're going to spend $10 to 20 million, but we're going to add a little more retail too.' " Thus, the

transcript reveals the town council denied the rezoning request because of the minimal increase in traffic in a heavily traffic congested area. Accordingly, the record reveals a plausible basis for the town council's decision that had a basis in reason and bore a substantial relation to public safety.

[4] As stated, this Court is not free to substitute its judgment for that of the town council. Furthermore, "the courts may not 'interfere with or control a municipality's zoning power or direct zoning ordinances to be repealed, enacted, or amended.' " *In re Markham*, 259 N.C. 566, 570, 131 S.E.2d 329, 333 (1963). Accordingly, the judgment below is,

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

James William BURGESS and Georgia Burgess, Plaintiffs

v.

JIM WALTER HOMES, INC.; First Union National Bank; Yadkin County, by and through its County Manager Cecil Woods; Jerry Miller, Individually; and Jerry Miller, in his capacity as Housing Inspector for the County of Yadkin, Defendants.

No. COA03-160.

Court of Appeals of North Carolina.

Dec. 2, 2003.

Property owners filed complaint against home builder and bank, seeking summary determination that no arbitration agreement existed between owners and builder. Builder and bank moved to stay action pending arbitration. The Superior Court, Yadkin County, Michael E. Helms, J., determined that no arbitration agreement existed and denied motion to stay. Builder and bank appealed. The Court of Appeals, Tyson, J., held that: (1) paragraph in construction contract did not show meeting of the minds with regard to agreeing to arbitrate disputes; (2) execution of second construction contract amounted to a novation with respect to earlier contract; and (3) property owners did not waive their right to challenge arbitration agreement.

Affirmed.

1. Arbitration ⇐23.20

Order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.

2. Arbitration ⇐7.1

Strong public policy favoring settlement of disputes by arbitration requires courts to resolve any doubts concerning scope of arbitrable issues in favor of arbitration.

3. Arbitration ⇐6.2

Paragraph in construction contract, which stated that buyer accepted arbitration agreement set forth as an exhibit, did not show a meeting of the minds between property owners and builder with regard to agreeing to arbitrate disputes, since no arbitration agreement was attached to contract, paragraph only referenced a purported document whereby parties intended to set forth arbitration agreement, paragraph did not clearly express whether parties agreed to arbitrate, and paragraph failed to specify scope and terms of any agreement.

4. Contracts ⇐15

Before valid contract can exist, there must be mutual agreement between parties as to terms of contract.

5. Contracts ⇐15

When there has been no meeting of the minds on essentials of agreement, no contract results.

culpatory clause where there is "intentional wrongdoing or gross negligence," "fraud or misrepresentation," on the part of the agency asserting the clause. No such wrongdoings were alleged in this case.

Greiner, 577 A.2d at 372 (citations omitted). The earlier case, *Boucher*, involved a customer who sued the inaptly named "Parachutes Are Fun, Inc." after he parachuted into power lines. Boucher argued that the exculpatory agreement he signed did not shield Parachutes Are Fun from liability for gross negligence. The court agreed, holding that "[a] waiver of a right to sue, such as the one executed between Boucher and Parachutes, is ineffective to shift the risk of a party's own willful, wanton, reckless, or gross conduct." *Boucher*, 514 A.2d at 488. *Boucher* is a further indication that, under Maryland law, a party to a contract cannot waive liability for gross negligence.

Martin Marietta tries to distinguish *Boucher* in two ways. First, Martin Marietta argues that *Boucher* involved parties of unequal bargaining power. Boucher signed a standard preprinted form containing an exculpatory clause, while Martin Marietta and INTELSAT negotiated a complex agreement. In response, we note that the language in *Boucher* is broad and not limited to parties of unequal bargaining power, and that the facts and the court's language in *Greiner* also undercut Martin Marietta's argument. Second, Martin Marietta argues that *Boucher* established a very high standard for gross negligence (wanton or reckless disregard) that the plaintiff failed to satisfy on facts more egregious than the facts in this case. However, there is no doubt that INTELSAT sufficiently alleged gross negligence so as to survive a 12(b)(6) motion. *See* Transcript of Oral Argument at 99, J.A. at 524. Whether INTELSAT convinces a jury that Martin Marietta was grossly negligent, or even survives summary judgment, is another question.

[9] Although recognizing *Boucher* to be the law of Maryland, the district court held that Congressional intent, as reflected in the 1988 Amendments to the Commercial Space Launch Act ("CSLA"), 49 U.S.C.App. §§ 2601–2623, required the court to interpret the parties' contract to preclude claims of gross negligence. 763 F.Supp. at 1333–34. We find absolutely no support for the court's conclusion that the CSLA 1988 Amendments overrode *Boucher*, because the parties' contract was signed in 1987, more than one year before Congress passed the Amendments. Even if the CSLA Amendments could apply retroactively, neither the language of the Amendments nor their legislative history reflects a Congressional intent to protect parties from liability for their own gross negligence. Accordingly, we hold that the district court erred in dismissing INTELSAT's gross negligence claim.

As we have upheld the dismissal of INTELSAT's negligence and negligent misrepresentation claims, but overturned the dismissal of INTELSAT's breach of contract and gross negligence claims, the judgment of the district court is hereby

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Robert F. BISER, Plaintiff–Appellant,

v.

TOWN OF BEL AIR; Carol Deibel; Edsel A. Docken, Sr.; James M. Decker; John E. Yantz; Donald Young; D. David Ranney, Jr., Defendants–Appellees.

Robert F. Biser, Plaintiff–Appellee,

v.

Town of Bel Air; Carol Deibel; Edsel A. Docken, Sr.; James M. Decker; John E. Yantz; Donald Young; D. David Ranney, Jr., Defendants–Appellants.

Nos. 92–1675, 92–1732.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 2, 1993.

Decided April 2, 1993.

Landowner filed action which included section 1983 civil rights claim and state

claims arising from municipality's delay in granting his application for special exception which would have permitted him to construct commercial office buildings in area zoned for residential use. The United States District Court for the District of Maryland, Joseph H. Young, Senior District Judge, 778 F.Supp. 249, granted municipality's motion to dismiss, dismissing section 1983 claim with prejudice and state claims without prejudice. Landowner appealed and municipality cross-appealed. The Court of Appeals, Wilkinson, Circuit Judge, held that: (1) since municipal board of appeals had significant discretion in deciding whether to grant special exception, landowner had no legitimate claim of entitlement, and so no property right to special exception cognizable under due process clause; (2) order of state court of equity estopping municipality on ground of statutory ambiguity from relying on its legal right to deny application did not represent legitimate claim of entitlement; and (3) the District Court did not abuse its discretion in dismissing state claims without prejudice.

Affirmed.

1. Constitutional Law ⇐277(1)

Since municipal board of appeals had significant discretion in deciding whether to grant landowner's application for special exception, which would have permitted construction of commercial office buildings in area zoned for residential use, landowner had only unilateral expectation that he would receive special exception, not legitimate claim of entitlement, and so landowner had no property right cognizable under due process clause to support his § 1983 civil rights claim. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

2. Estoppel ⇐62.4

Under Maryland law, equitable estoppel of municipal corporation requires official act taken within scope of authority, ambiguous statute or ordinance, and detrimental reliance by third party.

3. Estoppel ⇐52(7)

Under Maryland law, estoppel does not give rise to any affirmative duties.

4. Constitutional Law ⇐278.2(1)

Subsequent order by court of equity estopping municipality from relying on its legal right to deny landowner's application for special exception does not represent legitimate claim of entitlement to special exception on which substantive due process claim can be based; in order to justify substantive due process protection, legal right to special exception must exist before local agency denies permit, and claim of entitlement must come from existing legislative or administrative standard. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

5. Estoppel ⇐52(7)

Under Maryland law, equitable estoppel does not recognize preexisting legal right; rather, estoppel bars defendant from asserting legal right that it would otherwise be entitled to enforce, based on defendant's conduct.

6. Constitutional Law ⇐251.3

Arbitrary conduct on part of municipality, standing alone, does not create legitimate claim of entitlement on which substantive due process claim may be based, even if arbitrary conduct later leads to state court judgment against municipality. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

7. Civil Rights ⇐130
Constitutional Law ⇐278.2(1)
Zoning and Planning ⇐488

Fact that landowner obtained state court order, enforceable by court's power of contempt, barring municipal board of appeals from denying his application for special exception did not mean that he had preexisting legal right to special exception; although state court judgment is something to be enforced through state's judicial process, including its powers of contempt, not every state court judgment provides would-be plaintiff with cognizable property right under § 1983, and not every alleged delay in enforcement of mandate provides plaintiff with claim of deprivation

without due process of law. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

8. Constitutional Law ⇐277(1)

Equitable doctrine premised on statutory ambiguity, which state court of equity applied to estop municipality from relying on its right to deny landowner's application for special exception, did not give rise to cognizable property right under § 1983, since it did not rise to level of either certainty or very strong likelihood that application would have been granted, which is necessary to state legitimate claim of entitlement. 42 U.S.C.A. § 1983.

9. Estoppel ⇐52(2)

Far from being general rule of law whose application can be predicted, estoppel derives from court of equity's duty to do justice, and it necessarily depends upon facts and circumstances in each case.

10. Federal Courts ⇐18

District Court did not abuse its discretion in dismissing landowner's state claims without prejudice after dismissing landowner's section 1983 claim with prejudice, even though state claims were based on same facts and claimed same damages as section 1983 claim; state court was proper forum for local land use dispute. 42 U.S.C.A. § 1983.

W. Michel Pierson, Pierson, Pierson & Nolan, Baltimore, MD, argued for appellant.

Carol Brenick O'Keeffe, argued (Robert H. Levan, on brief) Levan, Schimel, Belman & Abramson, P.A., Columbia, MD, for appellees.

Before WILKINSON and WILKINS, Circuit Judges, and PAYNE, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

WILKINSON, Circuit Judge:

This case arises from a local zoning dispute in Bel Air, Maryland. Appellant Robert Biser claims that the Town of Bel Air deprived him of substantive due process when it denied him a "special exception" that would have permitted him to construct two commercial office buildings in an area zoned for residential use. The Circuit Court for Harford County, Maryland held that the Town was equitably estopped from denying Biser his special exception, which that court ordered the Town to grant. After completing his office buildings, Biser filed this suit under 42 U.S.C. § 1983, claiming $1 million in damages from the Town's delay in granting the special exception. The district court dismissed the complaint for failure to state a claim. 778 F.Supp. 249. We believe that neither the relevant zoning laws nor the ruling of the Circuit Court of Harford County was sufficient to confer a cognizable property interest upon Biser. We thus agree with the district court that this local land use dispute does not belong in federal court.

I.

The complaint alleges these facts. Robert Biser owns a tract of real property located at the corner of Vale Road and Rockspring Avenue in the Town of Bel Air, Maryland. That area has been zoned "R-2" (General Residence), restricting buildings in that area to residential use.

Local ordinances provide for commercial office use in residential areas under certain conditions, if the local Board of Appeals approves a special exception.[1] Maryland

1. The local ordinance provides, subject to the approval of the Board of Appeals, for

> conversion of a dwelling or part thereof into the office or studio of one or more physicians, surgeons, dentists, musicians, artists, lawyers, architects, engineers, teachers, insurance agents, real estate agents, photographers, accountants or other professionals; provided that the exterior residential appearance of the building shall be retained, that no floodlighting shall be used and adequate off-street parking areas shall be provided to accommodate all personnel and patrons. The Board of Appeals may impose further conditions pursuant to Section 16.0443 of this Ordinance in order to protect the neighborhood, adjacent properties and community.

Town of Bel Air Zoning Ordinance No. 208, art. 7.06.

law authorizes the Board of Appeals to decide appeals from decisions by administrative officials as well as to grant special exceptions from certain ordinances. Md. Ann.Code art. 66B, § 4.07(d).

In August 1988, Biser contacted Carol Deibel, Director of Planning and Community Development in Bel Air. He sought her assistance in obtaining a special exception from the residential zoning restrictions. Deibel reviewed Biser's preliminary plans for two office buildings and informed him that his plans required setback variances. Deibel suggested that Biser apply for the setback variances, obtain building permits, construct the buildings, and then request the special exception. Deibel informed Biser that the buildings would have to be built before they could be approved for a special exception.

Biser presented his plans at a meeting of the Board of Appeals on September 27, 1988. He informed the Board of his development plans and his desire to ascertain whether there were any impediments to those plans. The Board expressed no objections to Biser's plans and approved the setback variances.

Biser then submitted his completed building plans with his applications for building permits to the Town's Assistant Planner. The building permits were approved on June 27, 1989, but only after the references to "commercial office buildings" in the applications were struck out and replaced with "dwellings."

After construction had begun, Biser sought approval in August 1989 for his storm water management plans. Town employees informed him that the storm water management plans could not be approved until the Board granted a special exception. Biser again contacted Deibel to ascertain what would be required to secure a special exception. Deibel informed Biser that he could apply for a special exception as long as the buildings were "under roof" and their windows had been installed. Biser completed this construction and applied for a special exception at the Board's meeting on September 26, 1989. The Board did not issue a decision at this meeting.

Two days later, the Town's Superintendent of Public Works issued a "stop-work" order. The order stated that the buildings did not comply with the Building Code's requirements for single family dwellings. Biser protested this order without success. In order to avoid further delays, he installed the kitchen and bathroom facilities necessary to comply with the order. The order was lifted on October 16, 1989.

The Board met again on October 24, 1989 to consider Biser's application for a special exception, which the Board denied. Biser appealed the denial to the Circuit Court for Harford County. The Circuit Court found that the ordinance authorizing special exceptions was ambiguous as to whether use and occupancy permits must be presented before the special exception for conversion of a dwelling to office use could be granted. That court further found that Biser had relied to his detriment on the Town's approval of his building permits, and went on to hold that the Town was equitably estopped from denying Biser his special exception. The Circuit Court remanded to the Board with instructions to grant the special exception. The Town complied with that order forthwith.

After some further delay in the permitting process, Biser completed his office buildings. He then filed this suit under 42 U.S.C. § 1983, claiming that he had been denied due process by the Town's delay in granting his special exception. Biser also made two state law claims based on the same facts. The district court dismissed with prejudice the federal count for failure to state a claim, and declined to exercise pendent jurisdiction over the state claims, which the court dismissed without prejudice. Biser appeals from the complaint's dismissal. The Town cross-appeals, contending that the state claims should have been dismissed with prejudice.

II.

[1] In order for Biser to state a substantive due process claim, he must first demonstrate that he possesses a "cognizable property interest, rooted in state law,"

in the lost benefit. *See Scott v. Greenville County*, 716 F.2d 1409, 1418 (4th Cir.1983). We do not believe that Biser held a property interest in the special exception before it was granted by the Board. A property interest requires more than a "unilateral expectation" that a permit or license will be issued; instead, there must be a "legitimate claim of entitlement." *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). In applying this standard of entitlement, we have held that if a local agency has "[a]ny significant discretion" in determining whether a permit should issue, then a claimant has no legitimate entitlement and, hence, no cognizable property interest. *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir.1992).

Here the Board of Appeals had significant discretion in deciding whether to grant Biser's application for a special exception. In making its decision, the Board had to determine whether granting the exception "would adversely affect the public health, safety, security, morals or general welfare, or would result in dangerous traffic conditions or would jeopardize the lives or property of people living in the neighborhood." Town of Bel Air Zoning Ordinance, No. 208 art. 16.042. It is difficult to imagine a more flexible standard. Moreover, the ordinance requires the Board to consider eighteen separate factors in making this determination. *Id. See also Heath v. Mayor and City Council of Baltimore*, 187 Md. 296, 49 A.2d 799, 803 (1946) (noting discretion of local Boards of Appeals in granting special exceptions). In every respect then, the Board of Appeals possessed significant discretion under *Gardner* in deciding whether to grant special exceptions. Biser had only a unilateral expectation that he would receive the special exception. He possessed no legitimate claim of entitlement, and thus no property right cognizable under the due process clause. The fact that Biser believes that the Board acted arbitrarily on his application does nothing to change the fact that he was not deprived of any entitlement or right.

III.

Biser contends, however, that the Circuit Court of Harford County created a state-law property interest when it held that the Board of Appeals was equitably estopped from denying him the special exception.

[2, 3] We disagree. Under Maryland law, equitable estoppel of a municipal corporation requires (1) an official act taken within the scope of authority; (2) an ambiguous statute or ordinance; and (3) detrimental reliance by a third party. *See Permanent Fin. Corp. v. Montgomery County*, 308 Md. 239, 518 A.2d 123, 127–29 (1986). Equitable estoppel prevents "a defendant from relying upon a right of property, of contract or of remedy both at law or in equity." *Kline v. Lightman*, 243 Md. 460, 221 A.2d 675, 684 (1966). Here the Board was estopped from asserting its legal right to deny the special exception. Estoppel does not, however, give rise to any affirmative duties. *Leonard v. Sav-A-Stop Services, Inc.*, 289 Md. 204, 424 A.2d 336, 339–40 (1981).

[4–7] A subsequent order by a court of equity estopping a municipality from relying on its legal right does not represent a legitimate claim of entitlement. In order to justify substantive due process protection, the legal right to a permit must exist *before* the local agency denies the permit application—the claim of entitlement must come from "an *existing* legislative or administrative standard." *Dean Tarry Corp v. Friedlander*, 826 F.2d 210, 213 (2d Cir. 1987) (emphasis added). Equitable estoppel does not recognize a pre-existing legal right; rather, estoppel bars a defendant from asserting a legal right that it would otherwise be entitled to enforce, based on that party's conduct. *Fitch v. Double "U" Sales Corp.*, 212 Md. 324, 129 A.2d 93, 101 (1957) ("Equitable estoppel operates to prevent a party from asserting his rights under a general technical rule of law, when that party has so conducted himself that it would be contrary to equity and good con-

science to allow him to do so."). Arbitrary conduct standing alone does not create a legitimate claim of entitlement, even if it later leads to a state court judgment. *See Gardner*, 969 F.2d at 71 n. 3. Thus, the fact that Biser obtained a state court order, enforceable by that court's power of contempt, barring the Board of Appeals from denying his application for a special exception, does not mean that he had a preexisting legal right to that special exception.[2]

[8, 9] Moreover, an equitable doctrine premised on statutory ambiguity does not rise to the level of "either a certainty or a very strong likelihood that the application would have been granted," which is necessary to state a legitimate claim of entitlement. *See Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir.1985). Far from being a general rule of law whose application can be predicted, estoppel derives from a court of equity's duty to do justice, and it necessarily "depends upon the facts and circumstances in each case." *Liberty Mut. Ins. Co. v. American Auto. Ins. Co.*, 220 Md. 497, 154 A.2d 826, 828 (1959). Biser could not have anticipated at the time of his application for a special exception that a court of equity would later preclude the Board from asserting its legal right to deny that application. The equitable doctrine of estoppel thus did not give Biser a basis for believing that there was a "very strong likelihood" that his application would be granted.

IV.

[10] Finally, we note that Biser asserted state claims based on these same facts, for which he claims the same damages. Those claims were dismissed without prejudice, and Biser remains free to pursue them in state court. The Town of Bel Air has cross-appealed, claiming that the district court erred in dismissing Biser's state law claims without prejudice. We find no abuse of discretion here. In fact, the district court's order of dismissal properly left a local controversy for local resolution. The Circuit Court for Harford County has already given Biser relief once, and we see no reason why the Maryland courts are now inadequate to hear his current grievances. As we emphasized in *Gardner*, the proper forum for local land-use disputes is state, not federal, court. 969 F.2d at 69.

For the above reasons, the judgment of the district court is

AFFIRMED.

In re Clift C. LANE; Dorothy P. Lane, Debtors.

Clift C. LANE, Plaintiff-Appellant,

v.

William B. SULLIVAN, Defendant-Appellee.

No. 92-1939.

United States Court of Appeals, Fourth Circuit.

Argued March 3, 1993.

Decided April 12, 1993.

Final decree was entered in Chapter 11 case by the United States Bankruptcy Court for the Middle District of North Carolina, and debtor appealed. The District Court, Frank W. Bullock, Jr., Chief Judge,

2. To the extent that *Roy v. City of Augusta, Maine*, 712 F.2d 1517, 1522 (1st Cir.1983), implies otherwise, we respectfully disagree. A state court judgment is something to be enforced through the state's judicial process, including its powers of contempt. Every state court judgment does not provide a would-be plaintiff with a cognizable property right under 42 U.S.C. § 1983, and every alleged delay in the enforcement of the mandate does not provide a plaintiff with a claim of deprivation without due process of law. To hold otherwise would assign the federal courts the role of ombudsmen in monitoring the execution of state judgments, a role Congress surely did not envision in passing this statute, and one that would be destructive of federal-state relations.

are free to "construe our own constitution differently" from the construction given the Federal Constitution, even when the provisions are identical; provided "our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel Federal provision." *State v. Carter*, 322 N.C. 709, 713 370 S.E.2d 553, 555 (1988). The Federal and State Constitutional provisions relating to the right to confrontation are essentially identical[4] and the case law in this State supports the conclusion that a defendant is entitled to greater protection under the Confrontation Clause of the State Constitution than he is entitled to under the Federal Constitution. Therefore, the prosecution in a criminal trial must, as a prerequisite to the introduction of hearsay evidence, show the necessity for using the hearsay testimony and establish the inherent trustworthiness of the original declaration.

[5] In this case, although Mrs. Jackson's testimony falls within a firmly rooted hearsay exception, because Jackson (the out-of-court declarant) was available as a witness, the trial court erred in admitting Mrs. Jackson's testimony of her conversation with Jackson.

III

[6] We must now consider whether the trial court's erroneous admission of Mrs. Jackson's testimony was prejudicial to the defendant. Because the error is of constitutional dimensions it is "presumed to be prejudicial" and entitles the defendant "to a new trial unless the error committed was harmless beyond a reasonable doubt." *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert.* denied, 459 U.S. 1080, 103 S.Ct. 503, 74 L.Ed.2d 642 (1982); *cf.* N.C.G.S. § 15A–1443(b) (1988) (violation of Federal Constitution is prejudicial unless harmless beyond a reasonable doubt).

Our review of the entire record reveals that the hearsay testimony of Mrs. Jackson was central to the State's case. That evidence: (1) placed a handgun in the possession of the defendant the day before the assault; (2) shows that the defendant threatened the life of Jackson with that handgun the day before the assault; and (3) reveals that Jackson was "scared" of the defendant. This evidence is inconsistent with reasonable inferences to be drawn from the defendant's testimony at trial: (1) she did not have a handgun on the day of the assault; (2) Jackson had the handgun and was the aggressor on the day of the assault; and (3) she shot Jackson only in self-defense. Because of the vital importance of the hearsay testimony to the State's case, the State has failed to meet its burden of showing that the testimony was not prejudicial. In the context of a Constitutional error it is only the presence of overwhelming evidence of guilt that renders the error harmless beyond a reasonable doubt. *State v. Autry*, 321 N.C. 392, 403, 364 S.E.2d 341, 348 (1988). The evidence in this case is not overwhelming.

New Trial

WALKER and McGEE, JJ., concur.

BROWNING–FERRIS INDUSTRIES OF SOUTH ATLANTIC, INC., Petitioner

v.

GUILFORD COUNTY BOARD OF ADJUSTMENT and Kay Chemical Company, Endura Products, Inc., Foundation Services, Inc., GBA Systems, Golden State Foods Corp., and P.M. Tube & Specialty, Inc., Charles and Catherine Mears, Louise J. Rice, Mrs. Clinton R. Tucker and Larry E. Tucker, Respondents.

No. COA96–750.

Court of Appeals of North Carolina.

May 6, 1997.

Landowner seeking to construct and operate solid waste transfer station sought re-

4. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right to ... be confronted with the witnesses against him." U.S. Const., Amend. VI. The North Carolina Constitution provides in pertinent part: "In all criminal prosecutions, every person charged with crime has the right ... to confront the accusers and witnesses with other testimony." N.C. Const. art. I, § 23.

view of county board of adjustment's decision that amendment to county development ordinance requiring special use permits for transfer stations on property zoned heavy industrial applied to landowner's proposed station. The Superior Court, Guilford County, Sanford L. Steelman, Jr., J., affirmed. Landowner appealed. The Court of Appeals, Greene, J., held that landowner did not have vested right to proceed with construction and operation of transfer station under preamended ordinance.

Affirmed.

1. Zoning and Planning ⇐745.1

Court of Appeals would review de novo a county board of adjustment's decision that amendment to county development ordinance requiring special use permits for solid waste transfer stations on property zoned heavy industrial applied to landowner's proposed station, where landowner claimed that board misapplied vested rights standard and erred as matter of law.

2. Zoning and Planning ⇐151

As general proposition, adoption of zoning ordinance does not confer upon citizens any vested rights to have ordinance remain forever in force, inviolate, and unchanged.

3. Zoning and Planning ⇐465

Common law right to develop and/or construct vests when: (1) party has made, prior to amendment of zoning ordinance, expenditures or incurred contractual obligations "substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building," (2) obligations and/or expenditures are incurred in good faith, (3) obligations and/or expenditures were made in reasonable reliance on and after issuance of valid building permit, if such permit is required, authorizing use requested by party, and (4) amended ordinance is detriment to party; burden is on landowner to prove each element.

4. Zoning and Planning ⇐376

Where multiple permits are required preliminary to issuance of building permit, and substantial obligations and/or expenditures are incurred in good faith reliance on issuance of those permits, party acquires vested right in those provisions of ordinance or regulation pursuant to which preliminary permits were issued.

5. Zoning and Planning ⇐376

Landowner did not have vested right to proceed with construction and operation of solid waste transfer station under preamended county development ordinance, which, unlike amended ordinance, did not require issuance of special use permit prior to construction and operation of station, despite claim that landowner expended $582,000 in purchase and development of station in good faith reliance on preamended ordinance, agency letter, and conditional approval of site development plan; landowner did not obtain building permit before ordinance was amended, and nothing in record suggested that landowner was prejudiced.

Appeal by petitioner from order filed 16 April 1996 in Guilford County Superior Court by Judge Sanford L. Steelman, Jr. Heard in the Court of Appeals 26 February 1997.

Petree Stockton, L.L.P. by Richard E. Glaze, Stephen R. Berlin, and Donald M. Nielsen, Winston-Salem, for petitioner-appellant.

Office of the Guilford County Attorney by Jonathan V. Maxwell, and J. Edwin Pons, Greensboro; Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. by Jim W. Phillips, Jr., William G. Ross, and John R. Archambault, Greensboro; and Patton Boggs, L.L.P. by James S. Schenck, IV, Greensboro, for respondent-appellees.

GREENE, Judge.

Browning-Ferris Industries of South Atlantic, Inc. (BFI) appeals the Superior Court's 11 April 1996 order (order) affirming the Guilford County Board of Adjustment's (Board) decision that the 23 March 1995 amendment (amendment) to the Guilford County Development Ordinance (Ordinance) requiring special use permits for transfer

stations[1] on property zoned Heavy Industrial (HI) applies to BFI's proposed solid waste transfer station.

On 13 June 1994 James D. Elza (Elza), Director of the Department, informed BFI that a tract of land containing approximately 9.66 acres of land (Little Santee tract) was zoned HI and that a transfer station "is a permitted use in the HI zone." Elza further informed BFI that the Little Santee tract was "also in a watershed and will need to meet the watershed requirements as well as driveway, parking, landscaping and other requirements of the [Ordinance]."

BFI applied to the North Carolina Department of Environment, Health and Natural Resources (DEHNR) in July of 1994 to obtain a transfer station permit. In August of 1994 BFI submitted to the Guilford County Planning and Development Department (Department) a site development plan as required by Section 3-11.2 of the Ordinance.[2] DEHNR issued the transfer station permit on 8 November 1994. The Guilford County Technical Review Committee (TRC) reviewed the site development plan and neither approved or rejected the plan. BFI resubmitted a revised set of site development plans on 21 November 1994. On 2 December 1994 BFI purchased the Little Santee tract. In February 1995 DEHNR revoked the transfer station permit because it had not fulfilled all the Ordinance's requirements.

On 21 February 1995 the Board determined that transfer stations were permitted by right in HI zones. On 14 March 1995 the TRC "conditionally approved" the site development plan "subject to" twelve conditions and BFI was further instructed to "[r]evise and resubmit all drawings for complete plan." On 22 March 1995 BFI resubmitted a revised plan. On 23 March 1995 the Guilford County Board of County Commissioners (County) adopted an amendment to the Ordinance (effective upon passage) providing that the construction and operation of a transfer station would require "a special use permit," a permit not required under the pre-amended Ordinance. On 18 May 1995 Elza (in a letter) informed BFI that the 22 March 1995 plan "did not comply with the [O]rdinance requirements that it meet all approval conditions as listed by the [TRC] on March 14, 1995." Elza then stated (in the letter) that he could not "issue a *final* approval."

On 19 May 1995, the North Carolina Department of Justice ruled that because the transfer station permit "was issued without an appropriate zoning approval letter from Guilford County, the permit was void from the time of issuance." On 20 June 1995 the Board determined that Elza's decision was "improper" and found as fact that on 22 March 1995 BFI had fulfilled all conditions enumerated by TRC when it granted conditional approval on 14 March 1995. On 20 June 1995 the Board rejected BFI's claim that it had acquired a common law vested right to construct and operate a transfer station on the Little Santee tract without obtaining a special use permit. In support of its ruling the Board found that "[n]o valid permits had been approved for this project and ... BFI has not demonstrated ... that they have spent money following the issuance of a conditional approval of the [site development plan]." BFI appealed the Board's decision to the Superior Court which upheld the Board's decision in a 11 April 1996 order.

The record reveals that BFI had incurred expenses as of 23 March 1995 in the approximate amount of $582,000: $520,000 for land purchase and related fees, $49,000 for engineering consultation, $5,000 for design expense, and $8,000 for miscellaneous expenses.

The issue is whether BFI has a vested right to proceed with the construction and operation of a transfer station on the Little Santee tract under the pre-amended Ordinance.

[1] BFI argues that the Board "misapplied the vested rights standard and erred as a matter of law." Accordingly, this Court's

1. A transfer station is a facility where garbage collection vehicles empty the garbage they have collected locally. The garbage is then transferred into larger vehicles for transportation to a landfill.

2. The Ordinance requires that no "building permit shall be issued" until a site development plan has been approved. Ordinance, § 3-11.1(B).

review of the Board's decision is *de novo*. *Ballas v. Town of Weaverville*, 121 N.C.App. 346, 349, 465 S.E.2d 324, 326 (1996).

In this case before BFI constructed the transfer station on the Little Santee tract or was issued a building permit authorizing such construction, the County amended the Ordinance to require the issuance of a special use permit prior to the construction and operation of the transfer station. The special use permit was not a requirement of the pre-amended Ordinance. BFI argues that it is not required to obtain a special use permit under the amended Ordinance because it has a vested right to proceed with the development of the transfer station pursuant to the pre-amended version of the Ordinance. The basis of the argument is that it has expended $582,000 in the purchase and development of the transfer station site in good faith reliance on the pre-amended Ordinance, the 13 June 1994 letter from Elza, and the conditional approval of its site development plan.

[2] As a general proposition "[t]he adoption of a zoning ordinance does not confer upon citizens ... any vested rights to have the ordinance remain forever in force, inviolate and unchanged." *McKinney v. City of High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954). North Carolina does, however, recognize two methods for a landowner to establish a vested right in a zoning ordinance: (1) qualify with relevant statutes: N.C.G.S. § 153A-344.1 (1991)(counties), N.C.G.S. § 160A-385.1 (1994)(cities and towns); or (2) qualify under the common law, *Town of Hillsborough v. Smith*, 276 N.C. 48, 54, 170 S.E.2d 904, 909 (1969); N.C.G.S. § 153A-344.1(f)(2); N.C.G.S. § 160A-385.1(f)(2). In this case, BFI argues that it is entitled to a vested right pursuant to the common law and we address only that issue.

[3] The common law vested rights doctrine is "rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions" and "has evolved as a constitutional limitation on the state's exercise of its police power[s]." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986). A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations "substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building," *Town of Hillsborough v. Smith*, 276 N.C. at 55, 170 S.E.2d at 909; (2) the obligations and/or expenditures are incurred in good faith, *Id.*; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party, *Id.* (requiring building permit); *In re Campsites Unlimited*, 287 N.C. 493, 501, 215 S.E.2d 73, 77 (1975)(permit not required for vesting if permit not required under law in effect at time of expenditures); *Mecklenburg County v. Westbery*, 32 N.C.App. 630, 635, 233 S.E.2d 658, 661 (1977)(a mistakenly-issued permit cannot give rise to a vested right); *Warner v. W & O, Inc.*, 263 N.C. 37, 41, 138 S.E.2d 782, 786 (1964)(expenditures made prior to issuance of permit "not made in reliance on the permit"); *see Avco Com. Developers v. South Coast Reg. Comm'n*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 390-91, 553 P.2d 546, 551 (1976)(preliminary governmental approval not sufficient to support vested right); and (4) the amended ordinance is a detriment to the party. *See Russell v. Guilford County*, 100 N.C.App. 541, 545, 397 S.E.2d 335, 337 (1990); *see also* David W. Owens, *Legislative Zoning Decisions* (Institute of Government, 1993). The burden is on the landowner to prove each of the above four elements.

[4] In those situations where multiple permits are required preliminary to the issuance of the building permit, and substantial obligations and/or expenditures are incurred in good faith reliance on the issuance of those permits, the party does acquire a vested right in those provision(s) of the ordinance or regulation pursuant to which the preliminary permit(s) was issued. *See Cardwell v. Smith*, 106 N.C.App. 187, 192, 415 S.E.2d 770, 774, *cert. denied*, 332 N.C. 146, 419 S.E.2d 569 (1992)(landowner has vested right in ordinance provision under which special use permit had been issued).

[5] In this case there is no evidence that BFI obtained a building permit and thus it is not entitled to a vested right to proceed with the construction and operation of the transfer station consistent with the pre-amended Ordinance. In so holding we reject the arguments of BFI that substantial expenditures in reliance on the pre-amended Ordinance, the 13 June 1994 letter from Elza or the conditional approval of the site development plan gives rise to a vested right to construct and operate a transfer station. BFI's claim of a vested right is also properly rejected for another reason. There is nothing in this record to show that BFI would be prejudiced or harmed if the amended Ordinance is held to apply to its efforts to construct and operate the transfer station. The mere requirement (in the amended Ordinance) that BFI acquire a special use permit prior to construction and operation of the transfer station is not itself supportive of an argument that BFI has been prejudiced by the amended Ordinance.

The trial court correctly affirmed the decision of the Board.

Affirmed.

MARK D. MARTIN and McGEE, JJ., concur.

ROCKINGHAM COUNTY DEPARTMENT OF SOCIAL SERVICES, ex rel. Anne R. SHAFFER (Stout), Plaintiff,

v.

Todd A. SHAFFER, Defendant 1

Ronald Wayne Hamilton, Jr., Defendant 2.

No. COA96-757.

Court of Appeals of North Carolina.

May 6, 1997.

Paternity action was brought against two men. The District Court, Rockingham County, Richard W. Stone, J., after trial by jury, held that second man was father of child. Second man appealed. The Court of Appeals, Greene, J., held that chain of custody of blood samples was not properly established, either under statute or common-law rule.

Reversed and remanded.

1. Children Out-of-Wedlock ⇐45

Statute could not be relied upon to establish chain of custody of blood specimens used to establish paternity, even though chain of custody of blood specimens was certified, as there was no evidence that chain of custody of the blood tests relied on was verified as required by statute. G.S. § 8-50.1(b1).

2. Children Out-of-Wedlock ⇐45

For purposes of establishing chain of custody of blood test in paternity action, verification by affidavit requires that the verification be sworn to before a notary public or other officer of the court authorized to administer oaths. G.S. § 8-50.1(b1).

3. Children Out-of-Wedlock ⇐45

Common-law requirement in paternity action that blood tests be accurately identified by proving a chain of custody to insure that substance came from source claimed and that its condition was unchanged, can be met through competent evidence regarding the chain of possession, transportation and safekeeping of the blood sample sufficient to establish a likelihood that the blood tested was in fact blood drawn from the alleged parent.

4. Children Out-of-Wedlock ⇐45

Blood test results were not admissible in paternity action under common-law rule which requires independent evidence of chain of custody, where no witness testified to proper chain of possession, transportation and safekeeping of blood samples sufficient to establish a likelihood that blood tested was in fact blood drawn from defendant.

the jury after ruling in Southeastern's favor that it was entitled to indemnification from Herzig. Southeastern contends the result was inconsistent verdicts. However, these arguments are moot due to this Court's decision concerning the assignability of unfair practice claims.

VII.

Southeastern argues that the trial court abused its discretion by denying defendant's motion for a new trial under Rule 59 of the North Carolina Rules of Civil Procedure. Under this Rule, a party may obtain a new trial either for errors of law committed during the trial or for a verdict not sufficiently supported by the evidence. *See generally Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985); *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982). The grounds for a new trial relied upon by Southeastern are outlined in Rule 59 of the North Carolina Rules of Civil Procedure: "(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law; (8) Error in law occurring at the trial and objected to by the party making the motion, or (9) Any other reason heretofore recognized as grounds for new trial."

[14, 15] Our courts have held repeatedly since 1820 that the ruling of a judge on a motion for a new trial is in the sound discretion of the trial judge. In the absence of abuse of discretion, such ruling is not reversible on appeal. *See generally Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989); *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986); *Armstrong v. Wright*, 8 N.C. 93 (1820). Southeastern fails to cite any error in law occurring at trial to which it objected. It fails to demonstrate how the abundance of evidence presented can be deemed insufficient to justify the verdict reached. It fails to show any abuse of discretion by the trial judge. We overrule this argument.

VIII.

Southeastern argues that the restrictive covenants placed on the land when it was transferred by the City of Henderson to Henderson Heights, Ltd. are void as a restriction on alienation. This argument cannot be raised for the first time in this Court as it was not presented to the trial court or the Court of Appeals. *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983).

In summary, we hold that a claim for unfair practices under N.C.G.S. § 75-1.1 cannot be assigned. However, Investors is subrogated to the Bank's claim to the amount it paid to the Bank as determined by the jury's verdict and is entitled to a judgment in that amount. We hold that discretionary review as to petitioner Everett, Creech, Hancock & Herzig was improvidently allowed.

The decision of the Court of Appeals is reversed and this cause is remanded to that court for further remand to the Superior Court, Durham County, for the entry of judgment against defendant Southeastern in the amount of $34,364.38 and the costs of this action.

REVERSED AND REMANDED AS TO DEFENDANT SOUTHEASTERN.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED AS TO DEFENDANT PARTNERSHIP.

WHICHARD, J., did not participate in the consideration or decision of this case.

330 N.C. 761

Dr. Alvis L. CORUM

v.

UNIVERSITY OF NORTH CAROLINA Through its BOARD OF GOVERNORS; C.D. Spangler, President of the University of North Carolina in his official capacity; Appalachian State University; and John Thomas, Chancellor of Appalachian State University, and Harvey Durham.

No. 163PA90.

Supreme Court of North Carolina.

Jan. 31, 1992.

University faculty member who was discharged from his position as dean

brought action against university and university officials, alleging that his discharge violated his right to free speech. The Superior Court, Watauga County, Marvin K. Gray, J., denied defendants' motion for summary judgment, and defendants appealed. The Court of Appeals, 97 N.C.App. 527, 389 S.E.2d 596, affirmed in part, reversed in part, and remanded. The Supreme Court, Martin, J., held that: (1) professor had cause of action, under § 1983, against university vice-chancellor, sued in his official capacity; (2) professor had cause of action, under § 1983, for monetary damages against university vice-chancellor sued in his individual capacity; and (3) professor had direct cause of action, under State Constitution, against university vice-chancellor sued in his official capacity.

Affirmed in part, reversed in part, and remanded.

Webb, J., dissented.

1. Appeal and Error ⇐70(8)

Although denial of summary judgment motion is normally not immediately appealable, when motion for summary judgment based upon immunity defenses to § 1983 claim is denied, such interlocutory order is immediately appealable before final judgment. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐206(1), 207(1)

State university faculty member could not maintain federal civil rights claim for monetary damages against state university and individual university officials in their official capacities, as neither state nor its officials acting in their official capacity are "persons" for purposes of § 1983 when remedy sought is money damages; overruling *Truesdale v. University of North Carolina*, 91 N.C.App. 186, 371 S.E.2d 503. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights ⇐214(1)

Sovereign immunity cannot bar liability in federal civil rights actions filed in state courts. 42 U.S.C.A. § 1983.

4. Civil Rights ⇐206(1), 207(1)

State university faculty member could maintain federal civil rights claim for injunctive relief from state university and university officials acting in their official capacities, based upon alleged violation of faculty member's right to free speech as, in this context, university and university officials are "persons" reachable under § 1983. 42 U.S.C.A. § 1983.

5. Civil Rights ⇐214(1)

Defense of qualified immunity is not available under federal civil rights statute to one sued in his official capacity. 42 U.S.C.A. § 1983.

6. Civil Rights ⇐214(1)

Determination as to whether qualified immunity defense is appropriate in federal civil rights action requires proof of official's intent where existence of constitutional violation depends on proof of motivation. 42 U.S.C.A. § 1983.

7. Constitutional Law ⇐90.1(7.2)

Public employee's right to speak is not absolute, but is limited by government's need to preserve efficient governmental functions. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐90.1(7.2)

Public employee's right to freedom of speech is limited, in that only speech on matter of public concern is constitutionally protected. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇐90.1(7.2)

In order to determine whether public employee's speech concerns matter of public interest, court examines content, form, and context of speech in question. U.S.C.A. Const.Amend. 1.

10. Constitutional Law ⇐90.1(7.2)

Only where court determines that public employee's speech concerned matter of public interest does court apply balancing test to determine whether public employee's right to free speech is outweighed by government's need to preserve efficient governmental functions. U.S.C.A. Const. Amend. 1.

11. Constitutional Law ⇐90.1(7.2)

University professor's comments concerning proposed relocation of university's collection of historical materials related to matter of public concern, for purposes of First Amendment protection, where question of where to house those materials had been publicly debated on campus. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ⇐90.1(7.2)

In determining whether public employee's right to freedom of speech is outweighed by government's interest in preserving efficient governmental functions, considerations such as whether speech impairs discipline by superiors or harmony among co-workers, has detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes performance of speaker's duties, or interferes with regular operation of enterprise are relevant in balancing two competing interests. U.S.C.A. Const. Amend. 1.

13. Colleges and Universities ⇐8.1(3)
Constitutional Law ⇐90.1(7.2)

University professor had constitutionally protected right to speak out with regard to proposed relocation of university's collection of historical materials where relocation was matter of public concern, professor's comments did not impede his performance of his duties or interfere with regular operation of university, professor participated in packing and moving of collection, and professor's comments could not have affected and did not affect decision to move collection. U.S.C.A. Const.Amend. 1.

14. Civil Rights ⇐214(5)

In federal civil rights action brought by university professor against university vice-chancellor in his official capacity, based on vice-chancellor's alleged violation of professor's right to freedom of speech, vice-chancellor's subjective beliefs regarding legality of demoting professor after professor publicly opposed vice-chancellor's decision to relocate university collection of historical materials were irrelevent; issue was whether reasonable vice-chancellor could have believed that demoting professor was lawful in light of clearly established law and information which he possessed at time. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 1.

15. Civil Rights ⇐214(5)

Inquiry into motive or intent of university vice-chancellor who demoted university professor after professor spoke out against vice-chancellor was necessary to determination as to whether reasonable vice-chancellor could have believed that demotion was lawful in light of clearly established law; if vice-chancellor's motive was to suppress speech, then material question of fact would exist as to whether demotion was constitutionally justified. U.S.C.A. Const. Amend. 1.

16. Judgment ⇐181(27)

Genuine issue of material fact existed as to university vice-chancellor's motive in demoting university professor who publicly opposed vice-chancellor's plan to relocate university's collection of historical materials where, although professor was responsible for collection, vice-chancellor misled professor as to whether collection would be kept intact after it was moved, and professor, when he learned of collection's eventual destination, presented alternative proposal to vice-chancellor's representative and told representative that he wanted to talk to vice-chancellor before he would take any action regarding collection. U.S.C.A. Const.Amend. 1.

17. Colleges and Universities ⇐8.1(3)
Constitutional Law ⇐90.1(7.2)

No genuine issue of material fact existed as to whether state university, state university president, or state university chancellor violated university professor's right to freedom of speech where, although professor presented evidence that university vice-chancellor had demoted him in retaliation for his public comments opposing decision of vice-chancellor, professor failed to show any improper action or motive on part of university, university president, or university chancellor. U.S.C.A. Const. Amend. 1.

18. Constitutional Law ⇐90(1)

State constitutional provision which states that "freedom of speech and of the press * * * shall never be restrained * * *" is direct personal guarantee of each citizen's right of freedom of speech. Const. Art. 1, § 14.

19. States ⇐193

In absence of adequate state remedy, one whose state constitutional rights have been abridged by state has direct claim against state under State Constitution.

20. Constitutional Law ⇐32

Provision of State Constitution which protects right of freedom of speech is self-executing, and therefore, common law, which provides remedy for every wrong, will furnish appropriate action for adequate redress of violation of that right. Const. Art. 1, § 14.

21. Constitutional Law ⇐90(1)

Freedom of speech is equal, if not paramount, to individual right of entitlement to just compensation for taking of property by state, and right of free speech should be protected at least to extent that individual rights to possession and use of property are protected. Const. Art. 1, § 1 et seq.

22. States ⇐193

Direct action against state for its violations of free speech is essential to preservation of free speech. Const. Art. 1, § 14.

23. Constitutional Law ⇐82(1)

Purpose of State Constitution's Declaration of Rights is to ensure that violation of individual and personal rights by anyone invested with powers of state is never permitted. Const. Art. 1, § 1 et seq.

24. Constitutional Law ⇐45

Supreme Court is ultimate interpreter of State Constitution.

25. Constitutional Law ⇐45

State judiciary has responsibility to protect state constitutional rights of citizens.

26. Constitutional Law ⇐82(1)

State Constitution is more detailed and specific than Federal Constitution in protection of rights of its citizens.

27. Constitutional Law ⇐48(4)

Supreme Court gives State Constitution liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard liberty and security of citizens in regard to both person and property.

28. States ⇐193

State university professor had direct cause of action under State Constitution against university vice-chancellor, in his official capacity, where vice-chancellor allegedly violated professor's free speech rights by demoting professor after professor publicly opposed decision of vice-chancellor. Const. Art. 1, § 14.

29. Civil Rights ⇐108

Common law provides remedy for violation of plaintiff's constitutionally protected right of free speech, and what remedy will require, if plaintiff is successful at trial, will depend upon facts of case as developed at trial; various rights protected by Declaration of Rights may require greater or lesser relief to rectify their violation, depending upon right violated and facts of particular case. Const. Art. 1, § 14.

30. Constitutional Law ⇐70.1(1), 72

When called upon to exercise its inherent constitutional power to fashion common-law remedy for violation of particular constitutional right, judiciary must vow to establish claims and remedies where these provide alternative to extraordinary exercise of its inherent constitutional power, and judiciary must minimize encroachment upon other branches of government, in appearance and in fact, by seeking least intrusive remedy available and necessary to right wrong.

31. States ⇐191(1)

When there is clash between constitutional rights of citizens under Declaration of Rights, and sovereign immunity, consti-

tutional rights must prevail. Const. Art. 1, § 14.

32. Civil Rights ⟹451

There is no direct cause of action, under State Constitution, for monetary damages against persons, sued only in their individual capacities, who have allegedly violated plaintiff's constitutional right of free speech. Const. Art. 1, § 14.

33. Election of Remedies ⟹5

Plaintiff is not required to elect among his remedies at summary judgment hearing. Rules Civ.Proc., Rule 18(a), (e)(2), G.S. § 1A-1.

On appeal and discretionary review of an opinion by the Court of Appeals, 97 N.C.App. 527, 389 S.E.2d 596 (1990), reversing an order entered 21 October 1988 by Gray, J., which denied defendants' motion for summary judgment. Heard in the Supreme Court 11 February 1991.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by John W. Gresham, Charlotte, for plaintiff-appellant/appellee.

Lacy H. Thornburg, Atty. Gen. by Thomas J. Ziko, Sp. Deputy Atty. Gen., and Laura E. Crumpler, Asst. Atty. Gen., Raleigh, for defendant-appellants/appellees.

William G. Simpson, Jr., Raleigh, John Vail, Morganton, Travis Payne, Raleigh, J. Michael McGuinness, Boston, Mass., for amicus curiae North Carolina Civil Liberties Union Legal Foundation, and M. Jackson Nichols, Raleigh, for amicus curiae North Carolina Ass'n of Educators.

MARTIN, Justice.

For the reasons stated below, we reverse in part and affirm in part the decision of the Court of Appeals. Plaintiff filed this action on 20 February 1987 seeking injunctive relief and damages for the defendants' alleged retaliation against plaintiff for his exercise of certain free speech rights. Plaintiff's claims were brought under the North Carolina Constitution Article I, Sections 14, 19, and 35 and 42 U.S.C. § 1983. After filing an answer containing defenses, which included sovereign immunity and qualified immunity, defendants moved for summary judgment. Defendants' motion for summary judgment was denied on 21 October 1988.

[1] Defendants appealed the denial of their motion for summary judgment to the Court of Appeals. The Court of Appeals properly reasoned that a denial of a summary judgment motion is normally not immediately appealable; however, under the case of *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), when a motion for summary judgment based on immunity defenses to a section 1983 claim is denied, such an interlocutory order is immediately appealable before final judgment. The Court of Appeals went on to hold that the trial court erred in denying defendants' summary judgment motion with respect to plaintiff's 42 U.S.C. § 1983 claims, except for the motion pertaining to plaintiff's claims against individual defendants Spangler, Thomas, and Durham in their official capacities only for prospective injunctive relief. The Court of Appeals further held that the trial court erred in failing to grant defendants' motion for summary judgment with respect to plaintiff's claims brought under the State Constitution regarding the University of North Carolina, Appalachian State University, and the three individual defendants in their official capacities. The Court of Appeals also held that the defendants' motion was properly denied insofar as it concerned plaintiff's claims for monetary damages against the two individually named defendants for violation of plaintiff's state constitutional rights.

Viewing the record in the light most favorable to plaintiff, as we must when evaluating a summary judgment motion, the following facts arise upon the record. In early summer 1984, the plaintiff, a tenured faculty member at Appalachian State University, was the Dean of Learning Resources, a position he had held for approximately fourteen years. As Dean, Dr. Corum's responsibilities included supervising Appalachian State University's academic support units, including the library, the audiovisual services, and the Appalachian Col-

lection. The Appalachian Collection, a diversified collection of books, research reports, music, and artifacts, represents the mountain culture of the Southern Appalachian Region. Until mid-summer 1984 the Appalachian Collection was housed in the Daughtery Library.

Beginning in September 1983 and continuing for several months, various administrators at Appalachian State University ("ASU") discussed the possibility of moving the Appalachian Collection out of the Daughtery Library into different facilities. The plaintiff's chief concern regarding this move was that the Appalachian Collection remain intact so that the artifacts would not be split off from the books, manuscripts, and other materials. In the administrative chain of command at ASU the person responsible for deciding where the Appalachian Collection would be moved and whether it would be broken up was defendant, Dr. Harvey Durham. Dr. Durham was the Vice Chancellor for Academic Affairs and Dr. Corum's immediate supervisor.

In December 1983 Dr. Durham decided to split up the Collection and move the artifacts to University Hall, a building on the campus where the artifacts would form the basis of a new museum. The decision to split the artifacts off from the rest of the Collection was not communicated to Dr. Corum at this time; however, the decision was documented by a memorandum written at or near the time of the decision.

On 21 June 1984 Dr. Durham informed Dr. Corum that the Appalachian Collection would be moved to University Hall and that the move would need to be completed within a two-week period. On that same day, Dr. Durham informed Dr. Corum that the relocation of the Collection also entailed removing the personnel and budget supporting the Collection from Dr. Corum's purview to a new administrative home. While Dr. Corum expressed concern over this transfer, he accepted the decision as one which was workable because, in his understanding, it would at least maintain the physical integrity of the Collection. Dr. Durham did not inform Dr. Corum at this time that the artifacts would be separate from the rest of the Collection. Dr. Corum proceeded to set up a subsequent meeting with relevant administrators in order to work out the details of the moving of the Collection; the next meeting was scheduled for 25 June 1984.

At the 25 June meeting, Dr. Corum met with Dr. Barker, ASU's Librarian; Ms. Ball, the library staff member associated with the Appalachian Collection; and Dr. Clinton Parker, an Associate Vice Chancellor of Academic Affairs. Dr. Parker attended the meeting as Dr. Durham's representative because Dr. Durham had gone out of town. At the outset of the meeting on 25 June, Dr. Parker announced to those assembled that the written materials in the Appalachian Collection would be moved to University Hall, while the artifacts would be stored in Belk Library. Dr. Corum later testified that he saw this announcement as a dramatic shift from the directions previously given to him by defendant Durham.

The day after this meeting, plaintiff sought to present an alternative plan for the relocation of the Appalachian Collection, a plan that would keep the Collection secure and physically intact. Dr. Corum read aloud his proposal for an alternate location during a meeting held 26 June 1984 that was attended by Dr. Parker and Dr. William Strickland, Dean of Arts and Sciences at ASU. In the memorandum that he read to those assembled, Dr. Corum claimed that Dr. Durham's decision to move the Collection to University Hall presented many problems. Dr. Corum proposed instead to move the Collection into Belk Library and intershelve the holdings with the regular university library. To this proposal Dr. Parker responded that he had no authority to change Dr. Durham's decision. However, Dr. Parker volunteered to try to contact Dr. Durham to let him know of Dr. Corum's concerns. Dr. Parker did contact Dr. Durham later in the evening regarding Dr. Corum's concerns.

There is a material issue of fact in dispute as to whether at the 26 June meeting Dr. Corum refused to implement the move as per Dr. Durham's 21 June directive or

whether he encouraged his staff to go ahead with the move. The defendants' position is that Dr. Corum announced at the meeting that he would not go through with the move until he could talk to Dr. Durham. Dr. Corum's account is that he did not resist the move and cooperated fully despite his misgivings about the decision. Dr. Corum actually physically helped in the packing and moving.

When Dr. Parker called Dr. Durham after the 26 June meeting, Dr. Durham responded by immediately returning to ASU. Dr. Durham met at 6:30 a.m. on 27 June with defendant Dr. Thomas, the Chancellor of ASU. At 8:30 a.m. Dr. Durham met with Dr. Corum and informed him that he was being removed from his deanship. There is no evidence that Dr. Durham gave Dr. Corum an opportunity to explain his proposal or to comment on the events of the previous day. Chancellor Thomas subsequently affirmed Dr. Durham's decision to remove Dr. Corum from his duties as Dean of Learning Resources. Dr. Corum has, however, retained his position as a tenured faculty member.

Plaintiff contends that defendants discharged him from his deanship in retaliation for his speaking freely about the moving of the Appalachian Collection. Plaintiff contends that Dr. Durham's concealment of the fact that the Collection was to be split was intended to make the move administratively easier by preventing vocal opposition to the decision. When this "ruse" was discovered and exposed by Dr. Corum in his speaking out, defendants improperly removed him in retaliation for his speech. Plaintiff seeks damages and, among other things, reinstatement as Dean of Learning Resources as a result of this impermissible retaliatory removal.

It is defendants' position that the sole reason Dr. Corum was removed from his deanship was because he refused to carry out the move, and this insubordination justified his demotion.

Plaintiff filed a grievance proceeding with the University of North Carolina ("UNC") which resulted in a decision that Dr. Corum had failed to prove that his removal from the deanship was impermissibly based on his exercise of his right to freedom of speech. After this proceeding was completed Dr. Corum filed the instant case on 20 February 1987.

I. 42 U.S.C. § 1983 CLAIMS

Plaintiff's complaint alleges:

> 24. In relieving plaintiff of his duties as Dean and in denying plaintiff salary increases in retaliation for plaintiff having exercised his First Amendment rights, defendants violated plaintiff's rights protected by the First and Fourteenth Amendments of the Constitution of the United States. Such acts are in violation of 42 U.S.C. § 1983.

Under 42 U.S.C. § 1983, plaintiff sought a preliminary and permanent injunction, additional equitable relief including reinstatement, promotion, and compensatory seniority, as well as monetary damages. Section 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding to redress.

42 U.S.C. § 1983 (1979). The law regarding the interpretation of section 1983 is labyrinthine; for purposes of clarity we discuss the law in terms of several subcategories.

A. ASU, UNC, and State Officials—Official Capacities

[2, 3] The text of section 1983 permits actions only against a "person." In *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the Supreme Court held that when an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacity are "per-

sons" under section 1983 when the remedy sought is monetary damages.[1] *Accord Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Thus, under section 1983 plaintiff in the instant case is barred from seeking damages from UNC, ASU, Harvey Durham in his official capacity, Dr. Thomas in his official capacity, or C.D. Spangler in his official capacity.[2]

[4] Notably however, when injunctive relief is being sought under section 1983 from State institutions or employees acting in their official capacities, such equitable actions are not barred. The *Will* court explained:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham,* 473 US [159] at 167, n 14, 87 LEd2d 114, 105 SCt 3099 [3106 n. 14]; *Ex parte Young,* 209 US 123, 159–160, 52 LEd 714, 28 SCt 441 [454] (1908).

Will, 491 U.S. at 71 n. 10, 109 S.Ct. at 2311 n. 10, 105 L.Ed.2d at 58 n. 10. Therefore, plaintiff's action against UNC, ASU, and the individual defendants sued in their official capacities for prospective equitable relief is not barred because in this context these defendants are "persons" reachable under section 1983.

[5] In addition, under the federal cases interpreting section 1983, sovereign immunity alleged under state law is not a permissible defense to section 1983 actions. *Martinez v. California,* 444 U.S. 277, 283, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 488 (1980) (sovereign immunity cannot bar liability in section 1983 actions filed in state courts). The defense of qualified immunity is not available under section 1983 to one sued in his official capacity. *Brandon v. Holt,* 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985).

Having determined that the equitable relief sought against the defendants in their official capacities is not barred under section 1983 and that the defenses of sovereign and qualified immunity are not available to defendants, the question then becomes whether plaintiff has made a sufficient forecast of evidence to repel defendants' motion for summary judgment. Before examining the factual basis set forth by plaintiff in this regard, we continue analysis of section 1983 and will treat the factual aspect below *in toto.*

B. Durham and Thomas—Individual Capacities

Under *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), state governmental officials can be sued in their individual capacities for damages under section 1983. This holding was affirmed and applied in *Hafer v. Melo,* —— U.S. ——, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). This is because unlike a suit against a state official in his official capacity, which is basically a suit against the official office and therefore against the State itself, a suit against an individual who happens to be a governmental official but is not acting in his official capacity is not imputed to the State. Such individuals are sued as individuals, not as governmental employees. Presumably, they are personally liable for payment of any damages awarded. Under United States Supreme Court precedent, however, such officials sued as individuals may raise a defense of qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396

1. *Kentucky v. Graham,* 473 U.S. 159, 165–67, 105 S.Ct. 3099, 3105–06, 87 L.Ed.2d 114, 121–22 (1985) (explaining official versus individual capacities).

2. While the Court of Appeals reaches this result it does so under the case of *Truesdale v. University of North Carolina,* 91 N.C.App. 186, 371 S.E.2d 503 (1988), *disc. rev. denied,* 323 N.C. 706, 377 S.E.2d 229 (1989), *cert. denied,* 493 U.S. 808, 110 S.Ct. 50, 107 L.Ed.2d 19 (1989). Insofar as *Truesdale* states that section 1983 actions against state institutions are barred by the doctrine of sovereign immunity, it is overruled. *Martinez v. California,* 444 U.S. 277, 283, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 488 (1980) (sovereign immunity cannot bar liability in section 1983 actions filed in state courts); *accord Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990).

(1982). The defendants in the instant case have raised this defense.

Harlow sets forth an objective standard for determining whether qualified immunity will act as a bar to further litigation in a suit by providing that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410.[3] This standard was set forth to allow determination of whether a qualified immunity defense bars further proceedings by means of a process of examining the law in existence at the time of the offense to determine whether it contained "clearly established ... rights of which a reasonable person would have known." *Id.* By using the "reasonable person standard," the Supreme Court intended to avoid the necessity of an evidentiary consideration of whether a defendant raising the immunity defense, in fact, subjectively knew that his conduct toward plaintiff would violate plaintiff's constitutional rights. *Harlow*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (citing *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 214, 225 (1975)). *Cf. Mitchell*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411, 425 (Qualified immunity, if available, provides "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

[6] As a number of federal courts of appeal have observed, however, *Harlow's* "purely 'objective' test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated." *Collinson v. Gott*, 895 F.2d 994, 1001-02 (4th Cir.1990) (Phillips, J., concurring) (citations omitted). *Accord, e.g., Stewart v. Baldwin County Bd. of Election*, 908 F.2d 1499 (11th Cir.1990); *Morris v. Clifford*, 903 F.2d 574 (8th Cir.1990); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642 (10th Cir.1988). In other words, whether a qualified immunity defense is appropriate requires proof of an official's intent where the existence of a constitutional violation depends on proof of motivation. For example, as the Sixth Circuit Court of Appeals has written:

> [I]f a public employer terminates a black employee because he is black, that act clearly violates federal constitutional and statutory law. If, however, the employer terminates the black employee because of incompetence, then the discharge obviously does not violate the law at all. The act itself—the act of discharge—is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law.

Poe v. Haydon, 853 F.2d 418, 431 (6th Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989).

Similarly, in the instant case, if the defendants demoted Corum *because* of his exercise of free speech rights, such demotion clearly would violate federal law. If, however, he was demoted because of insubordination, the discharge may not violate the law at all. The act itself—the act of demotion—is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law. *Id.* Thus, in addition to *Harlow's* objective step—that is, a determination of whether at the time of the alleged act the law concerning the right was clearly established—we must also concern ourselves with the material issue of fact surrounding Dr. Durham's motive in demoting Corum. As explained below, we adopt the reasoning applied in the majority of federal circuit courts of appeal which have had to reconcile this issue with the objective test enunciated in *Harlow*. In brief, this approach holds that

3. Although *Harlow* did not concern the elements of qualified immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983, *see* 457 U.S. at 410 n. 30, 102 S.Ct. at 2738 n. 30, 73 L.Ed.2d at 410 n. 30, later cases apply the *Harlow* standard to state officials in this context.

> where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' actions were improperly motivated.

Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 649 (10th Cir.1988) (emphasis supplied).

Under *Harlow,* the first question arising upon the defendants' motion for summary judgment is whether a reasonable official in each defendant's position could have believed that his actions were lawful in light of clearly established law at the time and in light of the information possessed by the official at the time the conduct occurred. *Harlow,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396; *Anderson v. Creighton,* 483 U.S. 635, 642, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523, 532 (1987). The right that the officials allegedly violated must have been clearly established in a particularized sense: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 483 U.S. at 640, 107 S.Ct. at 3039, 97 L.Ed.2d at 531. This is because "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow,* 457 U.S. at 818–19, 102 S.Ct. at 2738, 73 L.Ed.2d at 411. *Accord Anderson,* 483 U.S. 635, 640 n. 2, 107 S.Ct. 3034, 3039 n. 2, 97 L.Ed.2d 523, 530 n. 2. Therefore, our focus is not upon the broad First Amendment right to speak freely in its most general or abstract sense, but upon its application to the particular conduct being challenged in the instant case. *Anderson,* 483 U.S. at 638–39, 107 S.Ct. at 3038, 97 L.Ed.2d at 530; *Collinson,* 895 F.2d 994, 998 (4th Cir.1990) (Phillips, J., concurring).

In the present case, this inquiry requires us to begin by examining the contours of a public employee's rights in June 1984 to speak without retaliation in his place of work. After this, we must ask (a) whether a reasonable vice chancellor (in the instant case, Dr. Durham) could have believed his actions were lawful in light of the information possessed by him at the time he demoted Dr. Corum, and (b) whether a reasonable chancellor (in the instant case, Dr. Thomas) could have believed that his or her actions in officially approving the demotion were lawful in light of clearly established law at the time and in light of the information possessed by him at the time he approved the demotion of Dr. Corum.

[7] As the United States Supreme Court explained in *Connick v. Myers,* "[f]or at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 1685, 75 L.Ed.2d 708, 716–17 (1983). However, in 1984 a public employee's right to speak was not absolute, nor is it today. Under *Pickering v. Board of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1735–36, 20 L.Ed.2d 811, 817 (1968), a public employee's right to free speech is limited by the government's need to preserve efficient governmental functions. As a recent case explained, "This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment." *Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315, 324 (1987).

[8–10] A further limitation under *Pickering* is that only speech on a matter "of public concern" is constitutionally protected. *Pickering,* 391 U.S. at 568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817. To determine whether speech fits in this category, the Court examines the content, form, and context of the public employee's speech. Only if the speech was on a matter of public concern is the balancing test reached.

[11] In the oral argument before this Court, although not in the briefs, counsel

for defendants[4] contended that Dr. Corum's speech was not on a matter of public concern. Even though not at issue on this appeal, the record discloses that the question of what to do with the Appalachian Collection had been publicly debated on the campus and was a matter of public concern. Given that the speech at issue addressed a matter of public concern we return to the *Pickering* balancing test to determine whether in 1984 the free speech rights allegedly violated by defendants were clearly established when defendants acted.

[12] In the *Pickering* analysis the manner, time, and place of the employee's expression are relevant, as is the context in which the speech occurred. *See Connick,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708. *Accord, e.g., Rankin,* 483 U.S. at 388, 107 S.Ct. at 2899, 97 L.Ed.2d at 327. Specifically, considerations such as whether the speech impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise are relevant in balancing the two competing interests. *Pickering,* 391 U.S. at 570–73, 88 S.Ct. at 1735–37, 20 L.Ed.2d at 817–20.

[13] In the instant case, we conclude that Dr. Corum had a constitutionally protected right to speak out in 1984 in the manner alleged. While the speech may have affronted Dr. Durham, it cannot be said that the speech impeded Corum's duties or interfered with the regular operation of the University, particularly during the approximately eighteen-hour period between the time he spoke out and the time he was demoted, nor was the likelihood of such interference over a longer interval great given that Corum did not, as we must presume on a review of a denial of summary judgment, refuse to carry out Durham's instructions. Later, in fact, Dr. Corum participated in carrying out Dr. Durham's directive. Durham's action in effect preempted the possibility of interference with ongoing library functions since it removed Corum from the chain of command. Since Corum's speech clearly could not have affected and did not affect Durham's decision to move the Appalachian Collection, its danger to the organization was *de minimis.* Thus, we conclude, after having balanced competing interests, that Corum's interest in speaking out on this public issue outweighed any negative effect it might have had on the efficient functioning of ASU. The law was clearly established in 1984 that Corum had a right to speak out in the way alleged. *See Pickering,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811. Whether a material question of fact exists as to whether Corum's demotion was constitutionally justified is discussed hereinafter.

[14] The next question then becomes whether a reasonable vice chancellor could have believed that demoting Dr. Corum was lawful in light of clearly established law and the information which he possessed at the time. *Anderson,* 483 U.S. at 643, 107 S.Ct. at 3041, 97 L.Ed.2d at 532–33. For purposes of this analysis, Dr. Durham's subjective beliefs about the legality of the demotion are irrelevant. *Id.*

[15] Where the "clearly established law" contains a subjective element, as in this case, of motive or intent, it is a part of the summary judgment analysis. While his subjective beliefs in this narrow respect are not relevant, an inquiry into Dr. Durham's motive or intent in demoting Corum is an unavoidable part of the process of determining whether a reasonable vice chancellor's actions here can be said to have violated Dr. Corum's First Amendment rights. This is so because if the motive was to suppress speech, one result is reached, while if the motive was to punish insubordination, another conclusion results. One problem this subjective analysis creates is a difficulty in deciding at summary judgment whether a qualified immunity defense is justified for the official whose conduct

4. The Attorney General represented all defendants by virtue of N.C.G.S. § 143–300.2.

and motive are challenged. As one judge has explained:

> Vindication of immunity policies depends heavily upon the ability to dispose of insubstantial claims by resolving immunity questions at the earliest possible stages of a litigation, preferably on pleading or summary judgment motions. *See Mitchell,* 472 U.S. at 526, 105 S.Ct. at 2815. Questions of subjective states of mind are of course notoriously ill-adapted to summary resolution because of the ease with which they can be held at issue by conclusory allegations and conjectures in pleadings and discovery materials. *Harlow's* wholly "objective" test was adopted in large part to avoid this impediment to early resolution, by making irrelevant to the immunity inquiry any question of an official's "bad faith" or his purely subjective perceptions about a plaintiff's rights. *See Harlow,* 457 U.S. at 815–19, 102 S.Ct. at 2736–39. As several courts of appeals have since recognized, however, the resulting purely "objective" test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated. *See, e.g., Pueblo Neighborhood Health Centers, Inc. v. Losavio,* 847 F.2d 642, 647–48 (10th Cir.1988); *Musso v. Hourigan,* 836 F.2d [736] at 743 [(2nd Cir.1988)]; *Gutierrez v. Municipal Court,* 838 F.2d 1031, 1050 n. 25 (9th Cir.1988); *Martin v. D.C. Metropolitan Police Dept.,* 812 F.2d 1425, 1432 (D.C.Cir.), *holding vacated,* 817 F.2d 144 (D.C.Cir.), holding reinstated *sub nom. Bartlett ex rel. Neuman v. Bowen,* 824 F.2d 1240 (D.C.Cir. 1987).
>
> As a result, as several of these courts also have recognized, there is a risk that in such cases the impediment to summary resolution that *Harlow* deliberately sought to remove could be reimposed. *See Pueblo,* 847 F.2d at 648; *Martin,* 812 F.2d at 1433. To minimize that risk, these courts have adopted a procedural approach designed to insure that meritorious immunity defenses can yet be established by summary judgment in such cases. Building on the Supreme Court's recent encouragement to proper usages of summary judgment in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Tenth Circuit, for example, has held that
>
>> [w]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials' actions were improperly motivated. *Pueblo,* 847 F.2d at 649; *see also Martin,* 812 F.2d at 1434.
>
> *Collinson,* 895 F.2d at 1001–02 (4th Cir.) (Phillips, J., concurring). *Accord, e.g., Stewart,* 908 F.2d 1499 (11th Cir.).

This approach appropriately retains the *Harlow* "objective look" test with respect to the law applicable at the time of the alleged violation, but it also permits a plaintiff who has some proof of the alleged violation to attempt to convince the finder of fact that his allegations are correct. To foreclose this opportunity would effectively prevent every plaintiff from recovering on a claim which has an element requiring a determination of subjective intent.

[16] In the present case then, the immediate question becomes whether there was sufficient evidence before the trial judge that Dr. Durham's demotion of Dr. Corum was improperly motivated, justifying the denial of summary judgment.

In this regard, Dr. Durham testified that he had gone to Chapel Hill prior to 25 June and that Dr. Parker, who had been at the meeting when Dr. Corum made his remarks, telephoned him to report on that meeting. Dr. Parker told him that Dr. Corum had decided not to carry out the decision that had been made, and that Dr. Corum wanted to talk with him (Dr. Durham). Dr. Durham replied that the time for talking was over. He returned to Boone that night, contacted Chancellor

Thomas, and met with Chancellor Thomas at 6:30 the next morning. All Dr. Durham had to rely upon in regard to Dr. Corum's position concerning the moving of the Collection was the short telephone conversation that he had the previous evening with Dr. Parker. At the 6:30 a.m. meeting with Chancellor Thomas, Dr. Durham made his recommendation to the Chancellor, and they agreed that Dr. Corum would be relieved of his responsibilities or given the opportunity to resign. Dr. Corum was relieved of his responsibilities as Dean of Learning Resources.

However, Dr. Parker's testimony as to the telephone communication with Dr. Durham was to the contrary. He testified:

> I told Harvey [Durham] that Bill Strickland and I had met with Al Corum, Judy Ball and Richard Barker, and that Al presented an alternative proposal and that he wanted to talk to Harvey about that before he would take any action regarding the Collection.
>
> Q What was Dr. Durham's response?
>
> A Well, I believe I asked him, "Do you want to talk to Dr. Corum?" And as well as I remember, his response was emphatic. He said, "Hell, no. The time for talking is over. I made my decision."
>
> ....
>
> Q And then, I believe, referring to the chronology there, you did have a meeting at 7:00 the next morning?
>
> A Yes.
>
> Q At that meeting at 7:00 did Dr. Durham inform you that he had just finished meeting with Chancellor Thomas, and he had decided to ask Dr. Corum to resign, and if Dr. Corum did not he was going to relieve him of his duties as Dean?
>
> A Yes.

As to the 26 June meeting between Dr. Corum, Dr. Parker, and others, Parker testified:

> Q Did you ever tell Dr. Durham in that meeting on June 26 that his desire to discuss the issue of how the move of—tell Dr. Corum that his desire to discuss the hows and whys of the move of the Appalachian Collection further with Dr. Durham or to discuss it at some point with Dr. Thomas would be insubordination?
>
> A I certainly did not.
>
> ....
>
> Q You just answer the question, Dr. Parker. Now, what do you recall him actually saying?
>
> A That he would not continue with it [dealing with the Appalachian Collection] until he had a chance to talk to Dr. Durham.

The effect of the proposed move on the Collection had been the subject of public debate on the campus. It was Dr. Corum's chief interest to keep the entire Collection intact when it was moved. However, the evidence also showed that Dr. Durham did not advise Dr. Corum that the Collection would be split up when he told Corum that it would be moved. The 21 June 1984 memorandum from Durham to Corum stated: "Further, the Appalachian Collection will be physically housed in University Hall," leading Corum to believe that the entire Collection would be together. In fact, Durham had already decided to split the Collection, the artifacts to be stored in the basement of another building. Thus, the 21 June memo becomes the "smoking gun," revealing the effort to deceive Dr. Corum until it was too late for public protests. Dr. Alvis L. Corum's deposition, exhibit 2.

The evidence before the trial court on the motion for summary judgment was sufficient to raise a material question of fact as to the motive of Dr. Durham in demoting Dr. Corum. Dr. Durham's evidence indicates his motive was to promote discipline and efficient administration of ASU; Corum's evidence indicates that Dr. Durham's motive was to stifle debate over the issue, to carry out his decision to split the Collection quickly, as well as to improperly punish Dr. Corum. We hold that plaintiff has presented sufficient specific evidence of improper motive to defeat defendant Durham's motion for summary judgment. *See*

Collinson, 895 F.2d 994 (4th Cir.) (Phillips, J., concurring).

Upon the foregoing findings and conclusions, we hold that defendant Durham's motion for summary judgment based upon the defense of qualified immunity to plaintiff's 42 U.S.C. § 1983 claims was properly denied by the trial judge. The Court of Appeals erred in reversing the trial court's order denying defendant Durham's motion for summary judgment.

[17] Plaintiff has failed to present a forecast of evidence as to any improper action or motive by ASU, UNC, President Spangler or Chancellor Thomas; therefore, the motion for summary judgment should have been allowed as to these defendants on all of plaintiff's 42 U.S.C. § 1983 claims.

II. STATE CONSTITUTIONAL CLAIMS

The Court of Appeals properly reversed the trial court's denial of summary judgment regarding plaintiff's state constitutional claims against defendants ASU, UNC, and President Spangler and Chancellor Thomas acting in their official capacities. However, as later discussed, the Court of Appeals erred in relying upon the doctrine of sovereign immunity in so deciding. The Court of Appeals erred in reversing the trial court on this issue as to defendant Durham.

This issue brings forward the question of whether a plaintiff has a direct cause of action under the State Constitution against governmental defendants for alleged violations of the plaintiff's free speech rights.

[18–20] Our Constitution states: "*Freedom of speech and Press.* Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. Const. art. I, § 14. The words "shall never be restrained" are a direct personal guarantee of each citizen's right of freedom of speech.

In *Midgett v. Highway Commission*, this Court held:

> Our Constitution, Article I, section 17, guarantees payment of compensation for property taken by sovereign authority.... A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance.

Midgett, 260 N.C. 241, 249–50, 132 S.E.2d 599, 608 (1963) (citing *Sale v. Highway Commission*, 242 N.C. 612, 89 S.E.2d 290 (1955)). Therefore, in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution. The provision of our Constitution which protects the right of freedom of speech is self-executing. *See Sale*, 242 N.C. 612, 89 S.E.2d 290. Therefore, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right. *Id.*

[21, 22] This great bulwark of liberty is one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution. Freedom of speech is equal, if not paramount, to the individual right of entitlement to just compensation for the taking of property by the State. *Flake v. News Co.*, 212 N.C. 780, 790, 195 S.E. 55, 62 (1938). Certainly, the right of free speech should be protected at least to the extent that individual rights to possession and use of property are protected. *Id.* A direct action against the State for its violations of free speech is essential to the preservation of free speech.

[23] The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action under the rationale adopted in the above-cited authorities. The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted,

manifesting the primacy of the Declaration in the minds of the framers. The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State. *State v. Manuel,* 20 N.C. 144 (1838).

[24] In *Trustees of the University of North Carolina v. Foy,* 5 N.C. 57 (1805), the Court recognized the supremacy of rights protected in Article I and indicated that it would only apply the rules of decision derived from the common law and such acts of the legislature that are consistent with the Constitution. This Court is the ultimate interpreter of our State Constitution. *Bayard v. Singleton,* 1 N.C. (Mart.) 5 (1787).

[25–27] It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. *King v. South Jersey Nat. Bank,* 66 N.J. 161, 330 A.2d 1 (1974). Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. *Lamb v. Wedgewood South Corp.,* 308 N.C. 419, 302 S.E.2d 868 (1983); Chief Justice James G. Exum, Jr., *Dusting Off Our State Constitution,* 33 State Bar Quarterly, No. 2, 6–8 (1986). We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property. *State v. Harris,* 216 N.C. 746, 6 S.E.2d 854 (1940).

[28] This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights. *Sale,* 242 N.C. 612, 89 S.E.2d 290. Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom of speech rights. *Id.* We conclude that plaintiff does have a direct cause of action under the State Constitution against defendant Durham in his official capacity for alleged violations of plaintiff's free speech rights.

The authorities in North Carolina are consistent with the decisions of the United States Supreme Court and decisions of other state supreme courts to the effect that officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated. *See, e.g., Bivens v. Six Unknown Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Bagg v. University of Tex. Medical Branch,* 726 S.W.2d 582 (Tex.Ct.App.1987); *Widgeon v. Eastern Shore Hosp. Ctr.,* 300 Md. 520, 479 A.2d 921 (1984); *Phillips v. Youth Dev. Programs, Inc.,* 390 Mass. 652, 459 N.E.2d 453 (1983); *Schreiner v. McKenzie Tank Lines & Risk Management Servs., Inc.,* 408 So.2d 711 (Fla.Dist. Ct.App.1982), *approved Schreiner v. McKenzie Tank Lines, Inc.,* 432 So.2d 567 (Fla.1983); *Fenton v. Groveland Community Servs. Dist.,* 135 Cal.App.3d 797, 185 Cal.Rptr. 758 (1982); *Lloyd v. Stone Harbor,* 179 N.J.Super. 496, 432 A.2d 572 (1981); *Peper v. Princeton Univ. Bd. of Trustees,* 77 N.J. 55, 389 A.2d 465 (1978); *Walinski v. Morrison and Morrison,* 60 Ill.App.3d 616, 18 Ill.Dec. 89, 377 N.E.2d 242 (1978). In *Laguna Publishing Co. v. Golden Rain Found.,* 131 Cal.App.3d 816, 182 Cal.Rptr. 813 (1982), the court allowed damages for violations of plaintiff's constitutional free speech rights.

[29, 30] As stated, the common law provides a remedy for the violation of plaintiff's constitutionally protected right of free speech. What that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief. As the evidence in this case is not fully developed at this stage of the proceedings, it would be inappropriate for this Court to

attempt to establish the redress recoverable in the event plaintiff is successful; however, such redress could consist of, *inter alia*, reinstatement to his prior status or a comparable status, with or without any loss of wages. Various rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending upon the right violated and the facts of the particular case. When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. *In re Alamance County Court Facilities*, 329 N.C. 84, 100–01, 405 S.E.2d 125, 133 (1991) (discussing and applying inherent powers of the judiciary). Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong. *Id.* In *Sale*, we concluded: "[W]hen a person has been deprived of his private property for public use nothing short of actual payment, or its equivalent, constitutes just compensation. The entry of a judgment is not sufficient." *Sale*, 242 N.C. at 618, 89 S.E.2d at 296. Our conclusion there, however, was dictated by the absence of any other adequate remedy and the fact that, in *Sale*, we were unable to fashion a common law remedy less intrusive than money damages which would correct the State's violation of the plaintiff's particular constitutional right at issue. *Id.*

Having determined that there is a direct claim against the State under the Declaration of Rights for the protection of plaintiff's free speech rights, we turn to the question of the relevance of the doctrine of sovereign immunity. The doctrine of sovereign immunity is judge-made in North Carolina and was first adopted by the North Carolina Supreme Court in *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). A brief history of the doctrine is found in *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971). The doctrine originated with the feudal concept that the king could do no wrong and culminated with its judicial recognition in the English case of *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng.Rep.R. 359 (1788). North Carolina adopted the common law of England as it existed in 1776. Sovereign immunity was not a part of the common law of England at that time because the holding of *Men of Devon* with respect to sovereign immunity was not promulgated until 1788. Accordingly, early North Carolina decisions expressly rejected the doctrine. *Steelman*, 279 N.C. 589, 184 S.E.2d 239. Only with the *Moffitt* decision was sovereign immunity made a part of our law. It is, nevertheless, firmly established in the law of our State today and has been recognized by the General Assembly as the public policy of the State. The doctrine of sovereign immunity has been modified, but never abolished. It has been said that the present day doctrine seems to rest on a respect for the positions of two coequal branches of government—the legislature and the judiciary. Thus, courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity.

[31] However, in determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary's responsibility to guard and protect those rights. The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.

It is also to be noted that individual rights protected under the Declaration of Rights from violation by the State are constitutional rights. Such constitutional

rights are a part of the supreme law of the State. *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). On the other hand, the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court as hereinabove set forth. Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.

Furthermore, this Court has long held that when public officials invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the doctrine of sovereign immunity even though they act or assume to act under the authority and pursuant to the directions of the State. *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975), *superceded on other grounds by statute as stated in, State v. Williams and Hessee*, 53 N.C.App. 674, 281 S.E.2d 721 (1981); *Schloss v. Highway Commission*, 230 N.C. 489, 53 S.E.2d 517 (1949). *Accord Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963); *Teer v. Jordan*, 232 N.C. 48, 59 S.E.2d 359 (1950); *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 22 S.E.2d 896 (1942). Indeed, that is the very harm that the people sought to thwart by adopting the Declaration of Rights.

This, of course, does not mean that defendant has no defense to the action. Durham is entitled to all defenses that may arise upon the facts and law of the case.

For the foregoing reasons, we hold that plaintiff does have a direct cause of action under the State Constitution for alleged violations of his freedom of speech rights, guaranteed by Article I, Section 14.

[32] We turn now to Thomas and Durham's petition for discretionary review of the decision of the Court of Appeals holding that defendants' motion for summary judgment as to plaintiff's claims for monetary damages against Thomas and Durham, sued in their individual capacities, for alleged violations of plaintiff's constitutional free speech rights was properly denied by the trial court. By allowing this petition, we are now faced with the first impression issue of whether North Carolina recognizes a direct cause of action for monetary damages under the North Carolina Constitution against persons, sued only in their individual capacities, who allegedly violated a plaintiff's constitutional rights of freedom of speech. We answer the issue in the negative and hold that North Carolina does not recognize this cause of action.

In deciding this issue, the Court of Appeals made no analysis as to whether plaintiff had a direct cause of action against Thomas and Durham in their individual capacities, but only held that the doctrine of sovereign immunity did not bar plaintiff's claim. We begin with an analysis of whether plaintiff has such direct action against these defendants sued in their individual capacities.

The Declaration of Rights was adopted by the people in 1776 in order to affirmatively reserve the rights of the people as well as to protect those rights from encroachment by the State. *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949). In 1776 when the people of North Carolina established the State of North Carolina, they clearly and affirmatively set forth certain fundamental human rights which their government was bound to respect. Through the Declaration of Rights, the people of North Carolina secured these rights against state officials and shifting political majorities. The Declaration of Rights, Article I, Section 35 states: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. With that in mind, this Court considers the purpose for the Declaration of Rights, the language of Article I, Section 14, as well as the function and traditional role of the courts in North Carolina's constitutional democracy. The Declaration of Rights was intended to protect individual rights from infringement by the State. To that end, the Declaration of Rights expresses the rights it guarantees in clear and explicit language.

As a matter of fundamental jurisprudence the Constitution itself does not rec-

ognize or create rights which may be asserted against individuals. Instead, the Constitution is the instrument by which "We, the people of the State of North Carolina," first acknowledge our individual rights and liberties and then create a government to better secure our enjoyment of those rights and liberties. The significant fact is that "We, the people," created the Constitution and the government of our State in order to limit our actions as the body politic. The Constitution is intended to protect our rights as individuals from our actions as the government. The Constitution is not intended to protect our rights vis-a-vis other individuals.

From its earliest days, this Court has noted this essential feature of the Constitution. In *Hoke v. Henderson*, 15 N.C. 1 (1833) then Chief Justice Ruffin, writing for the Court, expounded on the nature of constitutional government. Among many of the points relevant to this issue, Chief Justice Ruffin stated:

> In America, written Constitutions, conferring and dividing the powers of government, and restraining the actions of those in authority, for the time being, have been established as securities of public liberty and private right.
>
> ....
>
> It is true, the whole community may modify the rights which persons can have in things, or at their pleasure, abolish them altogether. But when the community allows the right and declares it to exist, that constitution is the freest and best, which forbids the *government* to abolish the right, or which restrains the *government* from depriving a particular citizen of it. In other words, *public liberty requires that private property should be protected even from the government itself.*

Id. at 9, 12 (emphasis added). In light of the purpose and language of the Constitution, plaintiff cannot rely on the Constitution to support a claim for money damages against individuals, acting in their personal capacities for the alleged violation of freedom of speech rights recognized under the Constitution. The Constitution only recognizes and secures an individual's rights vis-a-vis "We, the people of the State of North Carolina," not individual members of that body politic. Of course, the State may only act through its duly elected and appointed officials. Consequently, it is the state officials, acting in their official capacities, that are obligated to conduct themselves in accordance with the Constitution. Therefore, plaintiff may assert his freedom of speech right only against state officials, sued in their official capacity.

Although plaintiff's counsel at oral argument candidly admitted that plaintiff only sought relief against Thomas and Durham sued in their official status, we deemed it necessary to discuss the issue. We hold that plaintiff has no direct cause of action against Thomas or Durham sued in their *individual capacities* for alleged violations of plaintiff's constitutional freedom of speech rights. We reverse the Court of Appeals' holding to the contrary as to this issue.

We conclude that the Court of Appeals erred in applying the defense of sovereign immunity to plaintiff's claims under the State Constitution. However, plaintiff has failed to present a forecast of evidence sufficient to defeat the motion for summary judgment on behalf of ASU, UNC, President Spangler, and Chancellor Thomas as to plaintiff's state constitutional claims. Thus, the result reached by the Court of Appeals as to those defendants is affirmed. Plaintiff has, however, presented a sufficient forecast of evidence as to defendant Durham, sued in his official capacity, on this issue; therefore, the decision of the Court of Appeals as to Durham is reversed.

This holding completes the analysis of possible causes of action. Under section 1983, plaintiff has causes of action for:

1. Equitable relief against defendant Durham sued in his official capacity; and

2. Monetary damages against defendant Durham sued in his *individual* capacity.

Under the State Constitution, plaintiff has a direct cause of action against defendant Durham sued in his official capacity.

[33] Thus, under 42 U.S.C. § 1983, plaintiff can only obtain prospective equitable relief against Durham sued in his official capacity and monetary damages against Durham sued in his individual capacity. Plaintiff cannot recover monetary damages under section 1983 against Durham sued in his official capacity. Therefore, plaintiff's right to sue Durham in his official capacity under the State Constitution completes his remedies. Plaintiff is not required to elect now, at summary judgment, among his remedies. N.C.G.S. § 1A-1, Rule 18(a), (e)(2) (1983).

The decision of the Court of Appeals is affirmed in part, reversed in part, and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Watauga County, for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WEBB, J., dissents.

105 N.C.App. 424

CITY OF HIGH SHOALS, a Municipal Corporation, Plaintiff,

v.

VULCAN MATERIALS COMPANY; Gaston County; Donald E. Bailey; and James E. Thomason, Defendants.

No. 9127SC176.

Court of Appeals of North Carolina.

Feb. 18, 1992.

City brought action against corporation to enforce city zoning ordinance. The Superior Court, Gaston County, Marvin K. Gray, J., entered summary judgment in favor of corporation, and city appealed. The Court of Appeals, Wells, J., held that fact issue as to whether city zoning ordinance prohibited operation of quarry within city limits precluded summary judgment.

Reversed and remanded.

1. Judgment ⇐181(15)

Fact issue as to whether city zoning ordinance prohibited operation of quarry within city limits precluded summary judgment in city's action to enforce ordinance. Rules Civ.Proc., Rule 56(c), G.S. § 1A-1.

2. Judgment ⇐185(2)

On motion for summary judgment, burden is upon movant to establish absence of any issue of fact, and if once satisfied, opposing party must come forward with facts, rather than mere allegations, which negate moving party's case. Rules Civ. Proc., Rule 56(c), G.S. § 1A-1.

3. Judgment ⇐181(4)

Summary judgment is drastic remedy, not to be granted unless it is perfectly clear that no issue of fact is involved and inquiry into facts is not desirable to clarify application of law. Rules Civ.Proc., Rule 56(c), G.S. § 1A-1.

The City of High Shoals (hereinafter plaintiff) instituted this suit seeking to enforce its zoning ordinance and prohibit defendant Vulcan Materials Company (hereinafter Vulcan) from developing a rock quarry on certain properties located within the city's zoning jurisdiction. The record on appeal tends to establish the following facts and circumstances.

Plaintiff is a municipal corporation located in Gaston County. Vulcan, a North Carolina corporation, develops, among other things, materials used in the construction of buildings and highways. In December of 1988, Vulcan began preliminary operations to determine if an area of land within and adjacent to plaintiff's boundaries was suitable for the operation of a rock quarry. These operations included acquiring options to purchase three adjoining parcels of land.

Vulcan acquired options to purchase all three parcels of land by March 1989 and then began surveying, drilling and bulldoz-

CROWN MEDIA, LLC, Plaintiff-Counter-Defendant-Appellant,

v.

GWINNETT COUNTY, GA, Defendant-Counter-Claimant-Appellee.

No. 03-13707.

United States Court of Appeals, Eleventh Circuit.

Aug. 12, 2004.

Background: Outdoor advertising company sued county, seeking to enjoin county from removing sign, and challenging constitutionality of county's original and amended sign ordinances. The United States District Court for the Northern District of Georgia, No. 01-03478-CV-CAP-1, Charles A. Pannell, Jr., J., entered summary judgment for county. Company appealed.

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:

(1) company's challenge to constitutionality of county's original sign ordinance was not rendered moot by enactment of new sign ordinance, and

(2) company's challenge to constitutionality of county's amended sign ordinance was not rendered moot by enactment of new sign ordinance.

Reversed and remanded with instructions.

1. Constitutional Law ⚷228.2
Zoning and Planning ⚷762

County did not selectively enforce its sign ordinances against outdoor advertising company, in violation of Equal Protection Clauses of federal and Georgia constitutions, where company failed to show it was similarly situated to other property owners whose variance requests were approved, and company failed to identify any evidence of discriminatory intent. U.S.C.A. Const.Amend. 14; West's Ga. Const. Art. 1, § 2, Par. 3.

2. Federal Courts ⚷776

The Court of Appeals reviews questions of mootness *de novo*.

3. Federal Courts ⚷12.1

A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.

4. Constitutional Law ⚷46(1)
Mandamus ⚷16(1)

When a party challenges a law as unconstitutional and seeks only declaratory and prospective injunctive relief, a superseding statute or regulation moots a case to the extent that it removes challenged features of the prior law.

5. Federal Courts ⚷12.1

For the repeal of a statute to moot a challenge to that statute, the governmental defendant must show that there is no reasonable likelihood that the repealed statute or challenged practices would be reinstated.

6. Constitutional Law ⚷46(1)

When a plaintiff requests damages, as opposed to only declaratory or injunctive relief, changes to or repeal of the challenged ordinance may not necessarily moot the plaintiff's constitutional challenge to that ordinance.

7. Federal Courts ⚷430, 433

Whether a plaintiff has obtained vested property rights in an advertising sign or county permit is a question of state law.

8. Zoning and Planning ⚷376, 465

Under Georgia law, if a property owner obtains a valid sign or building permit authorizing a particular land use under an existing zoning ordinance, property rights vest when a permit is actually issued for a

particular land use, and a later, new zoning ordinance prohibiting that land use is not enforceable against the property owner.

9. Zoning and Planning ⚷376, 465

Under Georgia law, a landowner has vested rights in an issued permit for a particular land use notwithstanding a zoning or regulatory change subsequent to the issuance of the building permit, and notwithstanding the fact that there has been no substantial expenditure of funds in reliance upon the building permit.

10. Zoning and Planning ⚷467

Under Georgia law, a landowner retains the vested right to develop property pursuant to an issued permit during its term or for a reasonable time after its issuance if no term is specified.

11. Zoning and Planning ⚷465

Under Georgia law, the issuance of a permit vests a right in the permit holder only to build in accordance with the requirements in a valid permit or in a valid zoning ordinance.

12. Zoning and Planning ⚷465, 763

Under Georgia law, a property owner does not obtain vested property rights in a non-compliant structure, and a county may enforce pre-existing requirements in a valid permit or zoning ordinance and require, in some circumstances, that the non-compliant structure be taken down or moved to comply with the permit.

13. Zoning and Planning ⚷465, 467

Under Georgia law, although broadly speaking a property owner does not acquire vested property rights in a non-compliant structure, the property owner retains vested property rights to build its structure in accordance with the issued permit during its term or for a reasonable time after its issuance if no term is specified. West's Ga.Code Ann. § 36-74-23(b).

14. Zoning and Planning ⚷467

Under Georgia law, a property owner may attempt to bring a non-compliant structure into compliance during the permit time or for a reasonable time if no express time limit is in the permit.

15. Zoning and Planning ⚷762

Under Georgia law, even if one particular ordinance may be invalid or unconstitutional, a landowner still would have to comply with all other valid, relevant ordinances and regulations.

16. Constitutional Law ⚷46(1)

Outdoor advertising company's challenge to constitutionality of county's original sign ordinance was not rendered moot by enactment of new sign ordinance, where existence and scope of company's property rights in permits and erected sign under Georgia law, and extent to which they vested prior to enactment of new ordinance, could not be fully ascertained until constitutionality of old ordinance was determined.

17. Constitutional Law ⚷46(1)

Outdoor advertising company's challenge to constitutionality of county's amended sign ordinance was not rendered moot by enactment of new sign ordinance, where, if amended ordinance was unconstitutional, county's new special use permit requirement and new setback restrictions would be null and void and not enforceable under Georgia law against company's pre-existing, permitted sign.

David H. Flint, Mark W. Forsling, Schreeder, Wheeler & Flint, Atlanta, GA, for Crown Media, LLC.

Bret T. Thrasher, John Patrick O'Brien, Thompson, O'Brien, Kemp & Nasuti, P.C., Norcross, GA, Karen Gilpin Thomas, Gwinnett County Dept. of Law, Lawrenceville, GA, for Gwinnett County, GA.

Appeal from the United States District Court for the Northern District of Georgia.

Before EDMONDSON, Chief Judge, HULL, Circuit Judge, and BUCKLEW *, District Judge.

HULL, Circuit Judge:

In this sign ordinance case, Plaintiff Crown Media appeals the district court's order declaring that its constitutional challenges to Defendant Gwinnett County's now repealed 1990 and 1999 sign ordinances are moot. This case involves a sign that Gwinnett County approved but now seeks to have removed. Crown Media sued to enjoin Gwinnett County from requiring it to take down its sign. After oral argument and review, we conclude that Crown Media's complaint is not moot. Thus, we reverse and remand this case to the district court.

I. BACKGROUND

In this case, Crown Media challenges the constitutionality of Gwinnett County's now repealed 1990 and 1999 sign ordinances. The constitutionality of the current sign ordinance, enacted on August 28, 2001, is not involved in this case. Instead, Gwinnett County contends, and the district court concluded, that the enactment of the 2001 ordinance caused Crown Media's constitutional challenges to the repealed 1990 and 1999 ordinances to become moot.[1] To answer this mootness issue, we first review the events surrounding Crown Media's permits and erection of its sign.

A. *1990 Ordinance*

On September 11, 1998, Crown Media applied to Gwinnett County for a sign permit and a building permit for the construction of a sign on a 3.3 acre tract located at 4431 Peachtree Industrial Boulevard, zoned "M-1" for light industrial. Gwinnett County issued Crown Media both a sign permit and a building permit on September 17, 1998.[2]

At the time of Crown Media's application, Gwinnett County's ordinance (the "1990 ordinance") required this type of sign to be: (1) at least 300 feet from a residential zoning district and school, (2) at least seventy-five feet from a right-of-way, and (3) no more than forty feet in height. The dimensions in Crown Media's plans submitted with its sign application complied with the 1990 ordinance. Thus, Crown Media applied for a sign and building permit to erect a sign whose dimensions complied with the 1990 ordinance.

After obtaining permits, Crown Media paid $100,000 to PBJ Development Company ("PBJ") for the right to erect and maintain a sign on PBJ's property. Crown Media paid $32,515 to an independent contractor who completed the sign in March 1999. The contractor, however, did not erect the sign in exact compliance with Crown Media's plans. Specifically, the sign, as built, is: (1) seventeen and one-half feet closer than the approved placement to a residential zoning district of 300 feet; (2) closer than seventy-five feet to the nearest right-of-way; and (3) seven feet in excess of the approved height of

* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

1. The 1990 and 1999 sign ordinances were in Article XI of Gwinnett County's Zoning Ordinance. The 2001 sign ordinance is in Chapter 86 of Gwinnett County's Zoning Ordinance. Throughout this opinion, our references to "ordinance" are to the sign ordinance section of the Zoning Ordinance.

2. Although the actual sign and building permits are not in the record, the parties agree that on September 17, 1998, Gwinnett County issued these permits for the sign shown in Crown Media's submitted plans. The record does contain a schematic entitled "Site Plan as Submitted for Permits," and the dimensions in that schematic comply with the 1990 sign ordinance.

forty feet.[3] Notwithstanding the sign's *non-adherence* to the 1990 ordinance, the issued permits, and the plans on which the permits were based, Gwinnett County allowed and approved the sign through the required inspections, and Gwinnett County issued a certificate of occupancy and a certificate of completion of the sign on May 13, 1999. Crown Media then placed advertising on its sign.

B. 1999 Ordinance

After Gwinnett County issued the 1998 permits and 1999 certificates, Gwinnett County amended its sign ordinance on June 29, 1999 (the "1999 ordinance"). The required setback from the right-of-way and the height limitation remained the same in the 1990 and 1999 ordinances. The 1999 ordinance, however, increased the required setback distance for billboards from a residential zoning district, school, or daycare center from 300 feet to 500 feet.

The 1999 ordinance also changed an aspect of the permit process for billboards within the "M–1" zoning districts. The 1990 ordinance had provided that billboards may be permitted as "an allowed use" within the "M–1" districts. Gwinnett County, Ga., Ordinances art. XI, § 1113.1(1) (1990).[4] The 1999 ordinance, however, provided that "[b]illboards may be permitted ... by special use permit within the M–1 district." Gwinnett County, Ga., Ordinances art. XI, § 1113.1(1) (1999).

C. Complaints About the Sign

Crown Media did not receive any complaints about its sign during the initial ten months after its May 13, 1999, completion. On March 15, 2000, however, Phyllis Humrich, the Gwinnett County Zoning Compliance Manager, sent Crown Media a letter alleging that "several violations exist concerning the installation, placement, and lighting of the billboard."[5] Although written in 2000, Humrich's letter specifically noted that the sign violated the forty-foot height limitation, the 300 foot setback requirement, and the illumination regulations: all requirements of the 1990 ordinance in effect when the 1998 permits issued.[6] Thus, Gwinnett County originally faulted Crown Media for not complying with the 1990 ordinance. Prior to receipt of Humrich's March 15, 2000, letter, Crown Media believed that the contractor

3. Different measurements of the deviations from the approved plans are referenced in various parts of the record. The measured deviations referenced above are from Gwinnett County's March 15, 2000, letter discussed later. In any event, neither party disputes that deviations from Crown Media's approved plans in this approximate amount exist in the height and location requirements referenced above. We note that the letter does not mention the right-of-way violation, which was brought up later during litigation.

4. The 1990 ordinance stated that billboards "may be permitted ... as an allowed use within the C–2, C–3, M–1 and M–2 districts if located on properties that are adjacent to principal arterials, major arterials or state or national highways, provided that such highways are not designated as residential arterials as shown in the Gwinnett County Comprehensive Plan." Gwinnett County, Ga., Ordinances art. XI, § 1113.1(1) (1990).

5. After the enactment of the 1999 ordinance, Gwinnett County received a complaint regarding the height and location of Crown Media's sign on September 24, 1999. Gwinnett County prepared a survey of the area on October 20, 1999. There is no claim that Gwinnett County advised Crown Media of any problems until Humrich's March 15, 2000, letter.

6. Humrich's March 15, 2000, letter stated as follows:

- The total height approved for this sign is 40'. As measured, the sign is 47.01 feet high.
- Regulations existing at the time of permit approved [sic] required the sign to be

constructed its sign in accordance with its plans, which complied with the 1990 ordinance.

D. May 19, 2000, Meeting

A meeting about the alleged violations occurred on May 19, 2000. Humrich informed Crown Media that the sign's height should be reduced to forty feet and its head should be cantilevered or rotated so that all portions of the sign would be located at a minimum of 300 feet from any residential zoning district.[7] According to Crown Media, Humrich further advised that these changes could be made under the existing sign and building permits issued in 1998, and requested evidence that the sign could be safely altered to cause it to be located at a minimum of 300 feet from a residential subdivision. Crown Media assured Humrich that it would comply with her requests.

Crown Media then gave Gwinnett County a June 12, 2000, letter from the sign builder stating (1) that the sign could be moved to conform with Gwinnett County's requirements, and (2) that such construction could be completed in approximately three months.

E. July 6, 2000, Notice to Remove Sign

In response to the June 12, 2000, letter, Humrich sent Crown Media a July 6, 2000, notice stating that its sign violated Gwinnett County's sign ordinance and must be removed within thirty days to avoid further legal action. The notice stated that "the sign structure is in violation of the Gwinnett County Zoning Resolution Section 1113.1 and must be removed." The notice did not specifically state whether Gwinnett County relied on a violation of the 1990 or 1999 ordinance or both in determining that the billboard must be removed.[8]

After receiving Gwinnett County's July 6, 2000, notice, Crown Media appealed to the Gwinnett County Zoning Board of Appeals ("ZBA"). In that appeal, Crown Media claimed: (1) that Gwinnett County was impermissibly applying new zoning regulations enacted after the issuance of the permits and certificates of occupancy and completion; (2) that this was an illegal attempt to enforce a new law retroactively; (3) that the 1990 and 1999 ordinances were unconstitutional in any event; and (4) that Crown Media had a vested property right to maintain its sign. Crown Media asked the ZBA (1) to overturn the removal notice and (2) to order that Crown Media could complete construction of its sign in strict compliance with the 1990 ordinance in effect when its 1998 permits were issued.

placed a minimum of 300' from any residential subdivision (current requirements are 500'). The sign is only 282.63' from the edge of Berkeley Lake Estates, Unit 4.

- Section 1110 of the Gwinnett County Zoning Resolution states that the light from any illuminated sign shall not be of an intensity or brightness which will interfere with the peace, confor [sic], convenience, and genreal [sic] welfare of residents or occupants of adjacent properties. We have had numerous complaints regarding the intensity of the lights on this sign.

7. At this meeting between Humrich and Crown Media, Humrich did not express any concern with respect to the sign's distance from the right-of-way. However, in its pleadings, Gwinnett County claims the sign is less than seventy-five feet from the nearest right-of-way.

8. The parts of § 1113.1 in the 1990 ordinance that Crown Media concedes its sign violated are the height and setback requirements. The parts of § 1113.1 in the 1999 ordinance of which Crown Media's sign could be considered to be in violation are also the height and setback requirements. Further, the 1999 ordinance prohibits billboards in "M-1" zoning areas except by special use permit, which Crown Media applied for but was denied.

The ZBA denied Crown Media's appeal on August 9, 2000.[9] Crown Media appealed the ZBA's decision to the Superior Court of Gwinnett County in an action styled *Crown Media, LLC v. Gwinnett County, Ga.*, No. 00–A–8227–4 (Ga. Sup. Ct. filed Sept. 6, 2000). In that action, Crown Media claims that the 1990 and 1999 ordinances are unconstitutional and void, and that it has vested property rights in its sign. On March 4, 2002, the Gwinnett County Superior Court stayed that action until this pending federal litigation concludes.

F. August 21, 2001, Application for Special Use Permit

While the state court action was pending, Crown Media applied for a special use permit for its sign on August 21, 2001. The 1999 ordinance added this special use permit requirement for billboards in "M–1" zoning areas.[10] Crown Media initially sought variances under the 1999 ordinance for its sign, but was told by county officials that it must first obtain a "special use permit" under the 1999 ordinance, and then apply for variances.[11] On November 27, 2001, the Gwinnett County Board of Commissioners held a public hearing at which Crown Media requested a special use permit with the intent to relocate its sign to a conforming location under the 1990 ordinance, a plan similar to that discussed with Humrich. The Board denied Crown Media a special use permit.

On the Board's behalf, a Commissioner made these findings: (1) that there was no legitimate reason stated for the approval of the special use permit application; (2) that allowing Crown Media's sign to remain would set an adverse precedent under the 1999 ordinance; (3) that the sign does not meet the 500 foot minimum setback from a residential zoning district or daycare center; (4) that the sign does not meet the minimum separation from another billboard; (5) that the sign adversely affects the visual quality and traffic safety along the Peachtree Industrial corridor; (6) that the sign violates policy LI.2 of the comprehensive plan land use element for light industrial areas; and (7) that the sign creates light problems.

Having been denied a special use permit under the 1999 ordinance, Crown Media contends that the 1999 ordinance, like the 1990 ordinance, is unconstitutional, and that thus no valid law precluded its sign when the permits were issued in 1998, when the sign was erected in 1999, when Gwinnett County issued its removal notice in 2000, or when Crown Media applied for a special use permit in 2001.

G. 2001 Ordinance

On August 28, 2001, Gwinnett County adopted a new sign ordinance (the "2001 ordinance") that altered significantly the substance of the 1999 ordinance to address constitutional concerns.[12] The 2001 ordi-

9. Although the ZBA denied Crown Media's appeal of the removal notice, Crown Media points out that according to its evidence, the sign permit, the building permit, the certificate of occupancy, and the certificate of completion have never been revoked by Gwinnett County.

10. Although Crown Media made an effort to comply with the 1999 ordinance, it did not concede any of its constitutional challenges to the 1990 or 1999 ordinance.

11. Through discovery in the Gwinnett County Superior Court action, Crown Media learned that from 1995 until 2001, Gwinnett County had granted 610 variance requests while denying only thirty-one (a 95 percent approval of variances). After learning that information, Crown Media decided to apply for variances.

12. The 2001 ordinance eliminated the distinction between billboards as off-premises or on-premises, eliminated duration restrictions for political signs, changed the permit exemp-

nance, however, kept in place the 500–foot setback restriction from a residential zoning district and daycare center, the seventy-five foot setback restriction from a right-of-way, and the forty foot height limitation. Although Crown Media does not challenge the constitutionality of the 2001 ordinance, Gwinnett County contends that its enactment moots Crown Media's constitutional challenges to the 1990 and 1999 ordinances.

H. Procedural History

On December 20, 2001, Crown Media filed this federal suit, seeking declaratory relief that the 1990 and 1999 ordinances are unconstitutional and injunctive relief against Gwinnett County's continued enforcement of the height and location restrictions in these ordinances.[13] Crown Media seeks to keep its sign in place through injunctive relief and does not seek damages.[14]

[1] On cross-motions for summary judgment, the district court addressed Crown Media's claims under the 1990 and 1999 ordinances and granted judgment in favor of Gwinnett County. The district court concluded that Crown Media's constitutional challenge to the 1999 ordinance was moot because the 2001 ordinance removed all of the alleged constitutional violations in the 1999 ordinance. The district court also concluded that there was no reasonable expectation that the challenged practices will resume. The district court further determined that Crown Media did not possess any vested property rights in its sign or its permits issued under the 1990 ordinance.[15] This appeal followed.

II. STANDARD OF REVIEW

[2] This Court reviews a district court's grant of summary judgment *de novo*. *Cafe Erotica of Fla., Inc. v. St. Johns County*, 360 F.3d 1274, 1281 (11th Cir.2004). This Court reviews questions of mootness *de novo*. *Christian Coalition of Ala. v. Cole*, 355 F.3d 1288, 1290 (11th Cir.2004).

tions, included a statement of purposes specifically for sign regulation, and expressly allowed noncommercial messages on all signs. Gwinnett County stresses that its adoption of the 2001 ordinance resulted from years of studying court decisions in Georgia and elsewhere, and not in response to Crown Media's challenges.

13. Although Crown Media's complaint focused on the 1999 ordinance and does not specifically reference the 1990 ordinance, the parties litigated the case in the district court and now on appeal as if the constitutionality of both ordinances were at issue. Thus, we will decide this case as one in which Crown Media's complaint specifically places in issue the constitutionality of both ordinances. *See Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1024 n. 4 (11th Cir.2001) (*en banc*).

14. Crown Media does seek damages with respect to certain claims that are not the subject of this appeal. Specifically, Crown Media sought damages for the taking and inverse condemnation of Crown Media's property without just and adequate compensation. Crown Media also sought a writ of mandamus directing the Gwinnett County Board of Commissioners to issue the special use permit under the 1999 ordinance.

15. In its lawsuit, Crown Media also contended that Gwinnett County selectively enforced the 1999 ordinance against Crown Media, in violation of the Equal Protection Clauses of the federal and Georgia constitutions. The district court determined that Crown Media had not shown that it was similarly situated to other property owners whose variance requests were approved, nor had Crown Media identified any evidence of discriminatory intent, and thus Crown Media had not shown an equal protection violation. We agree and affirm the district court's order to the extent it granted summary judgment on Crown Media's claims that Gwinnett County selectively enforced its sign ordinances in violation of the Equal Protection Clauses of the federal and Georgia constitutions.

III. DISCUSSION

In this appeal, the only issue is whether Crown Media's constitutional challenges to the 1990 and 1999 ordinances are moot due to the enactment of the 2001 ordinance. To answer that question, we review (1) some general mootness principles and (2) Georgia law regarding vested property rights. We then apply those legal principles to Crown Media's claims.

A. *Mootness Principles*

[3] "The Constitution limits the jurisdiction of the federal courts to actual cases and controversies. To satisfy the case or controversy requirement of Article III, a plaintiff must have suffered some actual injury that can be remedied or redressed by a favorable judicial decision." *Nat'l Adver. Co. v. City of Ft. Lauderdale,* 934 F.2d 283, 285–86 (11th Cir.1991) (internal citation omitted). A case is moot " 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla.,* 351 F.3d 1112, 1119 (11th Cir.2003) (quoting *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969)). "Put another way, [a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *31 Foster Children v. Bush,* 329 F.3d 1255, 1263 (11th Cir.) (internal quotation marks and citation omitted), *cert. denied,* —— U.S. ——, 124 S.Ct. 483, 157 L.Ed.2d 376 (2003).

"[M]ootness is a justiciability doctrine that must be satisfied before we may decide a case." *Granite State Outdoor Adver.,* 351 F.3d at 1119. " 'Because the judiciary is unelected and unrepresentative, the Article III case-or-controversy limitation, as embodied in [the] justiciability doctrine, presents an important restriction on the power of the federal courts.' " *Coral Springs St. Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1327 (11th Cir. 2004) (quoting *Socialist Workers Party v. Leahy,* 145 F.3d 1240, 1244 (11th Cir. 1998)).

[4] "Generally, a challenge to the constitutionality of a statute is mooted by the repeal of the statute." *Coral Springs,* 371 F.3d at 1328–32 (surveying our mootness precedents). When a party challenges a law as unconstitutional and seeks only declaratory and prospective injunctive relief, a " 'superseding statute or regulation moots a case ... to the extent that it removes challenged features of the prior law.' " *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta,* 219 F.3d 1301, 1310 (11th Cir.2000) (quoting *Naturist Soc'y, Inc. v. Fillyaw,* 958 F.2d 1515, 1520 (11th Cir.1992)). " 'To the extent that those features remain in place, and changes in the law have not so fundamentally altered the statutory framework as to render the original controversy a mere abstraction, the case [is] not moot.' " *Coalition for the Abolition of Marijuana Prohibition,* 219 F.3d at 1310 (quoting *Naturist Soc'y, Inc.,* 958 F.2d at 1520).[16]

[5, 6] In addition, for the repeal of a statute to moot a challenge to that statute, the governmental defendant must show that there is no reasonable likelihood that the repealed statute or challenged practices would be reinstated. *Coral Springs,* 371 F.3d at 1328; *Christian Coalition of Ala.,* 355 F.3d at 1291; *Jews for Jesus, Inc. v. Hillsborourgh County Aviation Auth.,* 162 F.3d 627, 629 (11th Cir.1998).

16. *See Horton v. City of St. Augustine, Fla.,* 272 F.3d 1318, 1327–28 (11th Cir.2001) (concluding that amendment to street performance ordinance "did not so fundamentally alter either [the challenged ordinance's] statutory framework or the gravamen of [the plaintiff's] fundamental challenges as to render the original controversy moot").

Further, when a plaintiff requests damages, as opposed to only declaratory or injunctive relief, changes to or repeal of the challenged ordinance may not necessarily moot the plaintiff's constitutional challenge to that ordinance. *See Granite State Outdoor Adver.*, 351 F.3d at 1119 (concluding that even though sign ordinance was repealed, constitutional challenge was not moot because plaintiff requested damages).[17]

In this case, Crown Media does not request damages and does not contend that Gwinnett County may reinstate the repealed 1990 and 1999 ordinances. According to Crown Media, what makes this case justiciable is its vested property rights in its sign and permits. Specifically, Crown Media says that its challenges to these old ordinances are not moot because under Georgia law, its property rights in its sign and permits vested *prior to the enactment of the 2001 ordinance,* and that therefore subsequent changes to the old 1990 and 1999 ordinances do not affect whether it is entitled to its preexisting sign and permits.

In *Coral Springs,* 371 F.3d 1320 (11th Cir.2004), this Court recognized that a party's vested property rights constitute an enforceable entitlement to a permit or a sign unaffected by subsequent changes in sign ordinances and may keep a constitutional challenge to a repealed sign ordinance from becoming moot under federal law. *Id.* at 1333. Further, the parties here do not dispute that a vested property right to a pre-existing permit or sign is a cognizable interest that may keep a constitutional challenge to a subsequently repealed ordinance justiciable. Instead, they dispute whether Crown Media has any such vested property rights.

[7] Whether a plaintiff has obtained vested property rights in a sign or permit is a question of state law. *Id.* at 1333–34 (surveying Florida law and determining that plaintiff did not have a vested property right to the issuance of a sign permit under Florida law);[18] *Nat'l Adver. Co.*, 934 F.2d at 286 (stating that on remand, district court must "decide whether National has vested rights under Florida law to build billboards on its property"). Thus, to determine whether Crown Media has vested property rights in its sign and permits, we must examine Georgia law and then apply it to Crown Media's claims.

B. *Georgia Law*

1. *Issued Permits*

[8–10] If a property owner obtains a valid sign or building permit authorizing a particular land use under an existing zoning ordinance, Georgia courts have concluded that property rights vest when a permit is actually issued for a particular land use and that a later, new zoning ordinance prohibiting that land use is not enforceable against the property owner. *WMM Props., Inc. v. Cobb County,* 255 Ga. 436, 339 S.E.2d 252, 254 (1986); *Schul-*

17. *See also Naturist Soc'y, Inc.*, 958 F.2d at 1519 (stating that "claim for damages saves from mootness" constitutional challenges to "old" park regulations governing expressive conduct).

18. To support the principle that state law defines vested property rights, *Coral Springs* aptly relies on *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), where the Supreme Court stated:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law*—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Coral Springs, 371 F.3d at 1333 (quoting *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709) (emphasis added).

man v. Fulton County, 249 Ga. 852, 295 S.E.2d 102, 103 (1982); *Clark v. Int'l Horizons, Inc.,* 243 Ga. 63, 252 S.E.2d 488, 490 (1979); *Keenan v. Acker,* 226 Ga. 896, 178 S.E.2d 196, 197–98 (1970); *see Craig v. City of Lilburn,* 226 Ga. 679, 177 S.E.2d 75, 76 (1970).[19] "Once a building permit has issued, a landowner has the right to develop the property pursuant to that permit." *WMM Props.,* 339 S.E.2d at 254. Further, under Georgia law the landowner has such vested rights in an issued permit for a particular land use "notwithstanding a zoning or regulatory change subsequent to the issuance of the building permit, and notwithstanding the fact that there has been no substantial expenditure of funds in reliance upon the building permit." *Id.* In addition, the landowner retains that vested right to develop the property pursuant to an issued permit "during its term or for a reasonable time after its issuance if no term is specified." *Id.*[20]

2. Structure Built in Compliance with Permit

[11] Georgia courts have also determined that the issuance of a permit vests a right in the permit holder only to build in accordance with the requirements in a valid permit or in a valid zoning ordinance. In *Jackson v. Delk,* 257 Ga. 541, 361 S.E.2d 370 (1987), the Georgia Supreme Court stated that "the issuance of a building permit, as well as various other forms of administrative approval, vests the right of the permittee to develop his or her property in accordance with existing zoning or regulatory laws." *Id.* at 372; *see WMM Props.,* 339 S.E.2d at 254 (stating that "[o]nce a building permit has issued, a landowner has a right to develop the property pursuant to that permit"); *Gifford-Hill & Co. v. Harrison,* 229 Ga. 260, 191 S.E.2d 85, 89 (1972) (stating that "an applicant must thereafter comply with all reasonable conditions and requirements imposed upon the use of the land").

In addition, the Georgia Supreme Court has concluded that if a Georgia property owner builds its structure in accordance with its valid permits and the relevant ordinances, the property owner maintains a vested property right in its pre-existing structure, despite the subsequent enactment of an ordinance prohibiting the structure or previously permitted use.

19. For example, in *Clark,* the Georgia Supreme Court concluded that even though a special use permit was denied, a building permit issued and "a building permit legally obtained and valid in every respect may not be revoked by the zoning authority because the property is subsequently zoned against the type of building sought to be erected," and "[n]o showing of reliance is required." 252 S.E.2d at 490. In *Keenan,* the Georgia Supreme Court concluded that a property owner who had made inconsequential expenditures had a vested right to land use, stating that "where ... a permit has been legally obtained and is valid in every respect, it may not be revoked by the zoning authority because the property has subsequently been zoned against the type of building sought to be erected." 178 S.E.2d at 197–98.

20. The parties agree that Crown Media's permits were validly issued by Gwinnett County. Thus, we need not address the many Georgia decisions involving invalidly issued permits. *See, e.g., Union County v. CGP, Inc.,* 589 S.E.2d 240, 242 (Ga.2003); *Cafe Risque/We Bare All Exit 10, Inc. v. Camden County,* 273 Ga. 451, 542 S.E.2d 108, 110 (2001); *Jackson v. Delk,* 257 Ga. 541, 361 S.E.2d 370, 372 (1987) (stating that "the issuance of a building or other permit [by an official] in violation of existing zoning or regulatory laws is considered an ultra vires act and vests no one's rights"); *Corey Outdoor Adver., Inc. v. Bd. of Zoning Adjustments,* 254 Ga. 221, 327 S.E.2d 178, 183–84 (1985) (requiring removal of sign constructed within 300 feet of historic property because permit, although issued, was invalid); *City of Statham v. Diversified Dev. Co.,* 250 Ga.App. 846, 550 S.E.2d 410, 412 (2001); *see also McClure v. Davidson,* 258 Ga. 706, 373 S.E.2d 617, 622 (1988).

See Lamar Adver. of S. Ga., Inc. v. City of Albany, 260 Ga. 46, 389 S.E.2d 216, 217 (1990) (concluding plaintiff had vested property right to erect sign after obtaining permit to build, despite subsequent change in sign ordinance prohibiting permitted signs); *WMM Props.,* 339 S.E.2d at 254; *Craig,* 177 S.E.2d at 76.

3. Non–Compliant Structure and Valid Ordinance

[12] Georgia case law also addresses what happens when a property owner is issued a permit but does not construct the structure in accordance with that permit. Under Georgia law, a property owner does not obtain vested property rights in a non-compliant structure, and the county may enforce pre-existing requirements in a valid permit or zoning ordinance and require, in some circumstances, that the non-compliant structure be taken down or moved to comply with the permit. *See Dep't of Transp. v. Shiflett,* 251 Ga. 873, 310 S.E.2d 509, 512 (1984) (remove totally unauthorized sign); *Gray v. DeKalb County,* 230 Ga. 95, 195 S.E.2d 914, 916 (1973) (move partially completed house to proper setback, not destroy it); *DeKalb County v. DRS Invs., Inc.,* 260 Ga.App. 225, 581 S.E.2d 573, 575–76 (2003) (remove sign in light of knowing and gross violations of ordinance).

[13, 14] Although broadly speaking a property owner does not acquire vested property rights in its non-compliant structure, the property owner retains vested property rights to build its structure in accordance with the issued permit "during its term or for a reasonable time after its issuance if no term is specified." *WMM Props.,* 339 S.E.2d at 254; *DRS Invs.,* 581 S.E.2d at 575;[21] *see* O.C.G.A. § 36–74–23(b) ("[I]f a violation of any code or ordinance is found, the code inspector shall . . . give him or her a reasonable time to correct the violation."); *Tilley Props., Inc. v. Bartow County,* 261 Ga. 153, 401 S.E.2d 527, 529 (1991) ("A 'county has the duty and obligation to work with property owners to allow them the highest and best use of their property . . . .' ")(quoting *DeKalb County v. Flynn,* 243 Ga. 679, 256 S.E.2d 362, 364 (1979)). Accordingly, under Georgia law, a property owner may attempt to bring its non-compliant structure into compliance during the permit time or for a reasonable time if no express time limit is in the permit.[22]

This Georgia case law involves permits issued pursuant to *valid* ordinances. The difficult question is what happens when a property owner does not construct its structure in accordance with setback and height restrictions in an issued sign permit but the ordinance requiring those restrictions is unconstitutional or otherwise invalid. We turn to that question.

21. In *DRS Investments,* the Georgia court stated:

> "Once a building permit has issued, a landowner has a right to develop the property pursuant to that permit (during its term or for a reasonable time after its issuance if no term is specified), notwithstanding a zoning or regulatory change subsequent to the issuance of the building permit. . . ."

581 S.E.2d at 575 (quoting *WMM Props.,* 339 S.E.2d at 254).

22. *DRS Investments* appears to indicate that a sign company that *knowingly* violates its permit may not always have a reasonable time to bring its sign into compliance. *See DRS Invs.,* 581 S.E.2d at 575. In this case, there is no evidence that Crown Media *knowingly* violated its permits. Rather, it was not until almost a year after its construction and after Gwinnett County had issued certificates of occupancy and completion that Crown Media became aware that its sign violated its permits, and even then, Crown Media immediately sought to bring its sign into compliance with the 1990 ordinance under which the sign was erected.

4. Non-Compliant Structure and Unconstitutional Ordinance

In determining whether a property owner is entitled to a particular land use, Georgia courts at times have assessed the validity or constitutionality of the relevant zoning ordinance restricting the sought-after land use. For example, in *Tilley Props., Inc. v. Bartow County,* 261 Ga. 153, 401 S.E.2d 527, 529 (1991), the Georgia Supreme Court declared an agricultural zoning ordinance void and then stated that "[w]here ... there is no valid restriction on the property," the property owner "has the right under the law to use the property as it so desires." 401 S.E.2d at 529.[23] In *Tilley,* after declaring the zoning ordinance void, the Georgia Supreme Court granted a writ of mandamus directing the county to issue the property owner a land use certificate, a required first step for a surface mining permit. *Id.*

Sikes v. Pierce, 212 Ga. 567, 94 S.E.2d 427 (1956), provides an earlier example of a case in which the Georgia Supreme Court examined the validity of an ordinance to determine whether a property owner was entitled to the issuance of a permit for a particular land use. *Id.* at 429. In *Sikes,* the property owner applied for and was denied a building permit to construct a gasoline station on the grounds that the property was zoned only for residential purposes. *Id.* at 428. The Georgia Supreme Court determined that the charter of the municipality, which authorized the city to adopt zoning ordinances, and the zoning ordinances adopted under that charter violated interested property owners' due process rights and were "null and void." *Id.* at 429. In concluding that the property owners were entitled to a building permit, the Georgia Supreme Court stated that, "[i]n the absence of valid zoning regulations or restrictive covenants to the contrary, the right to use one's property for a lawful business purpose is a right inherent in the ownership of the property, and is protected by law." *Id.* at 428 (citations omitted).[24]

[15] Further, under Georgia law even if one particular ordinance may be invalid or unconstitutional, a landowner still would have to comply with all other *valid,* relevant ordinances and regulations. *See Butts County v. Pine Ridge Recycling, Inc.,* 213 Ga.App. 510, 445 S.E.2d 294, 297 (1994) (requiring company to comply with other valid restrictions even though there

23. In *Tilley,* the property owner applied for a certificate of land use approval, a required first step to obtaining a surface mining permit. *Id.* at 527. The county denied the application for the land use certificate because the property was not zoned for mining but was zoned for only agricultural purposes. *Id.* The property owner challenged that agricultural zoning ordinance as invalid. *Id.* The Georgia Supreme Court concluded that at the time the property owner applied for its land use certificate, the agricultural zoning ordinance restricting its property to agricultural purposes was invalid because of defects in its enactment. *Id.* at 529. After declaring an agricultural zoning ordinance void, the Georgia Supreme Court concluded that where "there is no valid restriction on the property, ... the [property owner] has the right under the law to use the property as it so desires." *Id.* While *Tilley* teaches that the validity of a zoning ordinance is relevant to whether a property owner is entitled to a requested certificate, it is important to note that *Tilley* did not address vested property rights in the face of a subsequent, new ordinance.

24. It is important to emphasize that Crown Media applied for and actually obtained permits. Thus, we need not address whether under Georgia law a property owner who never sought a permit for a particular land use acquires vested property rights in that use in the face of a subsequent ordinance precluding that land use. *See, e.g., N. Ga. Mountain Crisis Network, Inc. v. City of Blue Ridge,* 248 Ga.App. 450, 546 S.E.2d 850, 853 (2001); *Whipple v. City of Cordele,* 231 Ga.App. 274, 499 S.E.2d 113, 116 (1998).

was no valid county solid waste management plan); *Cannon v. Clayton County*, 255 Ga. 63, 335 S.E.2d 294, 295 (1985) (stating that after an applicant applies for authorization to use land for a particular purpose, the applicant "must thereafter comply with all reasonable conditions and requirements imposed upon the use of the land" (quoting *Gifford-Hill & Co.*, 191 S.E.2d at 89)).

Having discussed applicable Georgia law regarding permits, we now apply it to Crown Media's claims.

C. Crown Media's 1998 Permits

[16] As recounted earlier, Crown Media was issued sign and building permits by Gwinnett County in 1998. In this case there is no contention by Gwinnett County that these permits issued to Crown Media are invalid. Accordingly, we examine this case as one in which the property owner has been issued valid permits for a permissible land use—erection of a sign—under applicable laws and as one in which the merits issue is over whether Gwinnett County can require Crown Media to take down its sign for non-compliance with certain setback and height restrictions in the 1990 ordinance and in its permits stemming from the 1990 ordinance.

We first conclude that under Georgia law Crown Media had vested property rights in its permits. If Crown Media's sign had been built in compliance with the restrictions in the 1990 ordinance and its permits, this case would be simple. Crown Media's property rights in its sign would have vested under Georgia law and any subsequently enacted sign ordinance (such as the 1999 ordinance containing different setback restrictions) would be unenforceable against Crown Media's pre-existing, legally constructed sign, and those vested property rights would make Crown Media's challenge to the 1990 ordinance justiciable.

The difficulty for Crown Media is that its sign complied *almost*, but not fully, with the restrictions in the 1990 ordinance and its permits. Thus, if the 1990 ordinance is constitutional, Crown Media seemingly has no vested property right in its sign under Georgia law *to the extent the sign* was not in compliance with the 1990 ordinance and its permits. But under Georgia law Crown Media would have, and should have been given by Gwinnett County, the permitted time or a reasonable time to bring its sign into compliance with its permits (in which Crown Media did have vested property rights). This reasonable time-to-comply was especially relevant here where Crown Media had completed its sign and Gwinnett County approved the sign "as-built", issued certificates of occupancy, and did not complain about the sign until ten months after completion.[25]

Moreover, if the 1990 ordinance is unconstitutional, Gwinnett County cannot rely, as it does, on the 1990 ordinance to require Crown Media to remove its sign.

25. Because the issued 1998 permits are not in the record, we do not know whether they had an express expiration date. If not, under Georgia law, Crown Media had a reasonable time to construct its sign in accordance with its permits. According to Crown Media, Humrich of Gwinnett County initially indicated in 2000 that Crown Media would be given an opportunity to bring its sign into compliance with the 1990 ordinance and its existing permits. Crown Media then gave Gwinnett County a June 12, 2000, letter from its sign builder stating (1) that the sign could be moved to conform with Gwinnett County's requirements, and (2) that such construction could be completed within three months. If the 1990 ordinance is constitutional, the length of the time Crown Media has to conform its sign to its issued permits may be affected by Gwinnett County's approval and then belated discovery of the sign's non-compliance. Because we are remanding this case, the time-to-comply issue is best resolved by the district court in the first instance.

As of this juncture, Gwinnett County has identified no other restrictions regarding sign size or location in existence at the time Crown Media applied for its permits and erected its sign. *See Tilley,* 401 S.E.2d at 529; *Sikes,* 94 S.E.2d at 429. Further, if the 1990 ordinance is unconstitutional and if, as Crown Media claims, the restrictions in Crown Media's sign and building permits stem from and depend on that 1990 ordinance, then under Georgia law the restrictions in Crown Media's permits would be void and unenforceable as well. This observation illustrates that the existence and scope of Crown Media's property rights in its permits and erected sign under state law and the extent to which they vested prior to the enactment of the 2001 ordinance cannot be fully ascertained until the constitutionality of the 1990 ordinance is determined. Therefore, we conclude that Crown Media's challenge to the constitutionality of the 1990 ordinance is not moot.

D. 1999 Ordinance

[17] We recognize that if the 1990 ordinance is unconstitutional, this may resolve the parties' dispute over Crown Media's erected sign without any need to determine the constitutionality of the 1999 ordinance. Nonetheless, this appeal is also about Crown Media's constitutional challenge to the 1999 ordinance, and we conclude that issue is also not moot. After construction of Crown Media's sign and after Gwinnett County notified Crown Media to remove its sign, Crown Media applied for a special use permit for its pre-existing sign under the 1999 ordinance. Gwinnett County denied Crown Media a special use permit primarily because its pre-existing sign did not comply with the requirements in the 1999 ordinance, such as the increased 500–foot setback from a residential zoning district, and because allowing Crown Media's sign to remain would set an adverse precedent under the 1999 ordinance.

If the 1999 ordinance was unconstitutional, however, then Gwinnett County's new special use permit requirement and its new setback restrictions would be null and void and not enforceable against Crown Media's pre-existing, permitted sign. More important, the lack of a special use permit and non-compliance with the 1999 ordinance could be no basis for Gwinnett County's ordering Crown Media to remove its pre-existing sign. Thus, the adoption of the 2001 ordinance did not make Crown Media's constitutional challenge to the 1999 ordinance moot.[26]

IV. CONCLUSION

For all the above reasons, we conclude that, given the particular factual circumstances of this case, Crown Media's constitutional challenges to the 1990 and the 1999 ordinances are not moot. In reaching this conclusion, we do not say or imply anything about the merits of this case because our only role at this juncture is to decide the single issue of mootness in this appeal. Accordingly, we reverse and vacate the district court's order dismissing Crown Media's complaint as moot, and remand this case for further proceedings in the district court.

26. We note that the 2001 ordinance contains a new section that permits a sign to be maintained in nonconformance with the requirements of the 2001 ordinance, provided that "[t]he lawful use of a permanent sign exist[ed] at the time of the adoption of [the 2001 ordinance]." Gwinnett County, Ga., Ordinances ch. 86, § 107(a) (2001). The 2001 ordinance also provides that "[a] nonconforming sign structure may not be replaced by another nonconforming sign structure, except where changed conditions beyond the control of the owner warrant the signs repair." Gwinnett County, Ga., Ordinances ch. 86, § 107(c) (2001).

REVERSED and REMANDED with INSTRUCTIONS.

BAYSHORE FORD TRUCK SALES, INC., Heintzelman's Truck Center, Inc., et al., Plaintiffs–Appellants,

v.

FORD MOTOR COMPANY, Defendant–Appellee.

No. 03–13103.

United States Court of Appeals, Eleventh Circuit.

Aug. 13, 2004.

Background: Automobile dealership franchisees sued franchisor for breach of contract. The United States District Court for the Northern District of Georgia, No. 99–00173–CV–RLV–4, Robert L. Vining, Jr., J., granted summary judgment for franchisor, and franchisees appealed.

Holdings: The Court of Appeals, Forrester, District Judge, sitting by designation, held that:

(1) fact issue existed as to whether franchise agreement allowed franchisor to sell automobiles to franchisees at franchisee-specific prices;

(2) franchisees waived any right they had under franchise agreement to receive vehicle pricing decisions by personal delivery or mail; and

(3) disqualification of franchisor's law firm was not required.

Affirmed in part, reversed in part, and remanded.

1. Contracts ⚷143(1)

Under Michigan law, when language of contract is clear and unambiguous, then contract is not open to construction or interpretation and must simply be enforced as written.

2. Contracts ⚷143(2)

Under Michigan law, contract is "ambiguous," and thus open to construction or interpretation, if contract terms are inconsistent on their face, or are reasonably and fairly susceptible to multiple understandings and meanings.

See publication Words and Phrases for other judicial constructions and definitions.

3. Contracts ⚷176(2)

Under Michigan law, court must determine, as matter of law, whether contract is ambiguous.

4. Contracts ⚷143.5

Under Michigan law, contract should not be interpreted in manner that renders any term or clause mere surplusage.

5. Contracts ⚷143(2)

Under Michigan law, simple disagreement between parties as to meaning of contractual terms does not render contract ambiguous.

6. Federal Civil Procedure ⚷2492

Issue of material fact as to whether automobile dealership franchise agreement allowed franchisor to sell automobiles to franchisees at franchisee-specific prices precluded summary judgment in franchisees' suit for breach of contract.

7. Contracts ⚷227

Under Michigan law, waiver of contractual rights can be shown by proof of express language of agreement or ineffably established by such declaration, act, and conduct of party against whom it is claimed as are inconsistent with purpose to exact strict performance.

Declaratory Judgment

180 N.C.App. 582
Court of Appeals of North Carolina.

Dudley J. EMICK & Martha Emick, Plaintiffs,
v.
SUNSET BEACH & TWIN LAKES, INC., Edward M. Gore, Dinah E. Gore, & Town of Sunset Beach, Defendants and Third Party Plaintiffs,
v.
Ronald Ernest Cohn, et al., Third Party Defendants.

No. COA06-53.
|
Dec. 19, 2006.

Synopsis
Background: Home purchasers brought declaratory judgment action against town, seeking a judgment that a plan of development existed for eastern part of island, and investment company, which owned lots on eastern part of island, was joined as a necessary party. Home purchasers filed notice of lis pendens to exclude certain property that fell outside of the scope of litigation over development. The Superior Court, Brunswick County, William C. Gore and E. Lynn Johnson, JJ., entered orders dismissing lis pendens action, granting investment company summary judgment, and dismissing complaint against town. Home purchasers appealed.

Holdings: The Court of Appeals of North Carolina, Bryant, J., held that:

[1] home purchasers had standing to bring declaratory judgment action to enforce development plan;

[2] genuine issues of material fact regarding width of roadway precluded summary judgment; and

[3] trial court did not abuse its discretion in setting aside default judgment.

Vacated in part, reversed in part, affirmed in part, and remanded.

West Headnotes (12)

[1] **Declaratory Judgment**
Subjects of relief in general

Home purchasers had standing to seek a declaratory judgment that a plan of development existed with abutting roadway as a 60-foot right of way instead of a 30-foot right of way, according to the plat referenced in their deed, and they were entitled to take action to prevent owner of the larger tract of land from departing from the plan of development evidenced by a map made at the time the property was conveyed.

Cases that cite this headnote

[2] **Action**
Persons entitled to sue

To establish standing, plaintiffs must present an actual controversy between the parties.

Cases that cite this headnote

[3] **Action**
Persons entitled to sue

Plaintiffs are not required to allege or prove that a traditional cause of action exists against defendant in order to establish an actual controversy for purposes of standing; however, it is a necessary requirement of an actual controversy that the litigation appear to be unavoidable.

Cases that cite this headnote

[4] **Declaratory Judgment**
Other actions distinguished

The essential distinction between an action for declaratory judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded.

Cases that cite this headnote

[5] **Judgment**
Particular Cases

Genuine issues of material fact existed as to whether roadway that abutted homeowners' property was 60 feet wide, precluding summary judgment in homeowners' declaratory judgment action to enforce plan of development within their chain of title.

Cases that cite this headnote

[6] **Appeal and Error**
Opening Default
Judgment
Discretion of court

A motion to set aside an entry of default is addressed to the sound discretion of the trial judge, and the order of the trial court ruling on such a motion will not be disturbed on appeal absent a showing of abuse of that discretion. Rules Civ.Proc., Rule 55(d), West's N.C.G.S.A. § 1A-1.

2 Cases that cite this headnote

[7] **Appeal and Error**
On appeal from judgment by confession or default or from orders relating thereto

In appellate review of a trial court's decision to set aside entry of default, the appellate court considers the following factors: (1)whether the defendant was diligent in pursuit of this matter; (2) whether plaintiff suffered any harm by virtue of the delay; and (3) whether defendant would suffer a grave injustice by being unable to defend the action. Rules Civ.Proc., Rule 55(d), West's N.C.G.S.A. § 1A-1.

Cases that cite this headnote

[8] **Judgment**
Presumptions and burden of proof

Inasmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits.

1 Cases that cite this headnote

[9] **Declaratory Judgment**
Discretion of lower court

Trial court did not abuse its discretion in setting aside investment company's entry of default in home purchasers' declaratory judgment action in order for the case to proceed on the merits; home purchasers failed to show the appellate court what evidence the trial judge heard to set aside the entry of default, and thus, it was presumed that the judge acted within his discretion. Rules Civ.Proc., Rule 55(d), West's N.C.G.S.A. § 1A-1.

3 Cases that cite this headnote

[10] **Judgment**
Actions in which judgment by default is authorized
Judgment
Matters admitted

The failure of a defendant who has been duly served to appear and answer a complaint seeking a declaratory judgment constitutes an admission

of every material fact pleaded which is essential to the judgment sought, but the court must, nevertheless, proceed to construe such facts or instruments set out in the complaint and enter judgment thereon; the default caused by the defendant's failure to appear and answer does not entitle the plaintiff to a judgment based on the pleader's conclusions.

Cases that cite this headnote

[11] **Judgment**
Matters admitted

A default in a declaratory judgment action admits only the allegations of the complaint and does not extend either expressly or by implication the scope of the determination sought by the plaintiff, or which could be granted by the court.

Cases that cite this headnote

[12] **Appeal and Error**
Judgment by default

Where appellant fails to bring up for review the evidence heard by the trial judge upon defendant's motion to vacate the entry of default, the appellate court presumes the trial judge acted within his discretion on evidence showing good cause to vacate the entry of default. Rules Civ.Proc., Rule 55(d), West's N.C.G.S.A. § 1A-1.

Cases that cite this headnote

**492 Appeal by plaintiffs from orders entered 28 June 2005 by Judge William C. Gore and 24 August and 31 August 2005 by Judge E. Lynn Johnson in Brunswick County Superior Court. Heard in the Court of Appeals 23 August 2006.

Attorneys and Law Firms

Kennedy, Covington, Lobdell, Hickman, L.L.P., by Beverly A. Carroll and Andrew M. Habenicht, Charlotte, for plaintiff-appellants.

Trest & Twigg, by Roy D. Trest, Calabash, for defendant and third-party plaintiff-appellees Edward M. Gore and Dinah E. Gore.

Fairley, Jess, Isenberg & Thompson, by Michael R. Isenberg, Southport, for defendant and third-party plaintiff-appellees The Town of Sunset.

No brief filed for third-party defendants.

Opinion

BRYANT, Judge.

*583 Dudley J. Emick and Martha Emick (plaintiffs) appeal from orders entered 28 June 2005, 24 August 2005 and 31 August 2005 granting Rosewood Investments, L.L.P.'s (third-party defendants') motion to dismiss the amended lis pendens action on Rosewood's lots located at Sunset Beach, North Carolina; granting Rosewood's motion for summary judgment; and dismissing plaintiff's complaint against Sunset Beach & Twin Lakes, Inc., Edward M. Gore, Dinah E. Gore, & Town of Sunset Beach, Inc. (collectively defendants and third-party plaintiffs) for lack of standing.

The Sunset Beach plan of development began in 1955. In 1965, Sunset Beach conveyed three tracts of land to James Bowen which conveyance showed North Shore Drive as a sixty-foot right of way. Bowen subdivided those lots and a map was filed in 1977 in Map Book I, page 379 (Bowen Subdivision). Several maps prepared from 1955 until 1976 indicated that roads running east to west on the island, which included North Shore Drive, were to be sixty-feet wide. In *584 1976, Sunset Beach prepared a map which shows North Shore Drive to be a thirty-foot right of way.

On 3 December 2001, plaintiffs purchased a home on lot 25, Tract 19 at the corner of North Shore Drive and 19th Street on the eastern end of Sunset Beach in Brunswick County, North Carolina, Deed Book 1527, at page 1190. The map referenced in plaintiffs' deed shows North Shore Drive to be sixty-feet wide. Before plaintiffs purchased their Sunset Beach home, they inquired about the development of the strip of land that runs between North Shore Drive and the canal, bordering the northern end of their property and a tract of land on the eastern side of

their home, referred to as "the Point" (Tract 20 on Map 8, Page 7, Brunswick County Registry). Plaintiffs were told houses could not be built on the strip of land on the canal because it was not wide enough: North Shore Drive had been developed as a sixty-foot right of way such that this strip of land did not contain enough square footage between the right of way and the canal on which to build houses. In 2003, plaintiffs observed some land clearing on the strip of land between North Shore Drive and the canal and brought this action, seeking a declaratory judgment that a plan of development existed for Sunset Beach, in particular the eastern part of the island.

On 26 July 2004, the trial court granted the motion filed by defendant Sunset Beach to join as necessary parties all lot owners **493 with property in the Bowen Subdivision adjacent to or abutting North Shore Drive tracts 17, 18 and 19. Rosewood Investments, LLC[1] was also served to be joined as a necessary party in the litigation since it purchased lots on the Point and Tract 20. A third-party complaint, incorporating the necessary parties, was filed 2 August 2004.

On 14 October 2004, plaintiffs filed an amended notice of lis pendens to exclude certain real property across the canal from the strip of land bordering North Shore Drive that fell outside the scope of this litigation. On 24 November 2004, the motion for entry of default filed by Sunset Beach was granted as to a number of third-party defendants, including Rosewood Investments. On 10 June 2005, Rosewood Investments filed a motion to dismiss plaintiff's amended lis pendens. On that date, Judge Gary E. Trawick entered a consent order to set aside entry of default against Rosewood Investments.

*585 On 28 June 2005, Rosewood Investments' motion to dismiss the amended lis pendens was granted by Judge William C. Gore. Further, Judge Gore indicated plaintiffs did not have standing as they "failed to allege that they have a particular interest in the outcome of this suit involving public matters that surpasses the common interest of all citizens of the Town of Sunset Beach." Rosewood Investments filed an answer to the Sunset Beach third-party complaint and moved for summary judgment, citing plaintiffs' lack of standing as the legal basis for their motion. On 12 August 2005, plaintiffs also moved for summary judgment. On 24 August 2005, Judge E. Lynn Johnson entered an order granting Rosewood Investments' motion for summary judgment and dismissing plaintiffs' complaint for lack of standing. On 31 August 2005, Judge Johnson entered another order, granting Rosewood Investments' motion for summary judgment. From these orders, plaintiffs appeal.

On appeal plaintiffs argue whether the trial court erred: (I) in dismissing plaintiffs' complaint for lack of standing and granting Rosewood Investments' motion for summary judgment; and (II) in setting aside the entry of default and permitting Rosewood Investments to participate in this action.

I

Plaintiffs argue the trial court erred in dismissing plaintiffs' complaint for lack of standing and granting Rosewood Investments' motion for summary judgment. We agree.

Standing

[1] [2] [3] [4] Plaintiffs derive standing to bring this action for declaratory judgment pursuant to N.C. Gen.Stat. § 1-254 (2005).[2] To establish standing, plaintiffs must present an actual controversy between the parties; however

> [p]laintiff[s][are] not required to allege or prove that a traditional "cause of action" exists against defendant in order to establish an actual controversy. However, it is a necessary requirement of an *586 actual controversy that the litigation appear to be unavoidable. The essential distinction between an action for Declaratory Judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded.
> *Emerald Isle v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987) (citations omitted). In this case, we determine that plaintiffs have **494 standing to seek a declaration that a plan of development exists with North Shore Drive as a sixty-foot right of way, according to the plat referenced in their deed. *See March v. Town of Kill Devil Hills*, 125 N.C.App. 151, 479 S.E.2d 252 (1997) (holding subdivision property owners had standing to seek injunction prohibiting the town from improving unpaved road in violation of plan of development). Further, plaintiffs are entitled to take action to prevent the owner of the larger tract of land

from departing from a plan of development evidenced by a map made at the time the property was conveyed. *See Wooten v. Town of Topsail Beach*, 127 N.C.App. 739, 493 S.E.2d 285 (1997) (abutting landowners on a dedicated street had inherent standing to seek injunction prohibiting town from building parking spaces on street in violation of plan of development shown on recorded map). Plaintiffs are property owners whose land abuts North Shore Drive. Plaintiffs have identified the actual controversy in their complaint and challenge defendants' development on a portion of North Shore Drive. Specifically, plaintiffs allege in their complaint "the correct, legal and valid width of the right of way of North Shore Drive east of Cobia Street to the eastern end of North Shore Drive is sixty feet in width; that [ ]none of the defendants ever properly withdrew dedication of North Shore Drive in accordance with N.C.G.S. 139-96 or 160A-299; and that any document which declares the width of North Shore Drive east of Cobia Street to the eastern end of North Shore Drive to be any distance other than sixty feet should be declared null and void." The plat and the plan of development of property owners such as plaintiffs, whose land abuts North Shore Drive, indicate the right of way is sixty-feet wide.

Linda Fluegel, Town Administrator, gave deposition testimony stating that Sunset Beach was incorporated in 1964 and roads in existence at that time were dedicated to the town at that time. Fluegel also testified that a valid plat, in compliance with the town's ordinances, must have a deed reference number, certificate of ownership and dedication and must be signed off by the Planning Board indicating ***587** approval of the plat. The plat filed by defendants on 7 June 2004 (Map 30, Page 274, Brunswick County Registry) indicating North Shore Drive was thirty feet wide, failed to meet the requirements for a valid plat pursuant to the Sunset Beach Town Ordinance. Based on plaintiff's property rights evidenced in their deed, the sworn affidavit of plaintiff', AND THE DEPOSITION Testimony of the town administrator, lInda Fluegel, we reverse the trial court's findings and conclusion that plaintiffs lacked standing to seek this declaratory action.

Summary Judgment

[5] Summary judgment is proper if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen.Stat. § 1A-1, Rule 56(c) (2005). The evidence must be considered in a light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). When reviewing the trial court's grant of summary judgment, this Court's standard of review is *de novo*. *Id.*

Plaintiffs' evidence showed a chain of title going back to the Bowen Subdivision[4] which references a plan of development with a sixty-foot-wide North Shore Drive. This plan of development is memorialized in three ****495** places in the Brunswick County Registry: (a) the 1965 map at Book 8, page 7; (b) the 1976 map at Book H, page 356; and (c) the 1977 map in Book I, at page 379. The 1977 map was specifically referenced in plaintiffs' deed.

Ward v. Sunset Beach and Twin Lakes, Inc., 53 N.C.App. 59, 279 S.E.2d 889 (1981), is a case which also involved the development of Sunset Beach. In *Ward*, the plaintiff had purchased two lots in 1955 from Sunset Beach "pursuant to a recorded 1955 map, specifically ***588** Lots 3 and 4 of Block 25." This is the same plat that began the plan of development of Sunset Beach (Map Book 4, at pages 64-65, Brunswick County Registry). From 1955 to 1967, Tubbs Inlet engulfed a portion of the beach on the eastern end of the island including the plaintiff's lots. Sunset Beach dredged the waterway and later opened a smaller inlet, which changed the configuration of the beach, including Block 25. *Ward*, 53 N.C.App. at 63, 279 S.E.2d 889 at 892. In 1976, Sunset Beach had a new map[5] prepared on which Lots 3 and 4 on Block 25 (Map Book 4, pages 64-65, Brunswick County Registry), were redrawn as lots 22, 23, 24, and 25 of Block 15R. Sunset Beach also relocated Main Street by which the plaintiffs had access to their property. The Court determined in *Ward* that even though the property had been engulfed by water and reclaimed by Sunset Beach, the "plaintiff once again became fee simple owner of those lots and was entitled to the easement as it existed at the time the plaintiff first acquired the two lots." *Id.*, 53 N.C.App. at 63, 279 S.E.2d at 892. The *Ward* decision explained:

> That the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling it accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement this created.

Id., 53 N.C.App. at 66, 279 S.E.2d at 893-94. The Court further stated:

> This principle and its rationale are equally applicable in the case

> before us. It seems clear in this case, as in most cases, that plaintiff was induced, in part, to purchase lots 3 and 4 because the lots were accessible by some means other than the ocean. Once defendant reclaimed plaintiff's land, plaintiff once again became fee simple owner with rights to her land, including access by way of the easement, as it existed at the time of the purchase. Defendant could not revoke the easement as shown on the 1955 Map by having a new map platted.

Id.

In the instant case, plaintiffs have provided their deed as record evidence. Such deed falls in the chain of title that follows maps and ***589** plats evidencing a plan of development. Plaintiffs have also supplied maps showing the plan of development and provided expert testimony to establish the location of North Shore on the ground. Based on the record evidence, we reject defendants' assertions that no genuine issues of fact exist as set out in their arguments which include: (a) the Town withdrew North Shore Drive by resolution; (b) Sunset Beach, Inc. withdrew North Shore Drive from dedication in 1999; (c) defendant Town has recognized North Shore Drive as thirty-feet wide; (d) flooding by Tubbs Inlet since 1960 changed the island insofar as plaintiffs' chain of title is concerned; and (e) later maps show North Shore Drive as thirty-feet wide. *See Singleton v. Sunset Beach & Twin Lakes, Inc.*, 147 N.C.App. 736, 556 S.E.2d 657 (2001) (summary judgment reversed and remanded for additional findings where the Court was unable to come to any real legal conclusions since (a) plaintiff produced no deed showing a chain of title to the Bowen Subdivision; (b) the parties produced no maps indicating how North Shore Drive was in fact represented in a chain of title; and, (c) nothing was presented showing whether alleged flooding of Sunset ****496** Beach had affected Tracts 17-19 abutting North Shore Drive).

It is clear that the map at Book 8, page 7, shows North Shore Drive as a dedicated street, sixty feet in width, running the length of the eastern end of the island to Tubbs Inlet, past plaintiffs' lot on Tract 19, as early as 1963. North Shore Drive is the only avenue to Tracts 17-20 and has never been abandoned. Defendants argue they withdrew North Shore Drive in 1999 by filing a "Withdrawal" pursuant to N.C.G.S. §§ 136-96 and 160A-299. We reject this theory. North Carolina case law supports plaintiffs' right to enforce the plan of development within their chain of title. Based on the evidence viewed in the light most favorable to plaintiffs, the trial court erred in granting Rosewood Investments' motion for summary judgment. We therefore reverse the grant of Rosewood Investments' motion for summary judgment because of the existence of genuine issues of material fact, and we remand this matter for trial.

II

Plaintiffs argue the trial court erred by setting aside the entry of default and permitting Rosewood Investments to participate in this action. We disagree.

[6] [7] [8] Pursuant to the provisions of N.C. Gen.Stat. § 1A-1, Rule 55(d), the trial court may set aside an entry of default for good cause shown. A motion to set aside an entry of default is addressed to the sound ***590** discretion of the trial judge and the order of the trial court ruling on such a motion will not be disturbed on appeal absent a showing of abuse of that discretion. *Britt v. Georgia-Pacific Corp.*, 46 N.C.App. 107, 108, 264 S.E.2d 395, 397 (1980); *Privette v. Privette*, 30 N.C.App. 41, 44, 226 S.E.2d 188, 190 (1976); *Acceptance Corp. v. Samuels*, 11 N.C.App. 504, 510-11, 181 S.E.2d 794, 798 (1971). In our appellate review, we consider the following factors: "(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*, 87 N.C.App. 606, 608, 361 S.E.2d 895, 896-97 (1987). However, "inasmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." *Peebles v. Moore*, 48 N.C.App. 497, 504-05, 269 S.E.2d 694, 698 (1980) (citation omitted), *modified and aff'd*, 302 N.C. 351, 275 S.E.2d 833 (1981).

[9] On 24 November 2004, the Clerk of Superior Court signed an entry of default against Rosewood Investments. This entry was made at the request of defendants and third-party plaintiffs, Sunset Beach & Twin Lakes and Edward M. and Dinah E. Gore. On 9 June 2005, an order setting aside this entry of default was entered by the Court.

[10] [11] [12] In this case, for good cause shown, the trial court set aside the entry of default. The third-party plaintiffs who obtained the entry of default stipulated to

the existence of good cause for setting aside the entry. Therefore, the Court did not abuse its discretion in finding good cause. Appellants in this case have presented no evidence to show that the Court has abused its discretion in making this determination:

> Appellant has not favored us with the evidence heard by the trial judge upon defendant's motion to vacate the entry of default. Where appellant fails to bring the evidence up for review, we presume the trial judge acted within his discretion on evidence showing good cause to vacate the entry of default. In this case Appellants have likewise failed to show the Court what evidence the trial judge heard to set aside the Entry of Default and it is therefore presumed that he acted within his discretion.

Crotts v. Camel Pawn Shop, Inc., 16 N.C.App. 392, 394, 192 S.E.2d 55 (1972). In this case, the trial court's order setting aside the entry ***591** of default did not create any additional issues or create prejudice to plaintiffs.

> The failure of a defendant who has been duly served to appear and answer a complaint seeking a declaratory judgment constitutes an admission of every material fact pleaded which is essential to the judgment sought, but the court must, nevertheless, ****497** proceed to construe such facts or instruments set out in the complaint and enter judgment thereon; the default caused by the defendant's failure to appear and answer does not entitle the plaintiff to a judgment based on the pleader's conclusions. The default admits only the allegations of the complaint and does not extend either expressly or by implication the scope of the determination sought by the plaintiff, or which could be granted by the court.

Baxter v. Jones, 14 N.C.App. 296, 311, 188 S.E.2d 622, 631 (1972). We hold the trial court did not abuse its discretion in setting aside Rosewood Investments' entry of default judgment in order for the case to proceed on the merits. This assignment of error is overruled.

In conclusion, we vacate the 28 June 2005 order concluding plaintiffs lacked standing; reverse the 24 and 31 August 2005 orders granting Rosewood Investments' summary judgment and remand for a trial on the merits; and affirm the setting aside of Rosewood Investments' entry of default judgment.

Vacated in part; Reversed and remanded in part; and Affirmed in part.

Judges McGEE and ELMORE concur.

All Citations

180 N.C.App. 582, 638 S.E.2d 490

Footnotes

1 Rosewood Investments, LLC is the owner of lot numbers fifty, forty-eight and forty six of Block 14R as shown in Map Book 30, Page 274, Brunswick County Registry and has a binding contract to purchase lots twenty-nine, thirty, thirty-one, thirty-four, thirty-five and thirty-six of Block 14R as shown on plat recorded in Map Book 30, Page 274, Brunswick County Registry.

2 N.C. Gen.Stat. § 1-254 states "[a]ny person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof." N.C.G.S. § 1-254 (2005).

3 Plaintiff Dudley J. Emick submitted an affidavit on 15 July 2004 stating "[b]efore our purchase of the house, we inquired about the development plan for this area. We were told that houses could not be built on the strip of land between North Shore Drive and the canal because it was not wide enough ... Our deed specifically refers to Map Cabinet I at Page 379, as the basis for our [2001] conveyance. That map ... shows North Shore Drive to be sixty feet wide ... [and

was] a part of a development plan for the eastern end of Sunset Beach dating back to 1955. It is my intent in this lawsuit to require these Defendants to follow this [1955] development plan."

4 In 1965, Sunset Beach conveyed three tracts of land to James Bowen which showed North Shore Drive as a sixty-foot right of way. Bowen subdivided those lots and a map was filed in 1977 in Map Book I, page 379 (Bowen Subdivision). Several maps prepared from 1955 until 1976 indicated that roads running east to west on the island, which included North Shore Drive, were to be sixty-feet wide.

5 It is the same map that defendants assert should control in this case, at Book H, page 358, although it follows no chain of title.

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opinion as to the guilt or innocence of the defendants. The not guilty verdicts entered on 15 January 1981 are vacated, and the cases are remanded to the District Court of Wake County for trial.

Vacated and remanded.

ARNOLD and WELLS, JJ., concur.

John GRAHAM, Hill Powell, A. L. Goodwin, and Mark Holzapfel

v.

The CITY OF RALEIGH, Mamie T. Stevens, Charles A. Stevens, John D. Lyon, Barbara H. Lyon, and Max O. Barbour.

No. 8110SC616.

Court of Appeals of North Carolina.

Dec. 15, 1981.

Declaratory judgment action was brought to determine validity of city ordinance which rezoned a parcel of approximately 30 acres. The Superior Court, Wake County, Edwin S. Preston, Jr., granted defendants' motion for summary judgment and denied that of plaintiffs, and plaintiffs appealed. The Court of Appeals, Robert M. Martin, J., held that: (1) city did not violate its established zoning procedures in enacting the ordinance; (2) rezoning of the parcel did not constitute contract zoning; and (3) the ordinance was adopted in accordance with the comprehensive plan as required by statute.

Affirmed.

1. Declaratory Judgment ⟹129

Suit to determine validity of a zoning ordinance is a proper case for a declaratory judgment.

2. Judgment ⟹188

In a suit to determine validity of a zoning ordinance, summary judgment may be entered when otherwise proper, upon motion of either plaintiff or defendant.

3. Zoning and Planning ⟹602

In a suit to determine validity of a zoning ordinance, court may inquire into procedures followed by board at hearing before it and determine whether the ordinance was adopted in violation of required procedures, or is arbitrary and without reasonable basis in view of established circumstances.

4. Zoning and Planning ⟹27

A zoning ordinance will be declared invalid only where record demonstrates that it has no foundation in reason and bears no substantial relation to public health, public morals, public safety or public welfare in its proper sense.

5. Zoning and Planning ⟹154

It is not required that an amendment to a zoning ordinance accomplish or contribute specifically to accomplishment of all purposes specified in enabling act; it is sufficient that legislative body of the city had reasonable grounds upon which to conclude that one or more of those purposes would be accomplished or aided by the amending ordinance.

6. Zoning and Planning ⟹615

Legislative body of city is charged with primary duty and responsibility of determining whether its zoning action is in interest of public health, safety, morals, or general welfare, and reviewing courts are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for conclusion reached by that body.

7. Zoning and Planning ⟹672, 681

A duly adopted zoning ordinance is presumed to be valid and burden is on complaining party to show it to be invalid.

8. Zoning and Planning ⟹167, 684

City council had reasonable grounds to believe that rezoning of parcel of approxi-

mately 30 acres furthered one or more of purposes for rezoning set forth in enabling legislation, and plaintiffs failed to carry burden of showing that the rezoning ordinance was invalid.

9. Zoning and Planning ⟹191

Legislative body of municipality cannot rely exclusively on specific representations by rezoning proponents with respect to the property's intended use; circumstances must be such that property should be made available for all uses permitted in the new zoning district.

10. Zoning and Planning ⟹194

There was no unlawful contract zoning involved in adopting of ordinance which rezoned parcel of approximately 30 acres where record contained no representation by petitioners as to their specific plans for development of the subject property.

11. Zoning and Planning ⟹158

Rezoning of parcel of approximately 30 acres complied with city's comprehensive plan, as required by statute, since there existed sufficient change in conditions which city council could properly have taken into account in amending zoning ordinance to meet developing needs of the community. G.S. § 160A–383.

This is a suit for a declaratory judgment to determine the validity of Ordinance No. 1980 551ZC73 of the City of Raleigh, wherein, it approved petition Z–53–80 as modified in accordance with the recommendation of the Law and Finance Committee. Petition Z–53–80 requested the rezoning of approximately 53.5 acres in north Raleigh extending northward on the west side of Six Forks Road from the intersection of such thoroughfare with Lynn Road. The petition requested the rezoning of 34.9 acres of such parcel to Office and Institution III District, 17.9 acres to Neighborhood Business District, and .7 acre to Conservation Buffer District.

Plaintiffs' complaint alleged that the rezoning authorized by the ordinance was invalid on the grounds that the rezoning was arbitrary and capricious; that the City Council failed to consider the general welfare of the citizens of the City of Raleigh in allowing the rezoning; that the rezoning was contrary to the enabling legislation; that the rezoning was in direct conflict with the comprehensive plan of the City of Raleigh; that the rezoning was in violation of the City of Raleigh's own zoning regulations, and that the rezoning constituted unlawful contract zoning and unlawful spot zoning.

On 1 July 1980 a public hearing with respect to petition Z–53–80 was held before Raleigh City Council and the Raleigh Planning Commission. Thereafter, the Planning Commission approved petition Z–53–80 but with the recommendation that the rezoning request be denied with respect to 7 acres of the 53.5 acre parcel and that 17.9 acres thereof be rezoned Office and Institution I, rather than Neighborhood Business District.

The City Council thereafter referred the petition to the Comprehensive Planning Committee and upon its report to the Council the petition was referred to the Law and Finance Committee.

The Law and Finance Committee approved petition Z–53–80 to include 16.7 acres zoned Office and Institution I District, 2.6 acres zoned Conservation Buffer District, and 11 acres zoned Office and Institution III District. It voted to deny rezoning the remaining 23.2 acres of Petitioners' property, which comprised the southern portion of the original 53.5 acre parcel. The City Council adopted an ordinance wherein it approved petition Z–53–80 in accordance with recommendations of the Law and Finance Committee.

From an order of the trial court granting defendants' motion for summary judgment and denying that of the plaintiffs, the plaintiffs appealed to this Court.

Skvarla, Boles, Wyrick & From by Samuel T. Wyrick, III, and Robert A. Ponton, Jr., Raleigh, for plaintiffs.

Poyner, Geraghty, Hartsfield & Townsend by David W. Long and Lacy H. Reaves; Hunter, Wharton & Howell by

John V. Hunter, III, Raleigh, for defendants Stevens & Barbour.

Thomas A. McCormick, Jr., Raleigh, for defendant City of Raleigh.

Rich & Warren by John M. Rich, Wake Forest, for defendants Lyon.

ROBERT M. MARTIN, Judge.

[1, 2] This case involves a declaratory judgment action brought by the plaintiffs to determine the validity of Raleigh City Zoning Ordinance 80 551 ZC 73. It is settled law in North Carolina that such a zoning suit is a proper case for a declaratory judgment, and also that, in such a case, summary judgment may be entered when otherwise proper, upon motion of either plaintiff or defendant. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

Here, as plaintiffs set forth in their brief, the material facts are not in issue. The controversy is as to the legal significance of those facts. It is, therefore, a proper case for summary judgment determining the validity of Ordinance (1980) 551ZC73. We hold that the ordinance is valid and affirm the judgment of the superior court so declaring.

[3] Plaintiffs contend the City of Raleigh violated its established zoning procedures in enacting the challenged ordinance. They contend there is no evidence in the record to support a finding by the Council that rezoning Parcel Z–53–80 promotes the health, morals, or welfare of the people of the City of Raleigh required by Raleigh's own procedures. The court may inquire into procedures followed by the board at the hearing before it and determine whether the ordinance was adopted in violation of required procedures, or is arbitrary and without reasonable basis in view of the established circumstances. *Blades v. City of Raleigh, supra.*

[4–6] The procedures established under the General Statutes, Raleigh City Charter, and Raleigh City Code provide the basis for a legislative, rather than a judicial determination on the part of the City Council. Zoning petitioners are not required to offer evidence nor is the legislative body required to make findings that the requested rezoning promotes the health, morals, or general welfare of the people of Raleigh. A zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *In re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706 (1938). It is not required that an amendment to the zoning ordinance in question accomplish or contribute specifically to the accomplishment of all of the purposes specified in the enabling act. It is sufficient that the legislative body of the city had reasonable grounds upon which to conclude that one or more of those purposes would be accomplished or aided by the amending ordinance. The legislative body is charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. *Schloss v. Jamison*, 262 N.C. 108, 136 S.E.2d 691 (1964). When the action of the legislative body is reviewed by the courts, the latter are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body. *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968).

[7] A duly adopted zoning ordinance is presumed to be valid. The burden is on the complaining party to show it to be invalid.

> When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. (Citations omitted.)

In re Appeal of Parker, supra, 214 N.C. at 55, 197 S.E. 709.

Evidence adduced at the public hearings and minutes of the Council and its committees sufficiently document that the following considerations were before the Council and formed the basis for its adoption of the zoning ordinance:

(1) The property which is the subject of the Zoning Ordinance is located in a section of Raleigh which has experienced considerable growth and change in recent years, and there exists a significant demand for additional Office and Institution District zoning in such area.

(2) Such property has a narrow and elongated configuration and is enclosed within Lynn and Six Forks Roads, which buffer it from nearby residential neighborhoods.

(3) With respect to traffic flow and considerations of safety, Petitioners' property can be best developed as rezoned in the Zoning Ordinance, rather than as originally zoned Residential 4 District.

(4) In view of its specific location, geographical configuration, and other factors, such property could not be satisfactorily developed under its former Residential 4 zoning classification.

The record clearly establishes that the arguments offered on behalf of the petitioners in support of the petition complied with the city code. Those presenting the arguments discussed the need to rezone the property in accordance with the nodal concept of development of Raleigh's comprehensive plan. They argued that changed conditions in the immediate area of such property supported the rezoning. Moreover, the record includes in addition to the transcripts of a public hearing, nine meetings of the city council and Planning Commission, or their committees, at which the rezoning of the petitioners' property was discussed. Such transcripts demonstrate clearly that the circumstances and conditions concerning the questioned zone changes were peculiarly within the knowledge of the city council and that they considered all permissible uses available in the Office and Institution I and III Districts in enacting the questioned ordinance.

[8] The record demonstrates that the city council had reasonable grounds to believe that the rezoning of petitioners' property furthered one or more of the purposes for rezoning set forth in the enabling legislation. Plaintiffs failed to carry the burden of showing to the contrary.

[9] Plaintiffs argue there is no evidence in the record of such property's suitability for the residential uses available in Office and Institution I Districts. The legislative body of a municipality cannot rely exclusively on specific representations by the proponents with respect to the property's intended use. The circumstances must be such that the property should be made available for all uses permitted in the new zoning district. *Blades v. City of Raleigh, supra; Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971).

The record shows that at the public hearing on July 1, 1980, an opponent of the rezoning cited the suitability of the subject property for existing residential use. Residential development of the property was also discussed by one of the plaintiffs at the meeting of the Planning Commission on August 25, 1980, and was the subject of a petition read at a meeting of the City Council on September 2, 1981. At the meeting of the Comprehensive Planning Committee of the City Council on September 10, many potential uses of the subject property were discussed, and a City Planner specifically noted a recommendation that petitioners' property be developed for "high density or multi-family" residential use. High density residential use of the property was also discussed at the meeting of the City Council on September 16, 1980. In addition, plaintiffs' attorney noted that the petitioners' property was suitable for "low density, multifamily use" at the meeting of the Law and Finance Committee of the City Council on September 23, 1980. At most, the arguments were conflicting as to whether the property was suitable for all uses permitted under the challenged zoning ordinance. Consideration of the minutes of the several

commissions and the City Council show that the City Council, by inference at least, determined that the aforementioned tracts and the existing circumstances justified the rezoning so as to permit all uses permissible in the Office and Institution I and III Districts.

[10] Plaintiffs contend the rezoning of Parcel Z–53–80 constitutes contract zoning. They contend the Council relied on the promises of the developer that the property would be developed in a carefully conceived plan. In *Allred, supra*, the Court declared invalid a rezoning based upon the proponents specific representation to the City Council that he would construct "luxury apartments ... in twin high-rise towers" upon the rezoned property. Similarly, in *Blades v. City of Raleigh, supra*, the City Council acted upon the specific undertaking of the petitioner at the public hearing to build twenty "high class high rental town home apartments" upon his property, and the rezoning was overturned. We fail to find in the record in the case before us any representation by the petitioners as to their specific plans for development of the subject property. There was no unlawful contract zoning involved in the adopting of the challenged ordinance.

Finally, plaintiffs contend that rezoning of Parcel Z–53–80 is not in compliance with the Comprehensive Plan—City of Raleigh. The plan was adopted by the City Council in 1979 and is a general statement of policy which together with Raleigh's zoning procedures and regulations comprise the City's "Comprehensive Plan" for rezoning. The resolution of the Council in adopting the plan provides in Sections 3 and 4:

> [T]he elements of the comprehensive plan are adopted as the general policy of the city council ... [T]he items included in the adopted plan are to be interpreted to represent the general character ... of future City actions and are preempted by specific ... ordinances and other specific actions taken by the city council.

Resolution No. (1979) 949, The Comprehensive Plan, City of Raleigh.

> Unquestionably, [a city's legislative body] has authority to rezone property when reasonably necessary to do so in the interests of the public health, the public safety, the public morals or the public welfare. Ordinarily, the only limitation upon this legislative authority is that it may not be exercised arbitrarily or capriciously. (Citation omitted.)

Allred v. City of Raleigh, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971); N.C.Gen.Stat. § 160A–383.

By necessity, a comprehensive plan must undergo changes. If any zoning plan is to be comprehensive, it must be kept up to date. It would become obsolete if the council refused to recognize the changing conditions in the community. From the minutes of the council and its committees it appears the council considered the rezoning to be a logical extension of the commercial nodes or focus area at the intersection of Six Forks and Newton Roads identified in the plan adopted by the City Council in 1979.

In furtherance of the goals of the plan the zoning ordinance serves to more clearly define the boundaries of the Six Forks-Newton Road and Six Forks-Millbrook Road focus areas and to buffer residential uses from commercial nodes. The minutes of the council and its committee demonstrates that the subject property is located in a section of Raleigh which has experienced considerable growth and change in recent years and there exists a significant demand for additional office and institution districts zoning in such area.

The 1979 Resolution of the City Council adopting a comprehensive plan, resolved in Section 2 "[t]hat the Comprehensive Plan may be revised, amended or supplemented at any time as provided by law" and in Section 3 "[t]hat the elements of the Comprehensive Plan are adopted as the general policy of the City Council to be used as a guide for developing capital improvements, budgets, ordinances, and operating procedures to accomplish the plan."

Thus, the City recognized that the function of the comprehensive plan does not contemplate or require a plan which rigidly

provides for or attempts to answer in minute detail every possible question regarding land utilization or restrictions or attempts to fix a zoning map in a rigid and immutable mold, but rather the plan sets out general guidelines for the guidance of zoning policy. Annot., 40 A.L.R.3d 372 (1971). The questioned amendment serves not merely the functions of amending the zoning ordinance, but also enunciates a change in the comprehensive plan itself, thus bringing about the necessary conformity or harmony between the amendment and the comprehensive plan.

[11] We think there existed sufficient change in conditions which the Council could properly take into account in amending the zoning ordinance to meet the developing needs of the community. Undoubtedly, the action of the Council in rezoning the instant area falls within the purview of the comprehensive plan.

The record demonstrates that the plan, as well as such procedures and regulations, were afforded careful consideration during the deliberations which resulted in enactment of the ordinance. We hold that the ordinance was adopted in accordance with a comprehensive plan as required by G.S. 160A-383 and the City Charter.

The Order of the trial court granting defendants' motion for summary judgment should be sustained.

Affirmed.

HARRY C. MARTIN and BECTON, JJ., concur.

STATE of North Carolina

v.

Christopher Anthony INGRAM.

No. 8120SC427.

Court of Appeals of North Carolina.

Dec. 15, 1981.

Defendant was convicted before the Superior Court, Stanly County, Julius A. Rousseau, Jr., J., of second-degree murder, and he appealed. The Court of Appeals, Webb, J., held that conduct of trial court in allowing jury, after they had begun deliberating, to examine exhibits they had requested in the courtroom while a guilty plea was taken for a traffic offense in an unrelated case was not improper.

No error.

Criminal Law ⇐857(1)

Conduct of trial court, in prosecution for second-degree murder, in allowing jury, after they had begun deliberating, to examine exhibits they had requested in the courtroom while a guilty plea was taken for a traffic offense in an unrelated case was not improper.

The defendant was tried for second degree murder. After the jury had begun deliberating, they requested that they be allowed to examine some exhibits which had been offered in evidence. The defendant consented to the exhibits being taken to the jury room, but the State objected to the jury's doing so. The court then allowed the jury to examine the exhibits in the courtroom while a guilty plea was taken for a traffic offense in an unrelated case. Defendant took exception to this procedure.

Defendant was convicted of second degree murder and appealed from the imposition of a prison sentence.

Atty. Gen. Rufus L. Edmisten by Sp. Deputy Atty. Gen. John R. B. Matthis and Asst. Atty. Gen. James C. Gulick, Raleigh, for the State.

WESTLAW

338 Fed.Appx. 320
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter

Griffin v. Town of Unionville, NC
United States Court of Appeals, Fourth Circuit. July 27, 2009 338 Fed.Appx. 320 2009 WL 2235825 *(Approx. 5 pages)*
issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals,
Fourth Circuit.

Richard S. GRIFFIN; Griffin Farm & Landfill, Inc., Plaintiffs—Appellants,
v.
TOWN OF UNIONVILLE, NORTH CAROLINA, Defendant—Appellee.

No. 08–1409.
Argued: May 13, 2009.
Decided: July 27, 2009.

Synopsis

Background: Landfill operator who had obtained a special use permit (SUP) allowing construction of a "demolition landfill" sued town, claiming that town had violated the operator's due process and equal protection rights under federal and state law by refusing to amend its franchise ordinance to allow an industrial solid waste landfill. The United States District Court for the Western District of North Carolina, Robert J. Conrad, Jr., Chief Judge, 2008 WL 697634, granted summary judgment for the town, and operator appealed.

Holding: The Court of Appeals held that operator's expenditures were not made in good faith or in reasonable reliance upon town, county or state approval for operation of an industrial solid waste landfill.

Affirmed

West Headnotes (1)

Change View

1 **Zoning and Planning** Vested or property rights
Under North Carolina law, landfill operator's substantial expenditures in pursuit of operating an industrial solid waste landfill were not made in good faith or in reasonable reliance upon town, county or state approval for the project, and thus, he did not have a vested right to a franchise for an industrial solid waste landfill; when he applied to the county for a special use permit (SUP) allowing construction of a "demolition landfill," there was no mention of industrial solid waste in the application or in the resulting permit, and he did not subsequently apply for a modification of the SUP. West's N.C.G.S.A. § 130A–294(b1)(3, 4).

2 Cases that cite this headnote

**321* Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., Chief District Judge. (3:05–cv–00514–RJC–CH).

Attorneys and Law Firms

ARGUED: T. Jonathan Adams, Hamilton, Moon, Stephens, Steele & Martin, PLLC, Charlotte, North Carolina, for Appellants. Thomas Norfleet Griffin, III, Parker, Poe, Adams & Bernstein, LLP, Charlotte, North Carolina, for Appellee. **ON BRIEF:** Mark R. Kutny, Travis W. Moon, Hamilton, Moon, Stephens, Steele & Martin, PLLC, Charlotte, North Carolina, for Appellant Griffin Farm & Landfill, Inc.; R. Keith Johnson, R. Keith Johnson, P.A., Stanley,

North Carolina, for Appellant Richard S. Griffin. G. Nicholas Herman, The Brough Law Firm, Chapel Hill, North Carolina, for Appellee.

Before NIEMEYER, Circuit Judge, C. ARLEN BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation, and JOSEPH F. ANDERSON, JR., United States District Judge for the District of South Carolina, sitting by designation.

Opinion

Affirmed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

***1** Richard Griffin appeals the district court's grant of summary judgment in favor of the Town of Unionville, North Carolina ("the Town"). We affirm.

I.

In 1992, Griffin began operating a demolition landfill, more accurately now known as a "land clearing and inert debris" (LCID) landfill, pursuant to a permit issued by the Union County Health Department. The permit authorized the LCID landfill to accept waste, limited to stumps, limbs, leaves, concrete, brick, untreated wood, asphalt, uncontaminated earth, sand or rocks. In 1993, Griffin obtained "prior approval" from Union County (the county) authorizing him to expand his landfill by ten acres. This addition was authorized as a "construction and demolition" (C & D) landfill. Griffin did not begin operating the C & D landfill at that time, but received the prior local approval so that he could get a state permit, which was required. In 1995, the state natural resources department issued Griffin an operational permit for the C & D installation. This permit was amended and renewed by the state a number of times through the year 2005.

In January 1997, the county approved Griffin's application to expand his landfill again. In the summer of 1997, the county ***322** changed its land use ordinance to require that a landfill operator obtain a special use permit (SUP) from the county, in addition to the required state permits. So Griffin applied for a SUP and included all of his property—his then-existing LCID and C & D landfills, as well as the proposed expansion—in the SUP application. In November 1997, the county approved Griffin's request for a SUP. The SUP allowed construction of a "demolition landfill." [1] The county land use ordinance in effect at that time defined "demolition landfill" to include "debris associated with the construction or demolition of housing or buildings" and expressly prohibited industrial waste. The SUP also required that any modifications to proposed uses on the property covered by the SUP be pointed out to the county in writing, as required by the county land use ordinance. This ordinance provided that insignificant or minor changes were permitted without formal written approval, but any changes of significance had to be approved in the same manner as a new application for a SUP. It is undisputed that Griffin has never applied to the county for an amendment or modification to the 1997 SUP. Following issuance of the SUP in November 1997, Griffin retained an engineering firm to perform work on the property and incurred expenses.

At a June 1998 County Planning Board meeting, Griffin asked the county to amend the definition of a demolition landfill in the county's land use ordinance to allow for the disposal of nonhazardous industrial solid waste. The matter was considered further and approved at a July 1998 public hearing. The crux of the instant dispute is Griffin's assertion that this amendment was intended to retroactively apply to Griffin's 1997 SUP. Throughout this time, Griffin continued to have the engineering firm prepare the landfill expansion for waste.

**2 In November 1998, the Town revived its corporate charter, making it an incorporated municipality within the county of Union and in the state of North Carolina. The current and proposed landfills were included within its boundaries. Nonetheless, because the Town did not have a land use ordinance, the Town conferred jurisdiction on the county to regulate zoning and land use issues until October 2003 when the land use ordinance adopted in June 2003 became effective.

In July 1999, Griffin applied to the state for a permit authorizing him to operate an industrial solid waste landfill on his property. In response, in September 2001, the state informed Griffin that in order to operate the proposed landfill, pursuant to North Carolina General Statute §§ 130A–294(b1)(3) & (4), he would need local government zoning approval, and

would need to obtain a franchise from the local government.

Griffin accordingly sought to obtain a local franchise, but at that time, as previously noted, the Town did not have a land use ordinance or a local franchise ordinance, having temporarily ceded its authority on these issues to the county. Moreover, although the county had a land ***323** use ordinance, it did not have a franchise ordinance either, and thus Griffin never was able to obtain a franchise from the county.

In March 2003, Griffin asked the Town council to adopt a franchise ordinance. The Town council passed a "Solid Waste Franchise Ordinance for the Town of Unionville" in June 2003. The franchise ordinance allowed for C & D and LCID landfills only. Also in June 2003, the Town adopted a Land Use Ordinance, to be effective October 1, 2003. The definition of "demolition landfill" in the Town's land use ordinance was the same definition as the county's 1998 amended definition—it authorized the inclusion of industrial solid waste in a demolition landfill, creating a conflict with the franchise ordinance which only allowed C & D and LCID landfill waste within the Town.

Griffin and the Town entered into a franchise agreement in February 2004. The franchise agreement, in keeping with the ordinance, only authorized Griffin to operate landfills accepting C & D and LCID waste, not industrial solid waste. After obtaining the franchise, Griffin also confirmed, by way of a letter from the Town's land use administrator, that his 1997 county-issued SUP was still valid in the Town. Armed with these two pieces of information (the franchise and the presumably valid SUP), Griffin applied for and received an amended permit from the state for the continued operation of his C & D landfill in March 2005.

At this point, Griffin had official state authorization to operate a C & D landfill and though the record is not entirely clear on this point, he either did not need state authorization for an LCID, or he had the requisite LCID state permit. *See* J.A. 274. However, he still did not have state authorization to operate an industrial solid waste landfill. So in June 2005, Griffin sought a franchise from the Town to operate an industrial solid waste landfill. As part of his proposal, Griffin asked the Town to amend the franchise ordinance to allow for such a landfill. Various public meetings and requests for information ensued. Instead of amending the franchise ordinance as Griffin suggested, in May 2006, the Town amended the land use ordinance to delete from the definition of a demolition landfill the term "industrial solid waste." This action effectively denied Griffin's request for a franchise to operate an industrial solid waste landfill. Because he never obtained local approval, Griffin did not seek a permit from the state to operate an industrial solid waste landfill, and instead brought the current action.

***3** In his complaint, Griffin alleged that the Town's actions denied him due process and equal protection under federal and North Carolina law, and that he had a vested right to operate the industrial solid waste landfill. Griffin also sought specific performance and declaratory relief that the ordinance was unconstitutional. He alleged that the Town violated his rights by failing to amend the franchise ordinance because he had a common law vested right to construct and operate the installation as an industrial solid waste landfill and he spent over $750,000 in engineering fees to prepare the landfill. On cross-motions for summary judgment, the district court granted summary judgment to the Town, finding that Griffin did not have a vested right to operate an industrial solid waste landfill. The court also refused to declare the local ordinance unconstitutional. Griffin appeals the rulings regarding his vested right to operate an industrial solid waste landfill and specific performance.

II.

Our review on appeal from the district court's grant of summary judgment is de ***324** novo. *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir.2002).

Under North Carolina law, whether Griffin possessed a vested right to a franchise for an industrial solid waste landfill turns on whether (1) he has made substantial expenditures; (2) the expenditures were made in good faith; (3) the expenditures were made in reasonable reliance on and after the issuance of valid governmental approval; and (4) he would be harmed by a change in governmental requirements. *Browning–Ferris Indust. Of S. Atl., Inc. v. Guilford County Bd. of Adjustment*, 126 N.C.App. 168, 484 S.E.2d 411, 414 (1997).

Griffin's vested rights claim is that he spent approximately $750,000 in connection with his application to the state for a permit to operate an industrial solid waste landfill after relying upon (1) the 1997 SUP issued by the county, (2) the county's 1998 amendment to the definition of demolition landfill allowing industrial solid waste in those landfills, and (3) the Town's 2004 letter advising Griffin that it would recognize Griffin's 1997 SUP. Griffin alleges

that, by virtue of these authorizations, he received specific and valid approvals from the county and the Town to construct and operate an industrial solid waste landfill.

It is undisputed that Griffin has made substantial expenditures in pursuit of operating the industrial solid waste landfill. The remaining prongs from *Browning–Ferris* require us to examine whether Griffin's expenses were made in good faith and with reasonable reliance upon purported government approval for the project.

We find that Griffin did not make these expenditures in good faith or in reasonable reliance upon the Town, county or state approval for the project. When Griffin applied to the county for the SUP, there was no mention of industrial solid waste in the application or in the resulting permit. In fact, the SUP was issued at a time when the county's land use ordinance expressly prohibited landfills from disposing of industrial solid waste. Under North Carolina law, the SUP is limited by its own terms to those uses presented to the county in obtaining it. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment,* 354 N.C. 298, 554 S.E.2d 634, 638 (2001). Griffin specifically represented to the county that his landfill would be used to dispose of construction and demolition waste. He also told the county board that his construction and demolition landfill operated under a valid state permit for this type of landfill and that no "liner" was required to contain the waste. A liner would have been required for an industrial solid waste landfill.

***4** Finally, and perhaps most importantly, Griffin did not apply to the county or the Town to amend or modify the 1997 SUP. Griffin instead chose to rely upon the 1998 amendment to the county's definition of a demolition landfill as a retroactive "amendment" to his SUP. However, the county's land use ordinance, and later the Town's, required specific procedures to amend or modify the terms of a SUP, and these actions were not taken by Griffin. Even in the 2004 letter from the Town recognizing the continued validity of the 1997 SUP, the letter's author reminded Griffin that any changes from the issued SUP would require approval of an amended permit by the Town. The SUP did not authorize Griffin to operate an industrial solid waste landfill. Accordingly, Griffin cannot validly argue that his county-issued 1997 SUP permitted him to rely in good faith upon the proposition that he would be able to operate an industrial solid waste landfill.

Nor did Griffin undertake his expenditures in reasonable reliance upon Town, county, or state government actions. The ***325** record reflects that he did not obtain all of the government permits necessary under North Carolina law to operate an industrial solid waste landfill. Although arguably overkill, three authorizations are required to construct and operate an industrial solid waste landfill: local zoning approval, a local government franchise, and a permit from the State of North Carolina. N.C. Gen.Stat. Ann. §§ 130A–294(b1)(3) & (4).[2]

It is doubtful that Griffin obtained *any* of the required state permits for an industrial solid waste landfill. The only argument that he obtained zoning approval is that the SUP was retroactively amended when the county board changed the definition of a demolition landfill to include industrial solid waste. In light of our previous discussion, however, this argument carries little weight. Further, the franchise agreement with the Town in 2003 did not contain authorization for industrial solid waste. Likewise, the permit he received from the state only allowed him to continue to operate his C & D landfill, not an industrial solid waste landfill. None of Griffin's successful permit or franchise applications requested specific authorization to operate an industrial solid waste landfill. Where multiple permits or governmental approvals are required for a project, a landowner has no vested right to complete that project unless he makes his substantial expenditures in good faith reliance on and *after receiving* all requisite permits or other required approvals. *See, e.g., PNE AOA Media, L.L.C. v. Jackson County.* 146 N.C.App. 470, 554 S.E.2d 657, 663 (2001) (holding that expenditures made prior to acquiring necessary permits are not made in good faith reliance upon those permits, and company did not have a vested right to erect a billboard on a state highway). Because Griffin never obtained the required permits for industrial solid waste landfills, he could not have expended funds in reasonable reliance upon such permits.

III.

***5** Though Griffin has been operating landfills in Union County and the Town since 1992, his landfills have never accepted industrial solid waste, and he has never obtained a valid permit to do so. Therefore, he has no vested right to operate this category of landfill. The decision of the district court is affirmed.

AFFIRMED.

All Citations

Footnotes

1 Part of the difficulty with reciting the facts in this case is that the county continued to use the term "demolition landfill," while the state administrative regulations changed what was known as a demolition landfill to an LCID landfill in 1993. At the time the SUP was granted, the county's definition of demolition landfill allowed waste authorized by the state-defined LCID and C & D landfills. J.A. 399; 15A N.C. Admin. Code 13B.0101(11), (22), & (23); 15A N.C. Admin. Code 13B.0532(8). When amended by the county in 1998, the term "demolition landfill" exceeded what was allowed in an LCID and C & D landfill by allowing industrial solid waste.

2 We reject Griffin's arguments that this was either not the applicable statute or that his operation should be excepted from the statute's requirements.

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WESTLAW

Brief It

34 Fed.Appx. 92
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1

Henry v. Jefferson County Planning Com'n
United States Court of Appeals, Fourth Circuit. May 7, 2002 34 Fed.Appx. 92 2002 WL 864267 *(Approx. 6 pages)*

Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)
United States Court of Appeals,
Fourth Circuit.

Aubrey E. HENRY, Plaintiff-Appellant,
v.
The JEFFERSON COUNTY PLANNING COMMISSION; Scott Coyle, Commission Member, in his individual capacity; H. Richard Flaherty, Commission Member, in his individual capacity; Paul Griger, Commission Member, in his individual capacity; Sam Donley, Commission Member, in his individual capacity; Jim Knode, Commission Member, in his individual capacity; Ernie Benner, Commission Member, in his individual capacity; Gilbert Page Wright, Commission Member, in his individual capacity; Lyle Campbell Tabb, Commission Member, in his individual capacity; Paul J. Raco, Director of Planning and Zoning, in his individual and official capacity; Jefferson County; Jefferson County Board of Zoning Appeals, Defendants-Appellees,
and
State of West Virginia, Defendant.
Pacific Legal Foundation, Amicus Curiae.

No. 01-1948.
Argued Feb. 28, 2002.
Decided May 7, 2002.

Landowner brought action against county, county planning commission and county official, alleging constitutional violations arising from denial of his application for conditional use permit to build townhouses. The United States District Court for the Northern District of West Virginia, W. Craig Broadwater, J., entered judgment in favor of defendants, and landowner appealed. The Court of Appeals, 215 F.3d 1318, affirmed in part and remanded. On remand, the District Court, Broadwater, J., entered summary judgment in favor of defendants, and landowner again appealed. The Court of Appeals held that: (1) landowner's Fifth Amendment takings claim was not ripe for review, and (2) landowner did not possess property interest in conditional use permit to build townhouses on his property.

Affirmed.

West Headnotes (3)

Change View

1 **Eminent Domain** Conditions precedent to action; ripeness
Landowner's Fifth Amendment takings claim, based on county planning commission's denial of his application for a conditional use permit to build a townhouse development, was not ripe for review, where landowner had not pursued state compensation procedures or presented evidence that no such procedures were available. U.S.C.A. Const.Amend. 5.

5 Cases that cite this headnote

SELECTED TOPICS

Eminent Domain

Remedies of Owners of Property; Inverse Condemnation

Taking of Property and Denial of Just Compensation

Zoning and Land Use

City Denial of Special Use Permit

Secondary Sources

PART 157-APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

Nat. Gas Transp. Info. Service Regulations 18 CFR Part 157

...157.1 Definitions. 157.2 [Reserved] 157.3 [Reserved] 157.4 [Reserved] 157.5 Purpose and intent of rules. 157.6 Applications; general requirements. 157.7 Abbreviated applications. 157.8 Acceptance for f...

s 3:3. Substantive due process

1 Subdivision Law and Growth Mgmt. § 3:3 (2d ed.)

...The classic example of modern state substantive due process is the invalidation of exclusionary zoning. In National Land & Investment Co. v. Kohn, the Pennsylvania Supreme Court invalidated four-acre m...

Zoning: Proof of Inverse Condemnation from Excessive Land Use Regulation

31 Am. Jur. Proof of Facts 3d 563 (Originally published in 1995)

...The main purpose of zoning regulation is to promote orderly community development through various restrictions on location, size and types of land uses. Local zoning authority generally is delegated to...

See More Secondary Sources

Briefs

Petition for a Writ of Certiorari

1995 WL 17047896
TRIOMPHE INVESTORS, Petitioner, v. CITY OF NORTHWOOD; James Crane; Patricia Belknap; John Melnyk; Raymond Lark; John E. Blair, Respondents.
Supreme Court of the United States
June 05, 1995

...The parties to the proceedings below were the petitioner, Triomphe Investors, an Ohio General Partnership, consisting of the individual plaintiffs herein, James D. Haynes, Steven J. Linsenmeyer, and Ja...

BRIEF OF THE STATES, NEVADA, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENT

1997 WL 13542
Bernadine Suitum v. Tahoe Regional Planning Agency, Nevada
Supreme Court of the United States
Jan. 09, 1997

...FN*Counsel of Record Nevada, Hawaii, Vermont, Montana, and Maryland submit this brief as amici curiae in support of respondent Tahoe Regional Planning Agency (TRPA).

2 **Constitutional Law** Particular issues and applications
Zoning and Planning Family or multiple dwellings
Landowner did not possess property interest in conditional use permit to build townhouses on his property, as required to support substantive due process claim based on county planning commission's denial of his application for such a permit; issuance of permit was within the discretion of the commission, guided by process and factors enumerated in county's zoning ordinance. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

3 **Constitutional Law** Particular issues and applications
Zoning and Planning Particular prior or nonconforming uses
Landowner was not denied protected property interest that could support substantive due process claim when he was allegedly told by county official that he would be denied a permit to rebuild his restaurant after it burned down, where landowner never applied for such permit, and county had not prohibited him from rebuilding. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

*93 Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. W. Craig Broadwater, District Judge. (CA-96-40-3, CA-99-25-3).

Attorneys and Law Firms

ARGUED: James Sherman Burling, Pacific Legal Foundation, Sacramento, California, for Amicus Curiae. Michael Douglas Lorensen, Bowles, Rice, McDavid, Graff & Love, P.L.L.C., Martinsburg, West Virginia, for Appellees. John Christian Yoder, Harpers Ferry, West Virginia, for Appellant.

Before WILKINSON, Chief Judge, and NIEMEYER and MICHAEL, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

*94 OPINION

PER CURIAM.

**1 The Jefferson County Planning and Zoning Commission denied, by unanimous vote, Aubrey Henry's application for a conditional use permit to build a 76 unit townhouse development on 9.8 acres of land in Jefferson County, West Virginia. Henry sued the Commission and others, asserting that the local zoning ordinance was unconstitutionally vague on its face and that the denial of the permit to build the townhouse project amounted to an unconstitutional taking of his property without just compensation and violated his due process and equal protection rights. The district court granted summary judgment to the defendants on the vagueness challenge to the zoning ordinance and dismissed Henry's other claims on the grounds of *Burford* abstention. In reviewing that decision in an earlier appeal, we affirmed the ruling that the ordinance was not unconstitutionally vague, vacated the dismissal of the remaining claims, and remanded for further proceedings. The district court then granted summary judgment to the defendants on these remaining claims, and Henry appeals for a second time. He is joined by the Pacific Legal Foundation as amicus curiae. We now affirm the district court's grant of judgment to the defendants on the substantive due process claim and vacate the judgment on the takings claim because the latter claim is not ripe for review.

I.

Aubrey Henry is part owner of a 13.69-acre tract of land located in Jefferson County, West Virginia. Henry owned and operated a restaurant on this property beginning in 1979, when he took over the restaurant from his parents. In 1988 Jefferson County enacted a new Zoning Development and Review Ordinance which zoned the property as a Rural-Agricultural District. Henry's restaurant was a non-conforming use under the new ordinance, but he was permitted to continue operating the restaurant under a grandfather clause. In 1993 the restaurant burned to the ground. Henry discussed rebuilding the restaurant with Paul Raco, the Director of the Jefferson County Planning and Zoning Commission. According to Henry, Raco told him that he should not bother applying for a

The amici states have a strong inte...

Joint Appendix

2014 WL 3101940
T-Mobile South, LLC, Petitioner, v. City of Roswell, Georgia, Respondent.
Supreme Court of the United States
July 03, 2014

...[Filed May 13, 2010] NOW COMES Plaintiff T-Mobile South LLC ("Plaintiff"), by and through its undersigned counsel of record, and shows this Honorable Court as follows: This is an appeal and action for ...

See More Briefs

Trial Court Documents

In re South Canaan Cellular Investments, Inc.

2011 WL 4193251
In re SOUTH CANAAN CELLULAR INVESTMENTS, INC. & South Canaan Cellular Equity, LLC, Debtors.
United States Bankruptcy Court, E.D. Pennsylvania.
Sep. 08, 2011

...The above-captioned chapter 11 debtors seek confirmation under 11 U.S.C. § 1129(b) of their jointly filed second amended chapter 11 plan dated September 28, 2009. Confirmation is opposed by secured cre...

In re Flamingo Investments.

2010 WL 7375864
In re FLAMINGO INVESTMENTS, Debtors and Debtor-In-Possession. Check One or More as Appropriate: Affects Both Detor: 2 Affects Flamingo Investments only: X Affects Paradise Investments, Inc. only: 2.
United States Bankruptcy Court, C.D. California.
Mar. 02, 2010

...Chapter 11 DATE: February 16, 2010 TIME: 11:00 a.m. CTRM: 302 The "Motion of Flamingo Investments For Order: (1) Authorizing Sale Of Real Property Pursuant To Section 363(f); (2) Approving Breakup Fee;...

In re River Canyon Real Estate Investments, LLC

2013 WL 4792272
In Re: RIVER CANYON REAL ESTATE INVESTMENTS, LLC, Debtor.
United States Bankruptcy Court, D. Colorado.
July 31, 2013

...THIS MATTER comes before the Court on the (i) Revised Fourth Amended Plan of Reorganization Proposed by River Canyon Real Estate Investments, LLC (the "Plan"), filed by Debtor River Canyon Real Estate ...

See More Trial Court Documents

permit to rebuild the restaurant because he would not be able to satisfy a number of necessary conditions. Instead, Raco allegedly told Henry to submit an alternative plan to build townhouses. If this was approved, then supposedly it would be easier for Henry to get approval at a later time to rebuild his restaurant.

Allegedly in reliance on this advice, Henry in early 1994 sought a conditional use permit for a 76-unit townhouse project on 9.8 acres of the property. Because the land had reverted to agricultural use after the restaurant burned down, Henry's proposed use was not allowed as of right. Henry properly sought a conditional use permit under Jefferson County's Development Review System. After processing Henry's proposal according to this system, the Commission unanimously voted to deny the permit. The Commission denied the permit based on the project's high housing unit density (which was much greater than the density in the surrounding area), its effect on the adjacent park, and its general incompatibility with the neighborhood.

**2 Pursuant to state law procedure, Henry appealed this decision to the Jefferson County Board of Zoning Appeals. The Board affirmed the Commission's findings and decision. Henry then challenged the Board's decision through the West Virginia state court system. He sought certiorari in state circuit court, which affirmed the *95 Commission's decision. Henry then sought review in the Supreme Court of Appeals of West Virginia, which remanded the case to the Board with instructions that the Board support its decision with more thorough fact-finding. The Board gave Henry the opportunity to present more evidence, but Henry requested instead that the Board expedite the decision without another hearing. The Board then issued a six-page decision affirming the denial. The Board concluded that the Zoning Commission had properly followed the public hearing procedures set out in the ordinance. It also concluded that the proposed development, with a density of 7.75 housing units per acre, was incompatible with the relative density of the surrounding area, which consisted mainly of one single family home per two acres or more of land. The Board found the proposed development incompatible with the purpose of the Rural-Agricultural District, which was intended "to provide a location for low density single family residential development in conjunction with providing continued farming activities" and "to preserve the rural character of the County and the agricultural community." Jefferson County, W.Va., Zoning and Development Review Ordinance § 5.7 (1988). Henry again sought certiorari in the circuit court, which affirmed the Board's decision. The Supreme Court of Appeals of West Virginia denied review. Throughout this state review process, Henry challenged the legal and factual sufficiency of the Commission's decision. At no time during this process did Henry seek compensation for the denial of his permit. *See, e.g., Henry v. Jefferson County Planning Comm'n*, 201 W.Va. 289, 496 S.E.2d 239 (W.Va.1997).

Henry also brought suit in federal district court, challenging the constitutionality of the ordinance, alleging an unconstitutional taking of his property, and claiming due process and equal protection violations. As noted above, we affirmed the district court's ruling that the ordinance was not unconstitutionally vague in a prior appeal, but we remanded Henry's remaining claims for further proceedings. On remand, the district court granted summary judgment to the defendants on these claims. Henry now appeals the district court's ruling on his takings and substantive due process claims, but he does not appeal the court's ruling on the equal protection claim.

II.

1 We first address Henry's takings claim. The Takings Clause of the Fifth Amendment to the Constitution, applicable to the states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. As the Supreme Court has explained, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Thus, the mere taking of a landowner's property does not violate the Fifth Amendment; the violation occurs only when the property is taken *and* the landowner has been denied just compensation. That is to say, "the property owner cannot claim a violation of the Just Compensation Clause until [he] has used [State compensation] procedure [s] and been denied just compensation." *Id.* at 195, 105 S.Ct. 3108. So long as the state provides a "reasonable, certain and adequate provision for obtaining compensation," a landowner's takings claim is not ripe until he has exhausted state compensation *96 procedures.[1] *Id.* (quotations omitted).

**3 Here, Henry has not pursued state compensation procedures, nor does he present evidence that there is no such procedure available. If the West Virginia courts had made clear that no state process exists for seeking compensation in these circumstances, then

Henry could plausibly claim that he had been denied just compensation. Likewise, if a state compensation process existed but the West Virginia courts had made clear that, for example, a landowner is never entitled to compensation for zoning restrictions on property, then Henry could claim that he had been denied just compensation without having to pursue a clearly meritless claim. *See Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F.Supp. 1068, 1072-73 (M.D.N.C.1992) (takings claim ripe because prior North Carolina court decisions made clear that no compensation was due when a challenged ordinance contained an amortization period), *aff'd*, 19 F.3d 11 (4th Cir.1994) (per curiam), *cert. denied*, 513 U.S. 928, 115 S.Ct. 317, 130 L.Ed.2d 278. While it appears that West Virginia does not have a statutory inverse condemnation procedure, a West Virginia landowner, at least in some circumstances, may seek compensation for damage to property by bringing a mandamus action against a state official to compel that official to institute statutory eminent domain proceedings. *See Shaffer v. West Virginia Dep't of Transp.*, 208 W.Va. 673, 542 S.E.2d 836 (W.Va.2000); *Carter v. City of Bluefield*, 132 W.Va. 881, 54 S.E.2d 747 (W.Va.1949). We do not speculate as to whether mandamus would be available in this particular case; it is enough to observe that the West Virginia courts have generally recognized this compensation procedure in the past and that Henry has not demonstrated that the procedure is unavailable in this case. Accordingly, Henry has not established that his property has been taken *without just compensation*. Because the Fifth Amendment only prohibits the taking of property without just compensation, Henry's takings claim is not ripe and must be dismissed without prejudice.[2]

***97** III.

Henry also claims that the Commission's denial of his conditional use permit constituted a violation of his substantive due process rights. To establish this, Henry must demonstrate: (1) that he had a property interest in his proposed project; (2) that the state deprived him of this interest; and (3) "that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir.1995).

2 In this case, Henry has failed to establish that he possesses a property interest in the conditional use permit to build the townhouses. We have made clear that when a "land-use regulation [ ] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment." *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir.1992). If local regulations make it clear that a landowner is *entitled* to a permit upon application or upon the meeting of certain conditions, then the landowner has a property interest in that permit. *See Scott v. Greenville County*, 716 F.2d 1409, 1418 (4th Cir.1983) ("Under South Carolina law settled well before he applied for the building permit, Scott enjoyed an entitlement to the issuance of a permit upon presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance."). On the other hand, "[a]ny significant discretion conferred upon the local agency [to issue or deny the permit] defeats the claim of a property interest." *Gardner*, 969 F.2d at 68. *See also Sylvia*, 48 F.3d at 826-27.

3 ***4** Here, it is clear that Henry is not entitled as a matter of right to a permit for his high-density townhouse project. Rather, the issuance of this permit is within the discretion of the Commission, guided by the process and factors enumerated in the zoning ordinance. Accordingly, Henry has no protected property interest in this permit, and his substantive due process claim has no merit. Henry also presses a substantive due process claim with regard to his restaurant. However, Henry has yet ***98** to apply for or be denied a permit to rebuild his restaurant. Even if, as Henry alleges, Raco told him that he would not be able to obtain the restaurant permit, Henry must at least present the plan to the Commission and be turned down before he can claim that he was deprived of the opportunity to rebuild. Thus, aside from whether Henry even possesses a protected property interest in rebuilding the restaurant, he has not yet been deprived of any such interest because Jefferson County has not prohibited him from rebuilding. As noted above, Henry's substantive due process rights have not been violated until, at the very least, he has been deprived of his property. *Sylvia*, 48 F.3d at 827.

Henry also challenges the district court's grant of qualified immunity to the individual defendants. Normally, the question of qualified immunity arises only when some constitutional violation has occurred. Here, the court reached the question of qualified immunity because it disposed of the claims against the individual defendants two months before it determined on the merits that Henry's substantive due process right had not been violated. At this stage of the proceedings, because we agree that no due process violation has occurred, there is no liability either individually or officially and the question of immunity

does not arise.

IV.

In sum, Henry's takings claim is not ripe because he has not sought just compensation from the State of West Virginia and been denied it. Thus, we vacate the district court's grant of summary judgment to the defendants on Henry's takings claim and remand with instructions to dismiss the claim without prejudice. We affirm the district court's grant of summary judgment to the defendants on Henry's substantive due process claim.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

All Citations

34 Fed.Appx. 92, 2002 WL 864267

Footnotes

1 With regard to exhaustion in takings claims, it is important to distinguish between *Williamson's* "final decision" requirement and its "just compensation" requirement. A takings claim is "not ripe until the government entity charged with implementing the [challenged] regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. 3108. However, once a final decision has been reached by the initial decisionmaker, a landowner need not exhaust state procedures for review of that final decision in order to ripen a takings claim. *Id.* at 192-94, 105 S.Ct. 3108. Here, Henry has in fact exhausted state procedures for reviewing the Commission's denial of his conditional use permit. While he did not need to pursue such review in order to satisfy *Williamson's* "final decision" requirement, we do not suggest that pursuing state review is a pointless or unadvisable course of action. Indeed, in this case the Supreme Court of Appeals of West Virginia required the Board of Zoning Appeals to justify its conclusions with more extensive fact-finding, even though the permit denial was ultimately upheld. State review provides a valuable check on potentially arbitrary local decisionmaking and is often a better course of action than immediately seeking federal review. We simply note that exhausting state procedures to review a "final decision" is not required to ripen a federal takings claim. In contrast, a landowner must exhaust state compensation requirements in order to demonstrate that a Fifth Amendment violation has occurred. As stated above, while Henry did exhaust state procedures to review the Commission's decision, he did not seek compensation during that process. *Cf. McFillan v. Berkeley County Planning Comm'n*, 190 W.Va. 458, 438 S.E.2d 801 (W.Va.1993) (considering takings claim raised during the course of review of Commission's decision).

2 Commentators have criticized the use of the term "ripeness" to describe the "just compensation" requirement, stating that "the ripeness label gives the erroneous impression that litigation in state court will ripen a federal takings claim. In reality ... preclusion and the *Rooker-Feldman* doctrine often will bar federal court relitigation." Douglas T. Kendall et al., *Choice of Forum and Finality Ripeness: The Unappreciated Hot Topics in Regulatory Takings Cases*, 33 Urb. Law. 405, 409 (2001). *See also* Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* 450-51 (1998). The point is well taken. A determination that a claim is unripe often suggests that a litigant will eventually be able to return to federal court for a decision on the merits. Litigants should be aware that in the context of takings jurisprudence, a dismissal for ripeness does not imply that the litigant will eventually have the opportunity to litigate the merits of their takings claim in federal court. Often, by the time a federal takings claim is ripe, it is also precluded from being litigated. *See Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir.1998); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 72 (1995) ("Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight."). Nevertheless, the Supreme Court has referred to the "just compensation" predicate as a ripeness requirement, *see Williamson*, 473 U.S. at 194, 105 S.Ct. 3108, and we think the term, despite its potentially misleading connotations, most accurately explains why Henry's claim cannot be

considered on the merits at this stage. State court litigation does ripen the federal claim; any subsequent bar to federal court litigation would not be a ripeness bar, but a claim or issue preclusion bar.

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that the evidence could never be part of the sentencing decision at all."

Johnson v. Texas, — U.S. —, —, 113 S.Ct. 2658, 2665, 125 L.Ed.2d 290, 302 (quoting with approval some language from Kennedy, J.'s concurring in judgment opinion in *McKoy v. North Carolina,* 494 U.S. 433, 456, 110 S.Ct. 1227, 1240, 108 L.Ed.2d 369, 389 (1990)), *reh'g denied,* — U.S. —, 114 S.Ct. 15, 125 L.Ed.2d 767 (1993). Whether a mitigating circumstance is charged upon peremptorily is not an issue of constitutional dimension because failure to give a peremptory instruction does not preclude in any manner the presentation of mitigating evidence or limit the jury's consideration of such evidence. Where, as here, and as in *Gay* with regard to several nonstatutory circumstances, the jury considered and actually found the mitigating circumstance in question, it is clear that *Lockett* and its progeny have not been violated and that no error of constitutional dimension has occurred.

Since the failure to give a peremptory instruction is not an issue of constitutional dimension, the appropriate standard for determining whether the trial court's error was prejudicial is whether there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988). Further, "[t]he burden of showing such prejudice under this subsection is upon the defendant." *Id.* Applying this standard to the case *sub judice,* defendant has failed to demonstrate that he was prejudiced by the trial court's refusal to give a peremptory instruction on the statutory mitigating circumstance at issue.

In sum, I believe that *State v. Gay* was wrongly decided, that the majority's reliance on *State v. Gay* in this case is thus misplaced, and that the majority erroneously applies a "harmless beyond a reasonable doubt" standard to an error that is not of constitutional dimension. For these reasons, I respectfully dissent.

338 N.C. 445

McDONALD'S CORPORATION, Plaintiff,

and

Lacy H. Thornburg, Attorney General of North Carolina, Intervenor,

v.

William D. DWYER, and wife, Hester T. Dwyer; Jerone C. Herring, Trustee for Branch Banking and Trust Company; Branch Banking and Trust Company; and Joni-Son Enterprises, Inc., Defendants.

No. 355PA93.

Supreme Court of North Carolina.

Dec. 9, 1994.

Owner of property adjacent to abandoned railroad easement brought action against record title holders of land over which easement had run, lessee, and holder of deed of trust claiming that defendants lost whatever title they may have had to property by failing to bring action contesting presumption that title to abandoned railroad easement vests in adjacent landowners. The Superior Court, Craven County, David E. Reid, Jr., J., held that statute requiring that such an action be brought within one year after enactment of statute or abandonment of easement was constitutional. Defendants appealed. The Court of Appeals, Johnson, J., 111 N.C.App. 127, 432 S.E.2d 165, reversed. Discretionary review was granted. The Supreme Court, Frye, J., held that that portion of statute requiring persons claiming contrary to the presumption to bring an action within one year of enactment of statute or abandonment of easement violates due process.

Affirmed.

Exum, C.J., filed a dissenting opinion in which Meyer, J., joined.

1. Constitutional Law ⚷277(1)

In analyzing due process claim, Supreme Court first needs to determine whether con-

stitutionally protected property interest exists. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇐277(1)

To demonstrate a property interest under Fourteenth Amendment, party must show more than a mere expectation; he must have legitimate claim of entitlement. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐277(1)

Record title holders of land formerly subject to railroad right-of-way easement which had been abandoned, their lessee, and holder of deed of trust on the property had property interest in the land which could not be seized without their consent or due process of law; even if there were underlying disputes about validity of title, the record title holders, lessee, and holder of deed of trust were in open and full possession of the property. U.S.C.A. Const.Amend. 14.

4. Boundaries ⇐5

General rule is that a call for a monument as a boundary line in a deed will convey title of land to center of monument if it has width.

5. Constitutional Law ⇐278(1.3)
Railroads ⇐82(5)

Portion of statute requiring that persons claiming contrary to presumption, that title in abandoned railroad easement vests in adjacent landowners, bring lawsuit within one year of enactment of statute or abandonment of easement, whichever later occurs, or lose right to rebut presumption violates due process; statute turns rebuttable presumption into a conclusive presumption which effectively takes property of record title holders of railroad easement land without affording notice, an opportunity to be heard and just compensation. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 17; G.S. § 1-44.2.

6. Constitutional Law ⇐278(1.1)

Notice and opportunity to be heard prior to depriving a person of his property are essential elements of due process guaranteed by Federal and State Constitutions. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 17.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 111 N.C.App. 127, 432 S.E.2d 165 (1993), reversing an order entered 22 October 1991 by Judge David E. Reid, Jr., in Craven County Superior Court. Heard in the Supreme Court 11 April 1994.

Ward and Smith, P.A. by Kenneth R. Wooten, New Bern, for plaintiff-appellant.

Michael F. Easley, Atty. Gen. by James C. Gulick, Sp. Deputy Atty. Gen., for intervenor-appellant.

Moore & Van Allen by Joseph W. Eason, Denise Smith Cline and A. Bailey Nager, Raleigh, for defendant-appellees William D. Dwyer, Hester T. Dwyer, Jerone C. Herring as Trustee, and Branch Banking and Trust Co.

FRYE, Justice.

This case involves the ownership of land formerly subject to a railroad right-of-way easement which was abandoned by Seaboard Coastline Railroad prior to 19 June 1987. Defendants William D. Dwyer and wife, Hester T. Dwyer, have record title to the property at issue and have leased it to defendant Joni-Son Enterprises, Inc. Defendant Branch Banking and Trust Company holds a deed of trust on the Dwyers' property. Jerone C. Herring is the Trustee pursuant to the deed of trust. Plaintiff, McDonald's Corporation, is the owner of the property adjacent to the abandoned railroad easement.

Plaintiff does not contend that it has record title to the property at issue. However, plaintiff does contend that defendants lost whatever title they may have had to the property by failing to bring an action in accord with N.C.G.S. § 1-44.2(b) within one year after enactment of the statute and that title is now vested in plaintiff pursuant to the statute.

On 19 June 1987, the North Carolina Legislature enacted North Carolina General Statute section 1-44.2 (the "statute") which is entitled "Presumptive ownership of abandoned railroad easements." The statute provides in pertinent part:

(a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement....

....

(b) Persons claiming ownership contrary to the presumption established in this section shall have a period of one year from the date of enactment of this statute or the abandonment of such easement, whichever later occurs, in which to bring any action to establish their ownership. The presumption established by this section is rebuttable by showing that a party has good and valid title to the land.

N.C.G.S. § 1–44.2 (Supp.1994).

On 19 June 1990, plaintiff filed this action, as an adjacent landowner within the definition of N.C.G.S. § 1–44.2, to quiet title and eject defendants from the property at issue. Plaintiff alleged that defendants or their predecessors were required by statute to commence an action on or before 19 June 1988 to show good and valid title to the property in order to rebut the statutory presumption of ownership in plaintiff. Plaintiff further alleged that since no such action was filed within the statutory period as required by N.C.G.S. § 1–44.2(b), title to the property is vested in plaintiff.

Defendants countered that plaintiff is not entitled to the property pursuant to N.C.G.S. § 1–44.2 because the statute is unconstitutional, failing to provide notice or a hearing and effecting the taking of land without just compensation.

Plaintiff and defendants filed cross motions for summary judgment on the statute's constitutionality. The Attorney General for the State of North Carolina made a motion to intervene in the action to argue in favor of the statute's constitutionality. This motion was allowed on 3 June 1991. On 22 October 1991, Judge David E. Reid, Jr., granted plaintiff's motion for summary judgment and denied defendants' motion for summary judgment, upholding the constitutionality of the statute.

Defendants appealed to the Court of Appeals which reversed Judge Reid's order, finding that N.C.G.S. § 1–44.2 is unconstitutional as applied to fee simple landowners in possession of disputed property. The Court of Appeals reasoned that N.C.G.S. § 1–44.2 fails to provide fee simple landowners with adequate notice, an opportunity to be heard, and just compensation. On appeal, plaintiff-appellants contend that the Court of Appeals erred "when it found that defendant Dwyers are fee simple owners in possession and ignored controlling precedent when it held that as applied N.C.G.S. § 1–44.2 effects an unconstitutional taking without due process."

[1–3] In analyzing a due process claim, we first need to determine whether a constitutionally protected property interest exists. To demonstrate a property interest under the Fourteenth Amendment, a party must show more than a mere expectation; he must have a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The facts in this case clearly indicate that defendants meet this requirement. Defendants are the only holders of record title to the property. Even if there are underlying disputes about the validity of their title, this should have no effect on defendants' standing to challenge the constitutionality of the statute. Defendants are also in open and full possession of the property. Accordingly, defendants' property interest cannot be seized without their consent or due process of law. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

[4] The sole basis for plaintiff-appellants' ejection action against defendants is North Carolina General Statute section 1–44.2. The general rule is " 'that a call for a monument as a boundary line in a deed will convey the title of the land to the center of the monument if it has width.' " *Goss v. Stidhams*, 68 N.C.App. 773, 776, 315 S.E.2d 777, 778 (1984) (quoting J. Webster, *Webster's Real Estate Law In North Carolina* 188 (Rev.Ed.1981)). Subsection (a) of the statute is consistent with this common law presump-

tion insofar as it applies to abandoned railroad easements. The second sentence of subsection (b) appears to also be consistent with the common law since it provides that the presumption is rebuttable by showing that a party has good and valid title to the land. The parties do not contest these provisions of the statute.

[5] The first sentence of subsection (b) of the statute provides that persons claiming contrary to the presumption in subsection (a) must bring a lawsuit within one year of the enactment of the statute or the abandonment of the easement, whichever later occurs, or lose their right to rebut the presumption. It is this portion of the statute, which turns a rebuttable presumption into a conclusive presumption, that defendants contend violates their due process rights.

[6] Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950).

As early as 1877, this Court determined that notice greater than that provided by operation of law in the nature of a statute of limitations is required prior to divestment of a vested property interest. *See Trustees of the Univ. of North Carolina v. North Carolina R.R. Co.*, 76 N.C. 103 (1877). *Trustees* involved a North Carolina statute which required corporations to pay unclaimed corporate dividends to the Trustees of the University of North Carolina after five years and forfeit them completely after ten years. The Court, under the United States Constitution and the law of the land clause of the North Carolina Constitution, rejected the argument that a statute of limitations could deprive persons of their vested property rights. The Court stated:

> 'We know of no case in which a legislative Act to transfer the property from A to B without his consent has ever been a constitutional exercise of the legislative power in any State in the Union.' (Citations omitted).
>
> ... [T]he Act under review, not only bars the [dividend holder] of his right of recovery, but takes from him his property, transfers it to another and enables that other to recover and own it. The [dividend holder] not only loses his property, but by the magic of this Act and without consideration received, it is vested absolutely in another....

Id. at 107.

Similar to the statute in *Trustees*, N.C.G.S. § 1–44.2 not only bars a right of recovery by operation of a statute of limitations, but by operation of a presumption, "transfers [property] to another and enables that other to recover and own it. The [holder] not only loses his property, but by the magic of this [statute] and without consideration received, it is vested absolutely in another." *Id.* The statute turns a rebuttable presumption into a conclusive presumption which effectively takes defendants' property without affording notice, an opportunity to be heard and just compensation.

This Court has found due process violations in several other statutes which, without prior notice, purport to effect a forfeiture of property rights. *See Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977) (statute permitting a judgment on a tax lien and sale without notice held unconstitutional); *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (requiring that remaindermen receive notice of foreclosure sale of a life estate and opportunity to be heard); *Price v. Slagle*, 189 N.C. 757, 128 S.E. 161 (1925) (requiring that defaulting taxpayers receive notice before their land is foreclosed).

Plaintiff-appellants rely on this Court's decision in *Sheets v. Walsh*, 217 N.C. 32, 6 S.E.2d 817 (1940), for the proposition that a self-executing statute that requires the owner to file suit and prove his claim does not cause vested property rights to be reduced to

a mere cause of action and such statute provides notice and opportunity to be heard in compliance with due process and the law of the land.

In *Sheets*, the plaintiffs' land was included on two recorded plats and no one ever possessed the platted land. The platted streets were never built and were unnecessary for ingress and egress to lots sold within the parcel. In 1939, the plaintiffs withdrew the land dedicated for streets from public use pursuant to a newly enacted statute which created a presumption of revocation of a dedication of streets by plat if the streets were not opened for twenty years. The defendants, who wanted to purchase the land, challenged the constitutionality of the statute on due process grounds, arguing that purchasers of lots within the plats were deprived of their vested rights to enforce the easements shown on the plats. The Court held that no vested property right was destroyed by the statute, but merely that the remedy by which those rights could be enforced had changed. The Court further held that the grantees of deeds in which references to maps were made had constructive notice of and a reasonable time in which to challenge the statute. *Id.* at 39–40, 6 S.E.2d at 821.

We find that *Sheets* is distinguishable and inapplicable to the facts in this case. First, *Sheets* only applies where dedicated easements are revoked before they are accepted and used. The statute in *Sheets* provided that the land would be conclusively abandoned by the public if it "shall not have been actually opened and used by the public within twenty years from and after the dedication thereof." *Id.* at 36, 6 S.E.2d at 819. Here by contrast, there has been no allegation that defendants abandoned the property. In fact, defendants have been in actual possession and enjoyment of the land. Moreover, *Sheets* only affects the status of easements in a platted subdivision. It does not affect the title to the underlying fee as the statute in this case purports to do.

Plaintiff-appellants also argue that *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), is controlling. That case, like *Sheets*, involved non-possessory property interests. In *Texaco*, a divided United States Supreme Court determined that an Indiana statute, providing for lapse of subsurface mineral rights after twenty years of nonuse, was constitutional. The statute contained a two-year grace period after its enactment to prevent mineral interests subject to lapse from being extinguished. In addition, the statute required notice prior to divestment to owners of ten or more interests. *Id.*

Texaco is distinguishable from the instant case. The Supreme Court in *Texaco* held that the statute fulfilled due process requirements because "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right. . . ." *Id.* at 530, 102 S.Ct. at 793, 70 L.Ed.2d at 752. Unlike *Texaco*, here it is only the State's action that causes the lapse. No neglect, failure to use, or abandonment is attributable to defendants. Prior to and after N.C.G.S. § 1–44.2 was enacted, defendants and their predecessors paid for the property, took record title, paid property taxes, maintained and improved the property, operated a business on the property, and successfully defended earlier challenges to their title.

In this case, the statute requires defendants to bring suit within one year or forfeit property to which they have record title and of which they are in open possession. "The right to commence and prosecute an action may be lost by delay, but the right to defend against a suit for the possession of property is never outlawed. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield never." *Pinkham v. Pinkham*, 61 Neb. 336, 338, 85 N.W. 285, 285 (1901). Therefore, we conclude that the first sentence of subsection (b) of North Carolina General Statute section 1–44.2 is unconstitutional because it does not provide sufficient notice, an opportunity to be heard, and just compensation before divesting owners of a valuable property interest. The remaining portions of N.C.G.S. § 1–44.2 are not challenged in this case and remain in full force and effect.

For the reasons stated herein, the decision of the Court of Appeals, which reversed summary judgment for plaintiffs, is affirmed.

AFFIRMED.

EXUM, Chief Justice, dissenting.

The majority interprets N.C.G.S. § 1–44.2 as creating a conclusive presumption of title in the land underlying a railroad easement after the lapse of the statutory one-year period and automatically transferring title from whoever might own the property to the adjoining landowner. I do not so interpret the statute and am of the view that the majority reads more into the statute than the legislature intended.

In the first place, the statute clearly provides that the presumption which it establishes is not conclusive but "is rebuttable by showing that a party has good and valid title to the land." Second, by the statute's clear language, only those who claim ownership contrary to the presumption must bring an action to establish ownership within the one-year statutory period. Persons claiming ownership in accordance with the presumption are not so limited in the time within which they may bring their claim.

The statute, in my view, operates as follows: When a railroad abandons its easement, the statute establishes a rebuttable presumption that title to the land underlying the easement resides in the owner of land adjacent to the easement, and the title extends to the centerline of the abandoned easement. One claiming ownership contrary to this presumption has the statutory period of one year to bring an action to establish ownership. The presumption operates against such a claimant, but the claimant may rebut the presumption by showing "good and valid title to the land." Presumably this means title which is superior to that the adjoining landowner would have but for the presumption. If such a claim of superior title is not brought within the statutory period, it is procedurally barred and may not be thereafter asserted against the adjacent owner, either offensively or defensively. The title of the adjacent landowner is then secure and that of the challenging claimant lost not because the statutory presumption is conclusive or because title is transferred but because the statutory period of limitations for challenging the adjacent landowner's title has expired. The statute does not abrogate vested rights or transfer title from one person to another. It merely establishes the procedure by which title under the limited circumstances defined by the statute must be claimed. Failure to claim title in accordance with this procedure bars the right to claim title thereafter.

As applied to the case before us, the statute works as follows: Plaintiff McDonald's Corporation (McDonald's) is claiming ownership to the land underlying the abandoned easement in accord with the statutory presumption. McDonald's is entitled to the benefit of the presumption. Not having challenged, or sought to rebut, this presumption by a claim filed within the one-year statutory period of limitations, defendants are barred from doing so now. Defendants are not barred because the statutory presumption is conclusive or because the statute transfers title from them to McDonald's. Whether, leaving aside the statutory presumption, they have better title than McDonald's, has never been determined in a way which binds McDonald's. Defendants are barred from *claiming* they have title superior to McDonald's because they "slept on their rights" and did not assert their claims against McDonald's within the time prescribed by the statute.

The majority gets off track in this case by assuming that but for the statutory presumption defendants have record title to the property superior to that of McDonald's. The majority states, "Plaintiff does not contend that it has record title to the property at issue." This, I believe, is not the case. Both McDonald's and defendants claim to have superior record title. According to the forecast of evidence at the summary judgment hearing, the property was at one time owned by the Pepsi Cola Company (Pepsi). Pepsi filed bankruptcy in 1923 at which time Craven Holding Corporation (Craven) was incorporated in Virginia for the purpose of holding and making disposition of property owned by Pepsi. At this time the railroad had an active railroad easement over the property. Craven conveyed the property in question in 1923 and dissolved in 1931. McDonald's claims record title through mesne convey-

ances from Craven.[1] Defendants claim record title through quitclaim deeds from the heirs of deceased shareholders of Craven.[2]

Surely, in the interest of fairly settling titles, the constitution permits the state to establish a reasonable time within which one who claims title to land underlying an abandoned railroad easement must assert the claim against one who owns the land adjoining the easement or otherwise lose the right to do so. One year for the assertion of such claims is a reasonable time. The one-year period of limitations being reasonable, I see no constitutional infirmity in the statute.

My position is supported by *Sheets v. Walsh*, 217 N.C. 32, 34, 6 S.E.2d 817 (1940) and *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).

In *Sheets*, an action seeking specific performance of a contract to convey realty, the plaintiff promisee had record title to certain property, portions of which had previously been dedicated for public use as roads. The dedicated land had not, however, been developed as roads for more than twenty years and no one had brought suit to enforce any easement rights. Plaintiff asserted that it had ownership of the land under the following statutory provision:

> [E]very strip, piece, or parcel of land which shall have been at any time dedicated to public use ... which shall not have been actually opened and used by the public within twenty years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned by the public for the purposes for which same shall have been dedicated; and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein, unless such right shall have been asserted within two years from and after the passage of this act.

Id. at 36, 6 S.E.2d at 819. Defendant promisor, seeking to avoid the contract on the ground plaintiff did not have good title, contended this statute was not effective in that it constituted an unconstitutional taking since "the dedicators, predecessors in title of the plaintiffs, sold and conveyed lots to others by reference to the maps filed and recorded by them, the grantees in the deeds for such lots, and those claiming under them, were thereby vested with easements over all the streets shown on said maps." *Id.* at 38–39, 6 S.E.2d at 821.

The plaintiff and defendant in *Sheets* took positions comparable to those taken by plaintiff McDonald's and defendants here. The statute in *Sheets*, just as the statute here, required those seeking to claim their easement rights do so within two years or forever lose their right to make the claim. Concluding that the statute was constitutional, the Court reasoned:

> Any rights to enforce any easements which the grantees in the deeds made with reference to the maps, and of those claiming under them, may have had was clearly preserved for two years after its passage by the act itself. No vested right was destroyed by the act, only the remedy by which such rights might be enforced was changed, and when this was done these grantees, and those claiming under them, were left with a remedy reasonably adequate to afford relief, namely, two years after the passage of the act in which to assert their rights.

Id. at 39, 6 S.E.2d at 821. The Court found this result fair since "[t]he grantees ... were fixed by law with notice of the statutes, and

1. McDonald's states in its brief, "Plaintiff owns the property at issue. There is no evidence that Craven intended to retain ownership of the fee underneath the railroad easement when it conveyed all of the property adjacent to the railroad.... Plaintiff is the successor to the adjacent landowner to whom Craven conveyed the property."

2. Defendants claim that the description of the property in McDonald's record title does not include the property underlying the easement and that this issue was settled in *Matter of Craven Holding Corporation*, No. 88CVS713, Superior Court, Craven County, by order dated 3 November 1989, from which no appeal was taken. I do not read the order as settling this issue. The order simply extinguishes Craven's interest in the property and concludes that this interest, whatever it was, had been transferred to defendants successor in title. In any event, to the extent this order might purport to resolve the issue of record title as between defendants and McDonald's, McDonald's is not bound by the order since it was not a party to the litigation.

it was incumbent upon them within the two years allowed by the statute (a reasonable time) to take themselves out of the bar put upon them by asserting their right of easements over the streets involved." *Id.* at 39–40, 6 S.E.2d at 821.

The majority attempts to distinguish *Sheets* on the basis that it involved land which was not used by the parties asserting title contrary to the statutory presumption. *Sheets,* however, was not decided upon whether these parties possessed or used the land, but upon the fact that they were by law on notice of their statutory duty to assert their rights within a reasonable time. I think *Sheets* controls the instant case.

Texaco likewise supports the constitutionality of our statute. In *Texaco* the Supreme Court upheld an Indiana statute barring mineral rights claims which were not asserted within a certain statutory period. The statute provided that a severed mineral interest which is not used for twenty years reverts to the current surface owner of the property unless the mineral owner filed a claim to his rights within two years. *Id.* at 518, 538, 102 S.Ct. at 786, 797, 70 L.Ed. at 743–44, 756. Not having filed its claim within the statutory period, the mineral rights claimant lost its right to make the claim. The Supreme Court found no constitutional infirmity in the procedural bar of the statute.

The majority attempts to distinguish *Texaco* on the ground it also involved rights which were unused. Nowhere in *Texaco,* however, is there an indication that the decision was based upon the mineral rights claimant's failure to use the right in question. The Court's decision was instead based on the principle that "persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Id.* at 532, 102 S.Ct. at 793, 70 L.Ed.2d at 752. The Court concluded that the constitution did not require more notice than that provided by the statute. *Id.* at 537, 102 S.Ct. at 796, 70 L.Ed.2d at 756.

Other states have upheld similar statutes which require persons to assert their rights within certain time periods or else forsake them. In *Presbytery of Southeast Iowa v. Harris,* 226 N.W.2d 232, 235, *cert. denied,* 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed.2d 48 (1975), for example, the Supreme Court of Iowa faced a statute which provided that those with reversionary interests in land who did not file a claim for that interest within the latter of twenty years of the deed creating that interest or one year after enactment of the statute would be barred from maintaining an action to claim their interest. The Court upheld the statute, reasoning that the statute "does not abolish or alter any vested right. Rather, it modifies the procedure for effectuation of the remedy by conditionally limiting the time for enforcement of the right." *Id.* at 242. The Court also found that the statute itself provided adequate notice of the time limitation for filing claims. *Id.* The Court reached its conclusions after examining several cases from other jurisdictions and "the numerous commentators who persuasively argue that statutes premised on the theory the legislature may require periodic filing in order to preserve rights do not run afoul of constitutional limitations." *Id.* at 241.

The majority relies on *University v. North Carolina Railroad Company,* 76 N.C 103 (1877). This case is readily distinguishable. The University sued the railroad claiming it was entitled to certain unpaid stock dividends still held by the railroad. The statute under which the University claimed provided that declared stock dividends which were unclaimed for five years shall be paid by the issuing corporation to the University. The question in the case, as stated by the Court, was "whether the provisions of the Act are warranted by Art. IX, § 6, of the Constitution...." *Id.* at 105. The constitutional provision in question provided, in pertinent part, "that all ... unclaimed dividends, or distributive shares of the estates of deceased persons, shall be apportioned to the use of the University." The Court held that this constitutional provision was directed to the estates of deceased persons and did not authorize the legislature to transfer unclaimed dividends of living persons from the issuing corporation to the University. The first point is that this case involved stock dividends, not real property. Second, the dis-

pute was not between the shareholder and the University; it was between the University and the issuing corporation. Third, the case involved an attempt by the plaintiff University to have personal property, the entitlement to stock dividends, transferred from the shareholders to it by the issuing corporation. Since the case did not involve shareholders who themselves were trying to assert their rights, no issue as to whether they could be procedurally barred from doing so arose. The Court noted this, essentially distinguishing the issue in that case from the issue now before us, saying:

> The counsel for the plaintiff endeavored to support their case, by drawing an analogy between the operation of the statute of limitations and the Act under which they claim. The analogy fails them. The statute of limitations bars the remedy only, and the debtor retains the possession of his property. But the Act under review, not only bars the creditor of his right of recovery, but takes from him his property, transfers it to another and enables that other to recover and own it. The creditor not only loses his property, but by the magic of this Act and without consideration received, it is vested absolutely in another—it matters not whether that other is the State or its appointee.

Id. at 107.

As I have tried to demonstrate, the statute under consideration here does not transfer property from one party to another. The question of which party has better title is not reached. The statute simply creates a procedural bar to a claim of title contrary to the statutory presumption.

The trial court properly entered summary judgment for plaintiffs. I vote, therefore, to reverse the Court of Appeals, which reversed the trial court, and to reinstate the judgment of the trial court.

MEYER, J., joins in this dissenting opinion.

338 N.C. 412

STATE of North Carolina ex rel. UTILITIES COMMISSION

v.

NORTH CAROLINA POWER.

No. 230A93.

Supreme Court of North Carolina.

Dec. 9, 1994.

Electric utility which operated in two states appealed North Carolina Utilities Commission's order in utility's general rate case. The Supreme Court, Frye, J., held that: (1) Utilities Commission did not violate Public Utility Regulatory Policies Act (PURPA), state statute, or commerce clause of Constitution when it rejected proxy plant-based avoided cost determination of Virginia State Corporation Commission (VSCC) for utility and adopted lower avoided cost amount based on PURPA qualifying facility solicitation, in disallowing as recoverable cost portion of expenses for capacity payments made by utility to cogenerator under power purchase contracts executed in compliance with VSCC order, and (2) substantial evidence supported Commission's disallowance, from recoverable expenses, of 50% of salaries of officers of utility and its sole common stockholder.

Affirmed.

Mitchell, J., dissented in part and filed opinion in which Webb, J., joined.

1. Electricity ⟹11.3(4)

North Carolina Utilities Commission did not violate PURPA when it rejected proxy plant-based avoided cost determination of Virginia State Corporation Commission (VSCC) for electric utility, which operated in two states, and adopted lower avoided cost amount based on PURPA qualifying facility solicitation, in disallowing as recoverable cost in general rate case portion of expenses for capacity payments made by utility to cogenerator under power purchase contracts exe-

rate from the appraisal clause stated that the actual cash value would be tendered unless the insured proved that repairs had been completed. However, the policy's appraisal provision, virtually identical to the provision in *Harrell*, stated that where the parties cannot agree, as to the amount of the loss, they would submit to an appraisal. The provision further stated that when at least two of the three (two appraisers and one umpire) agree on an award, their decision "set[s] the amount of loss." Furthermore, the parties agreed that the appraisal would be binding.

If the parties had not submitted to the appraisal process, the "Loss Settlement" provision would have imposed certain conditions on plaintiffs' entitlement to the replacement cost value, including plaintiffs' obligation to prove that the necessary repairs had been completed. Instead, when the parties submitted to the contractual appraisal process, the resulting conclusion to that process "set the amount of loss."

Also, I believe that the majority's reliance on *Central Life Ins. Co.*, 466 N.W.2d 257, is misplaced, as that case is wholly distinguishable from the case *sub judice*. In *Central*, the insurance policy's appraisal provision stated that an appraiser was to be "disinterested," while the "Agreement for Appraisal," entered into after the parties elected appraisal and independent of the insurance policy, did not set forth the same appraiser qualifications. *Id.* at 259. Given the plaintiff's subsequent agreement to pay its appraiser a contingency fee based upon the amount of loss assessed, the defendant filed for summary judgment, arguing that such payment rendered the appraiser interested in contravention of the policy's appraisal provision. *Id.* at 259-60. Given these facts, the Iowa Supreme Court concluded that the policy's appraisal provision, requiring appraisers to be disinterested, controlled over the appraisal agreement which did not expressly dictate such qualification. *Id.* at 260-61. If anything, *Central* supports a position opposite that adopted by the majority—that the appraisal process and the corresponding insurance policy provision results in a binding award.

The majority notes that the appraisal provision in the present case does not indicate that a resulting appraisal is the exclusive remedy. I disagree, as the provision expressly states that the appraisal process "set[s] the amount of loss." I would also note the glaring absence in the appraisal provision of a reservation, by defendant, of its rights to modify the appraisal award. *See High Country Arts & Craft Guild v. Hartford Fire Ins. Co.*, 126 F.3d 629, 634 (4th Cir.1997)(finding that insurer retained its rights to deny a claim, even following an appraisal process, because insurer had inserted language in the insurance policy stating that it retained that right even if an appraisal was conducted). In the absence of such a provision, I cannot agree with the majority that the "Loss Settlement" provision modifies an otherwise binding appraisal.

For the above-stated reasons, I would affirm the trial court's order granting partial summary judgment in favor of plaintiffs.

Ronald H. SACK, Petitioner–Appellee,

v.

NORTH CAROLINA STATE UNIVERSITY; Marye Anne Fox, Chancellor; University of North Carolina; Respondents–Appellants.

No. COA02–39.

Court of Appeals of North Carolina.

Dec. 31, 2002.

Professor who was not recommended for a discretionary salary increase sought judicial review of decision of state university's board of governors sustaining dismissal of professor's grievance. The Superior Court, Wake County, Howard E. Manning, Jr., J., vacated decision of the board of governors and remanded professor's grievance to uni-

versity's grievance committee. University appealed. The Court of Appeals, Biggs, J., held that: (1) grievance committee's findings of fact, in regard to department head's recommendations to dean that professor not receive discretionary salary enhancement, were supported by substantial evidence; (2) professor was required to prove his allegations by the preponderance of the evidence; (3) committee was authorized to exclude evidence it found to be irrelevant or lacking in foundation; (4) as a matter of first impression, professor's due process rights were not implicated by decision of department head to recommend against discretionary salary enhancement; and (5) trial court erred by addressing age discrimination issue on appeal.

Reversed.

1. Colleges and Universities ⚷8.1(6.1)

Although trial court's order, which remanded professor's salary grievance to university's grievance committee rather than reversing decision of the board of governors, was interlocutory, Court of Appeals would elect to treat university's appeal as a petition for writ of certiorari in the interests of justice and pursuant to its authority to do so. Rules App.Proc., Rule 21.

2. Administrative Law and Procedure ⚷763, 788, 796

The standard of review applied by the superior court reviewing a final agency decision is determined by the type of error asserted; errors of law are reviewed de novo, while the whole record test is applied to allegations that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious. West's N.C.G.S.A. § 150B-51(b).

3. Administrative Law and Procedure ⚷744.1

De novo review requires a trial court, in reviewing a final agency decision, to consider the question anew, as if the administrative agency has not addressed it. West's N.C.G.S.A. § 150B-51(b).

4. Administrative Law and Procedure ⚷791

When it applies the whole record test, a reviewing court must examine all competent evidence to determine whether the administrative agency decision is supported by substantial evidence. West's N.C.G.S.A. § 150B-51(b).

5. Administrative Law and Procedure ⚷791

The whole record substantial evidence test does not permit a reviewing court to replace the administrative agency'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, but merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. West's N.C.G.S.A. § 150B-51(b).

6. Administrative Law and Procedure ⚷791

Under the whole record test, if an administrative agency's findings are supported by substantial evidence, they must be upheld on appeal to the superior court. West's N.C.G.S.A. § 150B-51(b).

7. Administrative Law and Procedure ⚷683

On appeal from an order of a trial court that reviewed a final administrative agency decision, the Court of Appeals must determine whether the trial court committed any error of law, and review of the trial court's order generally involves: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, and (2) deciding whether the court did so properly. West's N.C.G.S.A. § 150B-51(b).

8. Administrative Law and Procedure ⚷811

In its order regarding an administrative agency decision, the trial court should state the standard of review it applied to resolve each issue. West's N.C.G.S.A. § 150B-51(b).

9. Administrative Law and Procedure ⟹683

If necessary, the Court of Appeals' duty to review a superior court order for errors of law can be accomplished by addressing the dispositive issues before an administrative agency and the superior court without: (1) examining the scope of review utilized by the superior court or (2) remanding the case if the standard of review employed by the superior court cannot be ascertained, provided that the Court of Appeals can determine whether: (a) the agency committed any errors in law; (b) the agency followed lawful procedure; (c) the petitioner was afforded appropriate due process; (d) the agency's decision was supported by competent evidence in the whole record; and (e) the agency's decision was arbitrary and capricious. West's N.C.G.S.A. § 150B-51(b).

10. Colleges and Universities ⟹8.1(6.1)

De novo review was appropriate for evidentiary issues, the proper burden of proof, and failure of state university grievance committee to reach the issue of age bias, in appeal from decision of state university's board of governors sustaining dismissal of professor's salary grievance. West's N.C.G.S.A. § 150B-51(b).

11. Colleges and Universities ⟹8.1(6.1)

Professor's challenge to state university grievance committee's finding of fact, that department head had treated professor fairly in making his recommendations to dean regarding discretionary salary increase, required application of the whole record standard. West's N.C.G.S.A. § 150B-51(b).

12. Colleges and Universities ⟹8.1(6.1)

Although trial court erred by failing to conduct whole record review of issue challenging state university grievance committee's finding of fact, that department head had treated professor fairly in making his recommendations to dean regarding discretionary salary increase, remand was unnecessary, where central issue presented was whether there was competent, material, and substantial evidence to support committee's decision, and the entire record of the hearing was before Court of Appeals. West's N.C.G.S.A. § 150B-51(b).

13. Colleges and Universities ⟹8.1(5)

If true, professor's allegations that department head's decisions, regarding scheduling of professor's classes and recommendations to dean against discretionary salary enhancement, both were unfairly based on "purely personal reasons" could have constituted a clear abuse of discretion and, thus, state university grievance committee properly granted professor a hearing. West's N.C.G.S.A. § 116-11(2).

14. Colleges and Universities ⟹8.1(6.1)

Findings of fact of state university grievance committee that professor was treated fairly, in regard to department head's recommendations to dean that professor not receive discretionary salary enhancement, were supported by substantial evidence in view of the whole record; department head testified that he had not based his recommendations to dean on personal animus and had weighed many factors, and testimony of other university professors and administrators tended to show that department head was directed to employ multiple criteria in his determinations and that he was generally fair in making administrative decisions.

15. Administrative Law and Procedure ⟹754.1, 787, 793

An appellate court may not disturb an administrative agency's assessment of the credibility of the witnesses and the weight and sufficiency to be given to the testimony, and may not override decisions within the agency's discretion if made in good faith and in accordance with the law.

16. Colleges and Universities ⟹8.1(4.1)

Pursuant to state university regulations, professor had the burden to prove by the preponderance of the evidence his allegations that department head had "unfairly treated" him with regards to scheduling, that "this unfair treatment was deliberate," and that department head "deliberately overlooked [him] when recommending faculty for [salary] increases, again for purely personal reasons," and professor was not subjected to a heightened standard by committee's reference to his specific allegations,

that department head's scheduling and salary enhancement decisions were based on "purely personal reasons," by the more general term "personal malice." West's N.C.G.S.A. §§ 116-11(2, 14), 116-34.

17. Colleges and Universities ⚷8.1(4.1)

State university grievance committee was authorized to exclude certain testimony regarding scheduling of professor's classes, on the basis that witness was not involved in the decision making process and was not privy to professor's interactions with department head regarding scheduling issues.

18. Colleges and Universities ⚷8.1(4.1)

State university grievance committee was authorized to exclude professor's proffered "rebuttal evidence" on the basis that it was irrelevant and unnecessary to determination of whether department head's failure to recommend professor for a discretionary raise was deliberately based upon purely personal reasons, as alleged by professor, and committee's decision was not inconsistent with the principles of impartiality and equity that university required committee to apply.

19. Colleges and Universities ⚷8.1(4.1)
Constitutional Law ⚷278.5(2.1)

State university professor's due process rights were not implicated by decision of department head to recommend against discretionary salary enhancement; department head was directed to base his recommendations on an array of factors, both objective and subjective, such that individual faculty members had no more than a unilateral expectation that he or she would be recommended by department head for raise. U.S.C.A. Const.Amend. 14.

20. Constitutional Law ⚷277(1)

In analyzing a due process claim, a court must first determine whether a constitutionally protected property interest exists. U.S.C.A. Const.Amend. 14.

21. Constitutional Law ⚷277(1)

To demonstrate a property interest under the Fourteenth Amendment due process clause, a party must show more than a mere expectation; he must have a legitimate claim of entitlement. U.S.C.A. Const.Amend. 14.

22. Constitutional Law ⚷277(1)

A legitimate claim of entitlement, for due process purposes, requires more than a unilateral expectation of a property interest. U.S.C.A. Const.Amend. 14.

23. Colleges and Universities ⚷8.1(6.1)

State university professor did not raise the issue of age discrimination in his request for a grievance hearing, did not request an amendment of his grievance, and did not even raise the issue at the hearing, and, thus, issue was not properly before the trial court on appeal.

Appeal by respondents from order entered 1 October 2001 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 9 October 2002.

Capitol District Law Offices by Reagan H. Weaver and Robert J. Harris, Raleigh, for petitioner-appellee.

Attorney General Roy Cooper by Assistant Attorney General Joyce S. Rutledge, for respondents-appellants.

BIGGS, Judge.

Respondents (N.C. State University; Marye Anne Fox, Chancellor of N.C. State University; University of North Carolina) appeal from an order vacating their dismissal of petitioner's grievance. For the reasons that follow, we reverse.

This appeal arises from a grievance filed by petitioner challenging a decision not to recommend him for a discretionary salary increase. The evidence in the record tended to show the following: Petitioner was employed by North Carolina State University (the university) as a history professor in 1971, and was tenured in 1974. In 1996, 'academic enhancement' funds were made available to the university for discretionary pay raises to 50% of the history faculty. "The purpose of the academic enhancement funds was to reward highly productive faculty who [were] likely to receive counter offers elsewhere, [and] who could not be easily replaced because of the talents they had."

Dean Zahn, the Dean of the College of Humanities and Social Sciences, asked Dr. Riddle, the chair of the history department, to identify the top 50% of the history faculty. Dr. Riddle was directed to consider several objective and subjective factors in making this determination, including: the number and quality of recent publications; service to the university and the community; special talents brought to the department; level of scholarship; likelihood of receiving an offer from another university; and the need to remedy existing salary inequities among history faculty. Dr. Riddle submitted his recommendations to Dean Zahn, who made the final decisions and awarded the discretionary salary enhancements. Petitioner was not among those recommended by Dr. Riddle.

In December, 1996, petitioner filed a grievance against Dr. Riddle, and requested a hearing before the university faculty grievance committee. He alleged that Dr. Riddle had (1) treated him unfairly "for personal reasons" with regards to scheduling of classes and had (2) "deliberately overlooked" him when making his recommendations regarding the discretionary salary enhancements, "again for purely personal reasons." Petitioner was granted a hearing, and on 29 December 1997, the committee submitted its report and recommendation to Chancellor Monteith, then Chancellor of the university. The committee "was unanimous in concluding that [petitioner] was treated fairly" with regard to both the scheduling of classes and the determination of who Dr. Riddle would recommend for a salary enhancement. The committee acknowledged that it had spoken by telephone with Dean Zahn to clarify the time period during which faculty publications were evaluated. The committee also offered an opinion that "perhaps if Dr. Riddle had been more forthright" with petitioner, "the issue of salary enhancement would have been resolved and would have not resulted in a grievance."

In June, 1998, Chancellor Monteith "accepted the committee's finding on [the] issue" of class schedules. With regards to the issue of salary enhancement, Chancellor Monteith noted that the committee's *ex parte* phone conversation with Dean Zahn violated the university's grievance procedure, which requires that all decisions of the committee "shall be based solely on material presented in the hearings." To correct this error, Chancellor Monteith remanded the grievance "for the limited purpose of receiving Dean Zahn's testimony on the record and providing each party the opportunity to cross-examine." Petitioner then wrote to university administrators asking whether he would be permitted to offer evidence to rebut Dean Zahn's testimony, and was informed that "the committee may entertain a request ... to present rebuttal to any relevant testimony that Dean Zahn may present regarding the issue of how enhancement monies were allocated."

The committee conducted its remand hearing in December, 1998, and submitted an addendum to its earlier report in May, 1999. The committee again concluded that petitioner "was treated fairly and properly with regard to the manner by which he was evaluated in 1996 for a salary enhancement." The committee also repeated its concerns about "the manner by which Dr. Riddle dealt with [petitioner] concerning this issue."

In July, 1999, Chancellor Fox, who had succeeded Chancellor Monteith, wrote to the committee, petitioner, and Dr. Riddle, stating her intention to accept the committee's recommendation that "no remedial action [was] required" on either of petitioner's grievances. Before finalizing her decision, Chancellor Fox requested that the committee prepare a memo clarifying why it had neither permitted petitioner to present certain rebuttal testimony on the issue of faculty scheduling of classes, nor considered certain documents submitted by petitioner at the remand hearing. Petitioner had proffered documents to show that, although Dr. Riddle testified that he evaluated faculty publications for the previous 2 years, he had recommended certain faculty members for enhancement money whose publication records would not, standing alone, have qualified them unless Dr. Riddle had included their publications for the previous 3 years.

The committee responded that it excluded the testimony regarding rescheduling of classes, because the proposed witness "was

not involved in the decision making process ... [and] was not privy to [petitioner's] interactions with Dr. Riddle" regarding scheduling issues. The committee further explained that it excluded petitioner's proffered documentation as "irrelevant and immaterial" to its resolution of either of the issues it considered dispositive: whether petitioner had shown by a preponderance of the evidence "that Dr. Riddle acted out of deliberate, personal malice," or whether Dr. Riddle's recommendations "evidence[d] unfairness to [petitioner]." The committee made findings of fact that Dr. Riddle was directed to "give very heavy weight" to "the question of whether a given faculty member was both likely to be lured away by another university and was worth retaining." Therefore, the committee determined that Dr. Riddle's review of the number of publications of each faculty member, whether for two or three years, would not necessarily be "the final word on even his initial recommendation to the Dean." The committee also found that the Provost's guidelines "require[d] that Dr. Riddle exercise reasonable judgment" and make a "broader assessment" of an individual faculty members "overall likelihood of being made an offer worth countering." Finally, the committee noted that it had evaluated whether Dr. Riddle's recommendations to Dean Zahn "reflected a reasonable determination of [petitioner's] relative value to his department[,]" and "agreed unanimously and without reservation, that Dr. Riddle's recommendation was indeed reflective of a reasonable determination." On 17 December 1999, Chancellor Fox issued her final decision accepting the committee's conclusions.

Petitioner then appealed to the President of the University of North Carolina. He reiterated his original complaints, and added new allegations of age discrimination, breach of contract, and violation of his due process rights. President Broad found no evidence that "the process or decisions reached in [petitioner's] appeal were wrongly made or otherwise in error" and, accordingly, found "no basis for reversing or otherwise modifying" Chancellor Fox's decision. President Broad declined to address petitioner's age discrimination and breach of contract allegations, as these were not raised before the committee. Thereafter, petitioner appealed to the UNC Board of Governors, who referred the matter to their Committee on University Grievance. That committee found "no compelling basis ... for disturbing the president's decision" and recommended that the board sustain the president's decision and dismiss petitioner's appeal. The Board of Governors approved the recommendation on 10 November 2000.

From the decision of the Board of Governors, petitioner on 15 December 2000 appealed to the superior court for review. Petitioner's appeal was heard in superior court on 7 June 2001. On 1 October 2001, the trial court issued an order vacating the Board of Governors decision upholding Chancellor Fox's dismissal of petitioner's grievance. The court remanded petitioner's grievance "to the Grievance Committee" with instructions directing the committee to list all history faculty publications between specific starting and ending dates, and to assign "points" for publications of various types, according to the system that Dr. Riddle testified he used. The committee was ordered to prepare "a master list of all the faculty members ... in rank order" and "determine the position occupied by the Petitioner" according to the "point" system for the quantity of publications during the specified time period. If petitioner was in the top half of this list, the court ordered that "[petitioner's] name and position in the ranking will be submitted to the Chancellor with a recommendation that he was not treated fairly." Conversely, if petitioner was not in the top 50%, the court ordered that "[petitioner's] grievance will be recommended for dismissal[.]" The court also ordered that "the Grievance Committee shall not consider the age of any faculty member, or any other factor" besides the publications each faculty member had during the specified time period, and directed the committee to take testimony and rebuttal evidence on the issue of whether respondent had any "legitimate business reason" for considering the age of faculty members. Finally, the trial court ordered that "[t]he Chancellor shall accept the recommendations of the Grievance Committee ... and shall issue

her determination of Petitioner's grievance." From this order, respondents appeal.

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[1] Preliminarily, we address petitioner's appellate motions to dismiss respondents' appeal, and to strike portions of respondents' reply brief. In his motion to dismiss, petitioner argues that, because the trial court remanded to the committee rather than reversing the Board of Governors, respondents' appeal should be dismissed as interlocutory. Petitioner correctly asserts that the trial court's order was interlocutory. *See Heritage Pointe Bldrs. v. N.C. Licensing Bd. of General Contractors,* 120 N.C.App. 502, 504, 462 S.E.2d 696, 697–698 (1995), *disc. review denied,* 342 N.C. 655, 467 S.E.2d 712 (1996) (where trial court "vacated the Board's decision and remanded the case for a rehearing, consistent with its order ... the order requires further action to settle the controversy, [and] it is interlocutory"). This Court has generally held that an order "remanding an action to an agency for hearing ... is not immediately appealable because avoidance of a hearing does not affect a substantial right." *Byers v. N.C. Savings Institutions Division,* 123 N.C.App. 689, 693, 474 S.E.2d 404, 407 (1996). However, in the case *sub judice,* we find merit in certain of respondents' substantive arguments. Therefore, in the interests of justice and pursuant to our authority under N.C.R.App. P. 21, we elect to treat respondents' appeal as a petition for writ of *certiorari. See* N.C. R.App. P. 21 (2001)(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review ... when no right of appeal from an interlocutory order exists[.]"). *See also Tastee Freez Cafeteria v. Watson,* 64 N.C.App. 562, 564, 307 S.E.2d 800, 802 (1983) (granting immediate review where trial court "exceeded its scope of review by [remanding for] further findings without first determining whether the [agency's] findings were sufficient to support [its] conclusion").

Petitioner also filed a motion to strike portions of respondents' reply brief. We conclude that respondents' reply brief comports with the requirements of N.C.R.App. P. 28(h), and, accordingly, deny petitioner's motion.

Standard of Review

The trial court's order was entered pursuant to petitioner's appeal from a final agency decision, in this case the decision by the Board of Governors denying further review of his grievance against Dr. Riddle. Judicial review of a final agency decision is governed by N.C.G.S. § 150B–51(b) (2001):

> [I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case ... for further proceedings. It may also reverse or modify the agency's decision ... [if] substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Unsupported by substantial evidence ... in view of the entire record as submitted; or (6) Arbitrary or capricious, or an abuse of discretion.

[2, 3] The standard of review applied by the superior court reviewing a final agency decision is determined by the type of error asserted; errors of law are reviewed *de novo,* while the whole record test is applied to allegations that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious. *Amanini v. N.C. Dept. of Human Resources,* 114 N.C.App. 668, 443 S.E.2d 114 (1994). "De novo review requires a court to consider the question anew, as if the agency has not addressed it." *Blalock v. N.C. Dep't of Health and Human Servs.,* 143 N.C.App. 470, 475–76, 546 S.E.2d 177, 182 (2001).

[4–6] When it applies the whole record test, "the reviewing court [must] examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *ACT–UP Triangle v. Commission for Health Services,* 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted). Substantial evidence is " 'more than a scintilla' and is 'such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion.' " *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C.App. 479, 483, 548 S.E.2d 793, 796 (2001) (quoting *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)). The whole record test "does not permit the court 'to replace the [agency'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,' " *N.C. Dept. of Correction v. McNeely*, 135 N.C.App. 587, 592, 521 S.E.2d 730, 733 (1999) (quoting *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)), but "merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Dept. of Correction v. Gibson*, 58 N.C.App. 241, 257, 293 S.E.2d 664, 674 (1982), *rev'd on other grounds*, 308 N.C. 131, 301 S.E.2d 78 (1983). Thus, if the agency's findings are supported by substantial evidence, they must be upheld. *Id.*

[7-9] On appeal, this Court must determine whether the trial court committed any error of law, and our review of the trial court's order generally involves "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini*, 114 N.C.App. at 675, 443 S.E.2d at 118-19. Thus, in its order regarding an agency decision, the trial court should state the standard of review it applied to resolve each issue. *Deep River Citizens' Coalition v. North Carolina Dept. of Environment and Natural Resources*, 149 N.C.App. 211, 215, 560 S.E.2d 814, 817 (2002) (citation omitted). However, if necessary, "this Court's duty to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the [agency] and the superior court without (1) examining the scope of review utilized by the superior court [or] (2) remanding the case if the standard of review employed by the superior court cannot be ascertained," provided that this Court can "determine whether: (1) the [b]oard committed any errors in law; (2) the [b]oard followed lawful procedure; (3) the petitioner was afforded appropriate due process; (4) the [b]oard's decision was supported by competent evidence in the whole record; and (5) ... the [b]oard's decision was arbitrary and capricious." *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment* (I), 152 N.C.App. 474, 567 S.E.2d 440 (2002) (quoting *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment* (II), 146 N.C.App. 388, 390, 392, 552 S.E.2d 265, 267 (2001), (Greene, J., dissenting), *rev'd per dissent*, 355 N.C. 269, 559 S.E.2d 547 (2002)).

In the case *sub judice*, petitioner, in his appeal to superior court, argued that the committee erred by (1) excluding testimony by petitioner's rebuttal witness on the issue of Dr. Riddle's scheduling of classes; (2) excluding petitioner's proffered documentary rebuttal evidence on the issue of whether Dr. Riddle had recommended certain faculty members whose publications during the previous two years would not have been enough to place them in the top 50%; (3) requiring petitioner to show by the preponderance of the evidence that Dr. Riddle had acted out of personal malice; (4) failing to "note the use of an impermissible criterion that influenced Riddles's selection process; to wit, age bias"; and, (5) finding that petitioner had been treated fairly by Dr. Riddle with regards to his recommendations to Dean Zahn regarding salary enhancement. Petitioner also added a generalized allegation that his "substantial rights" were violated because respondent's actions were "in violation of constitutional provisions, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence ... in view of the entire record as submitted, and arbitrary or capricious." However, petitioner did not associate this broad statement with any specific finding or decision by respondent.

[10, 11] In its order, the trial court concluded that "a *de novo* review is appropriate for its consideration of each of Petitioner's assignments of error, because the [c]ourt views each of Petitioner's assignments of error as alleging errors of law." This conclusion was correct as regards the evidentiary issues, the proper burden of proof, and the

committee's failure to reach the issue of age bias. However, petitioner's challenge to the committee's finding of fact, that Dr. Riddle had treated petitioner fairly in making his recommendations to Dean Zahn, requires application of the whole record standard.

[12] Although the trial court erred by failing to conduct whole record review of this issue, "[w]e do not believe a remand is necessary, however, because the central issue presented ... is whether there was competent, material, and substantial evidence to support [the committee's] decision ... and the entire record of the hearing is before us." *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002) (reviewing issue despite trial court's failure to properly delineate the standard of review it employed).

I.

Respondents argue that the trial court erred by "ignoring and misinterpreting" "agency regulations bearing on the faculty grievance proceedings." We agree.

We first review the relevant agency regulations. Under N.C.G.S. § 116-11(2) (2001) the UNC Board of Governors is "responsible for the general ... control, supervision, management and governance of ... the constituent institutions[, and f]or this purpose ... may adopt such policies and regulations as it may deem wise." Accordingly, the Board of Governors has directed that the Chancellor of each constituent institution "shall provide for the establishment of a faculty grievance committee" (Board of Governors Code § 607) and has authorized the various Boards of Trustees to "adopt personnel policies not otherwise prescribed by state law[.]" (Board of Governors Code, Appendix 1). NCSU regulations governing its grievance procedures are found in its Faculty Handbook, § 24.01, Grievance Procedure for Faculty, and in its NCSU Grievance Committee Manual. Under the university's grievance procedures, the trial court's review of the Board of Governors' decision not to hear petitioner's appeal was the fourth level of appeal by petitioner from Dr. Riddle's determination that petitioner should not be recommended for a discretionary pay raise. The earlier stages of the university's grievance process are summarized below:

1. The grievance committee conducts a hearing to determine whether the petitioner has shown by a preponderance of the evidence that "a decision which has adversely affected a [grievant's] professional or academic capacity, has been reached improperly or unfairly." The committee "has no power to reverse an administrative decision but can only recommend a reassessment of that decision[.]"

2. Based upon a review of the complete record of the committee, the Chancellor makes the decision whether to accept the committee's recommendation.

3. The President of UNC reviews the Chancellor's decision to determine whether "the process in reaching [the] decision[ ] was correctly followed and that the final conclusion reached had an evidentiary basis in the record."

4. The Board of Governors examines the record to determine if significant procedural or substantive errors below require review.

NCSU Grievance Manual, III.A.; NCSU Grievance Procedure, 24.01.10 and 13; Board of Governors, "Appellate Review Policies and Procedures." Before conducting a hearing, the grievance committee must ascertain whether the alleged grievance meets its jurisdictional requirements. The committee may conduct a hearing only if the petitioner asserts that an administrative decision was reached improperly or unfairly, as those terms are defined by the university:

> Improperly means in violation of a specific university rule, regulation, policy, or practice pertaining to the employment relationship between the grievant and the university. Unfairly means in an arbitrary or capricious manner or in an unlawfully discriminatory manner.

NCSU Grievance Procedure, 24.01.2.1. Moreover, the grievance procedure "cannot be used for ... discretionary actions, such as salary adjustments ... except to determine (1) whether the discretionary action was made in accordance with relevant university rules, regulations, policies, practices, proce-

dures, or criteria; and (2) whether the action constitutes a clear abuse of discretion." NCSU Grievance Procedure, 2401.2.2.b. Thus, "if the grievance contains allegations that are not grievable, those allegations must be dismissed." NCSU Grievance Manual, IV.A.2.a. Further, the "grievant bears the burden of establishing the jurisdictional grounds ... and the burden of proving by a preponderance of the evidence [the] grounds for the grievance." NCSU Grievance Manual, III.A; IV.I.2.

[13] In the case *sub judice,* petitioner alleges neither a violation of "a specific university rule, regulation, policy, or practice," nor that he was the victim of discrimination. Rather, his grievance alleged that Dr. Riddle's decisions regarding scheduling of petitioner's classes for Spring, 1996, and his recommendations to Dean Zahn for salary enhancement both were unfairly based on "purely personal reasons." Petitioner's allegations, if proven, could constitute "a clear abuse of discretion" and, thus, the committee properly granted petitioner a hearing.

In its order the trial court concluded that the committee "did not properly perform its official duties." The court did not specify which "official duty" the committee had neglected. We have, therefore, reviewed each of the issues raised by petitioner in his appeal to superior court, to determine whether the resolution of these issues provides support for the trial court's conclusion.

In his appeal to superior court, petitioner excepted to the committee's findings that he was "treated fairly with regard to the salary enhancement issue." We disagree with petitioner.

[14] The committee is the only fact-finding body in the grievance procedure; it is charged with "resolving conflicting testimony," and must "evaluate the evidence and determine the truth of material evidence." NCSU Grievance Manual, IV.D.2. In the case before us, the committee's report to the Chancellor stated that the committee "was unanimous in concluding that [petitioner] was treated fairly." After remanding to take Dean Zahn's testimony on the record, the committee prepared an addendum to their report, stating that "[o]nce again, the [c]ommittee concludes that [petitioner] was treated fairly and properly with regard to the manner by which he was evaluated in 1996 for a salary enhancement." Finally, in its memorandum to Chancellor Fox clarifying certain evidentiary rulings, the committee "agreed unanimously and without reservation, that Dr. Riddle's recommendation was indeed reflective of a reasonable determination." We conclude that the committee's findings of fact in this regard were supported by substantial evidence in view of the whole record.

[15] At the hearing, Dr. Riddle testified that he had not based his recommendations to Dean Zahn on personal animus, and had weighed many factors. The testimony of other university professors and administrators tended to show that Dr. Riddle was directed to employ multiple criteria in his determinations, and that he was generally fair in making administrative decisions. Petitioner's testimony indicated that Dr. Riddle's recommendations were to be based on the number of publications for the previous three years, and that if factors other than the number of publications were excluded, he might have been in the top 50%. The committee was thus required to resolve conflicting testimony. "An appellate court may not ... disturb an agency's assessment of the credibility of the witnesses and the weight and sufficiency to be given to the testimony, ... and may not override decisions within the agency's discretion if made in good faith and in accordance with the law." *Teague v. Western Carolina University,* 108 N.C.App. 689, 692, 424 S.E.2d 684, 686, *disc. review denied,* 333 N.C. 466, 427 S.E.2d 627 (1993) (citing *Jarrett v. N.C. Dep't of Cultural Resources,* 101 N.C.App. 475, 479, 400 S.E.2d 66, 68 (1991)). Further, the university has expressly admonished the committee to "understand the limits of their role. A Committee does not replace management[,] ... [and] may not support a grievance where reasonable persons could have differed and improper factors and improper procedures were not involved." We conclude that the committee's finding that petitioner had been treated fairly was supported by substantial competent evidence, and must be upheld.

[16] Petitioner also argued on appeal to superior court that the committee erred by requiring him to prove deliberate personal malice. Two issues are presented: the appropriate burden of proof, and the committee's use of the term "deliberate personal malice." Regarding the burden of proof, university regulations are clear that petitioner had the burden of proving his allegations by a preponderance of the evidence. NCSU Grievance Manual, III.A; IV.I.2. In the instant case, therefore, petitioner had the burden to prove his allegations that Dr. Riddle had "unfairly treated" him with regards to scheduling; that "this unfair treatment was deliberate"; and that Dr. Riddle "deliberately overlooked [him] when recommending faculty for [salary] increases, again for purely personal reasons." Regarding the committee's use of the term "personal malice," we note that the Code of the Board of Governors, applicable to its constituent institutions, *see* N.C.G.S. § 116-11(2) and (14), and N.C.G.S. § 116-34, defines "personal malice" as "dislike, animosity, [or] ill-will ... based on personal characteristics, [or] traits ... of an individual that are not relevant to valid University decision-making." Board of Governors, "Appellate Review" III-I-15. Petitioner's assertions that Dr. Riddle, *e.g.*, "deliberately overlooked [him] when recommending faculty for increases, again for purely personal reasons" would appear to fall within the Board of Governors definition of "personal malice," as the term is used in university proceedings. Moreover, although the committee used the term "personal malice" in a memorandum clarifying one of its evidentiary rulings, the committee's written submissions to university administrators all stated affirmatively that Dr. Riddle's recommendation was reflective of a reasonable determination, and that petitioner was treated fairly. We hold that the committee did not err by requiring petitioner to prove his allegations by the preponderance of the evidence, and that petitioner was not subjected to a heightened standard by the committee's reference to petitioner's specific allegations, that Dr. Riddle's scheduling and salary enhancement decisions were based on "purely personal reasons," by the more general term "personal malice."

Petitioner's appeal to superior court also challenged two of the committee's evidentiary rulings. We first note that the committee is authorized to "exercise complete control" over the hearing, including the determination of "whether information or testimony is material and relevant to the issues involved in the grievance." It "may rule that certain presentations not be considered[,]" and in so doing, the committee is "not bound by strict rules of legal evidence" although its rulings must be "[c]onsistent with the principles of impartiality and equity[.]" NCSU Grievance Procedures, § 24.01.8.

[17] In the present case, the committee excluded certain testimony regarding scheduling of classes, on the basis that the witness "was not involved in the decision making process ... [and] was not privy to [petitioner's] interactions with Dr. Riddle" regarding scheduling issues. We conclude that this determination was within the scope of the committee's authority, and was not error.

[18] The committee also excluded documents offered by petitioner in rebuttal to Dean Zahn's testimony. These documents were intended to show that Dr. Riddle had recommended certain faculty to Dean Zahn despite the fact that the number of publications by these faculty in the past two years would not, standing alone, have placed them in the top 50%. In excluding this evidence, the committee rejected petitioner's basic premise—that Dr. Riddle's recommendations for salary increases were supposed to be based primarily upon how many publications each faculty member had within a certain time period, so that evidence that in several cases Dr. Riddle's recommendations did not correspond to the faculty member's rank according to number of publications would tend to show unfairness on Dr. Riddle's part. Instead, the committee, as fact-finder, determined that Dr. Riddle was directed to base his recommendations largely on a subjective assessment of many factors, in order to determine whether a faculty member was likely to receive an competitive offer from another institution, and on Dr. Riddle's evaluation of the faculty member's "relative value to his

department." The committee concluded that, even assuming Dr. Riddle made an "inadvertent error" in his tabulation of the number of publications for the two or three previous years, this "would not, without more evidence, have established deliberate personal malice." The committee found that there was no other evidence that Dr. Riddle acted for personal reasons, and that "Dr. Riddle's recommendation reflected a reasonable determination of [petitioner's] relative value to his department." The committee therefore excluded petitioner's proffered "rebuttal evidence" on the basis that it was "irrelevant and unnecessary" to their determination of whether Dr. Riddle's failure to recommend petitioner for a raise was "deliberately" based upon "purely personal reasons" as alleged by petitioner. We hold that the committee's decision not to consider petitioner's rebuttal evidence was within its authority, and was not inconsistent with the "principles of impartiality and equity" that the university requires the committee to apply.

For the reasons discussed above, we are unable to discern any basis in the issues presented by petitioner to the trial court, for the trial court's conclusion that the committee "did not properly perform its official duties." Accordingly, respondents' assignment of error that the trial court erred in interpreting relevant agency regulations is upheld.

II.

[19] Respondents also argue that the trial court erred by concluding that petitioner was denied due process because petitioner's grievance "implicates no interest protected by due process rights." Specifically, respondents contend that the discretionary salary enhancement did not give rise to any property right of petitioner's invoking his right to due process. We agree.

[20–22] "In analyzing a due process claim, we [must] first . . . determine whether a constitutionally protected property interest exists. To demonstrate a property interest under the Fourteenth Amendment, a party must show more than a mere expectation; he must have a legitimate claim of entitlement." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994) (citing *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). A 'legitimate claim of entitlement' requires "more than a 'unilateral expectation' of a property interest[.]" *Chapman v. Byrd*, 124 N.C.App. 13, 18, 475 S.E.2d 734, 738 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 50 (1997) (quoting *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972)).

Although North Carolina appellate courts have not addressed this issue in the context of a discretionary salary increase, appellate cases from other jurisdictions have held there is no property interest in discretionary decisions about employment. *See, e.g., Leventhal v. Knapek*, 266 F.3d 64, 67 (2nd Cir.(N.Y.) 2001) ("discretionary salary increase was not a form of property protected by the Constitution against deprivation without due process of law"); *Temple v. Inhabitants of City of Belfast*, 30 F.Supp.2d 60, 67 FN. 5 (D.Me.1998) (no property interest in raise absent evidence of entitlement, *e.g.*, "facts indicating that such raises were provided for by statute, regulation, rule, or contractual provision"); *Day v. Board of Regents of University of Nebraska*, 911 F.Supp. 1228, 1241 (D.Neb.1995), *aff'd*, 83 F.3d 1040 (8th Cir.(Neb.) 1996) (no property interest in salary raise where plaintiff "claims that he has not received salary increases which he believes his academic record merits, [but] he has offered no evidence of any statute, regulation, rule, or contractual provision [that] would entitle him to receive any raise, let alone one of a specific amount").

In the case *sub judice*, petitioner does not cite any statute or university regulation that would entitle him to be recommended for the salary enhancement. Moreover, as discussed above, the committee found that Dr. Riddle was directed to base his recommendations on an array of factors, both objective and subjective. These findings of fact establish that an individual faculty member could have no more than a unilateral expectation that he or she would be recommended by Dr. Riddle. We hold that petitioner's Due Process rights were not implicated in Dr. Riddle's recommendations to Dean Zahn, and that the trial court erred by concluding that petitioner had

a contractual right to be recommended for a raise, or that his Due Process rights were violated.

III.

[23] Finally, respondents argue that the trial court erred in reaching the issue of age discrimination. Again, we agree.

The trial court concluded that "the Board of Trustees, the Dean, and Dr. Riddle were all influenced illegally by age bias[,]" and that the committee "ignored substantial evidence of age discrimination." University regulations strictly limit a grievance committee to consideration of issues alleged in petitioner's grievance letter, or which the committee has unanimously consented to consider by later amendment of the grievance. NCSU Grievance Procedure, 3.1.1; 8.1.11.

In the instant case, it is undisputed that petitioner did not raise the issue of age discrimination in his request for a grievance hearing, did not request an amendment of his grievance, and did not even raise the issue at the hearing. Therefore, this issue was never presented at petitioner's grievance hearing, and thus was not properly before the trial court on appeal. *See Tate Terrace Realty Investors, Inc. v. Currituck County,* 127 N.C.App. 212, 224, 488 S.E.2d 845, 852, *disc. review denied,* 347 N.C. 409, 496 S.E.2d 394 (1997) ("superior court in its posture of an appellate court, ... may not consider a matter not addressed by the [agency]") (citation omitted). Therefore, the trial court erred by addressing the issue on appeal.

For the reasons discussed above, we conclude that the trial court's order, reversing respondents' decision dismissing petitioner's grievance, was erroneous and must be

Reversed.

Judges WALKER and THOMAS concur.

Karen Ann BLANKENSHIP and Mike Thompson, Plaintiffs,

v.

TOWN AND COUNTRY FORD, INC. and Ford Credit Leasing Company, Inc., Defendants.

No. COA02-191.

Court of Appeals of North Carolina.

Dec. 31, 2002.

Used car buyers brought suit against dealer for failure to disclose damage to vehicle, fraud, and unfair and deceptive trade practices. After default judgment was entered against dealer, the Superior Court, Mecklenburg County, Richard D. Boner, J., denied dealer's motion to set aside default. Dealer appealed. The Court of Appeals, Walker, J., held that: (1) dealer was properly served; (2) trial court did not abuse its discretion in failing to set aside entry of default; (3) Court of Appeals would not enforce arbitration agreement such that default judgment would be set aside based on existence of agreement; (4) trial court had personal jurisdiction over dealer; and (5) damages award was not justified.

Affirmed in part, reversed in part, and remanded.

1. **Appeal and Error** ⚷982(1)
Judgment ⚷344

The granting of a motion to set aside judgment is within the trial court's sound discretion and is reviewable only for abuse of discretion. Rules Civ.Proc., Rule (60)(b)(4), West's N.C.G.S.A. § 1A-1.

2. **Courts** ⚷26

Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason.

3. **Appeal and Error** ⚷1010.1(4)

If there is competent evidence of record on both sides of motion to set aside, it is the duty of the trial court to evaluate such evidence, and the trial court's findings sup-

SWAN BEACH I

tion omitted). In addition, "[b]efore ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has **refused** to **provide support which is adequate** under the circumstances existing at the time of the institution of the action or proceeding[.]" N.C. Gen.Stat. § 50–13.6 (emphasis added).

[15] In the instant action, both parties requested an award of attorney's fees. Specifically, plaintiff sought to recover "at least" $25,265.50 in attorney's fees from defendant. In its order, the trial court found that neither party was entitled to recover attorney's fees because each had sufficient means to defray the cost of litigation. On appeal, our focus hinges on whether plaintiff had sufficient funds to defray the costs of litigation. "With regard to this determination, a court should generally focus on the disposable income and estate of just that spouse, although a comparison of the two spouses' estates may sometimes be appropriate." *Barrett* at 374, 536 S.E.2d at 646 (citation omitted). Having reviewed the trial court's findings, we find them to be sufficient to form a basis to deny plaintiff attorney's fees. Excluding bonus income, plaintiff's monthly gross income is $10,242.00, and her reasonable needs total $3,183.87. After paying $2,652.35 per month towards the minor children's reasonable needs, plaintiff is left with a surplus of $4,405.78 per month. This alone supports the trial court's determination that plaintiff had sufficient means to defray the cost of litigation.

[16] Further, the trial court did not find as fact that defendant refused to provide support which was adequate under the circumstances. *See* N.C. Gen.Stat. § 50–13.6. The record indicates that defendant complied with the terms of the Agreement directing him to make child support payments; in fact, he voluntarily made support payments in excess of what he was required to pay. This evidence further supports the trial court's decision to deny plaintiff's motion for attorney's fees. *See Prescott v. Prescott,* 83 N.C.App. 254, 262, 350 S.E.2d 116, 121 (1986) (holding that the trial court did not abuse its discretion in denying wife's motion for reasonable attorney's fees in connection with her child support action when the husband paid adequate child support and voluntarily made additional support payment which he was not obligated to make under the parties' consent order). We hold that the trial court's findings of fact are supported by competent evidence and conclude that it was not an abuse of discretion for the trial court to deny plaintiff's motion for an award of attorney's fees.

III. *Conclusion*

The trial court did not err in denying plaintiff's motions for retroactive child support and for attorney's fees. However, by excluding the parties' bonus income in its calculation of the parties' gross base income, the trial court did err in calculating its child support award. We reverse the requisite portions of the trial court's order and remand so that the trial court can include the bonus income in its calculations. We further instruct the trial court to recalculate the supporting parent's child support obligation accordingly.

Affirmed, in part; reversed and remanded, in part.

Judges McCULLOUGH and DAVIS concur.

SWAN BEACH COROLLA, L.L.C., Ocean Associates, LP, Little Neck Towers, L.L.C., Gerald Friedman, Nancy Friedman, Charles S. Friedman, Til Morning, LLC, And Second Star, L.L.C., Plaintiffs,

v.

COUNTY OF CURRITUCK; The Currituck County Board of Commissioners; and John D. Rorer, Marion Gilbert, O. Vance Aydlett, Jr., H.M. Petrey, J. Owen Etheridge, Paul Martin, and S. Paul O'Neal as members of the Currituck County Board of Commissioners, Defendants.

No. COA13–1272.

Court of Appeals of North Carolina.

July 1, 2014.

Background: Property owners brought action against county seeking declaratory

judgment regarding vested rights to develop their properties commercially and claimed equal protection violations. The Superior Court, Currituck County, Wayland J. Sermans, J., 2013 WL 7011836, dismissed. Owners appealed.

Holdings: The Court of Appeals, Stroud, J., held that:

(1) owners were not required to exhaust administrative remedies before county board of adjustment in order to bring action seeking declaratory judgment regarding vested rights;

(2) allegations in property owners' complaint against county were sufficient to state a claim for common law vested rights;

(3) owners were not required to exhaust administrative remedies in order to bring § 1983 claim against county;

(4) county was not protected by sovereign immunity from property owners' § 1983 claims; and

(5) allegations in complaint were insufficient to state claim under provision of North Carolina Constitution requiring uniform taxation.

Affirmed in part, reversed in part, and remanded.

1. Administrative Law and Procedure ⚷229

As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.

2. Administrative Law and Procedure ⚷229

If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed.

3. Administrative Law and Procedure ⚷229

A party need not exhaust an administrative remedy where the remedy is inadequate.

4. Administrative Law and Procedure ⚷229

Facts justifying avoidance of administrative procedure must be pled in the complaint.

5. Administrative Law and Procedure ⚷229

For purposes of determining if exhaustion of administrative remedies is required, the administrative remedy is considered inadequate unless it is calculated to give relief more or less commensurate with the claim.

6. Administrative Law and Procedure ⚷229

Constitutional Law ⚷983

Generally, constitutional claims are not subject to administrative remedies, so failure to pursue such remedies is not fatal to those claims.

7. Declaratory Judgment ⚷44

Zoning and Planning ⚷1571

Property owners were not required to exhaust administrative remedies before county board of adjustment in order to bring action seeking declaratory judgment regarding vested rights to build commercial buildings on residentially zoned property; interpretation of zoning ordinance was not at issue, and ordinance prohibited owners' intended use of property, and thus, owners' only contention was that they had a legal right to build, which right the county could not take from them. Rules Civ.Proc., Rule 12(b)(1), West's N.C.G.S.A. § 1A-1.

8. Zoning and Planning ⚷1451

A determination of an issue under the "vested rights doctrine," which has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances, requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures.

See publication Words and Phrases for other judicial constructions and definitions.

9. Zoning and Planning ⚷1333(1, 3)

In reviewing the determination of an administrative enforcement officer, a board of adjustment sits in a quasi-judicial capacity and has only the authority it is granted under that statute. West's N.C.G.S.A. § 160A-388.

10. Zoning and Planning ⚷1333(1), 1469

Board of adjustment's role is solely related to the interpretation of the ordinances and deciding whether to grant a variance from those ordinances; boards of adjustment do not have the authority to adjudicate constitutional claims. West's N.C.G.S.A. § 160A-388(b).

11. Zoning and Planning ⚷1471

Power of board of adjustment to determine and vary is limited to such variations and modifications as are in harmony with the general purpose and intent of the ordinance and do no violence to its spirit.

12. Zoning and Planning ⚷1558

A plaintiff is not required to request that the board of adjustment issue a variance that it does not have the authority to issue.

13. Zoning and Planning ⚷1571

Where the interpretation of the ordinance is not at issue, the ordinance prohibits the property owner's intended use, and the property owner is claiming a common law vested right to such a nonconforming use, the only claim is a constitutional one; in such a case, plaintiffs are not required to first exhaust the procedures before the board of adjustment.

14. Zoning and Planning ⚷1352

Allegations in property owners' complaint against county were sufficient to state a claim for common law vested rights; owners alleged that their property was not zoned at the time they made their expenditures to prepare the business lots, that this use was lawful at the time the expenditures were made and that the expenditures were made in good faith reliance on that fact, that they expended over $400,000 on the development, and that they were prejudiced by the zoning ordinance because their intended commercial use would not be permitted under the ordinance.

15. Zoning and Planning ⚷1451

A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the enactment or amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party.

16. Zoning and Planning ⚷1300

When a property owner makes expenditures in the absence of zoning, subsequent changes in the zoning of the property may not prohibit the resulting nonconforming use.

17. Zoning and Planning ⚷1451

A property owner need not rely on the existence of a permit authorizing construction if none was required at the time the expenditures were made for purposes of asserting a claim of vested rights in a nonconforming use.

18. Zoning and Planning ⚷1451

To acquire vested property rights it is sufficient that, prior to the enactment of the zoning ordinance and with the requisite good faith, property owner make a substantial beginning of construction and incur therein substantial expense.

19. Zoning and Planning ⚷1451

Party claiming a common law vested right in a nonconforming use of land acts in good faith reliance when it has an honest belief that the nonconforming use would not violate declared public policy.

20. Pretrial Procedure ⚷679, 683

On a motion to dismiss for failure to state a claim, court must assume that the facts alleged by plaintiffs are true and lib-

erally construe the complaint. Rules Civ. Proc., Rule 12(b)(6), West's N.C.G.S.A. § 1A-1.

21. Zoning and Planning ⚷1451

The required good faith for a common law vested rights claim is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

22. Civil Rights ⚷1343

A municipality is a "person" within the meaning of § 1983. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

23. Constitutional Law ⚷983

While claims for violation of procedural due process may be subject to exhaustion requirements, substantive constitutional claims are not. U.S.C.A. Const.Amend. 14.

24. Civil Rights ⚷1318

Property owners were not required to exhaust administrative remedies in order to bring § 1983 claim against county alleging violation of equal protection regarding enforcement of zoning ordinance. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

25. Civil Rights ⚷1376(4)

County was not protected by sovereign immunity from property owners' § 1983 claims alleging violation of equal protection in regards to enforcement of zoning ordinance. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

26. Appeal and Error ⚷173(10)

County failed to preserve on appeal claim that property owners' § 1983 claim was barred by statute of limitations, where county failed to raise the issue in the trial court.

27. Taxation ⚷2135

Allegations in property owners' complaint that county refused to allow business development on property that it had classified for tax purposes as business property were insufficient to state a claim under provision of North Carolina Constitution requiring uniform taxation; owners did not actually challenge the tax classification or the uniformity of the tax rules, and they did not allege that county taxed property in a non-uniform manner. West's N.C.G.S.A. Const. Art. 5, § 2(2).

28. Taxation ⚷2121, 2127

The North Carolina Constitution requires that taxation must be imposed by a uniform rule; that requirement is met if the rate is uniform throughout each taxing authority's jurisdiction. West's N.C.G.S.A. Const. Art. 5, § 2(2).

Appeal by plaintiffs from Order entered 24 July 2013 by Judge Wayland J. Sermons in Superior Court, Currituck County. Heard in the Court of Appeals 24 April 2014.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Lacy H. Reaves and J. Mitchell Armbruster, for plaintiffs-appellants.

County of Currituck, by Donald I. McRee, Jr., for defendants-appellees.

STROUD, Judge.

Plaintiffs appeal from an order entered 24 July 2013 dismissing their complaint for declaratory judgment regarding vested rights they claimed to develop their property commercially, for violations of constitutional rights under 42 U.S.C. § 1983, and for violation of Article V, Section 2 of the North Carolina Constitution. We reverse in part, affirm in part, and remand for further proceedings.

I. Background

Plaintiffs are five companies and three individuals who own property in the Swan Beach Subdivision in Currituck County. On 6 July 2012, they filed a complaint against the County of Currituck, the Currituck Board of Commissioners, and the commissioners themselves in their official capacities. Plaintiff Ocean Associates was the original

developer of the land and the other plaintiffs purchased their land from it.[1] They alleged that they have common law vested rights to develop commercial uses on their property. They also raised claims of laches, "easement rights" to commercially develop their property, state constitutional violations, and violations of federal equal protection and due process under 42 U.S.C. § 1983.

According to the complaint, plaintiff Ocean Associates, LP, purchased approximately 1400 acres of property in the Carova Beach area of Currituck County in 1966 to develop a residential subdivision along with related commercial services.[2] In 1969, Ocean Associates created and recorded a plat indicating that it intended to divide the property into residential and business lots. At the time, Currituck County had no applicable zoning ordinance. However, the County asked Ocean Associates to refrain from developing the business lots until the residential lots were sufficiently occupied. After filing the plat, Ocean Associates began to prepare both the residential and business lots for development. They spent $425,050.00 on services such as surveying, land geosciences, general engineering, road grading, canal digging, dune building, filling lots, evacuating ditches, and landscaping. This infrastructure would serve both the business and residential lots.

In 1971, Currituck County adopted a zoning ordinance. The 1971 ordinance designated plaintiffs' property as RA-20. The RA-20 district allowed for low density residential and agricultural uses with only limited business uses. Plaintiffs allege that they did not know that the zoning of their property had changed. In 1975, the County enacted a new zoning ordinance. This ordinance zoned plaintiffs' property in a similar manner to the previous ordinance. Plaintiffs believed that the County would still permit them to develop their property for commercial uses because the County had allowed other property owners to do the same.

In 1989, Currituck County enacted a Unified Development Ordinance (UDO). The UDO zoned plaintiffs' property RO2, which does not allow business uses except for marinas, campgrounds, outdoor recreational facilities, and small professional offices. The business and commercial uses intended by plaintiffs would not be permitted under this ordinance. Nevertheless, plaintiffs continued to believe that they would be allowed to commercially develop their property.

In 2004, plaintiffs decided to move forward with development of the business lots because the density of the residential lots had finally become sufficient to support such use. They wanted to build a convenience store, real estate offices, a post office, and a restaurant. Around September 2004, the County informed plaintiffs that such uses would not be permitted. Plaintiffs asserted that they had vested rights to use their property in this manner, but the County disagreed, asserting that the UDO barred such uses. Over the next three years, plaintiffs then attempted to convince the County to rezone their property so that they could develop their property for business uses. The parties agreed that such uses would not be permitted on their property under the UDO.

Plaintiffs allege that despite the County's assertion that the UDO prohibits business development in the RO2 district, the County has permitted other businesses to operate in the area. They alleged that the County treated plaintiffs differently without a rational basis, or because the individual plaintiffs are Jewish.

On 12 September 2012, defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). Defendants argued that plaintiffs failed to exhaust applicable administrative remedies and that they are protected by sovereign, governmental, and legislative immunity. They further argued that plaintiffs' complaint is barred by the applicable statutes of limitations.

Plaintiffs filed an amended complaint on 13 February 2013. The amended complaint

1. The precise nature of the relationship between Ocean Associates and the other plaintiffs is not clear from the complaint.

2. Because this case comes to us on a motion to dismiss, all of the following facts are from the complaint; we express no opinion as to their veracity.

added an allegation that the County adopted a zoning ordinance in 1968, but that there was no map accompanying the ordinance and that their property was not zoned at that time. The amended complaint also added a claim under Article V, Section 2 of the North Carolina Constitution. Plaintiffs alleged that the County had taxed their property as business property since 1969, so its failure to permit plaintiffs to develop their property for business uses contravenes the requirement of taxation by uniform rule.

Defendants then filed an amended motion to dismiss and an amended brief in support of their motion. The motion was heard by the superior court on 20 May 2013. By order entered 24 July 2013, the superior court allowed defendants' 12(b)(1) motion to dismiss for failure to exhaust administrative remedies and their 12(b)(6) motion for failure to state a claim, though it did not specify a reason. Plaintiffs timely appealed to this Court.

II. Standard of Review

Defendants moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction under N.C. Gen.Stat. § 1A-1, Rule 12(b)(1) (2011) and for failure to state a claim under N.C. Gen.Stat. § 1A-1, Rule 12(b)(6) (2011).

> Rule 12(b)(1) permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy. We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings. Pursuant to the de novo standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Trivette v. Yount, 217 N.C.App. 477, 482, 720 S.E.2d 732, 735 (2011) (citations, quotation marks, brackets, and italics omitted).

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A., — N.C.App. ——, ——, 752 S.E.2d 661, 663-64 (2013) (citation and quotation marks omitted).

III. Common Law Vested Rights Claim

Plaintiffs argue that the trial court erred in dismissing their common law vested rights claim under Rule 12(b)(1) for failure to exhaust administrative remedies. Defendants counter that even if it was error to dismiss under Rule 12(b)(1), dismissal was proper under Rule 12(b)(6). We hold that plaintiffs did not fail to exhaust administrative remedies and that their common law vested rights claim was sufficiently pled to survive a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6).

A. Exhaustion of Administrative Remedies

[1-4] "As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). "If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed." *Justice for Animals, Inc. v. Robeson County*, 164 N.C.App. 366, 369, 595 S.E.2d 773, 775 (2004). Nevertheless, "a party need not exhaust an administrative remedy where the remedy is inadequate." *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C.App. 527, 534, 571 S.E.2d 52, 58 (2002). Facts justifying avoidance of administrative procedure must be

pled in the complaint. *Id.* at 534, 571 S.E.2d at 58.

[5, 6] "The [administrative] remedy is considered inadequate unless it is calculated to give relief more or less commensurate with the claim." *Jackson for Jackson v. North Carolina Dept. of Human Resources,* 131 N.C.App. 179, 186, 505 S.E.2d 899, 904 (1998) (citation and quotation marks omitted), *disc. rev. denied,* 350 N.C. 594, 537 S.E.2d 213 (1999). Generally, constitutional claims are not subject to administrative remedies, so failure to pursue such remedies is not fatal to those claims. *See Meads v. N.C. Dep't of Agric.,* 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); *Hardy ex rel. Hardy v. Beaufort County Bd. of Educ.,* 200 N.C.App. 403, 409, 683 S.E.2d 774, 779 (2009).[3]

[7, 8] Here, plaintiffs specifically pled that they were not required to exhaust administrative remedies and that the administrative remedies are inadequate. Nevertheless, we must consider whether the facts as pled justify failure to exhaust administrative procedures. We hold that plaintiffs sufficiently pled futility because the Currituck County Board of Adjustment would not be authorized to hear plaintiffs' common law vested rights claim.

> The 'vested rights' doctrine has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances. A determination of the 'vested rights' issue requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures.

Huntington Properties, LLC v. Currituck County, 153 N.C.App. 218, 226, 569 S.E.2d 695, 701 (2002) (citations, quotation marks, and brackets omitted).

[9, 10] "In reviewing the determination of an administrative enforcement officer pursuant to N.C. Gen.Stat. § 160A–388, a board of adjustment sits in a 'quasi-judicial capacity' and has only the authority it is granted under that statute." *Dobo v. Zoning Bd. of Adjustment of City of Wilmington,* 149 N.C.App. 701, 706, 562 S.E.2d 108, 111 (2002), *rev'd in part on other grounds,* 356 N.C. 656, 576 S.E.2d 324 (2003). N.C. Gen. Stat. § 160A–388(b) (2011) authorizes boards of adjustment to "hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance." Its role is solely related to the interpretation of the ordinances and deciding whether to grant a variance from those ordinances. *See Godfrey v. Zoning Bd. of Adjustment of Union County,* 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986). Boards of adjustment do not have the authority to adjudicate constitutional claims. *Id.; Dobo,* 149 N.C.App. at 706, 562 S.E.2d at 111.

[11, 12] Some common law vested rights cases have been appealed from boards of adjustment[4]; others have been brought as civil actions without prior administrative proceedings.[5] These cases do not announce a clear rule for the proper method to pursue a vested rights claim. Nevertheless, a rule can be inferred from the appellate courts' treatment of those cases and the statutory authority of boards of adjustment discussed above. Our Supreme Court has differentiated between interpretations of zoning ordinances, which are properly considered by boards of adjustment, and constitutional challenges, which are not. *See Batch v. Town of Chapel Hill,* 326 N.C. 1, 11, 387 S.E.2d 655, 661–62

3. Exhaustion may be required for procedural due process claims. *See Edward Valves, Inc. v. Wake County,* 343 N.C. 426, 435, 471 S.E.2d 342, 347 (1996), *cert. denied,* 519 U.S. 1112, 117 S.Ct. 952, 136 L.Ed.2d 839 (1997); *Copper ex rel. Copper v. Denlinger,* 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010).

4. *See, e.g., Application of Campsites Unlimited, Inc.,* 287 N.C. 493, 215 S.E.2d 73 (1975), *Browning-Ferris Industries Of South Atlantic, Inc. v. Guilford County Bd. of Adjustment,* 126 N.C.App. 168, 484 S.E.2d 411 (1997), *Kirkpatrick v. Village Council for Village of Pinehurst,* 138 N.C.App. 79, 530 S.E.2d 338 (2000).

5. *See, e.g., Town of Hillsborough v. Smith,* 276 N.C. 48, 170 S.E.2d 904 (1969), *Russell v. Guilford County,* 100 N.C.App. 541, 397 S.E.2d 335 (1990), *MLC Automotive, LLC v. Town of Southern Pines,* 207 N.C.App. 555, 702 S.E.2d 68 (2010), *disc. rev. denied,* 365 N.C. 211, 710 S.E.2d 23 (2011).

(holding that it was error to join a claim concerning the interpretation of development ordinances with constitutional challenges thereto), *cert. denied*, 496 U.S. 931, 110 S.Ct. 2631, 110 L.Ed.2d 651 (1990). We have noted that where interpretation of an ordinance is involved the property owner should follow the administrative procedure of seeking permission for a nonconforming use from the board of adjustment. *See Huntington Properties, LLC*, 153 N.C.App. at 227, 569 S.E.2d at 702; *see also Kirkpatrick*, 138 N.C.App. at 87–88, 530 S.E.2d at 343–44 (considering a common law vested rights claim in a case first brought to the board of adjustment, along with issues concerning interpretation of the ordinances). However, the discretion of a board of adjustment is not unlimited. Its "power to 'determine and vary' is limited to such variations and modifications as are in harmony with the general purpose and intent of the ordinance and do no violence to its spirit." *Lee v. Board of Adjustment of City of Rocky Mount*, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (1946). A plaintiff is not required to request that the board of adjustment issue a variance that it does not have the authority to issue. *See Smith*, 276 N.C. at 57, 170 S.E.2d at 911.

[13] Where the interpretation of the ordinance is not at issue, the ordinance prohibits the property owner's intended use, and the property owner is claiming a common law vested right to such a nonconforming use, the only claim is a constitutional one. In such a case, plaintiffs are not required to first exhaust the procedures before the board of adjustment. Here, as in *Smith*, plaintiffs' "contention is that they have a legal right to build, which right the city cannot take from them and for which not require them to make a vain trip to the City Hall before exercising it." *Id.* at 57, 170 S.E.2d at 911. Plaintiffs specifically alleged that the meaning of the UDO was not in dispute and that their desired use was not allowed under the ordinance.

Therefore, we conclude that plaintiffs were not required to exhaust administrative remedies before the Currituck County Board of Adjustment in order to bring the present civil action. The trial court erred in dismissing plaintiffs' vested rights claim under Rule 12(b)(1) for failure to exhaust administrative remedies.

B. Sufficiency of Claim

[14, 15] Next, we must consider whether plaintiffs' common law vested rights claim was sufficiently pled to state a cause of action. We hold that plaintiffs sufficiently pled their common law vested rights claim to survive a motion to dismiss.[6]

> A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the [enactment or] amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party.

Browning-Ferris, 126 N.C.App. at 171–72, 484 S.E.2d at 414 (citations and quotation marks omitted).

[16–19] "[W]hen a property owner makes expenditures in the absence of zoning ..., subsequent changes in the zoning of the property may not prohibit the resulting nonconforming use." *Finch v. City of Durham*, 325 N.C. 352, 366, 384 S.E.2d 8, 16 (1989). A property owner need not rely on the existence of a permit authorizing construction if none was required at the time the expenditures were made. *MLC Automotive, LLC*, 207 N.C.App. at 565, 702 S.E.2d at 75. "To acquire such vested property right[s] it is sufficient that, prior to the ... enactment of the zoning ordinance and with the requisite

6. This case involves only common law vested rights; plaintiffs do not assert statutory vested rights under N.C. Gen.Stat. § 160A-385.1.

good faith, he make a substantial beginning of construction and incur therein substantial expense." *Campsites Unlimited*, 287 N.C. at 501, 215 S.E.2d at 78 (citation and quotation marks omitted). "A party acts in good faith reliance when it has an honest belief that the nonconforming use would not violate declared public policy." *Kirkpatrick*, 138 N.C.App. at 87, 530 S.E.2d at 343 (citation, quotation marks, and brackets omitted).

[20] As we are considering a 12(b)(6) motion to dismiss, we must assume that the facts alleged by plaintiffs are true and liberally construe the complaint. *Mosteller v. Duke Energy Corp.*, 207 N.C.App. 1, 11, 698 S.E.2d 424, 431 (2010), *disc. rev. denied*, 365 N.C. 211, 710 S.E.2d 38 (2011). The relevant allegations are as follows:

In 1966, plaintiffs or their predecessors in interest acquired approximately 1400 acres of property in Currituck County. The property was not then zoned and commercial development was allowed. In June 1966, the County adopted a "Subdivision Ordinance." On 2 September 1969, consistent with this ordinance, Plaintiff Ocean Associates recorded a plat showing 577 residential lots and six business areas on the property. Such commercial uses were permitted in that area at the time. The County asked that the commercial development not begin until there was sufficient residential density in the area to support the businesses and plaintiffs agreed. Plaintiffs began development in 1969. Between 1968 and 1971, plaintiffs spent approximately $425,050.00 to prepare both the residential and the business lots. These expenditures included general engineering, land geosciences, road grading, canal digging, dune building, lot filling, evacuating ditches, landscaping, and surveying. Plaintiffs would not have expended these funds "but for the fact that business and commercial uses were permitted on the Property under County law. . . ." In the early 1970s, plaintiffs completed the infrastructure that would serve both the business and residential lots.

In October 1971, Currituck County adopted a zoning ordinance and prepared a map. The map seemed to designate the property as "RA–20." The RA–20 district permitted mostly low density residential and agricultural uses, with only limited business or commercial uses. The County adopted a second zoning ordinance in 1975, which seemed to continue designating plaintiffs' property as RA–20. The County assured property owners that subdivisions approved prior to adoption of these ordinances would continue to be allowed.

In 1989, the County adopted a UDO, which is still in effect. Although unclear, plaintiffs' property was apparently zoned RO2. The RO2 district allows only limited business uses. Plaintiffs' planned uses for the property are not allowed under the UDO. Plaintiffs moved forward with further development of the business lots in 2004. The County informed plaintiffs that their intended uses were not permitted under the UDO and denied that plaintiffs had any vested rights to use their property in that manner.

Taking these facts as true, we hold that plaintiffs sufficiently pled their claim for common law vested rights to survive a motion to dismiss. Plaintiffs have alleged that their property was not zoned at the time they made their expenditures to prepare the business lots. They have alleged that this use was lawful at the time the expenditures were made and that the expenditures were made in good faith reliance on that fact. They have alleged that they expended over $400,000 on the development. They allege that they are prejudiced by the zoning ordinance because their intended commercial use would not be permitted under the ordinance.

In *Campsites Unlimited*, our Supreme Court held that the property owners had a vested right because they made substantial expenditures in reliance on the lack of zoning. 287 N.C. at 502, 215 S.E.2d at 78. In that case, the property owners had cleared and constructed roadways and staked out lots. *Id.* The alleged construction activities here were at least as substantial as those in *Campsites Unlimited*, if not more. Plaintiffs' clearing of the lots, canal digging, dune building, and road grading were intended to prepare the site for development. *Cf. Russell*, 100 N.C.App. at 545, 397 S.E.2d at 337 (holding that the plaintiff's expenditures were not substantial where there was "no

evidence of ground breaking, tree clearing or anything else done to prepare the site for development"). We conclude that these expenditures were "substantial."

[21] Additionally, taking the allegations of the complaint as true, plaintiffs' reliance on the lawfulness of their project was in good faith. The required "good faith"

> is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

Campsites Unlimited, 287 N.C. at 503, 215 S.E.2d at 79 (citation and quotation marks omitted).

Here, plaintiffs filed plats indicating business development before any zoning ordinance was in place. There is no indication that they were aware of any plans to zone their property such that business development would not be allowed. *Cf. id.* The face of the complaint does not reveal that plaintiffs failed to acquire any other permits required to begin construction. *Cf. Browning-Ferris*, 126 N.C.App. at 172, 484 S.E.2d at 414. Indeed, plaintiffs have alleged that the County was aware of their plans and condoned them.

In sum, plaintiffs' allegations, if true, show that they have made substantial expenditures in good faith reliance on the lack of zoning at the time the expenditures were made. We conclude that plaintiffs have sufficiently pled a common law vested rights claim. Accordingly, we hold that the trial court erred in allowing defendants' motion to dismiss under Rule 12(b)(6).[7]

IV. Equal Protection and Due Process § 1983 Claims

Plaintiffs next argue that the trial court erred in dismissing their equal protection and substantive due process claims under 42 U.S.C. § 1983 (2006) for failure to exhaust administrative remedies and sovereign immunity.[8] Although the basis for its decision is not clear from the trial court's order, defendants moved to dismiss plaintiffs' § 1983 claims on the basis of failure to exhaust administrative remedies, sovereign immunity, and legislative immunity. Defendants did not argue at the motion hearing that the § 1983 claim was improperly pled or that the claims would be barred by the statute of limitations. On appeal, defendants do not argue that they are immune.

[22] "To state a claim under 42 U.S.C. § 1983, a plaintiff must show that [a person], acting under color of law, has 'subjected [him] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.' " *Copper*, 363 N.C. at 789, 688 S.E.2d at 429 (quoting 42 U.S.C. § 1983 (2006)). "[A] municipality is a 'person' within the meaning of section 1983." *Moore v. City of Creedmoor*, 345 N.C. 356, 365, 481 S.E.2d 14, 20 (1997).

Plaintiffs alleged that the County has allowed other similarly situated property owners to operate businesses in the zoning districts that prohibit commercial buildings while denying plaintiffs the opportunity to do the same. They have alleged that the County treated them differently because they are Jewish. Moreover, plaintiffs allege that the County's decision to treat them differently was arbitrary and without any rational relationship to a valid governmental objective. They allege that they have been damaged by this discrimination because they have lost income they could have received from the commercial development of their property. All of the claims were brought against the

7. There was a question raised at oral arguments concerning whether the plaintiffs other than Ocean Associates could bring a vested rights claim as successors in interest even though they did not actually expend the funds themselves. The individuals involved with the property are apparently the same, but the corporate forms have changed. This issue was not raised in the pleadings, briefed by the parties, or addressed by the trial court, so we express no opinion on that question.

8. Defendants did not argue to the trial court and do not argue on appeal that plaintiffs failed to allege any element of these claims.

County itself and the individual County Commissioners in their official capacity.

[23, 24] First, plaintiffs' § 1983 claims may not be dismissed for failure to exhaust administrative remedies. While claims for violation of procedural due process may be subject to exhaustion requirements, *Copper*, 363 N.C. at 789–90, at 688 S.E.2d at 430, substantive constitutional claims are not, *Edward Valves, Inc.*, 343 N.C. at 435, 471 S.E.2d at 347. Here, plaintiffs' claims are founded on substantive due process and equal protection. They were not required to exhaust any administrative process to bring these claims. *See Edward Valves, Inc.*, 343 N.C. at 435, 471 S.E.2d at 347.

[25] Second, defendants are not protected from § 1983 claims on the basis of sovereign immunity. *Corum v. University of North Carolina Through Bd. of Governors*, 330 N.C. 761, 772, 413 S.E.2d 276, 283 ("[S]overeign immunity alleged under state law is not a permissible defense to section 1983 actions."), *disc. rev. denied*, 506 U.S. 985, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992); *Glenn-Robinson v. Acker*, 140 N.C.App. 606, 627, 538 S.E.2d 601, 616 (2000) (noting that "a municipal entity has no claim to immunity in a section 1983 suit" (citation and quotation marks omitted)), *disc. rev. denied*, 353 N.C. 372, 547 S.E.2d 811 (2001). Indeed, defendants do not argue on appeal that they are immune from suit under § 1983.

[26] Finally, defendants argue that plaintiffs' § 1983 claim is barred by the statute of limitations concerning challenges to zoning ordinances. Plaintiffs urge us not to consider this argument since it was not raised below. Defendants *did* argue in their brief to the trial court that the statute of limitation barred plaintiffs' § 1983 claims, but only "[t]o the extent Plaintiffs['] due process and equal protection claims are a based on" a lack of notice of the amendments to the zoning ordinances. But plaintiffs' § 1983 claims are not based on any notice issue. Plaintiffs specifically alleged in their amended complaint that they are not "attacking a defect in the ordinance adoption process. . . ." Defendants apparently recognized this fact as they did not argue at the motions hearing that the statute of limitations would require dismissal of these claims. Moreover, it is not clear that they ever received a ruling from the trial court on this issue. Therefore, they have not preserved this issue for our review and we will not address it. N.C.R.App. P. 10(a)(1); *Lovelace v. City of Shelby*, 153 N.C.App. 378, 384, 570 S.E.2d 136, 140 (declining to address an appellee's argument that was not raised below), *disc. rev. denied*, 356 N.C. 437, 572 S.E.2d 785 (2002).

We hold that the trial court erred in dismissing plaintiffs' claims under 42 U.S.C. § 1983 because the claims are not barred by sovereign immunity or failure to exhaust administrative remedies. Therefore, we reverse the portion of the trial court's order dismissing these claims.

V. Tax Claim

[27] Plaintiffs finally argue that the trial court erred in dismissing their claim under Article V, Section 2(2) of the North Carolina Constitution. We disagree.

[28] Plaintiffs alleged that defendant violated Article V, Section 2(2) of the North Carolina Constitution by refusing to allow business development on property that it has classified for tax purposes as business property. The North Carolina Constitution "requires that taxation must be imposed by a uniform rule." *HED, Inc. v. Powers*, 84 N.C.App. 292, 294, 352 S.E.2d 265, 266, *disc. rev. denied*, 319 N.C. 458, 356 S.E.2d 4 (1987). That requirement is met "if the rate is uniform throughout each taxing authority's jurisdiction." *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 49, 165 S.E.2d 201, 206 (1969).

Here, plaintiffs do not actually challenge the tax classification or the uniformity of the tax rules. Indeed, they assert that the tax classification of their property as business property is entirely accurate. They have not alleged that defendants tax such property in a non-uniform manner. At best, the tax classification of plaintiffs' property might be relevant to the "good faith" element of their vested rights claim. But their allegations are insufficient to state a claim under Article V, Section 2 of the North Carolina Constitu-

tion. Therefore, we affirm the trial court's dismissal of this claim.

VI. Conclusion

For the foregoing reasons, we conclude that the trial court erred in dismissing plaintiffs' vested rights claim and their § 1983 claims, but that it properly dismissed plaintiffs' tax claim. Therefore, we reverse those portions of the trial court's order dismissing the vested rights and § 1983 claims, affirm the portion dismissing the tax claim, and remand for further proceedings.

REVERSED, in part; AFFIRMED, in part; and REMANDED.

Judges HUNTER, JR., ROBERT N. and DILLON concur.

Terri Lynn ROBERTSON and Mary Dianne Daniel, Plaintiffs,

v.

STERIS CORPORATION, a Delaware Corporation, et al., Defendants.

No. COA13-1301.

Court of Appeals of North Carolina.

July 1, 2014.

Background: Plaintiffs' former attorney in negligence case moved to intervene in underlying case to recover attorney fees and costs. The Superior Court, Brunswick County, D. Jack Hooks, Jr., J., granted motion and awarded costs and attorney fees. Plaintiffs appealed.

Holdings: The Court of Appeals, Stephens, J., held that:

(1) trial court had jurisdiction to award former attorney fees and costs from plaintiffs' settlement in underlying negligence action;

(2) former attorney was not required to file a motion to intervene in order to recover attorney fees and costs in quantum meruit;

(3) former attorney could recover attorney fees and costs in quantum meruit, even if contingent fee contract violated Rules of Professional Conduct; and

(4) trial court did not abuse its discretion in determining amount of sanction to impose on former attorney for discovery violation in underlying case.

Affirmed.

1. Appeal and Error ⚷893(1)

Whether a trial court has subject matter jurisdiction is a question of law, reviewed de novo on appeal.

2. Courts ⚷4

"Subject matter jurisdiction" involves the authority of a court to adjudicate the type of controversy presented by the action before it.

See publication Words and Phrases for other judicial constructions and definitions.

3. Courts ⚷1, 24

Subject matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law.

4. Courts ⚷37(2), 40

When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, as if it had never happened; thus, the trial court's subject matter jurisdiction may be challenged at any stage of the proceedings.

5. Attorney and Client ⚷157.1

Trial court had jurisdiction to award former attorney fees and costs from plaintiffs' settlement in underlying negligence action; the consent order explicitly noted that the matter of attorney's costs and fees had been raised in the underlying lawsuit and remained pending after release of the settlement funds due to attorney having filed a

WESTLAW SWAN BEACH II

781 S.E.2d 350 (Table)
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE

Swan Beach Corolla, L.L.C. v. County of Currituck
Court of Appeals of North Carolina. December 15, 2015 781 S.E.2d 350 (Table) 2015 WL 8747777 *(Approx. 5 pages)*

Court of Appeals of North Carolina.

SWAN **BEACH** COROLLA, L.L.C., et al., Plaintiffs,

v.

COUNTY OF **CURRITUCK**, et al., Defendants.

No. COA15–293.
Dec. 15, 2015.

Opinion

*1 Appeal by Defendants from order entered 25 November 2014 by Judge Cy A. Grant in **Currituck** County Superior Court. Heard in the Court of Appeals 10 September 2015.

Attorneys and Law Firms

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for the Plaintiff–Appellees.

County of **Currituck**, by **Currituck** County Attorney Donald I. McRee, Jr., for the Defendants–Appellants.

Simonsen Law Firm, P.C., by Lars P. Simonsen, for Amicus Curiae, the Northern **Currituck** Outer Banks Association.

Roger W. Knight, P.A., by Roger W. Knight, for Amicus Curiae, the Fruitville **Beach** Civic Association.

DILLON, Judge.

The County of **Currituck**, the **Currituck** County Board of Commissioners, and members of that Board ("Defendants") appeal from the trial court's order denying their motion to set aside entry of default. For the following reasons, we affirm in part and dismiss in part.

I. Background

This appeal is the second appeal to this Court in this matter. Facts relevant to the issues raised by this second appeal follow, and other information concerning this litigation is available for reference in our decision in Defendants' prior appeal. *See Swan **Beach** Corolla, L.L.C. v. Cnty. of **Currituck**,* —— N.C.App. ——, ——, 760 S.E.2d 302, 305–07 (2014) ("*Swan **Beach** I*").

Plaintiffs are the owners of certain real property in **Currituck** County, which they wish to develop commercially. Defendants are local government entities and officials opposing the development.

After Plaintiffs were informed that certain of Defendants would refuse to allow development, Plaintiffs filed their complaint in this action asserting three claims regarding Defendants' refusal to approve the Plaintiffs' proposed development:

(1) Plaintiffs have common law vested rights to develop the property (the "Vested Rights Claim");

(2) Defendants were violating Plaintiffs' rights to due process and equal protection under the federal Constitution (the "Equal Protection Claim"); and

(3) Plaintiffs' right to taxation by uniform rule as guaranteed by Article V, Section 2 of the

SELECTED TOPICS

Appeal and Error
Review
Supreme Court Appeal

Secondary Sources

Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error

1 A.L.R. 725 (Originally published in 1919)

...As to erroneous decision as law of the case on a subsequent appeal, see annotation to United States Annuity & L. Ins. Co. v. Peak, post, 1259. The general rule, supported by the great weight of authori...

Erroneous decision as law of the case on subsequent appellate review

87 A.L.R.2d 271 (Originally published in 1963)

...The present annotation supersedes the ones in 1 A.L.R. 1267 and 67 A.L.R. 1390. As a general proposition, the decision of an appellate court in a case establishes the law of the case for the trial upon...

APPENDIX III - JUDICIAL OPINIONS

FDA Enforcement Man. Appendix III

...No. 74-215 Supreme Court of the United States 421 U.S. 658; 95 S. Ct. 1903 2d 489 Argued March 18-19, 1975 June 9, 1975 Mr. Chief Justice Burger delivered the opinion of the Court. We granted certiorar...

See More Secondary Sources

Briefs

Petition for a Writ of Certiorari

2000 WL 34005466
Alphonso L. GRANT, in his individual capacity and in his official capacity as a member of the City of Lynchburg Electoral Board and John E. Mason, Jr., in his individual capacity, et al., Petitioners, v. Inez SALES and Debra M. Miller, Respondents.
Supreme Court of the United States
2000

...The opinion of the United States Court of Appeals for the Fourth Circuit subject of this Petition is reported at 224 F.3d 293 (4th Cir. 2000). A copy of the Opinion is included in the Appendix as Appen...

David Allen SATTAZAHN, Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, Respondent.

2002 WL 32102972
David Allen SATTAZAHN, Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, Respondent.
Supreme Court of the United States
June 03, 2002

...11 25 A.M. Initiating Document: Notice of Appeal Case Status: Decided/Active Journal Number: J-64-2000 Date Listed Submitted: May 1, 2000 Case Category: Capital Case Type: Includes Lesser Offenses STAR...

Brief for Appellant Leonard A. Pelullo

1998 WL 34083633
UNITED STATES OF AMERICA, Appellee, v. Leonard A. PELULLO, Appellant.
United States Court of Appeals, Third Circuit.
Aug. 10, 1998

North Carolina Constitution had been violated (the "Uniform Tax Claim").

Defendants did not file an answer but rather moved to dismiss all three claims pursuant to Rule 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. After a hearing on the matter, the trial court entered an order granting Defendants' motion to dismiss Plaintiffs' three claims. Plaintiffs appealed, which was the first appeal to this Court and which resulted in our opinion in *Swan **Beach** I.*

In *Swan **Beach** I*, we affirmed the court's dismissal of the Uniform Tax Claim. However, we reversed the trial court's dismissal of the Vested Rights Claim and the Equal Protection Claim and remanded the matter to the trial court for further proceedings on these remaining two claims. *Id.* at ——, 760 S.E.2d at 313.

After twenty days had passed from the issuance of our mandate in *Swan **Beach** I*, Plaintiffs moved the clerk of court to enter default based on Defendants' failure to file a timely responsive pleading as to their Vested Rights Claim and Equal Protection Claim. [1] The clerk entered default against Defendants.

*2 Thereafter, Defendants moved the trial court to set aside the clerk's entry of default. Following a hearing on the matter, the trial court denied Defendants' motion. Defendants timely appealed the trial court's order.

II. Appellate Jurisdiction

At the outset, we note that the trial court's order is merely *a denial to set aside the clerk's entry of default;* it is not a *default judgment.* The order being appealed is, therefore, interlocutory. *Duncan v. Duncan*, 102 N.C.App. 107, 111, 401 S.E.2d 398, 400 (1991) (holding that a mere "entry of default is not a final order or a final judgment").

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldstone v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, our Supreme Court has held that a right to an immediate appeal from an interlocutory order exists where the order "deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992). Further, the appellants have the burden "of showing this Court that the [trial court's interlocutory] order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C.App. 377, 380, 444 S.E.2d 252, 254 (1994).

Here, Defendants argue that we have jurisdiction over this appeal because the trial court's order denying their motion to set aside the entry of default deprives them of certain substantial rights. We agree.

To determine the threshold question of our jurisdiction, we must determine (1) whether any right identified by Defendants is, indeed, "substantial" and (2) whether the interlocutory order is of the type which would deprive Defendants of this right. *See Frost v. Mazda Motors of America, Inc.*, 353 N.C. 188, 192, 540 S.E.2d 324, 327 (2000). However, in answering this threshold jurisdictional question, "we do not reach the *merits* of [Defendant's] claim to that substantial right." *Neusoft Med. Sys., USA, Inc. v. Neuisys, LLC*, ——N.C.App. ——, ——, 774 S.E.2d 851, 855 (2015). To do so would, in the words of the United States Supreme Court, "conflat[e] the jurisdictional question with the merits of the appeal." *Arthur Andersen, LLC v. Carlisle*, 556 U.S. 624, 628, 129 S.Ct. 1896, 1900 (2009). *See also Turner v. Hammocks **Beach** Corp.*, 363 N.C. 555, 681 S.E.2d 770 (2009). [2]

Here, Defendants *claim* that their defenses of governmental immunity and of collateral estoppel will be deprived by the trial court's order. Our Supreme Court has recognized that both governmental immunity and collateral estoppel are "substantial" rights. *See Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (governmental immunity); *Turner v. Hammocks **Beach** Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (collateral estoppel). Again, whether there is any merit to these claimed defenses is not relevant to our determination of the threshold issue of our jurisdiction.

*3 Next, we must determine whether the trial court's order denying Defendants' motion to set aside the entry of default is of the type which would deprive Defendants of their claimed substantial rights, assuming there is merit to Defendants' claim of these rights. We note that each right claimed by Defendants involves the right not to have to proceed with further litigation. *See Craig*, 363 N.C. at 337, 678 S.E.2d at 354 (recognizing that governmental immunity is "an immunity from suit rather than a mere defense to liability"); *Turner*, 363 N.C.

...The district court had jurisdiction over the criminal case below under 18 U.S.C. § 3231 (1994). Jurisdiction of the appeal from the judgment of conviction is conferred upon the Court of Appeals by 28 U...

See More Briefs

Trial Court Documents

In re General Growth Properties, Inc.

2009 WL 8520035
In re GENERAL GROWTH PROPERTIES, INC., et al., Debtors. A&K Endowment, Inc., Appellant, v. General Growth Properties, Inc., et al., Appellees.
United States Bankruptcy Court, S.D. New York.
Apr. 16, 2009

...JOHN G. KOELTL, District Judge: The appellant, A&K Endowment, Inc. (the "Endowment"), appeals from an order of the United States Bankruptcy Court for the Southern District of New York (Allan L. Gropper...

In re D.C. Diamond Corp.

2013 WL 4516493
In Re: D.C. DIAMOND CORPORATION, Debtor.
United States Bankruptcy Court, E.D. Virginia.
Aug. 14, 2013

...THIS MATTER originally came before the Court on the Joint Motion for Order Authorizing Use of Cash Collateral and Granting Adequate Protection Pursuant to 11 U.S.C. § 363 [Dkt. No. 53] (the "First Moti...

In re Realty Mortg. Corp.

2009 WL 8519965
In re: REALTY MORTGAGE CORPORATION, Debtor.
United States Bankruptcy Court, S.D. Mississippi.
May 01, 2009

...Chapter 11 This matter came before the Court on the Amended Motion to Approve Compromise and Settlement with Countrywide Bank, FSB and Countrywide Home Loans (the "Motion") (Dkt. # 127) filed by Realty...

See More Trial Court Documents

at 558, 681 S.E.2d at 773 (stating that collateral estoppel involves "a substantial right to avoid litigating issues that have already been determined"). This Court has held that a trial court's order which denied a defendant's request for leave to amend its answer a year into the litigation in order to assert governmental immunity as a defense was immediately appealable. *Mabrey v. Smith*, 144 N.C.App. 119, 121, 548 S.E.2d 183, 185 (2001) (stating that the "denial of dispositive motions such as motions to dismiss, for judgment on the pleadings, and to amend pleadings that are grounded on governmental immunity affect a substantial right and are immediately appealable"). This is so because, absent an immediate appeal, the party claiming governmental immunity would be forced to continue defending the claim asserted against it.

Similar to the trial court's action in *Mabrey*, the trial court's action here deprives Defendants of an opportunity to file an answer and assert therein governmental immunity as an affirmative defense. Following *Mabrey*, we must conclude we have jurisdiction over this appeal and turn to consider the *merits* of Defendants' arguments.

III. Analysis

A. Governmental Immunity

Defendants argue that the trial court's order affects their substantial right of governmental immunity with respect to Plaintiffs' two surviving claims: the Vested Rights Claim and the Equal Protection Claim. We disagree and conclude that Defendants' argument has no merit.

In *Swan **Beach** I*, we held that Plaintiffs' Equal Protection Claim was not barred by sovereign immunity. *Id.* —— N.C.App. at ——, 760 S.E.2d at 312 (holding that "[D]efendants are not protected from [the Equal Protection Claim] on the basis of sovereign immunity"). Our Supreme Court has long recognized that a decision by an appellate court on a prior appeal presenting the same legal questions and involving the same facts "constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Tennessee–Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974). Accordingly, Defendants' sovereign immunity argument fails based on our prior holding in *Swan **Beach** I*.

Concerning Plaintiffs' Vested Rights Claim, we note that Defendants conceded at oral argument that governmental immunity was not a meritorious defense to this claim. Our Supreme Court has observed that

> ***4** [t]he 'vested rights' doctrine has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances. The doctrine is rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions.

Godfrey v. Zoning Bd. of Adjustment of Union Cnty., 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986). *See also* N.C. Const. art. I, § 19 ("No person shall be ... disseized of his freehold, ... or in any manner deprived of his ... property, but by the law of the land."). Further, the Supreme Court has held that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights [in Article I of our State Constitution.]" *Corum v. Univ. of North Carolina*, 330 N.C. 761, 785–86, 413 S.E.2d 276, 291 (1992). "Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292. Accordingly, we hold that the trial court did not err in failing to conclude that the doctrine of governmental immunity precluded denying Defendants' motion to set aside entry of default.

B. Collateral Estoppel

We hold that the trial court did not err in failing to conclude that collateral estoppel precluded denying Defendants' motion to set aside entry of default.

"Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773 (internal marks omitted).

Defendants essentially contend that collateral estoppel precludes Plaintiffs from challenging Defendants' refusal to allow them to develop their property where Plaintiffs failed to first exhaust their administrative remedies. However, we have already answered this question in the negative in Defendants' prior appeal, holding that Plaintiffs were not required to first

exhaust administrative remedies before bringing their Vested Rights Claim, *see Swan Beach I.* —— N.C.App. at ——, 760 S.E.2d at 309, or their Equal Protection Claim, *see id.* at ——, 760 S.E.2d at 312. Accordingly, we hold that the trial court did not err in failing to conclude that the doctrine of collateral estoppel precluded denying Defendants' motion to set aside the entry of default. *See Tennessee–Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183.

C. Other Arguments

Defendants assert that the facts of this case are exceptional and merit suspension of the appellate rules pursuant to N.C. R.App. P. 2. However, where an interlocutory order denies a motion on certain bases, only some of which are immediately appealable, our jurisdiction over the appeal is limited to the immediately appealable bases of the order being reviewed. *Lake v. State Health Plan for Teachers and State Emps.*, —— N.C.App. ——, ——. 760 S.E.2d 268, 271 (2014). Furthermore, "suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns." *Bailey v. State*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000). Therefore, we do not reach the parties' other arguments. Accordingly, Defendants' other arguments are dismissed.

IV. Conclusion

*5 We hold that we have jurisdiction to consider Defendants' challenge to the trial court's order denying their motion to set aside the entry of default; however, our jurisdiction is limited to Defendants' arguments relating to governmental immunity and collateral estoppel. On the merits of these arguments, we affirm the court's order. As to Defendants' other arguments challenging the trial court's order which do not involve any substantial right, we dismiss Defendants' appeal without prejudice to any right Defendants may have to make these arguments at some later stage.

AFFIRMED IN PART; DISMISSED IN PART.

Judge DIETZ concurs and Judge HUNTER, JR. concurs in result only.
Report per Rule 30(e).

All Citations

781 S.E.2d 350 (Table), 2015 WL 8747777

Footnotes

1 Plaintiffs based their motion for entry of default on Rule 12(a)(1)(a) of the North Carolina Rules of Civil Procedure, which requires that the responsive pleading "shall be served within 20 days after notice of the court's action in ruling on [a defendant's motion to dismiss]."

2 In *Turner*, the defendants moved to dismiss the plaintiffs' claims based on collateral estoppel. The trial court denied the defendants' motion. The defendants immediately appealed, though the trial court's denial was an interlocutory order. Our Supreme Court held that it had jurisdiction over the appeal, concluding collateral estoppel was a substantial right, and, therefore, did not dismiss the appeal. *Then*, the Court addressed the merits of the defendants' collateral estoppel defense, concluding that there was no merit to the defense. Accordingly, the Court affirmed the trial court.

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VACATED AND REMANDED FOR RESENTENCING.

SYLVIA DEVELOPMENT CORPORATION; Karel Dohnal, individually and as Agent for Sylvia Development Corporation, Plaintiffs–Appellants,

v.

CALVERT COUNTY, MARYLAND; Michael J. Moore; Hagner R. Mister; Patrick M. Buehler; Mary M. Krug, all of the above are Board of County Commissioners of Calvert County in their official capacities; Joyce Lyons Terhes, in her official capacity as current and former Member of Board, and individually; William T. Bowen, individually and in his official capacity as former Member of Board of County Commissioners of Calvert County; Barbara A. Stinnett, individually and in her official capacity as former Member of Board of County Commissioners of Calvert County, Defendants–Appellees.

No. 94–1181.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 3, 1994.

Decided March 3, 1995.

Developer and its president brought civil rights action against county and county commissioners, arising out of denial of special zoning designation. The United States District Court for the District of Maryland, 842 F.Supp. 183, Peter J. Messitte, J., entered summary judgment for county and commissioners, and developer and president appealed. The Court of Appeals, Niemeyer, Circuit Judge, held that: (1) developer and its president did not establish that denial was based on president's national origin or status as nonresident of county; (2) developer and president did not have constitutionally protected property interest in approval of application; (3) even if they did have such interest, they failed to establish deprivation of procedural due process; and (4) denial did not violate substantive due process.

Affirmed.

1. Federal Courts ⟹776

In reviewing summary judgment, Court of Appeals applies de novo same standard that district court is required by law to apply for granting motion for summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Federal Civil Procedure ⟹2544

Once defendant makes properly supported motion for summary judgment, burden shifts to plaintiff to set forth specific facts showing that there is genuine issue for trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Federal Civil Procedure ⟹2543

In reviewing motion for summary judgment, court must draw any permissible inference from underlying facts in light most favorable to party opposing motion, but only reasonable inferences from evidence need be considered. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

4. Federal Civil Procedure ⟹2543

On motion for summary judgment, whether inference drawn from underlying facts is reasonable cannot be decided in vacuum, it must be considered in light of competing inferences to contrary. Fed.Rules Civ. Proc.Rule 56(c), 28 U.S.C.A.

5. Federal Civil Procedure ⟹2546

Party opposing summary judgment must do more than present scintilla of evidence in its favor; rather, nonmovant must present sufficient evidence such that reasonable jurors could find by preponderance of evidence for nonmovant, as apparent dispute is not "genuine" unless nonmovant's version is supported by sufficient evidence to permit rea-

sonable jury to find facts in its favor. Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

6. Federal Civil Procedure ⟹2546

If evidence is merely colorable or not significantly probative, motion for summary judgment may be granted. Fed.Rules Civ. Proc.Rule 56(c), 28 U.S.C.A.

7. Constitutional Law ⟹211(3)

Equal protection clause requires that states apply each law, within its scope, equally to persons similarly situated and that any differences of application be justified by law's purpose. U.S.C.A. Const.Amend. 14.

8. Constitutional Law ⟹213.1(2)

Equal protection clause does not prohibit persons in different circumstances from being treated differently under law; rather, classification of purposes to which law applies must be reasonable, not arbitrary, and must rest upon some ground of difference having fair and substantial relation to object of legislation. U.S.C.A. Const.Amend. 14.

9. Constitutional Law ⟹211(1, 3)

Equal protection clause limits all state action, prohibiting any state from denying person equal protection through enactment, administration, or enforcement of its laws and regulations; even though state law is facially neutral, its administration or enforcement can effect unequal application by favoring one class of persons and disfavoring another. U.S.C.A. Const.Amend. 14.

10. Constitutional Law ⟹213.1(2)

If classification utilized is specifically stated on face of statute or in reasons given for its administration or enforcement, equal protection analysis requires court to determine whether appropriate relationship exists between legislative purpose and classification adopted to achieve that purpose; however, if classification is not explicitly stated, plaintiff bears initial burden of proving that classification was nonetheless intentionally utilized and only if use of classification is thus established does equal protection analysis proceed with inquiry into whether classification furthers legitimate legislative purpose. U.S.C.A. Const.Amend. 14.

11. Constitutional Law ⟹211(3)

To prove that statute has been administered or enforced discriminatorily in violation of equal protection clause, more must be shown than fact that benefit was denied to one person while conferred on another; violation is established only if plaintiff can prove that state intended to discriminate. U.S.C.A. Const.Amend. 14.

12. Constitutional Law ⟹215

Even when facially neutral statute has racially disproportionate impact, discriminatory animus must nevertheless be proved to establish equal protection violation. U.S.C.A. Const.Amend. 14.

13. Constitutional Law ⟹220.5(1)

Even when facially neutral administrative action implementing facially neutral zoning regulation disparately impacts members of particular racial group, it will not be found to violate equal protection clause unless plaintiff demonstrates that action was motivated, at least in part, by invidiously discriminatory intent. U.S.C.A. Const.Amend. 14.

14. Constitutional Law ⟹211(1)

For purposes of equal protection analysis, discriminatory intent implies more than intent as volition or intent as awareness of consequences; it implies that decision maker selected or reaffirmed particular course of action at least in part "because of," not merely "in spite of," its adverse effects on identifiable group. U.S.C.A. Const.Amend. 14.

15. Constitutional Law ⟹220.5(1)

In equal protection analysis, there is element of causation that is necessary part of plaintiff's showing, especially when plaintiff is trying to uncover motivation of multimember decision-making body, such as zoning board; while plaintiff is not required to prove that challenged action rested solely on racially discriminatory purposes, proof that racial discrimination was a motivating factor does not end matter but merely shifts burden to decision-making body to demonstrate that same decision would have resulted even had

impermissible purpose not been considered. U.S.C.A. Const.Amend. 14.

16. Constitutional Law ⚷211(3)

For purposes of equal protection analysis, factors probative of whether decision-making body was motivated by discriminatory intent include evidence of consistent pattern of actions by decision-making body disparately impacting members of particular class of persons, historical background of decision, which may take into account any history of discrimination by decision-making body or jurisdiction it represents, specific sequence of events leading up to particular decision being challenged, including any significant departures from normal procedures, and contemporary statements by decision makers on record or in minutes of their meetings. U.S.C.A. Const.Amend. 14.

17. Constitutional Law ⚷211(3)

Plaintiff claiming equal protection violation has burden of establishing that classification introduced through administrative action was clear and intentional. U.S.C.A. Const.Amend. 14.

18. Constitutional Law ⚷211(1)

In determining whether statutory purpose is legitimate for purposes of equal protection analysis, substantial judicial deference is required so that court does not substitute its value judgments for those established by democratically chosen branch; that deference to legislative will, however, must not lead to approval of pernicious legislative purpose or one that does not comport with traditional notions of proper role of government. U.S.C.A. Const.Amend. 14.

19. Constitutional Law ⚷213.1(2)

As general proposition, legislation will be sustained under equal protection clause if classification utilized by statute is rationally related to legitimate state interest. U.S.C.A. Const.Amend. 14.

20. Constitutional Law ⚷211(2)

When social or economic legislation is involved in equal protection analysis, states are permitted wide latitude in adopting classifications to further legitimate government purposes. U.S.C.A. Const.Amend. 14.

21. Constitutional Law ⚷215

When statute classifies by race, alienage, or national origin, it is subjected to strict scrutiny under equal protection clause and will be sustained only if legislative means are suitably tailored to serve compelling state interest. U.S.C.A. Const.Amend. 14.

22. Constitutional Law ⚷228.2

Deferential level of scrutiny applied to developer's claim that county violated equal protection clause by denying his application for special zoning designation based on his status as nonresident of county. U.S.C.A. Const.Amend. 14.

23. Federal Civil Procedure ⚷2543

While summary judgment standard requires court to resolve conflicting inferences from circumstantial evidence in favor of nonmoving party, it does not allow court to ignore or distort plain meaning of words or conveniently read them out of context. Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

24. Civil Rights ⚷130

Developer, who was born in Czechoslovakia and spoke with accent, failed to establish, in his civil rights action alleging violation of equal protection clause, that county commissioners' denial of his application for special zoning designation was based on his national origin; there was no evidence of history of actual discrimination against Czechs, Eastern Europeans, or immigrants in general or any departure from usual procedure for such applications, there were no explicit or implicit references at hearing to developer's ethnicity, and, although two of three applications denied in three-year period were allegedly submitted by immigrants, there was no information as to national or ethnic origins of 31 applicants whose applications were approved and no information as to voting records of individual commissioners. U.S.C.A. Const.Amend. 14.

25. Constitutional Law ⚷228.2

Discriminatory motivations of people who testified before decision-making board could only be probative of board's motivations for purposes of equal protection analysis where public testimony was overwhelm-

ingly opposed to proposal for distinct discriminatory reason and board members were clearly swayed by that public opposition, fully aware of its basis in discrimination and prejudice. U.S.C.A. Const.Amend. 14.

26. Civil Rights ⚷130

Developer failed to establish, in his civil rights action alleging violation of equal protection clause, that county commissioners' denial of his application for special zoning designation was based on his status as nonresident of county, even though activist at hearing on application stated that she wanted to know where developer "came from" and that "outside people" were developing county; ten other citizens testified at hearing, there was no other comment or question on subject of developer's out-of-county residence, commissioner noted irrelevance of activist's comments, and, in ensuing debate among commissioners, no reference was made to activist's comments. U.S.C.A. Const.Amend. 14.

27. Constitutional Law ⚷228.2

Facts that state court ruled that county commissioners' denial of developer's application for special zoning designation was arbitrary as matter of state law and that similarly situated developer's application was approved were not sufficient to establish prima facie case of deprivation of equal protection; there was no evidence of discriminatory intent. U.S.C.A. Const.Amend. 14.

28. Constitutional Law ⚷211(1)

While equal protection claim must be rooted in allegation of unequal treatment for similarly situated individuals, showing of such disparate treatment, even if product of erroneous or illegal state action, is not enough by itself to state constitutional claim. U.S.C.A. Const.Amend. 14.

29. Constitutional Law ⚷277(1)

To establish claim against county for denial of procedural due process, plaintiffs must establish that they had property or property interests of which county deprived them without due process of law. U.S.C.A. Const.Amend. 14.

30. Constitutional Law ⚷277(1)

Developer did not have constitutionally protected property interest in approval of application for special zoning designation to develop agricultural land in county into subdivision of single-family homes, even though zoning ordinances required creation of special zoning areas; location of special zoning areas was discretionary with county commissioners, and criteria imposed by zoning ordinance for land to qualify for special zoning were merely preconditions for consideration for approval. U.S.C.A. Const.Amend. 14; Calvert County, Md., County Code § 12-105; Calvert County, Md., Zoning Ordinance §§ 4-3.01, 4-3.02, 4-3.03.

31. Constitutional Law ⚷277(1)

County planning commission's favorable recommendation with respect to developer's application for special zoning designation to develop agricultural land in county into subdivision of single-family homes did not create constitutionally protected property interest in approval of application; while county commissioners were required to seek recommendation of planning commission, zoning ordinance required only that commissioners consider, not follow, that recommendation. U.S.C.A. Const.Amend. 14; Calvert County, Md., County Code § 12-105(a).

32. Constitutional Law ⚷277(1)

State court judgment reversing county commissioners' denial of developer's application for special zoning designation to develop agricultural land in county into subdivision of single-family homes did not indicate that developer had preexisting constitutionally protected property interest in approval of application. U.S.C.A. Const.Amend. 14.

33. Constitutional Law ⚷278.2(2)
Zoning and Planning ⚷431

Even if developer had constitutionally protected property interest in approval of application for special zoning designation to develop agricultural land in county into subdivision of single-family homes, developer failed to establish violation of procedural due process with respect to denial of application, notwithstanding assertion that county commissioners' decision was mistaken and lacked

evidentiary support; commissioners conducted open hearing, following notice, at which they heard positions of all interested parties, following hearing, commissioners made decision and stated reasons for decision, and developer was entitled to appeal decision and did so successfully. U.S.C.A. Const.Amend. 14.

34. Constitutional Law ⚷278(1)

To make out claim for violation of substantive due process, plaintiffs must demonstrate that they had property or property interest, that state deprived them of that property or property interest, and that state's action fell so far beyond outer limits of legitimate governmental action that no process could cure deficiency. U.S.C.A. Const.Amend. 14.

35. Constitutional Law ⚷251.3

Protection of substantive due process is narrow and covers only state action which is so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any predeprivation procedural protections or of adequate rectification by any postdeprivation state remedies. U.S.C.A. Const.Amend. 14.

36. Constitutional Law ⚷278.2(1)

Substantive due process claim in context of zoning action can survive only if alleged purpose behind state action has no conceivable rational relationship to exercise state's traditional police power through zoning. U.S.C.A. Const.Amend. 14.

37. Constitutional Law ⚷278.2(1)
Zoning and Planning ⚷381.5

Denial of application for special zoning designation to develop agricultural land in county into subdivision of single-family homes did not violate developer's substantive due process rights, even though state court ruled, in reversing denial, that county commissioners' finding that project would create traffic hazard and deplete water supplies was not supported by evidence; impact of development on traffic safety and water supplies is quintessentially legitimate zoning concern. U.S.C.A. Const.Amend. 14.

38. Constitutional Law ⚷278.2(1)
Zoning and Planning ⚷381.5

Denial of application for special zoning designation to develop agricultural land in county into subdivision of single-family homes did not violate developer's substantive due process rights, notwithstanding contention that sole reason for denial was county commissioners' desire to placate citizens who opposed project and that other reason given was pretext; public opposition centered around legitimate land use issues such as concern over further growth in rural county, consequences of increased residential density, and preservation of community's aesthetic character, and it is not pernicious per se for zoning authority to be influenced by political pressure in community. U.S.C.A. Const. Amend. 14.

39. Constitutional Law ⚷278.2(1)

Legality of zoning decision under applicable state law is not determinative of whether decision violated federal substantive due process. U.S.C.A. Const.Amend. 14.

40. Constitutional Law ⚷318(1)

Every agency decision reversed as arbitrary and capricious under state or federal administrative law does not rise to level of substantive due process violation; inquiry into arbitrariness under due process clause is completely distinct from and far narrower than inquiry into arbitrariness under state or federal administrative law. U.S.C.A. Const. Amends. 5, 14.

ARGUED: Tracy E. Mulligan, Jr., Rockville, MD, for appellants. Charles B. Keenan, Jr., Stark & Keenan, P.A., Bel Air, MD, for appellees.

Before MURNAGHAN, NIEMEYER, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge MURNAGHAN and Judge MOTZ joined.

OPINION

NIEMEYER, Circuit Judge:

The Calvert County (Maryland) Board of Commissioners, by a vote of three to two, denied Sylvia Development Corporation a special zoning designation to develop agricultural land in Calvert County into a subdivision of single-family homes. Although the County Board's decision was reversed by the Circuit Court for Calvert County and the special zoning rights were later approved (again by a three to two vote), Sylvia Development lost its economic opportunity because of the 11-month delay. Sylvia Development and its president and principal stockholder, Karel Dohnal, sued the County and the members of its Board of Commissioners, under 42 U.S.C. §§ 1983 and 1985(3), alleging (1) that the Board arbitrarily denied Sylvia Development's application because Dohnal was born in Czechoslovakia, or because he and his company were out-of-county developers, in violation of the Equal Protection Clause of the Fourteenth Amendment; (2) that the commissioners conspired to deny Dohnal and Sylvia Development their equal protection rights; and (3) that the Board's decision arbitrarily deprived Sylvia Development of a property interest in the special zoning designation in violation of the Due Process Clause of the Fourteenth Amendment. The district court entered summary judgment in favor of the defendants and, for the reasons that follow, we affirm.

I

In March 1989, Karel Dohnal, president, CEO, and principal stockholder of Sylvia Development Corporation, signed a conditional contract on behalf of Sylvia Development to purchase a 97.2 acre tract of rural land along Hance Road in Calvert County, Maryland. Dohnal intended to develop the tract into a subdivision of single-family homes called "Blue Dolphin Estates." The land contract was conditioned on Sylvia Development's obtaining the necessary zoning approvals to increase the property's allowable residential density from 22 lots to at least 38 lots.

Dohnal filed an application on behalf of Sylvia Development with Calvert County in May 1989 to designate the property as a Transfer Zone District ("TZD"), which would allow the increase in density necessary to build Blue Dolphin Estates. The County's TZD regulations are a component of its Agricultural Land Preservation Program. *See* Calvert County Code § 12–101 *et seq.* A "transfer zone" is an area "designated by the county commissioners as an area where development rights may be used to increase the density of residential use." § 12–101(i). In essence, the TZD regulations enable prospective developers to purchase unused "development rights" from participating agricultural landowners in exchange for the sellers' commitments to preserve their land as undeveloped and rural. Through the use of TZDs, the County seeks to preserve prime farm and forest land by relocating development without affecting the County's overall permitted residential density. *See* Calvert County Zoning Ordinance § 4–3.01.

Ultimate authority for designating TZDs rests with the County Board of Commissioners ("the Board" or "the County Board"), although the Board must first seek the recommendation of the County Planning Commission. *See* Zoning Ordinance § 4–3.02. Once the County Planning Commission reviews the application and makes a recommendation, the County Board must hold a duly-advertised public hearing and determine whether the proposed development complies with various land use ordinances and regulations and other criteria before approving the TZD designation. *See* Zoning Ordinance §§ 4–3.02 & 3.03.

Sylvia Development's TZD application for Blue Dolphin Estates received a favorable recommendation from the County Planning Commission in June 1989, subject to Sylvia Development's meeting certain conditions during subdivision review. As part of its review of the Blue Dolphin Estates proposal, the Planning Commission staff analyzed the proposal's traffic and environmental impacts and concluded that the proposal met all six of the criteria required for TZD approval. The Planning Commission also solicited comments from several state agencies with regard to traffic engineering, environmental protection, school capacity, and the provision

of public services. Upon receiving the favorable report of the Planning Commission, the County Board notified the public that a hearing on the application would be held on July 18, 1989.

At the July 18 hearing before the five-member County Board, numerous residents who lived in the vicinity of Hance Road testified in opposition to the Blue Dolphin project. Most of the residents commented on traffic and safety. One resident voiced her concern that "[t]here's so much traffic now that I can not pull out of my driveway safely," while another told of several fatalities that had already occurred on the narrow local roads. Other residents questioned whether the project would deplete fresh water reserves and warned that the development would harm wildlife. While the citizens who spoke at the hearing raised a number of different objections, one common theme ran throughout their testimony: a deep concern, expressed passionately by some, that the rural character of the area in which they had lived for years was being destroyed by residential developments like Blue Dolphin. As one resident put it:

> I'm 58 years old, I won't be around here much longer, but I've got children and grandchildren that hope to live here. I've lived here all my life and I'm used to rural country. I know it's getting away from us.... Folks, I'm telling you, we've got to put a stop to it, and you're the folks up there that can do this.

Another resident, a community activist who was apparently one of the more vociferous commentors on July 18, summed up the anti-development mood in the audience:

> You know, I'm proud to say that I live in the country and I'd like to continue to do so. What you're saying right now, is I can say I live in the country but it's behind a subdivision. I don't want to say that.

Dohnal was allowed to respond to the citizens' comments at the hearing. During his response, Dohnal criticized "the garbage and the lack of aesthetics of one of the inhabitants" of Hance Road. According to the deposition testimony of several persons present on July 18, the hearing became emotionally charged after Dohnal's disparaging comment. An African-American resident, who believed that Dohnal was associating her with the garbage-strewn property, interrupted Dohnal and later expressed that she was "incensed" at Dohnal's insinuation. When the resident sat down, the public testimony ended with the following exchange between Commissioner William T. Bowen and the community activist who spoke earlier:

> Activist: I'd like to know where this developer comes from?
>
> Bowen: I think that has no bearing on this hearing.
>
> Activist: Well it's outside people coming in here and developing Calvert County.
>
> Bowen: Any other comments? Is the Board prepared to act at this time?

After further discussion and debate among the five board members, the Board decided to deny Sylvia Development's TZD application by a vote of three to two. A simple majority was required for approval.

In their comments, made on the record, all three of the board members who voted against Blue Dolphin Estates cited the significant public opposition expressed at the hearing as a reason for their decision. The Board issued its official denial of Dohnal's application in a resolution dated August 22, 1989. The Board's resolution rested on three findings: (1) the Board concluded that, in light of the public testimony, the local roads were inadequate to accommodate increased residential density; (2) the Board was persuaded by an unidentified consultant's report "setting forth the general inadequacy of water availability for fire fighting"; and (3) the Board determined that issuing this TZD "would be contrary to the public interest of Calvert County at this time."

Sylvia Development and Dohnal timely appealed the Board's resolution to the Circuit Court for Calvert County. In May 1990, the Circuit Court reversed the Board's decision as unsupported by probative evidence. The court's opinion explained that under Maryland law the Board, sitting as an adjudicative body in a TZD application hearing, was required to render a final decision with findings of fact based upon substantial evidence in the record. In the case of Blue Dolphin Estates,

the court found that the only support in the record for the Board's finding of inadequate road access consisted of the "unsubstantiated, generalized concerns" of local residents. Such lay testimony, without more, could not be considered probative in the face of contrary expert evidence produced by engineers from the County Planning Commission and several state agencies. The court also summarily rejected the Board's second and third findings, as the consultant's report on water supply was never admitted into the record and the "contrary to public interest" determination was asserted without any factual basis. The court held that an adjudicative agency decision made without the support of any record evidence was by definition "arbitrary" and ordered the Board to grant Sylvia Development's TZD application. The Board did so in a resolution issued July 3, 1990.

Thus, while Sylvia Development and Dohnal were successful on appeal, the initial denial of Sylvia Development's TZD application caused an 11-month delay in obtaining the necessary zoning approval. During this 11-month period, the Board approved the TZD application of another developer, Brooke Kaine, for a subdivision of 26 lots called "Olde Mill." Kaine needed the TZD approval to develop a 63-acre tract directly across Hance Road from the proposed Blue Dolphin subdivision. The County defendants concede that the proposals of Kaine and Dohnal were "similarly situated" for purposes of the TZD review process, at least in terms of the layout and location of the respective tracts of land. Once Kaine received approval for Olde Mill in February 1990, he was able to obtain the necessary further approvals and to proceed with construction and the sale of the lots. Thus, even though Kaine had applied for TZD designation after Sylvia Development, because of the 11-month delay in Sylvia Development's obtaining its TZD approval, Kaine was able to jump in front of Sylvia Development and secure the necessary certification of availability of school facilities, a certification which Sylvia Development could not obtain until October 1991. By that time, Sylvia Development alleges, it had defaulted on its loans and the Blue Dolphin project had been lost to foreclosure.

In August 1992, Sylvia Development and Dohnal sued Calvert County, the County Board of Commissioners, and the three individual Board members who blocked the Blue Dolphin project under 42 U.S.C. §§ 1983 and 1985(3), alleging (1) that the County defendants unlawfully discriminated against Sylvia Development and Dohnal "based on [Dohnal's] ethnic background and immigrant status, and/or non-resident status in Calvert County" in violation of the Equal Protection Clause; (2) that defendants conspired to deprive Sylvia Development and Dohnal of equal protection of the laws; and (3) that the defendants' "arbitrary, capricious, and invidiously discriminatory" denial of Sylvia Development's TZD application constituted a denial of property without due process of law under the Fourteenth Amendment. The district court granted defendants' motion for summary judgment on all counts, 842 F.Supp. 183, and this appeal followed.

II

[1, 2] In reviewing a summary judgment, we apply *de novo* the same standard that the district court was required by law to apply for granting the motion for summary judgment. *See Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 718 (4th Cir.1991), *cert. denied*, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992). Once a defendant makes a properly supported motion for summary judgment, the burden shifts to the plaintiff to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Summary judgment is justified if, from the totality of the evidence presented, including pleadings, depositions, answers to interrogatories, and affidavits, the court is satisfied that there is no genuine factual issue for trial and the moving party is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c).

[3–6] In reviewing a motion for summary judgment, the court must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir.1992), *cert. denied*, —

U.S. ——, 113 S.Ct. 1276, 122 L.Ed.2d 671 (1993). But as we explained in *Ford Motor Co. v. McDavid*, only "reasonable" inferences from the evidence need be considered by the court:

> [I]t is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.

259 F.2d 261, 266 (4th Cir.), *cert. denied*, 358 U.S. 908, 79 S.Ct. 234, 3 L.Ed.2d 229 (1958). Whether an inference is reasonable cannot be decided in a vacuum; it must be considered "in light of the competing inferences" to the contrary. *See Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356–57, 89 L.Ed.2d 538 (1986). In the end, the non-moving party must do more than present a "scintilla" of evidence in its favor. *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. Rather, the non-moving party must present sufficient evidence such that "reasonable jurors could find by a preponderance of the evidence" for the non-movant, *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512, "for an apparent dispute is not 'genuine' within contemplation of the summary judgment rule unless the non-movant's version is supported by sufficient evidence to permit a reasonable jury to find the fact[s] in his favor." *Stone v. University of Maryland Medical Sys. Corp.*, 855 F.2d 167, 175 (4th Cir.1988). Thus, if the evidence is "merely colorable" or "not significantly probative," a motion for summary judgment may be granted. *Anderson*, 477 U.S. at 249–50, 106 S.Ct. at 2510–11.

III

We turn first to Sylvia Development and Dohnal's claim that the Calvert County Board of Commissioners, in denying Sylvia Development's TZD application, violated the Equal Protection Clause of the Fourteenth Amendment. Sylvia Development and Dohnal contend that their project, "Blue Dolphin Estates," was similarly situated to the project of a local developer, "Olde Mill," but Olde Mill was granted TZD approval while Blue Dolphin Estates was denied approval. Sylvia Development and Dohnal argue that the Board's stated reasons for the denial were arbitrary and that the real reason was Dohnal's status as an "outsider." They variously imply that Dohnal's "outsider" status stems from the fact that Dohnal is a "naturalized alien," an "immigrant" from Czechoslovakia, a "foreigner," or a non-Calvert County resident.[1] The County Board's intent in denying Sylvia Development's TZD application, appellants assert, "was to placate public opinion against any and all outsiders whom the populace disliked." Appellants argue that they produced facts which at least entitled them to a trial on the equal protection issue and that summary judgment was therefore improperly entered.

[7, 8] The Equal Protection Clause of the Fourteenth Amendment, which provides in deceptively simple language that a state may not "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, lies at the core of our rule of law. It requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose. But this does not mean that persons in different circumstances cannot be treated differently under the law. Rather, the essential command of the Equal Protection Clause has always been that the classification of persons which a law applies must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561–62, 64 L.Ed. 989 (1920).

[9, 10] The Equal Protection Clause limits *all* state action, prohibiting any state from denying a person equal protection through the enactment, administration, or enforcement of its laws and regulations. Even

1. Dohnal was born in Czechoslovakia, became a naturalized U.S. citizen in 1976, and at the time of this litigation resided in Anne Arundel County, Maryland.

though a state law is facially neutral, its administration or enforcement can effect an unequal application by favoring one class of persons and disfavoring another. If the classification utilized is explicitly stated on the face of a statute or in the reasons given for its administration or enforcement, then the equal protection analysis requires us to determine whether an appropriate relationship exists between the legislative purpose and the classification adopted to achieve that purpose. On the other hand, if a classification is not explicitly stated, the plaintiff bears the initial burden of proving that a classification was nonetheless intentionally utilized. *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944). And only if the use of a classification is thus established does the equal protection analysis proceed with the inquiry into whether the classification furthers a legitimate legislative purpose.

[11–17] To prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. *Snowden*, 321 U.S. at 8, 64 S.Ct. at 401. A violation is established only if the plaintiff can prove that the state *intended* to discriminate:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it *an element of intentional or purposeful discrimination.*

Id. (emphasis added). Thus, even when a facially neutral statute has a "racially disproportionate impact," a discriminatory animus must nevertheless be proved to establish an equal protection violation. *See Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). A facially neutral administrative action implementing a facially neutral zoning regulation is treated similarly. Thus, even when an administrative action disparately impacts members of a particular racial group, it will not be found to violate the Equal Protection Clause unless the plaintiff demonstrates that the action was motivated, at least in part, by an "invidiously discriminatory" intent. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir.1982); *Talbert v. City of Richmond*, 648 F.2d 925, 929 (4th Cir.1981), *cert. denied*, 454 U.S. 1145, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982).[2] Several factors have been recognized as probative of whether a decisionmaking body was motivated by a discriminatory intent, including: (1) evidence of a "consistent pattern" of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings. *See Arlington Heights*, 429 U.S. at 266–68, 97 S.Ct. at 564–65; *Talbert*, 648 F.2d at 929. In the end, the plaintiff has the burden of establishing that a classification introduced through administrative action was "clear and intentional." *Snowden*, 321 U.S at 8, 64 S.Ct. at 401.

2. We note also that discriminatory intent "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (internal citations omitted). Further, we recognize that there is an element of causation that is a necessary part of plaintiff's showing, especially when plaintiff is trying to uncover the motivation of a multi-member decisionmaking body, such as a zoning board. While a plaintiff is not required to prove that "the challenged action rested *solely* on racially discriminatory purposes," *Arlington Heights*, 429 U.S. at 265, 97 S.Ct. at 563 (emphasis added), proof that racial discrimination was *a* motivating factor would not end the matter. Such proof merely shifts the burden to the decisionmaking body to demonstrate that "the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270–71 n. 21, 97 S.Ct. at 566 n. 21.

In short, where a classification does not appear on the face of a statute and is not officially stated as a reason for administrative action, the plaintiff has the burden of proving that the classification was actually utilized in the administrative action and that its use was intentional and purposeful.

[18] Whether a statute or administrative action employs a classification explicitly or implicitly, the equal protection analysis of that state action consists of the same two components. The first, a substantive component, requires us to examine whether the end that the state seeks to achieve is a legitimate governmental purpose. In determining whether a statutory purpose is legitimate, substantial judicial deference is required so that the court does not substitute its value judgments for those established by the democratically chosen branch. *United States v. Commonwealth of Virginia* ("*VMI II*"), 44 F.3d 1229, 1236 (4th Cir.1995). "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). This deference to legislative will, however, must not lead to approval of a "pernicious legislative purpose or one that does not comport with traditional notions of the proper role of government." *VMI II*, 44 F.3d at 1236. Because of the necessary judicial deference to the state's legislative purpose, statutes or administrative actions are seldom struck down under this component of the equal protection analysis.

[19–21] The second component of the equal protection analysis, the procedural component or means analysis, examines whether the classification appropriately furthers the legislative purpose. As a general proposition, legislation will be sustained if the classification utilized by the statute is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Thus, when social or economic legislation is involved, the states are permitted wide latitude in adopting classifications to further legitimate governmental purposes. *Id.; see also Dukes*, 427 U.S. at 303, 96 S.Ct. at 2516. When a statute, however, classifies by race, alienage, or national origin, it is subjected to "strict scrutiny and will be sustained only if [the legislative means] are suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). And for that reason classifications based on racial descent can be justified only in the "most exceptional circumstances," *Oyama v. California*, 332 U.S. 633, 646, 68 S.Ct. 269, 275, 92 L.Ed. 249 (1948), requiring the "most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944).

[22] Sylvia Development and Dohnal contend in this case that the Calvert County Board discriminated against them because of Dohnal's status either as a Czech immigrant or as a non-county resident. Thus, while we recognize that a classification based on Dohnal's ethnic origin—if established—requires the most rigid scrutiny, demanding a compelling state interest for its justification, we see no reason to employ any but the most deferential level of scrutiny to a classification based on his residence outside of the county. The Supreme Court has never applied anything greater than a rational basis level of review in cases involving equal protection challenges to bona fide residence requirements. *See, e.g., Martinez v. Bynum*, 461 U.S. 321, 103 S.Ct. 1838, 75 L.Ed.2d 879 (1983) (upholding state statute permitting public schools to deny free tuition to students whose official residence is outside the school district); *County Bd. of Arlington County v. Richards*, 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977) (upholding local ordinance reserving free parking permits for local residents and their invitees). The Court in *Martinez* specifically held that there is nothing invidious about a bona fide residence requirement, so long as it is uniformly applied and does not deprive nonresidents of a "fundamental right." 461 U.S. at 328 n. 7, 103 S.Ct. at

1842 n. 7. Therefore, "the question is simply whether there is a rational basis for it." [3] *Id. But cf. Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (striking down a *durational* residency requirement which conditioned public assistance on a minimum one-year residence in the jurisdiction because it impinged on the constitutional right to travel); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 n. 3, 106 S.Ct. 2317, 2321 n. 3, 90 L.Ed.2d 899 (1986) (distinguishing the Court's deferential treatment of bona fide residency requirements from its treatment of durational residency requirements).

In sum, in deciding the case before us we must first determine whether the County Board actually utilized an implicit classification in administering its zoning ordinance, since Sylvia Development and Dohnal do not contend either that the ordinance was discriminatory on its face or that the Board's reasons for denying their application articulated a discriminatory intent. Thus, at the outset we must determine whether Sylvia Development and Dohnal have met their burden of establishing that the County Board denied Sylvia Development's application *because* Dohnal was a Czech immigrant or *because* he was a non-resident. In either case, the use of the classification must be clear and intentional. Only if we conclude that the County's decision utilized one of these two classifications will we proceed to determine whether the classification appropriately supported a legitimate governmental objective.

With these principles in hand, we proceed to examine Sylvia Development and Dohnal's equal protection claims.

IV

Since, as we have noted, both the announced reasons for denying Sylvia Development's TZD application and the ordinance under which the County Board acted are facially neutral, we begin by examining whether Sylvia Development and Dohnal produced sufficient facts to show that the Board's decision was based, at least in part, on the fact either that Dohnal was a Czech or that he was not a resident of Calvert County.

As far as appellants' claim that Dohnal's ethnic origin was a motivating factor in the County Board's decision, we have been directed to no evidence of any history of actual discrimination against Czechs, Eastern Europeans, or immigrants in general, by the County Board or any other entity in Calvert County. Neither is there any evidence, or assertion by Sylvia Development and Dohnal, that the Board in any way departed from its usual procedural sequence in processing their application and administering the public hearing. Instead, appellants' evidence centers around certain remarks made at the public hearing on Sylvia Development's TZD application and an alleged pattern of discrimination against immigrants by the Calvert County Board when considering TZD applications.

[23] Sylvia Development and Dohnal's efforts to establish a triable issue of fact consist of four pieces of evidence. First, they point to a statement made at the hearing by defendant Barbara Stinnett, one of three board members who voted against the Blue Dolphin proposal. At the conclusion of her remarks, Stinnett said, "I think it's time that the wishes and the rights of the people that live here and have property here are taken into account and are held with as much vim and vigor and respect *as those who are coming in here shoving things down our throats*" (emphasis added). While the summary judgment standard requires us to resolve conflicting inferences from circumstantial evidence in favor of the non-moving party, it does not allow us to ignore or distort the plain meaning of words or conveniently

3. In the instant case, for example, it is presumably a legitimate governmental purpose to preserve the rural nature of a community and to maintain its aesthetic and functional characteristics through zoning requirements. In relation to that purpose, it might be rational to conclude that persons with an interest in the community beyond simply a financial one will be more sensitive to the spirit of zoning requirements and more accountable to the community's desires. Non-local developers, for instance, do not have to live with the adverse consequences of their development projects. Nevertheless, this case does not require us to resolve the issue of whether a rational basis could be found for classifying developers by their residence.

to read them out of context. *See Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir.), *cert. denied*, 358 U.S. 908, 79 S.Ct. 234, 3 L.Ed.2d 229 (1958). Even after resolving all available inferences in the light most favorable to appellants, we see no possible way to read Stinnett's remarks about "those who are coming in here" as a reference to non-U.S. natives. The full context of Stinnett's statement reveals at most that she was remonstrating against the Board for catering to outside developers *of any origin* who would impose unwanted development and growth on the local community. A more extensive excerpt from Stinnett's remarks discloses this meaning:

> I see faces that I've seen all my life in this room, people who have lived here all their lives, because [they're] coming out and [they're] standing up and saying, we're tired of this and we don't want any more of this. People are tired of having development shoved down their throat....[O]ur tax payers, and our people that live in this County ... are footing the bills for this growth, and we can't continue to do it .... it can't continue. It just can't continue.

While Stinnett may have intended to set up a "we/they" dichotomy, the "we" obviously refers to the residents and tax payers of Calvert County, and the "they" just as obviously refers to *any* developer who would destroy the County's rural character—not merely foreign-born developers.

The second piece of evidence on which Sylvia Development and Dohnal rely is the deposition testimony of Mark Frazer, one of the commissioners who voted *in favor* of the Blue Dolphin proposal. Specifically, Frazer testified that Dohnal spoke with a discernible foreign accent at the hearing (Frazer was actually one of several people who remembered that Dohnal had an accent, though most, including Frazer, believed it was a "German" accent). At one point in his deposition, Frazer also recalled that there was an emotional outburst during the hearing in which "there may have been some reference [made] to Mr. Dohnal's ethnicity only because, I think, of his accent." What Sylvia Development and Dohnal overlook, however, is Frazer's immediate caveat that he could not recall whether that reference stemmed from a commissioner or from someone in the audience. Frazer acknowledged that "the transcript would reflect that. That is the best that I can recall." A careful review of the transcript of the Board's remarks, however, reveals not a single explicit or implicit reference to Dohnal's ethnicity. Indeed, later in his deposition testimony, Frazer recalled that the emotional outburst, the details of which he only vaguely remembered, did not stem from the commissioners, but occurred in an exchange between Dohnal or his representative and other persons in the audience. Moreover, Frazer testified that he could not recall any matter before the Board in which he believed that a commissioner's vote was influenced by a person's nationality or racial background. He testified that he could state "very forthrightly" that he "never heard discussions or felt any sense of prejudice among any of the board members with respect to any applicant's or resident's nationality or sex or color, race, religion."

Sylvia Development and Dohnal's third piece of evidence is a statement made by a local resident, referred to above as the "community activist," in an exchange with Commissioner William T. Bowen which concluded the public testimony segment of the hearing.

> Activist: I'd like to know where this developer comes from?
>
> Bowen: I think that has no bearing on this hearing.
>
> Activist: Well it's outside people coming in here and developing Calvert County.
>
> Bowen: Any other comments? Is the Board prepared to act at this time?

This solitary remark is the only statement in the entire transcript of the public hearing which even touches on the question of Dohnal's status as an outsider. Read in the context of the community activist's earlier testimony, and in the context of the hearing as a whole, it would be a gross distortion to assume that by "outside people" she meant foreign-born developers. And while it would be a difficult task in any case to convince this court to project the feelings of a single audience member onto the members of a decisionmaking body, such a task is made nearly impossible in this case given Commissioner

Bowen's hasty dismissal of the community activist's question.

Additionally, Sylvia Development and Dohnal attempt to establish a pattern of discriminatory impact by showing that the Board consistently denied the applications of foreign-born TZD applicants. While it is true that discriminatory impact, if shown, may be probative (though not dispositive) on the issue of intent, *see Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, appellants' statistical evidence in this case is not even probative of discriminatory impact. Appellants note that between 1987 and 1990 the County Board approved 31 of 34 applications for TZD designation and that of the three applications denied, two were submitted by immigrants: Dohnal and David Lewis, who, according to his resume was a naturalized U.S. citizen born in Zimbabwe.[4] Accepting these data as true, they fall far short of demonstrating that the Board, in considering 34 TZD applications, manifested the "consistent pattern" of action described by the *Arlington Heights* Court as probative evidence of purposeful discrimination. No conclusion can be drawn from the simple fact that of 34 applicants, two immigrants were turned down. Any meaningful statistical pattern must take into account all 34 applicants. Yet Sylvia Development and Dohnal provide no information about the national or ethnic origins of the 31 applicants who were granted TZD approvals. Evidence that some of these successful applicants were also foreign-born would likely dispel any inference that the Board was systematically discriminating against immigrants.

Equally as important as appellants' failure to examine the entire pool of 34 applicants is their failure to produce sufficient data on the voting records of the individual commissioners who voted against their application. It is undisputed in this case that two of the commissioners, Joyce Terhes and Barbara Stinnett, were openly hostile to unchecked growth and therefore often voted to deny TZD applications. Terhes voted to deny 24 of the 34 TZD applications under discussion, and Stinnett voted to deny at least 17. Dohnal and Sylvia Development provide no evidence about the national origins of those applicants whom Terhes and Stinnett voted against, leaving us with the non-probative statistics that 2 of 24 TZD applicants voted against by Commissioner Terhes and 2 of 17 voted against by Commissioner Stinnett were foreign-born. Even as to Commissioner Bowen, who voted against TZD applicants four times,[5] with Dohnal and Lewis being the only two of those applicants who were foreign-born, the fact that appellants provide no data on the heritage of the 30 applicants whom Bowen approved leaves the statistic meaningless.[6]

[24] In sum, the evidence produced by the appellants fails to show a clear intent by the Board to discriminate on the basis of racial or immigrant status. Indeed, there is no evidence to show that the Board was even aware of Dohnal's place of birth, other than the fact that Dohnal speaks with a discernible foreign accent. Without more, a reasonable trier of fact cannot conclude that the County Board discriminated against Sylvia Development and Dohnal merely because

4. Though born in Zimbabwe, Lewis' resume indicates that he was educated in South Africa and Canada, and before coming to the U.S. around 1971, lived and worked as an engineer in Canada. Even if we assume for summary judgment purposes that the Board was aware of this biographical information on his resume, the record contains not a scintilla of evidence that Lewis' personal history was discussed by the Board, raised by anyone at Lewis' public hearing, or in any way played a role in the Board's deliberations. Like Dohnal, Lewis' denial was reversed by the Calvert County Circuit Court as unsupported by an adequate evidentiary record, but also like Dohnal, the court raised no suspicion of discrimination as the reason for the denial. Thus, Sylvia Development and Dohnal are left with the bare statistical data that two out of three *unsuccessful* TZD applicants were naturalized U.S. citizens.

5. The record shows that Bowen switched his vote in one of these cases at a rehearing six months after the initial denial. For this reason, appellants contend that Bowen ultimately voted against only three.

6. While it is not necessary to consider evidence advanced by the County defendants, we note that they provided further explanations of the board members' voting patterns which indicate plausible, nondiscriminatory reasons for why these members voted as they did.

Dohnal had a foreign accent, just as racial or gender discrimination cannot be presumed from the mere fact that someone adversely affected by state action has a particular skin color or gender. We conclude that appellants failed to create a triable issue of fact on the issue of discrimination based on Dohnal's immigrant status or ethnic background.

If Sylvia Development and Dohnal cannot demonstrate discrimination based on Dohnal's Czech origin, they argue in the alternative that the Board discriminated against them because Dohnal is an out-of-county developer. But while appellants' argument on this point is stronger, they likewise fail to proffer sufficient facts to survive summary judgment on this theory of discrimination.

Sylvia Development and Dohnal contend that if Commissioner Stinnett's comment about "those who are coming in here shoving things down our throats" cannot be read as a xenophobic comment about Czechs or foreigners, then it must be interpreted to refer specifically to out-of-county developers. In the context of the entirety of her remarks, however, Stinnett surely meant developers in general, regardless of where they happened to reside. The generality of her opposition to development is made especially clear by her preceding comment to the effect that "People are tired of having development"—presumably regardless of the developers' residence—"shoved down their throats."

Sylvia Development and Dohnal make a more salient point with respect to the outburst of the resident, whom we referred to as the "community activist," who inquired, "I'd like to know where this developer comes from." Appellants add to this evidence Commissioner Mark Frazer's deposition testimony, which included his interpretation of the activist's subsequent comment, "Well, it's outside people coming in here and developing Calvert County." When asked to read the transcript of the activist's remarks, Frazer interpreted her comments as a "[k]ind of a slur on developers, particularly out-of-the-county developers coming in and disrupting our quality of life."

[25, 26] Even taken in the light most favorable to appellants, however, the community activist's remarks tend to prove only one thing: that she personally did not think highly of out-of-county developers. While the discriminatory motivations of people who testify before a decisionmaking board might in limited circumstances be probative of the board's motivations, this could be true only where public testimony was overwhelmingly opposed to a proposal for a distinct discriminatory reason, and board members were clearly swayed by that public opposition, fully aware of its basis in discrimination and prejudice. *See, e.g., Marks v. City of Chesapeake,* 883 F.2d 308, 312 (4th Cir.1989) (zoning board admittedly swayed by community's religious prejudice); *Smith v. Town of Clarkton,* 682 F.2d at 1066–67 (town officials clearly reacting to public's racial hostility). In this case, the community activist was only one of eleven citizens who testified at the July 18 hearing, and the transcript reflects not a single other comment or question by anyone on the subject of Dohnal's out-of-county residence. Furthermore, as we noted above, Commissioner Bowen effectively and appropriately thwarted any further inquiry into where Dohnal "comes from" by noting the irrelevance of the activist's question and terminating the hearing. In the ensuing debate among the commissioners on the record, no further reference was made to the activist's remarks. On these facts, we find that a trier of fact could not reasonably impute to the County Board the motivations of a single audience member who made one isolated comment, and thus that summary judgment for the County defendants was appropriate on the claim of discrimination based on Dohnal's out-of-county residence.

[27] Notwithstanding appellants' inability to show that the County Board took either Dohnal's ancestry or residency into account in making its decision, appellants argue that they established a prima facie equal protection claim merely because a state court ruled that the initial denial of Sylvia Development's TZD application was arbitrary as a matter of state law. According to appellants' logic, the fact that the County Board arbitrarily denied the TZD application for "Blue Dolphin Estates" while approving the TZD application (of another developer) for "Olde Mill," combined with the "Appellees' concession that

the Blue Dolphin and Olde Mill projects were similarly situated, compels the conclusion that Appellants made out a *prima facie* case of deprivation of equal protection."

[28] We reject appellants' theory as a matter of law. While an equal protection claim must be rooted in an allegation of unequal treatment for similarly situated individuals, a showing of such disparate treatment, even if the product of erroneous or illegal state action, is not enough by itself to state a constitutional claim. "[W]here the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws." *Snowden*, 321 U.S. at 8, 64 S.Ct. at 401. If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim. *See id.* at 11–12, 64 S.Ct. at 403 ("A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored.").

The fact that the Board's differential treatment of two similar proposals was ruled illegal or arbitrary under state law is not alone probative of a constitutional violation. *See, e.g., Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353, 38 S.Ct. 495, 495–96, 62 L.Ed. 1154 (1918); *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir.1987), *cert. denied*, 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). As we noted above, even if the enforcement of a facially neutral ordinance has a "racially disproportionate impact," a violation of the Equal Protection Clause still requires a showing of clear and intentional discrimination. *See Washington v. Davis*, 426 U.S. at 239, 96 S.Ct. at 2047. Likewise, a showing of disproportionate impact on any other class of persons would not, without more, establish an equal protection violation. And proof of discriminatory intent is no less necessary if the enforcement action is unlawful; the fact of its illegality does not prove that it was discriminatory.

In this case, confusion also arises because appellants conflate the meaning of the term "arbitrary" as used by the state court in applying state administrative law with the term "arbitrary" as it might be used in a constitutional sense. It does not follow, as appellants contend, from the fact that the Board's action was arbitrary as a matter of state law that there was "no rational basis ... to support the denial of Sylvia Development's application for the TZD." The Board did indeed have a rational basis for the denial: avoiding an adverse impact on traffic safety and water supply. The Board's action was ruled "arbitrary" not because its reasoning lacked a rational basis, but because the evidentiary record was inadequate to support the Board's findings. This failure is simply a matter of state law.

In sum, the most appellants could prove if this case were permitted to go to trial is that two similarly situated developers were treated differently by a local zoning board, without an adequate evidentiary basis for such treatment. Appellants cannot show that the County Board's decision was based in whole or in part on a deliberate classification that he was Czech, an immigrant, or a non-resident. The district court thus was compelled to grant summary judgment for defendants on the equal protection claim.

Because there was a lack of evidence to support the allegation of intentional discrimination, Sylvia Development and Dohnal's second count alleging a *conspiracy* to deny them equal protection must also be dismissed on summary judgment.

V

The third count of Sylvia Development and Dohnal's complaint alleges that the County defendants denied them a property interest without due process of law in violation of the Fourteenth Amendment. First they contend that they had a property interest in the approval of a TZD because, they argue, their application met all the criteria for a TZD, as stated in the Calvert County ordinances, and therefore they were *entitled* to approval of

their application. They also contend that because the defendants denied their application with *no* evidence to justify such a decision, the County Board's decision was "arbitrary," in violation of the Due Process Clause.

[29] If appellants purport to claim that Calvert County denied them *procedural* due process, then they must establish that (1) they had property or a property interest (2) of which Calvert County deprived them (3) without due process of law. Because appellants failed to demonstrate at least two of the required elements, their procedural due process claim must fail.

[30] First, Sylvia Development cannot establish that it has a property interest in a TZD created by Calvert County's Agricultural Land Preservation Program. *See* Calvert County Code § 12–101 *et seq.* According to Calvert County Zoning Ordinance § 4–302, the creation of a TZD at any particular location in the County is discretionary with the County Board. Thus, Sylvia Development cannot claim entitlement to a TZD on its property, and approval of a TZD accordingly cannot be claimed by Sylvia Development as a property interest. *See Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (to have a property interest in a benefit a person must have a "legitimate claim of entitlement to it"). *See also Biser v. Town of Bel Air,* 991 F.2d 100 (4th Cir.), *cert. denied,* — U.S. —, 114 S.Ct. 182, 126 L.Ed.2d 141 (1993).

In furtherance of its Agricultural Land Preservation Program, the County Board is required to establish transfer zones to serve as "receiving area[s] for lots that are being transferred from prime farm and forest land." Zoning Ordinance § 4–3.01. While Transfer Zone Districts must be created, *see* Calvert County Code § 12–105, their location and approval rest within the discretion of the County Board of Commissioners. This is evident not only in the enabling portion of the ordinance which states, "The County Commissioners *may* designate a TZD if all criteria for a TZD are met," Zoning Ordinance § 4–3.02 (emphasis added), but also in the ordinance's language regarding where such zones may, but need not, be located:

> While the Comprehensive Plan recommends that residential development be directed to Towns, the Comprehensive Plan also recognizes that some people desire home sites "out in the country." Therefore, by locating Transfer Zone Districts on less viable farmland, the demand for land "out in the country" can be satisfied without usurping important productive resources and without destroying the rural character of the County.

Zoning Ordinance § 4–3.01.

Moreover, the criteria imposed by the zoning ordinance for land to qualify as a TZD does not, as appellants argue, *entitle* land meeting these qualifications to TZD status. Rather, the criteria are *preconditions* which must be met before land can be *considered* for TZD approval. As the ordinance states: "The following criteria must be met *if an area is to be acceptable* as a Transfer Zone District." Zoning Ordinance § 4–3.03 (emphasis added).

Further evidence that a TZD is not an entitlement is provided by the numerous reviews required in approving a TZD, many of which involve interpretive judgments and discretion. A TZD must satisfy the standards for any other development in Calvert County, including subdivision regulations, storm water management, sediment control, and road access requirements. *See* Zoning Ordinance § 4–3.03. While Sylvia Development may believe that if it satisfied the stated criteria, it would receive a TZD, that belief is at best a mere "unilateral expectation," *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709, because the question of whether criteria are met must be resolved by the exercise of judgment. To establish a property interest subject to a procedural due process analysis of the Fourteenth Amendment, a "legitimate claim of entitlement" must be shown. *Id.*

[31, 32] Finally, we reject appellants' contention that an entitlement to the TZD was created either by the County Planning Commission's favorable recommendation or by the state court judgment in their favor. While the County Board must seek the recommendation of the County Planning Commission, the ordinance requires only that the

Board *consider*, but not follow, that recommendation. *See* Calvert County Code, § 12–105(a). As to the court judgment, a court order requiring the Board to approve the application does not mean that the applicant had a preexisting legal right to that approval. *See Biser*, 991 F.2d at 105. " 'The fact that the permit *could* have been denied on nonarbitrary grounds defeats the federal due process claim.' " *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 71 (4th Cir. 1992) (emphasis added) (quoting *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir.1989)).

[33] In addition to their failure to show the deprivation of a property interest, Sylvia Development and Dohnal assert no unfairness in the procedure afforded their application for a TZD except to say that the Board's decision was mistaken and lacked the support of evidence. As appellants must concede, the County Board duly conducted an open hearing, following notice, at which it heard the positions of all interested parties. And following the hearing, the Board made a decision and stated its reasons. Aggrieved by the decision, the appellants were entitled to appeal and did appeal to the Circuit Court for Calvert County in the manner provided by the ordinance. Moreover, they persuaded the circuit court to reverse the decision of the Board as unsupported by adequate evidence. Not only were appellants provided all the procedure to which they were entitled, they used the procedure to obtain a favorable result.

While appellants thus cannot make out a procedural due process claim, it appears from their allegations that they may also be intending to allege that Calvert County denied them *substantive* due process. They state in the complaint that the County Board's decision was "arbitrary" without support of any evidence. Appellants' brief also cites a Second Circuit opinion to support their contention that "if the [Appellees] had no authority under state law" to deny Sylvia a TZD, "then a trier of fact could conclude that there was no 'rational basis' " for Appellees' actions, "and that, as a result, the [Appellees] violated appellants' rights to substantive due process" (quoting *Brady v. Town of Colchester*, 863 F.2d 205, 215–16 (2d Cir.1988)). But even if appellants' claim alleges a violation of substantive due process, we conclude that it is most inadequate.

[34–36] To make out a claim that Calvert County's action violated *substantive* due process, appellants must, in the circumstances of this case, demonstrate (1) that they had property or a property interest; (2) that the state deprived them of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency. *See Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir.1995) ("Substantive due process is a far narrower concept than procedural; it is an absolute check on certain governmental actions notwithstanding 'the fairness of the procedures used to implement them.' "). The protection of substantive due process is indeed narrow and covers only state action which is "so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir.1991), *cert. denied*, 502 U.S. 1097, 112 S.Ct. 1175, 117 L.Ed.2d 420 (1992). And in the context of a zoning action involving property, it must be clear that the state's action " 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.' " *Nectow v. Cambridge*, 277 U.S. 183, 187–88, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)). In more recent decisions, the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *but cf. Moore v. City of*

East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (city's requirement that families exclude blood relatives violates substantive due process). In short, the doctrine of substantive due process is a constitutionally imposed limitation, *see Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring), which is intended only "to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *Collins v. City of Harker Heights*, 503 U.S. 115, 126, 112 S.Ct. 1061, 1069, 117 L.Ed.2d 261 (1992) (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989)).

[37] In addition to the fact that Sylvia Development and Dohnal cannot demonstrate, as we noted above, that Calvert County deprived them of a property interest, their substantive due process claim must fail also because of their inability to show that the County Board's action bore no rational relationship to the exercise of the state's traditional police power through zoning. The state court which reversed the Board found that the Board had rejected Sylvia Development's application for two main reasons: (1) the Board's impression that Blue Dolphin Estates would create a traffic hazard and deplete water supplies; and (2) the Board's desire to placate the citizens at the hearing who opposed the project. While the state court held that the first reason could not stand up under state law without admissible evidence to support it, one cannot deny that the impact of development on traffic safety and water supply is quintessentially a legitimate zoning concern.

[38] Sylvia Development and Dohnal argue, however, that the first reason was merely a pretext for the second, the commissioners' desire to mollify public opposition to the Blue Dolphin project. In support of this contention, they point to the statements of certain board members who candidly admit they were swayed by public opposition, such as the following remarks of Commissioner Joyce Terhes:

> [W]hen I left the house this morning and when I ran, I ran knowing it was a representative democracy and that I was elected to represent the wishes of the people. And the people of Calvert County have spoken out, they are concerned about the growth, they are concerned about the schools, they are concerned about the roads, they are concerned about the water.... I am not a rubber stamp for the Planning Commission.... I have letter after letter about people complaining about traffic on Hance Road.... I'm sorry, I will not accept it.

Even if Sylvia Development and Dohnal are correct that appeasing the public was the only purpose behind the Board's action, in the context of this case we still cannot say that the Board's action bore no rational relationship to the exercise of the state's traditional zoning power. Given the nature of the citizens' opposition, it is clear that the Board was acting well within the ambit of a local zoning authority for purposes of our constitutional analysis.

Zoning is inescapably a political function. Indeed, it is the very essence of elected zoning officials' responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and development in the community. We stated as much in *Gardner*:

> [L]and-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community. The formulation and application of land-use policies, therefore, frequently involve heated political battles, which typically pit local residents opposed to development against developers and local merchants supporting it. Further, community input is inescapably an integral element of this system. Subdivision control is an inherently discretionary system that allows—indeed, sanctions—compromise and negotiation between developers and the planners who represent the community.
>
> Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts.... Accordingly, federal

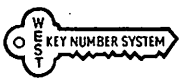
> courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes.

969 F.2d at 67–68 (internal citation omitted). The record in this case reveals that the public opposition to the Blue Dolphin project, as well as the sympathy to this opposition expressed by certain commissioners, centered around legitimate land use issues such as the concern over further growth in rural Calvert County, the consequences of increased residential density, and the preservation of the community's aesthetic character—issues that are at the heart of countless local zoning disputes in every corner of the country. It is not pernicious *per se* for a zoning authority to be influenced by political pressure in the community. "Such give-and-take between government officials and an engaged citizenry is what democracy is about." *Id.* at 72. *See also Nestor Colon Medina & Sucesores, Inc. v. Custodio,* 964 F.2d 32, 46 (1st Cir. 1992) ("'nothing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic ... government'") (quoting *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir.1988)).

[39, 40] Our analysis should not be interpreted as condoning the actions of public officials who circumvent legally established criteria in their decisionmaking. Actions that violate state law are properly challenged in state courts, as Sylvia Development and Dohnal have done in this case. But the legality of a zoning decision under applicable state law is not determinative of whether the decision violated federal substantive due process.[7] Moreover, the fact that established state procedures were available to address and correct illegal actions by the Board belies the existence of a substantive due process claim. *See Rucker,* 946 F.2d at 281.

At bottom, this case amounts to a routine zoning action by a county board which a state court later found to be unsupported by the evidence and therefore reversed. While the County Board announced perfectly acceptable reasons for its zoning decision, the decision was flawed because the evidence relied on by the Board was speculative. These are not the circumstances that demonstrate a violation of the Due Process Clause, either in its procedural or substantive application.

The judgment of the district court is *AFFIRMED.*



UNITED STATES of America, Plaintiff–Appellee,

v.

Kevin J. DAUGHTRY, Defendant–Appellant.

No. 93–5703.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 31, 1995.

Decided March 3, 1995.

Defendant was convicted by the United States District Court for the District of

7. Appellants rely on broad sounding language in cases from other circuits, such as *Brady v. Town of Colchester,* 863 F.2d 205, 215 (2d Cir.1988) ("the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational zoning actions"). *But see Nestor Colon Medina & Sucesores, Inc. v. Custodio,* 964 F.2d 32, 46 (1st Cir.1992) (declining to follow *Brady*). But to conclude that every agency decision reversed as "arbitrary and capricious" under state or federal administrative law rises to the level of a constitutional claim would distort the substantive due process doctrine. As the courts have consistently recognized, the inquiry into "arbitrariness" under the Due Process Clause is completely distinct from and far narrower than the inquiry into "arbitrariness" under state or federal administrative law. *See Gardner,* 969 F.2d at 71 n. 3; *RRI Realty Corp. v. Incorporated Village of Southampton,* 870 F.2d 911, 914 n. 1 (2d Cir.), *cert. denied,* 493 U.S. 893, 110 S.Ct. 240, 107 L.Ed.2d 191 (1989); *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1221 (6th Cir.1992). While administrative law focuses on whether an agency's decision was supported by record evidence and abided by statutory criteria, substantive due process inquires into the conceivable outer limits of legitimate government power.

IV.

In sum, we hold that Oliva established a nexus between his proposed social groups and the persecution he faced. The success of Oliva's petition thus depends on whether either of his proposed social groups is cognizable. In determining that Oliva had not alleged a cognizable particular social group, the BIA failed to adequately address Oliva's evidence. Accordingly, we grant Oliva's petition for review, reverse the BIA's determination on nexus, and remand this matter to the BIA for consideration of whether Oliva's proposed social groups are cognizable in light of all of the relevant evidence.

PETITION FOR REVIEW GRANTED; ORDER REVERSED IN PART, VACATED IN PART, AND REMANDED

TOMMY DAVIS CONSTRUCTION, INC., Plaintiff–Appellee,

v.

CAPE FEAR PUBLIC UTILITY AUTHORITY; New Hanover County, Defendants–Appellants.

Tommy Davis Construction, Inc., Plaintiff–Appellee,

v.

Cape Fear Public Utility Authority; New Hanover County, Defendants–Appellants.

Nos. 14–1778, 14–2132.

United States Court of Appeals, Fourth Circuit.

Argued: Sept. 15, 2015.

Decided: Dec. 1, 2015.

Background: Subdivision developer brought action against county and public utility authority, as successor to local water and sewer district, seeking refund of impact fees developer paid to county, which collected those fees on behalf of district, for services that district allegedly did not provide and had no concrete plans or immediate ability to provide. The United States District Court for the Eastern District of North Carolina, Malcolm J. Howard, Senior District Judge, 2014 WL 3345043, granted developer's summary judgment motion, and, 2014 WL 4961111, awarded attorney fees and costs to developer. Defendants appealed.

Holdings: The Court of Appeals, Niemeyer, Circuit Judge, held that:

(1) developer's § 1983 claim for violation of due process rights was untimely;

(2) developer's state-law claims were timely;

(3) county's collection of impact fees was ultra vires; and

(4) awarding attorney fees to developer was appropriate.

Affirmed.

1. Civil Rights ⚷1384

Federal Courts ⚷3034(5)

Section 1983 was basis of subdivision developer's federal due process claim against county and public utility authority, as successor to local water and sewer district, even if developer's complaint did not expressly cite to § 1983, and thus claim was subject to North Carolina law's three-year statute of limitations for claims involving injuries to person or rights of another, since developer was suing county and authority, to which § 1983 applied, for deprivation of rights secured by Federal Constitution, and specifically to obtain re-

fund of fees developer paid to county, which collected those fees on behalf of district, for services that district allegedly did not provide and had no concrete plans or immediate ability to provide. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; West's N.C.G.S.A. § 1-52(5).

2. Civil Rights ⚷1379

Federal Courts ⚷3034(5)

In § 1983 suits, the court borrows the applicable state's statute of limitations for personal-injury actions, even when the plaintiff's particular § 1983 claim does not involve personal injury. 42 U.S.C.A. § 1983.

3. Limitation of Actions ⚷58(1)

Applicable limitations period for a § 1983 claim begins to run when the plaintiff has a complete and present cause of action, or in other words when it could have filed suit and obtained relief. 42 U.S.C.A. § 1983.

4. Limitation of Actions ⚷58(6)

Subdivision developer's § 1983 claim against county and public utility authority, as successor to local water and sewer district, for violation of federal due process rights accrued, and North Carolina law's three-year statute of limitations for claims involving injuries to person or rights of another began to run, when developer paid challenged fees to county, which county collected on behalf of district, for services that district allegedly did not provide and had no concrete plans or immediate ability to provide. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; West's N.C.G.S.A. § 1-52(5).

5. Water Law ⚷2238

Zoning and Planning ⚷1605

Subdivision developer's claim against county and public utility authority, as successor to local water and sewer district, alleging that county lacked authority under North Carolina law to impose impact fees it collected from developer on behalf of district, was subject to catch-all, 10-year statute of limitations for all actions not otherwise limited by statute, as no other statute established limitations period for such claim. West's N.C.G.S.A. §§ 1-56, 162A-88.

6. Water Law ⚷2238

Zoning and Planning ⚷1605

Doctrine of laches did not apply to render untimely subdivision developer's claim against county and public utility authority, as successor to local water and sewer district, alleging that county lacked authority under North Carolina law to impose impact fees it collected from developer on behalf of district, where defendants did not establish kind of prejudice necessary to bar suit under doctrine of laches. West's N.C.G.S.A. § 162A-88.

7. Equity ⚷84

Under North Carolina law, laches is an equitable defense that is not available in an action at law.

8. Zoning and Planning ⚷1382(4)

County's collection of impact fees from subdivision developer on behalf of local water and sewer district was ultra vires under North Carolina statute conferring authority to municipal corporations to collect such fees for water and sewer services "to be furnished" to development, where county had only generalized goal of extending water and sewer services to entire county, including subject development, but there was nothing to indicate that county or district had taken any steps to extend water and sewer services to development or that they had made any official decision to do so. West's N.C.G.S.A. § 162A-88.

9. Zoning and Planning ⚷1382(4)

Under the North Carolina statute conferring authority to municipal corporations to collect an impact fee for water and sewer services "to be furnished" to a development, the phrase "to be furnished" could be construed meaningfully only in the context of the developer's needs, such that the developer can expect that it will have water and sewer services within a reasonable time after it completes the development. West's N.C.G.S.A. § 162A–88.

See publication Words and Phrases for other judicial constructions and definitions.

10. Counties ⚷228

Municipal Corporations ⚷1040

Awarding attorney fees to subdivision developer was appropriate under North Carolina statute allowing attorney fees against municipal corporation in any suit in which municipal corporation was party, in developer's suit against county and public utility authority, as successor to local water and sewer district, alleging violations of federal due process rights and that county lacked authority under North Carolina law to impose impact fees it collected from developer on behalf of district, where court found that county acted outside scope of its legal authority by collecting those fees as condition of receiving building permits. U.S.C.A. Const.Amend. 14; West's N.C.G.S.A. §§ 6–21.7, 162A–88.

ARGUED: Jeremy M. Wilson, Ward and Smith, P.A., Wilmington, North Carolina, for Appellants. Bradley Andrew Coxe, Hodges & Coxe, P.C., Wilmington, North Carolina, for Appellee. **ON BRIEF:** Ryal W. Tayloe, Ward and Smith, P.A., Wilmington, North Carolina, for Appellants.

Before NIEMEYER, GREGORY, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge GREGORY and Judge THACKER joined.

NIEMEYER, Circuit Judge:

The main question presented in these appeals is whether New Hanover County, North Carolina, acted *ultra vires* in collecting fees on behalf of the New Hanover County Water and Sewer District from a subdivision developer, Tommy Davis Construction, Inc., for water and sewer services that the Water and Sewer District did not provide and had no concrete plans or immediate ability to provide. Davis Construction had arranged to have a privately owned utility, Aqua North Carolina, Inc., provide water and sewer services to the subdivision.

The district court ruled that the County acted *ultra vires* in collecting the fees on behalf of the Water and Sewer District and ordered both the County and the successor to the Water and Sewer District, the Cape Fear Public Utility Authority, to refund the fees in the amount of $34,268.96, together with prejudgment interest. The court also awarded Davis Construction attorneys fees and costs. For the reasons that follow, we affirm.

I

In the course of developing Becker Woods, a residential subdivision with 29 lots, located on Cape Fear in the southern part of New Hanover County, Davis Construction arranged to have Aqua NC provide water and sewer services to each lot in the subdivision. Aqua NC was and remains the only utility offering those services in that part of the County, and it therefore provided water and sewer ser-

vices to the existing subdivisions surrounding Becker Woods.

In February 2005, Davis Construction applied for building permits from the County for a few of the lots in the subdivision. A County employee advised Davis Construction that it was required to pay "impact fees" to the Water and Sewer District before the County would issue the building permits. The County Board of Commissioners had created the Water and Sewer District as a public utility in 1983 to provide water and sewer services to the unincorporated areas of the County. The Water and Sewer District, however, did not offer service throughout its entire jurisdiction. Portions of the County, including the area where Becker Woods was located, were instead served by private water and sewer utilities, such as Aqua NC. Even though the Water and Sewer District did not offer service to every area within its jurisdiction, it nonetheless assessed, and the County collected, impact fees for all new development in every area, including the Becker Woods subdivision, relying on an ordinance that required "[a]ll new development ... obtaining a certificate of occupancy" to pay a "facility fee ... based on average daily flow" as a "[o]ne-time sewer charge[ ]." New Hanover County, N.C., Code § 56–312(b) (2005). According to the County, the impact fees were used "to develop [the County's] wastewater infrastructure with the goal of providing expanded service coverage in the unincorporated areas of New Hanover County."

Davis Construction objected to the fees because the Water and Sewer District was not going to be providing water and sewer services to its subdivision and it had already paid impact fees to Aqua NC. After objecting repeatedly, Davis Construction paid the fees under protest so that it could proceed with the subdivision's development. Between March 2005 and July 2006, it paid $34,268.96 in impact fees to build houses on 23 lots.

In 2007, the County and the City of Wilmington began the process of consolidating their separate water and sewer systems with the creation of the Cape Fear Public Utility Authority. The Authority was incorporated in 2007, and on July 1, 2008, it assumed all the rights and liabilities of the Water and Sewer District and began operating the region's public water and sewer infrastructure. During this same period, the Authority and the County also changed the prior impact-fee policy and began assessing and collecting impact fees only when a customer applied to the Authority for service. Accordingly, when Davis Construction thereafter applied for a building permit for another lot in Becker Woods, the County did not collect an impact fee because Aqua NC, not the Authority, was going to provide the water and sewer services. Davis Construction subsequently requested that the Authority refund the impact fees that it had previously paid, but, on June 9, 2010, the Authority denied that request.

Davis Construction commenced this action against the Authority in the Superior Court of New Hanover County on December 2, 2011, seeking a refund of the impact fees it had paid to the Water and Sewer District in 2005 and 2006, along with interest and attorneys fees. By an amended complaint, it added the County as a defendant, and the County removed the action to federal court. The amended complaint alleged that the defendants' actions in collecting impact fees were *ultra vires* and violated Davis Construction's right to due process under the U.S. and North Carolina Constitutions.*

* Davis Construction also alleged that the defendants had violated its rights to equal protec-

On the parties' cross-motions for summary judgment, the district court ruled in favor of Davis Construction on July 7, 2014, concluding that the defendants' collection of impact fees from Davis Construction for the Becker Woods development was "an ultra vires act beyond their statutory authority." The court also rejected the defendants' defenses that Davis Construction's claims were barred by the statute of limitations and the doctrine of laches. The court ordered the defendants to refund to Davis Construction $34,268.96, together with prejudgment interest of 6% from July 13, 2006, the date of Davis Construction's last impact fee payment. The court entered judgment on July 8, 2014, and subsequently awarded Davis Construction attorneys fees of $20,000 and non-taxable costs of $270.

These appeals from the judgment and from the award of attorneys fees followed.

II

As an initial matter, we address the defendants' contention that the district court erred in refusing to dismiss Davis Construction's claims as untimely. They contend that the district court incorrectly concluded that the catchall 10-year statute of limitations provided by N.C. Gen.Stat. § 1-56 applies to Davis Construction's *ultra vires* claim. They argue that the claim is instead barred by the three-year statute of limitations set out in N.C. Gen.Stat. § 1-52(2) for claims based upon a "liability created by statute." Alternatively, they argue that the *ultra vires* claim is barred by either the two-year limitations period that applies to an "action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied," N.C. Gen.Stat. § 1-53(1), or the three-year limitations period for "an action ... for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated," *id.* § 1-52(5). As to Davis Construction's federal and state due process claims, they contend that those claims are barred by the three-year statute of limitations provided by N.C. Gen.Stat. § 1-52(5). And finally, they contend that, even if Davis Construction's claims are found to have been filed within the applicable limitations period, the claims are nonetheless barred by the equitable doctrine of laches.

[1, 2] To begin, we agree that Davis Construction's federal due process claim is barred by the three-year statute of limitations provided by N.C. Gen.Stat. § 1-52(5). Although Davis Construction's complaint does not expressly invoke 42 U.S.C. § 1983 in alleging the federal due process claim, that statute provides the basis for the cause of action when a plaintiff sues a state actor for the deprivation of rights secured by the U.S. Constitution, and "municipalities and other local government entities [are] included among those persons to whom § 1983 applies." *Collins v. City of Harker Heights,* 503 U.S. 115, 120, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (citing *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)); *see also Hughes v. Bedsole,* 48 F.3d 1376, 1383 n. 6 (4th Cir. 1995) (noting that, because the Fourteenth Amendment "does not create a cause of action," a plaintiff's "claim under the Fourteenth Amendment merges into her § 1983 claim because § 1983 merely creates a statutory basis to receive a remedy for the deprivation of a constitutional right"). The statute of limitations for all § 1983

tion under the U.S. and North Carolina Constitutions, but it has since abandoned those claims.

claims is borrowed from the applicable state's statute of limitations for personal-injury actions, even when a plaintiff's particular § 1983 claim does not involve personal injury. *Wilson v. Garcia*, 471 U.S. 261, 275–80, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *see also Wallace v. Kato*, 549 U.S. 384, 387, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). And we have applied *Wilson* to conclude that § 1983 claims arising in North Carolina are limited by "the three-year period for personal injury actions set forth in § 1–52(5)." *Nat'l Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1162 n. 2 (4th Cir.1991).

[3, 4] The limitations period for a § 1983 claim begins to run when the plaintiff has "a complete and present cause of action"—in other words, when it could have "file[d] suit and obtain[ed] relief." *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997)). In this case, the period began when Davis Construction paid the impact fees under protest. Because it filed this action on December 2, 2011—some five and one-half years after it paid the last impact fee at issue in 2006—the federal claim was time-barred.

We conclude, however, that Davis Construction's state law claims were timely filed. The North Carolina Court of Appeals recently addressed the question of which statute of limitations applies to claims like those brought by Davis Construction, and its holding guides our disposition of this issue. *See Point South Props., LLC v. Cape Fear Pub. Util. Auth.*, —— N.C.App. ——, 778 S.E.2d 284, 287–89 (2015). Like in the present case, the plaintiffs in *Point South Properties* were developers that sued New Hanover County and the Cape Fear Public Utility Authority to recover impact fees paid to the Water and Sewer District, alleging that the defendants lacked authority to impose such fees. As here, sewer and water services were being provided to the developers' property by Aqua NC. *Id.* at 286–87. The defendants in *Point South Properties* maintained that the plaintiffs' claims were based on N.C. Gen.Stat. § 162A–88, the statute that grants a water and sewer district the authority to levy fees for "services furnished or to be furnished," and therefore that their claims were subject to the three-year statute of limitations provided by N.C. Gen.Stat. § 1–52(2) for "an action . . . [u]pon a liability created by statute." The North Carolina Court of Appeals rejected that argument, however, concluding "that plaintiffs' claims [were] not based upon defendants' alleged breach of a duty or liability established by N.C. Gen.Stat. § 162A–88." *Point South Props.*, 778 S.E.2d at 288. Rather, the court noted, it was the "defendants who [had] raise[d] the statute as a defense to plaintiffs' claims." *Id.* at 288. The court also rejected the defendants' alternative argument that the plaintiffs' claims were barred by the two-year statute of limitations that applies to an "action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied." *Id.* at 289 (quoting N.C. Gen.Stat. § 1–53(1)). Instead, the court ruled that "because no other statute establishes the statute of limitations for their claim, the residual or 'catch all' period of 10 years set out in N.C. Gen Stat. § 1–56 applies." *Id.*

[5] Following *Point South Properties*, we likewise conclude that the 10–year statute of limitations provided by N.C. Gen. Stat. § 1–56 applies to Davis Construction's state-law claims and therefore affirm the district court's ruling that those claims were filed well within the limitations period.

[6, 7] The decision in *Point South Properties* similarly persuades us to reject the defendants' argument that, even if not barred by the applicable statute of limitations, Davis Construction's claims are nonetheless untimely under the doctrine of laches. Considering this same argument, the court concluded that "the doctrine of laches is not applicable to this case" because "plaintiffs' claims are legal," while "laches is an equitable defense [that] is not available in an action at law." *Point South Props.*, 778 S.E.2d at 289 (quoting *Cater v. Barker*, 172 N.C.App. 441, 617 S.E.2d 113, 118 (2005)). It concluded that the doctrine of laches was also inapplicable because "defendants have failed to produce evidence that they were prejudiced by plaintiffs' delay in bringing suit," emphasizing that "[d]efendants do not contend that they undertook any expenditures that would not have been otherwise necessary, or that their legal position has been negatively impacted by the passage of time." *Id.* Here, too, the defendants have not established the kind of prejudice necessary to bar Davis Construction's suit under the doctrine of laches.

In sum, we conclude that Davis Construction's state-law claims are not time-barred.

III

[8] On the merits, the defendants contend that the district court erred in concluding that their collection of impact fees from Davis Construction was *ultra vires.* While the district court allowed that the defendants could collect impact fees for water and sewer "services ... *to be furnished,*" N.C. Gen.Stat. § 162A-88 (emphasis added), it concluded that the defendants failed to demonstrate that they would be able to furnish such services to Becker Woods within any meaningful time in the future or that they even intended to do so, particularly in view of the fact that such services were already being provided by Aqua NC. The defendants argue, however, that the evidence shows that they would furnish those services because they had longstanding plans to provide such services to the area in which Becker Woods was being developed. They note:

> As far back as 1976, the Greater Wilmington Area 201 Facilities Plan included the southern unincorporated areas in its Regional Wastewater Treatment Plan and called for expansion of the Southside Wastewater Treatment Plant. Defendants have used such funds to prepare for service expansion, including spending approximately $8 million on the design of a wastewater treatment plant in the southern part of the County. Additional planning documents confirm that [the Water and Sewer District] and [the Authority] have planned to expand service to areas including Becker Woods.

They argue that, in light of those plans, § 162A-88 authorized them to collect impact fees to fund them.

The district court recognized that for almost 40 years the County has, indeed, had plans to expand its water and sewer services to the southern portion of the County. But it also noted that those "plans [were] at best vague, and some plans even indicate[d] that water and sewer services [would] not need to be provided by the government because service [was] already available through Aqua NC." It concluded that the record showed that the "[d]efendants have not taken concrete steps to actually provide water and sewer services to Becker Woods."

[9] We find the district court's observations to be apt. Surely, the authority conferred by § 162A-88 to collect a fee for water and sewer services *to be furnished* to a development must be construed as the

power to collect a user fee from those *who are going to use* the system's services. *See McNeill v. Harnett Cnty.*, 327 N.C. 552, 398 S.E.2d 475, 485 (1990) (characterizing § 162A–88 as "authorizing *user fees* for services 'to be furnished'" (emphasis added)). As such, "to be furnished" can be construed meaningfully only in the context of the developer's needs, such that the developer can expect that it will have water and sewer services within a reasonable time after it completes the construction of the houses. But, as the district court noted, even 10 years after Davis Construction first sought its permits, neither the Water and Sewer District nor the Authority had taken *any* steps to provide service. And Aqua NC stated that it was unaware of any plan of the Water and Sewer District or the Authority "to ever provide water and sewer services to Becker Woods." In these circumstances, we cannot conclude that the impact fees that the County and the Water and Sewer District assessed and collected were for services "to be furnished" *to Becker Woods.*

The North Carolina Court of Appeals in *Point South Properties* addressed this precise factual scenario and similarly concluded that the impact fees collected in that case were *ultra vires.* The court explained that the defendants' "generalized goal of extending water and sewer service to unspecified parts of New Hanover County at an unspecified time in the indefinite future" was not "sufficient to authorize imposition of impact fees for services 'to be furnished.'" *Point South Props.*, 778 S.E.2d at 292. The court noted that, to survive summary judgment, the defendants had to present "evidence from which it might reasonably be found that defendants have ever evidenced *a commitment* to extending water and sewer service to the subject properties, regardless of the timeline." *Id.* at 290 (emphasis added). Concluding that there was "no evidence in the record that defendants have ever planned for water and sewer service 'to be furnished' to the subject properties," *id.* at 292, the court affirmed the trial court's grant of summary judgment to the plaintiffs on their claim that the defendants' imposition of impact fees was *ultra vires, id.* at 294–95.

Like in *Point South Properties,* the defendants in this case have a generalized goal of extending water and sewer services to the entire County, but, as already noted, there is no evidence in the record that they have taken any steps to extend water and sewer services to Becker Woods or that they have even made an official decision to do so. Accordingly, we conclude that the defendants exceeded their statutory authority by requiring Davis Construction to pay the impact fees and therefore affirm the district court's summary judgment in Davis Construction's favor.

IV

[10] Finally, in their second appeal, the defendants contend that the district court erred in awarding Davis Construction attorneys fees. In doing so, the district court relied on N.C. Gen.Stat. § 6–21.7, which provides:

> In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.

The defendants argue that the Water and Sewer District and its successor, the Authority, are the entities that allegedly acted outside their legal authority and that

neither is a "city or county," as required for application of § 6–21.7.

This argument, however, overlooks the fact that the district court found that the County acted outside the scope of its legal authority by requiring Davis Construction to pay the invalid impact fees as a condition of receiving building permits and collecting those fees on behalf of the Water and Sewer District. Accordingly, we conclude that the district court had authority to award attorneys fees.

* * *

For the foregoing reasons, we affirm both the district court's July 8, 2014 judgment and its subsequent award of attorneys fees.

AFFIRMED

Madiagne DIOP, Petitioner,

v.

Loretta E. LYNCH, Attorney General, Respondent.

No. 14–2115.

United States Court of Appeals, Fourth Circuit.

Argued: Oct. 28, 2015.

Decided: Dec. 2, 2015.

Background: Alien, a native of Senegal, who was diagnosed with psychosis, petitioned for review of Board of Immigration Appeals' (BIA) affirmance of immigration judge's (IJ) decision to deny him continuance or administrative closure of his removal proceedings so he could receive mental health evaluation.

Holdings: The Court of Appeals, Wilkinson, Circuit Judge, held that:

(1) IJ's denial of alien's request for mental health evaluation did not deprive him of procedural due process, and

(2) BIA did not err in refusing to remand case to permit alien to apply for withholding of removal.

Petition denied.

1. Constitutional Law ⚷4438

Respondents in removal proceedings are entitled to procedural due process. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 237, 8 U.S.C.A. § 1227.

2. Constitutional Law ⚷4438

To establish a procedural due process violation in removal proceedings, alien must prove both that the defect in the proceedings rendered it fundamentally unfair and that the defect prejudiced the outcome of the case. U.S.C.A. Const. Amend. 5; Immigration and Nationality Act, § 237, 8 U.S.C.A. § 1227.

3. Aliens, Immigration, and Citizenship ⚷403(2)

Immigration judge's (IJ) factual finding of competency in removal proceedings is reviewed under the substantial evidence standard and treated as conclusive unless the evidence presented was such that any reasonable adjudicator would have been compelled to conclude to the contrary. Immigration and Nationality Act, § 237, 8 U.S.C.A. § 1227.

4. Aliens, Immigration, and Citizenship ⚷346

Inherent in process of determining mental competency in removal proceedings is a high degree of flexibility and discretion for the fact-finder to tailor his approach to the case at hand; first, the

an indictment is subject to plain error review, it would be judicial treachery to "elect to ignore" the difference between the omissions from jury instructions at issue in *Johnson* and *Neder* and the omissions from indictments at issue here and in *Cotton*, in the course of holding, *on the authority of Johnson and Neder*, that the omission of an element from an *indictment* is subject to plain error review.

Because the present indictment omits an essential element of the offense charged (and the elements alleged do not otherwise constitute an offense), Benenhaley's conviction for violation of section 841 simply cannot stand. This is a result that our court, like every other Court of Appeals that has misapplied *Apprendi* to section 841, is at pains to avoid. But it is a result that is now analytically and constitutionally required by our holding (however mistaken) in *Promise*.

TRI-COUNTY PAVING, INCORPORATED, Plaintiff-Appellant,

v.

ASHE COUNTY; Ashe County Board of Commissioners, Defendants-Appellees.

No. 01-1931.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 5, 2001.

Decided Feb. 22, 2002.

Paving contractor which had unsuccessfully sought building permit for proposed asphalt plant brought suit under § 1983 challenging county's actions in denying permit, and in subsequently adopting moratorium on asphalt plants and polluting industries development ordinance. The United States District Court for the Western District of North Carolina, Richard L. Voorhees, J., granted county's motion for summary judgment. Contractor appealed. The Court of Appeals, Wilkinson, Chief Judge, held that: (1) refusal to issue permit did not result in a violation of contractor's procedural due process rights; (2) county's actions were rationally related to a legitimate governmental purpose, and did not violate contractor's equal protection and substantive due process rights; and (3) ordinance was not unconstitutionally vague.

Affirmed.

See also, 2000 WL 1811606.

1. Constitutional Law ⚷209, 251

Due process and equal protection clauses of North Carolina Constitution are interpreted as synonymous with their Fourteenth Amendment counterparts. U.S.C.A. Const.Amend. 14; N.C.Const. Art. 1, §§ 18, 19.

2. Constitutional Law ⚷278(1)

To state a valid procedural due process claim, plaintiff must demonstrate (1) that it had a property interest (2) of which it was deprived (3) without due process of law. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⚷277(1)

Fourteenth Amendment's due process clause itself does not create property interests; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an inde-

pendent source such as state law. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⚷277(1)

To have a property interest in a benefit that is protected by due process clause, a person must have a legitimate claim of entitlement to it, and a mere abstract need or desire for it or a unilateral expectation of it is insufficient. U.S.C.A. Const. Amend. 14.

5. Constitutional Law ⚷278(1.1)

Due process of law generally requires that a deprivation of property be preceded by notice and opportunity for hearing appropriate to the nature of the case. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⚷251.5

To determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state. U.S.C.A. Const. Amend. 14.

7. Constitutional Law ⚷278.2(2)

Zoning and Planning ⚷431

Even assuming that paving contractor had a protected property interest in obtaining building permit authorizing construction of asphalt plant, county's refusal to issue permit did not result in a violation of contractor's procedural due process rights, where contractor was provided with abundant predeprivation process, including opportunity to submit documentation necessary to obtain permit, and notice and opportunity to be heard, but failed to take advantage of much of it, and contractor did not take advantage of available postdeprivation remedies following what it believed to be a wrongful denial of permit. U.S.C.A. Const.Amend. 14.

8. Constitutional Law ⚷251.5

Procedural due process does not require certain results; rather, it requires only fair and adequate procedural protections. U.S.C.A. Const.Amend. 14.

9. Civil Rights ⚷109

A due process violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

10. Mandamus ⚷87

Under North Carolina law, mandamus is the proper procedure to compel local officials to issue a building permit when a party shows that it has met all of the permit requirements.

11. Mandamus ⚷1

Under North Carolina law, writ of mandamus is still available through the equitable remedy of mandatory injunction, and substantive grounds for granting the writ have not changed, notwithstanding repeal of statutes giving courts authority to grant writs of mandamus.

12. Constitutional Law ⚷211(2), 213.1(2)

When no fundamental right or suspect classification is at issue, equal protection clause allows a legislative body wide latitude in drawing classifications, and social or economic legislation will be sustained if the classification drawn is rationally related to a legitimate state interest. U.S.C.A. Const.Amend. 14.

13. Constitutional Law ⚷228.2

Zoning and Planning ⚷76, 86, 384.1

County's actions in refusing to issue permit allowing paving contractor to build asphalt plant, enacting one-year moratorium on the building of asphalt plants, and enacting polluting industries development

ordinance which applied to restrict operation of asphalt plants, were rationally related to legitimate state interest in protecting health, safety, general welfare, and property values of county citizens from potential harm caused by facility, and thus did not violate contractor's equal protection rights. U.S.C.A. Const.Amend. 14.

14. Municipal Corporations ⚷63.15(3)

Court in which equal protection challenge to governmental classification is raised will not substitute its policy judgments as to the exercise of the police power for those of a democratically elected local government. U.S.C.A. Const.Amend. 14.

15. Constitutional Law ⚷213.1(2)

Relevant question in performing rational basis review of governmental classification that is challenged as violative of equal protection clause is whether local officials reasonably could have believed that their action was rationally related to a legitimate governmental interest, and the actual motivation for the challenged action is irrelevant. U.S.C.A. Const.Amend. 14.

16. Constitutional Law ⚷211(1), 213.1(2)

A plaintiff can bring an equal protection claim by alleging it has been intentionally treated differently from others similarly situated, and that there is no rational basis for the difference in treatment. U.S.C.A. Const.Amend. 14.

17. Constitutional Law ⚷278(1)

To state a valid substantive due process claim, plaintiff must demonstrate (1) that he had property or a property interest, (2) that the state deprived him of this property or property interest, and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency. U.S.C.A. Const.Amend. 14.

18. Constitutional Law ⚷251.3

Substantive due process protections run only to state action so arbitrary and irrational, and so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies. U.S.C.A. Const. Amend. 14.

19. Constitutional Law ⚷278.2(1)

Zoning and Planning ⚷76, 86, 384.1

County's actions in refusing to issue permit allowing paving contractor to build asphalt plant, and in enacting through its general police power one-year moratorium on the building of asphalt plants, and subsequent polluting industries development ordinance which applied to restrict operation of asphalt plants, were rationally related to legitimate state interest in protecting health, safety, general welfare, and property values of county citizens from potential harm caused by facility, and thus did not violate contractor's substantive due process rights. U.S.C.A. Const.Amend. 14.

20. Zoning and Planning ⚷6, 30

Under North Carolina law, counties may enact ordinances regulating land use in two fashions: pursuant to a comprehensive zoning plan, and pursuant to their police powers. N.C.G.S. §§ 153A-121, 153A-341.

21. Constitutional Law ⚷251.2

Courts ⚷489(1)

Governmental actions that are violative of state law are properly challenged in state courts, which exist, in part, to protect citizens from abuses of state law, and the fact that state courts are available to redress and correct violations of state law belies the existence of a substantive due process claim. U.S.C.A. Const.Amend. 14.

22. Statutes ⚷47

A law is unconstitutionally vague if it is not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, and if men of common intelligence must necessarily guess at its meaning and differ as to its application.

23. Constitutional Law ⚷278.2(1)
Zoning and Planning ⚷28

County polluting industries development ordinance, which required a polluting industry to obtain a special use permit, and prohibited the locating of a polluting industry within specified distances of residences, schools, daycare facilities, hospitals, and nursing homes, was sufficiently clear that people of common intelligence could determine the meaning of its terms, and thus was not unconstitutionally vague.

24. Waters and Water Courses ⚷36
Zoning and Planning ⚷13

States and localities possess traditional and primary power over land and water use.

ARGUED: Donald Merritt Nielsen, Kilpatrick Stockton, L.L.P., Winston-Salem, North Carolina, for Appellant. James Redfern Morgan, Jr., Womble, Carlyle, Sandridge & Rice, P.L.L.C., Winston-Salem, North Carolina, for Appellees. **ON BRIEF:** Stephen R. Berlin, Kilpatrick Stockton, L.L.P., Winston-Salem, North Carolina, for Appellant.

Before WILKINSON, Chief Judge, and WILKINS and LUTTIG, Circuit Judges.

Affirmed by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge WILKINS and Judge LUTTIG joined.

OPINION

WILKINSON, Chief Judge.

Plaintiff Tri-County Paving, Inc. ("TCP") claims that Ashe County, North Carolina and the Ashe County Board of Commissioners (collectively "the County") violated its due process and equal protection rights by not issuing a building permit for TCP's proposed asphalt plant, by enacting a one-year moratorium on the building of asphalt plants, and by subsequently enacting a Polluting Industries Development Ordinance. TCP seeks damages and injunctive relief pursuant to 42 U.S.C. § 1983 and the North Carolina Constitution. The district court granted summary judgment for the County. Because TCP was not deprived of a property interest without due process of law, and because the County's actions were rationally related to a legitimate state interest, we affirm the judgment of the district court.

I.

In the mid-1990's, Tri-County Paving began to consider constructing an asphalt plant on its property in an unincorporated portion of Ashe County, North Carolina. Some time prior to August 1997 and again in August 1998, TCP's principal shareholders, Leonard and Lucian Jordan, informally discussed their plans to construct the plant with George Yates, Chairman of the Ashe County Board of Commissioners. In August 1998, TCP purchased a used asphalt plant and moved the disassembled plant to its property. Leonard Jordan also informed the County Planner that TCP was applying to the North Carolina Department of Environment and Natural Resources ("NCDENR") for an air quality permit to operate the plant and requested a consistency determination. On August 26, 1998, the County Planner wrote that TCP's proposed site did not violate any existing County ordinances.

However, TCP's plans to construct and operate an asphalt plant soon met with community resistance. At the October 5,

1998 Commissioners' meeting, Chairman Yates voiced concerns over TCP's proposed plant and urged the citizens of the Town of West Jefferson to exercise territorial jurisdiction rights to stop the project. The news of TCP's plans quickly spread through the small, rural county. Two citizen advocacy groups, the Ashe County Citizens Against Pollution and the Blue Ridge Environmental Defense League, requested that a discussion of TCP's proposed plant be included on the agenda of the October 19 Commissioners' meeting.

Meanwhile, on October 15, Leonard Jordan's daughter-in-law requested a building permit for the asphalt plant from the County Inspector's Office. She was told that TCP had to submit a set of signed and sealed blueprints before the County could issue a building permit.[1] The following day, TCP returned to the office to again seek a permit. Taking the evidence in the light most favorable to TCP, the Jordans submitted a set of properly signed and sealed blueprints. It is undisputed however that Robert Reed, the Director of Building Inspections, never issued a building permit to TCP for the plant.

Furthermore, TCP's application for a building permit remained deficient in several respects. TCP did not submit a written application for a building permit, even though the North Carolina Building Code and Ashe County ordinances expressly require a written application before a building permit can be issued.[2] Further, it is undisputed that TCP did not have a wastewater permit and that, under North Carolina law, a wastewater permit is required before a building permit can be issued.[3] TCP did not obtain a wastewater permit until October 18, 1999—over a year after TCP applied for a building permit. It is also undisputed that TCP's initial application to the NCDENR for an air permit was incomplete and that the NCDENR did not issue an air permit until May 10, 1999—almost seven months after TCP applied for a building permit. Under North Carolina law, TCP could not have commenced construction of its asphalt plant without an air permit.[4] In fact, on November 17, 1998, the NCDENR called TCP's engineer to inform him that if TCP "commenced construction" of the plant without an air permit, TCP would be in violation of state law. Robert Reed also stated under oath that he "wouldn't have issued a [building] permit without an air quality control [permit]."

Following their failed attempt to obtain a building permit, Leonard and Lucian

1. The North Carolina Building Code ("N.C.B.C."), which applies to all local governments, requires signed and sealed architectural and engineering drawings for commercial projects over 2,500 square feet or valued over $90,000. *See* N.C.B.C. §§ 302.1, 302.3, and 302.4; Ashe County Ordinance § 150.22.

2. N.C.B.C. § 301.3 provides that an application for a building permit "shall be filed with the [local] Inspection Department on a form furnished for that purpose." And in its building regulations, Ashe County Ordinance § 150.21 states that "[w]ritten application shall be made for all permits required by this chapter and shall be made on forms provided by the Department of Inspections."

3. N.C. Gen.Stat. § 130A-338 provides that "[w]here construction, location or relocation is proposed to be done upon a ... place of business ... no permit required for ... construction, location or relocation activity under any provision of general or special law shall be issued until an authorization for wastewater system construction has been issued."

4. N.C. Gen.Stat. § 143-215.108 makes clear that until a party has applied for and received an air permit from NCDENR they may not "[b]uild, erect, use or operate any equipment which may result in the emission of air contaminants or which is likely to cause air pollution."

Jordan attended the October 19, 1998 Commissioners' meeting, where a spirited public debate ensued regarding TCP's proposed asphalt plant. It is clear that the Jordans had notice that TCP's plant would be discussed at the meeting and that the Jordans spoke on behalf of the project during the meeting. The Commissioners ultimately passed, by a vote of 3–2, an ordinance placing a one-year moratorium on the construction of asphalt plants in unincorporated portions of Ashe County. Because the first vote on the moratorium was not unanimous, a second reading was required and the moratorium was scheduled to be taken up at the next Commissioners' meeting on November 18, 1998. The Jordans had notice that TCP's asphalt plant would be discussed at the November meeting by virtue of their attendance at the first meeting. And Leonard Jordan actually attended the second meeting, where the moratorium again passed by a vote of 3–2. The moratorium included a provision allowing a party to appeal to the Commissioners for a variance in cases of severe hardship. However, TCP did not apply for or receive a variance under the moratorium.

Near the end of the moratorium period, the Commissioners passed the Ashe County Polluting Industries Development Ordinance ("PIDO"), which required a polluting industry to obtain a special use permit from the County Planning Department, and prohibited the location of a polluting industry within 1,000 feet of a residence or within 1,320 feet of any school, daycare, hospital or nursing home. *See* Ashe County Ordinance §§ 159.01–159.08, § 159.99. Because it does not have a comprehensive zoning ordinance, the County enacted both the moratorium and the PIDO pursuant to its general police power under N.C. Gen. Stat. § 153A–121, which allows a county to pass ordinances to protect the health, safety, or welfare of its citizens. Like the moratorium, the PIDO contained a variance process and authorized the County Planning Board to issue a variance if strict adherence to the PIDO "would cause an unnecessary hardship." Ashe County Ordinance § 159.07. TCP did not receive a variance or permit to construct its asphalt plant after the enactment of the PIDO.

[1] In July 1999, TCP initiated this action, alleging that the County violated its due process and equal protection rights by denying it a building permit and by passing the moratorium and the PIDO. TCP also alleged that the PIDO was unconstitutionally vague.[5] TCP sought relief pursuant to 42 U.S.C. § 1983 and the North Carolina Constitution.[6] The district court granted summary judgment to the County with respect to all of TCP's claims. The court held that TCP's procedural due process claim failed because TCP did not have a vested property right to construct or operate an asphalt plant. The court concluded that TCP's substantive due process claim also failed because TCP lacked a valid property interest and because the County's actions were not beyond the

5. TCP did not raise a takings claim. Therefore, we have no reason to consider any takings issues raised in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir.2000), *cert. granted*, 533 U.S. 948, 121 S.Ct. 2589, 150 L.Ed.2d 749 (2001).

6. TCP has failed to assert any distinction between its federal and state claims. And North Carolina courts have consistently interpreted the due process and equal protection clauses of the North Carolina Constitution as synonymous with their Fourteenth Amendment counterparts. *See, e.g., Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858, 871 (1994); *In re Moore*, 289 N.C. 95, 221 S.E.2d 307, 309 (1976); *see also Browning-Ferris Indus. v. Wake County*, 905 F.Supp. 312, 323 (E.D.N.C. 1995).

broad limits of legitimate governmental action. The district court similarly rejected TCP's equal protection claim, finding that the County's actions were rationally related to a legitimate governmental end. Finally, the district court rejected TCP's vagueness claim, finding that the terms in the PIDO were "reasonably determinable by people of common intelligence." TCP appeals.

II.

A.

[2–4] We begin by considering TCP's procedural due process claim. In order to state a valid procedural due process claim, TCP must demonstrate: (1) that it had a property interest; (2) of which the County deprived it; (3) without due process of law. *Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810, 826 (4th Cir.1995). It is well-settled that the Fourteenth Amendment itself does not create property interests. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Further, to have a property interest in a benefit, a person must have a "legitimate claim of entitlement to it." *Id.* A mere "abstract need or desire for it" or "a unilateral expectation of it" is insufficient. *Id.*

[5, 6] Due process of law generally requires that a deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). *See also Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). However, "to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state." *Fields v. Durham,* 909 F.2d 94, 97 (4th Cir.1990) (citing *Zinermon v. Burch,* 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)). The procedures due in zoning cases, and by analogy due in cases such as this one involving regulation of land use through general police powers, are not extensive. For example, the Supreme Court held in *City of Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976), that a local government could, consistent with the Due Process Clause, make zoning decisions through the political process in a referendum with no hearings of any kind. *See id.* at 677, 679, 96 S.Ct. 2358; *see also River Park, Inc. v. City of Highland Park,* 23 F.3d 164, 166–67 (7th Cir.1994) (discussing *Eastlake* and concluding that "the procedures 'due' in zoning cases are minimal").

B.

[7, 8] We will assume without deciding that TCP had a property interest in obtaining a building permit to construct an asphalt plant and that the County deprived TCP of this property interest. However, the County did not deprive TCP of its property interest without due process of law. Summary judgment was therefore appropriate on TCP's procedural due process claim. TCP was provided with more than constitutionally adequate pre-and postdeprivation process in this case. TCP failed to take advantage of much of it. And when TCP did take advantage of the available process, the outcome was not what it had hoped for. But procedural due process does not require certain results—it requires only fair and adequate procedural protections.

The County provided TCP with an abundance of predeprivation process. First,

there is no evidence that TCP was denied the opportunity to submit the documentation necessary to qualify for a building permit. TCP was allowed full access to the County Building Inspector's office on numerous occasions and the Jordans often spoke directly with Robert Reed, the Director of Building Inspections, regarding TCP's permit application. Lucian Jordan stated in deposition testimony that he and Leonard Jordan applied for a permit "several times in October and November 1998 and many times after that" and "would just drop in [at Reed's office] and tell them we needed a building permit." Leonard Jordan similarly testified that he and Lucian "asked for a building permit on many occasions." However, TCP never submitted a complete application—it lacked a written application, a wastewater permit, and an air quality permit. The County was under no obligation to issue a building permit without the required documentation and permits. Indeed, if the County had issued a building permit it would have violated North Carolina statutes, the North Carolina Building Code, and an Ashe County ordinance. *See* N.C.B.C. § 301.3 (written application requirement); Ashe County Ordinance § 150.21 (same); N.C. Gen.Stat. § 130A-338 (wastewater permit requirement); N.C. Gen.Stat. § 143-215.108 (air quality permit requirement).

The County also provided TCP with adequate process before the moratorium and the PIDO were enacted by giving TCP both notice and an opportunity to be heard. The Jordans were given notice that TCP's asphalt plant would be discussed at the Commissioners' meeting on October 19, 1998. Lucian Jordan testified that the County Manager informed him and Leonard that "there was a group that was going to speak at the Commissioners' meeting in opposition to [the plant]." The Commissioners' meeting was open to the public and the Jordans attended. At the meeting, members of citizen advocacy groups spoke against the asphalt plant, while the Jordans spoke on behalf of it. The Jordans explained that they had spoken "to Chairman Yates several months ago and told him of their intentions to build a plant," that they had received a consistency determination from the County Planner, and that they "ha[d] been working with [the County Planner] and the [NCDENR] to apply for permits." The Commissioners listened to both sides of the debate before passing the moratorium.

During the October meeting, the Jordans were given notice that the plant and the moratorium would again be discussed at the November 18, 1998 Commissioners' meeting. Leonard Jordan testified that he attended this second meeting and that he also attended the Commissioners' meeting on November 15, 1999, when the PIDO was discussed and passed. TCP was given the opportunity to comment at these public meetings. TCP simply lost the political battle in the County. If, as *Eastlake* teaches, a community can make land-use decisions through a popular referendum with no hearings of any kind and still satisfy the mandates of due process, certainly conducting open community meetings and giving affected parties the opportunity to speak on behalf of their project is constitutionally sufficient.

[9] However, predeprivation process was not the only avenue open to TCP. Postdeprivation process was likewise available. And a "due process violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Fields*, 909 F.2d at 98 (quoting *Zinermon*, 494 U.S. at 126, 110 S.Ct. 975).

There were numerous postdeprivation remedies available to TCP to rectify what it believed to be a wrongful denial of its right to build an asphalt plant. TCP failed to take advantage of them. First, TCP could have applied to the Commissioners for a variance under the moratorium, or could have applied to the County Planning Board for a variance under the PIDO. The moratorium contained a provision allowing parties to apply to the Commissioners for a variance in "situations where a severe hardship may arise," and mandated that the Commissioners "hold a public hearing on the subject" before making a decision on any variance request. The PIDO contained a similar provision allowing parties to apply to the Planning Board for a variance "[w]here strict adherence to the provisions of [the PIDO] would cause an unnecessary hardship." Ashe County Ordinance § 159.07. Yet TCP did not apply for a variance under the moratorium and has never properly applied for one under the PIDO.[7]

[10, 11] Additionally, TCP had remedies available to it in the state courts but chose not to utilize them. For example, TCP could have petitioned a state court for a writ of mandamus to compel the County to issue a building permit if it was unlawfully withheld. North Carolina courts have stated that mandamus is the proper procedure to compel local officials to issue a building permit when a party shows that it has met all of the permit requirements. *See, e.g., Lee v. Walker,* 234 N.C. 687, 68 S.E.2d 664, 671–72 (1952); *Clinard v. City of Winston-Salem,* 173 N.C. 356, 91 S.E. 1039, 1040 (1917); *Buckland v. Town of Haw River,* 141 N.C.App. 460, 541 S.E.2d 497, 499 (2000).[8] TCP also could have filed an inverse condemnation suit in state court. *See, e.g., Robertson v. City of High Point,* 129 N.C.App. 88, 497 S.E.2d 300, 302–03 (1998); *Smith v. City of Charlotte,* 79 N.C.App. 517, 339 S.E.2d 844, 847–48 (1986); N.C. Gen.Stat. § 40A-51. TCP chose not to pursue any of these avenues of relief in the state courts. It therefore cannot complain now that the state did not provide adequate procedures.

III.

A.

[12] We next turn to TCP's claim that the County violated its equal protection rights. The Supreme Court has made clear that when no fundamental right or suspect classification is at issue, the Equal Protection Clause allows a legislative body wide latitude in drawing classifications. Social or economic legislation "will be sustained if the classification drawn ... is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citing *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976)). TCP does not allege that the County has bur-

7. There is some dispute about this. TCP claims that it applied for a variance under the PIDO after the district court issued its opinion in this case. However, there is no evidence in the record to support TCP's claim, and it is undisputed that TCP has not received a variance. In any event, the point is the availability of adequate process, not the outcome.

8. TCP correctly notes that the statutory authority in N.C. Gen.Stat. §§ 1-511 to 1-513 for North Carolina courts to grant a writ of mandamus was repealed effective January 1, 1970. However, North Carolina courts have subsequently held that the writ of mandamus is still available through the equitable remedy of mandatory injunction, and that the substantive grounds for granting the writ have not changed. *See, e.g., Sutton v. Figgatt,* 280 N.C. 89, 185 S.E.2d 97, 99 (1971); *Carter v. N.C. Bd. of Registration,* 86 N.C.App. 308, 357 S.E.2d 705, 709 (1987).

dened a fundamental right or employed a suspect classification. Therefore, we apply the most deferential standard of review to the County's actions under the Equal Protection Clause. *See, e.g., Sylvia*, 48 F.3d at 820; *Int'l Sci. & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1156–57 (4th Cir.1997).

B.

[13, 14] The district court properly granted summary judgment with respect to TCP's equal protection claim. First, as the district court noted, we need look only to the text of the moratorium and the PIDO to uncover the County's legitimate governmental purpose. The moratorium stated that its purpose was "to protect the public health, safety, general welfare, and property values of citizens of Ashe County from potential adverse health effects caused by [asphalt] facilities." The PIDO stated a similar purpose with respect to all polluting industries and went on to make clear that it was intended to "allow for the placement and growth of polluting industrial activities, while maintaining the health, safety and general welfare standards of established residential and commercial areas in Ashe County." Ashe County Ordinance § 159.02. Further, there is no evidence that the County's objectives were any less legitimate when it denied TCP's building permit. Promoting the health, safety, and well-being of the County's citizens are basic governmental functions. And this court will not substitute its policy judgments as to the exercise of the police power for those of a democratically elected local government. *See, e.g., Sylvia*, 48 F.3d at 820.

[15] Second, the County's actions were rationally related to these legitimate ends. We have previously stated that the relevant question under rational-basis review is whether local officials "reasonably could have believed that [their] action was rationally related to a legitimate governmental interest." *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 290 (4th Cir. 1998). The actual motivation for the County's actions are irrelevant. *See, e.g., United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980). Here, the County officials could certainly have believed that passing the moratorium and the PIDO were rationally related to their legitimate interest in protecting the health and safety of Ashe County's citizens. Both the moratorium and the PIDO sought to limit polluting industries' proximity to citizens, especially school children and those in need of medical care. For example, the PIDO prohibited a polluting industry from locating "within 1,000 feet, in any direction, of a residential dwelling unit or commercial building," or "within 1,320 feet of any school, daycare, hospital or nursing home facility." Ashe County Ordinance § 159.06(B). It is rational for a community to decide that it does not want polluting industries, such as asphalt plants, in close proximity to residences, schools, daycare centers, hospitals, or nursing homes.

[16] TCP attempts to save its equal protection claim by arguing that it was treated differently from other "similarly situated" persons or businesses in the County. The Supreme Court made clear in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), that a party can bring an equal protection claim by alleging it has "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564, 120 S.Ct. 1073. TCP argues that it was treated differently from permit applicants who sought other sorts of residential and commercial building per-

mits, and differently from the one existing asphalt plant in Ashe County.

We are unpersuaded. TCP has not provided evidence that it was irrationally or arbitrarily treated differently from similarly situated parties. In fact, TCP has failed to present evidence that the County intentionally treated TCP differently from any similarly situated entity. All TCP has shown is that other businesses in Ashe County were granted building permits while its application was denied, and that a 30–year old asphalt plant continued to operate in the County.

The County's granting of other building permits is irrelevant because TCP has not shown that any other company applied for a permit to construct a facility with environmental and safety concerns similar to an asphalt plant. Nor has TCP shown that any other building permit applicant met with the kind of public apprehension that TCP's proposed plant generated. The existing asphalt plant's continued operation is likewise inapposite because the County's actions dealt with future, further development and did not affect existing industry. Thus, TCP has failed to state a valid equal protection claim.

IV.

A.

[17, 18] Finally, we address TCP's substantive due process claim. In order to validly state such a claim, TCP must demonstrate: "(1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *Sylvia*, 48 F.3d at 827. *See also Front Royal*, 135 F.3d at 287–88. Substantive due process protections "run only to state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." *Rucker v. Harford County*, 946 F.2d 278, 281 (4th. Cir.1991).

B.

[19] The district court properly granted summary judgment with respect to TCP's substantive due process claim. We will again assume without deciding that TCP had a property interest and that the County deprived it of that property interest. However, TCP's claim that the County violated its substantive due process rights fails as a matter of law under the third prong of the *Sylvia* test. The County's actions clearly did not fall beyond the outer limits of legitimate governmental action. In fact, quite the opposite is true. The County's actions were rationally related to a legitimate governmental purpose. Therefore, TCP cannot demonstrate that the County's actions were arbitrary or irrational as required by *Sylvia* and *Rucker*.

[20] TCP argues that the County's enactment of the moratorium and the PIDO pursuant to N.C. Gen.Stat. § 153A–121's general grant of police power, rather than through the specific statutory provisions governing zoning, violated North Carolina law. *See Vulcan Materials Co. v. Iredell County*, 103 N.C.App. 779, 407 S.E.2d 283, 286 (1991) (stating that "[i]f an ordinance substantially affects land use, it must be enacted under the procedures which govern zoning and rezoning"). TCP asserts that the County's alleged violation of state law demonstrates that the County acted arbitrarily and violated TCP's substantive due process rights. However, the district court concluded that the County's regulation of land use under its general police

powers was consistent with North Carolina law. Section 153A-121 explicitly states that "[a] county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens." And North Carolina courts after *Vulcan* have stated that "[c]ounties may enact ordinances regulating land use in two fashions: one, pursuant to a comprehensive zoning plan, N.C. Gen.Stat. § 153A-341 (1991), and two, pursuant to their police powers, N.C. Gen.Stat. § 153A-121 (1991)." *Maynor v. Onslow County*, 127 N.C.App. 102, 488 S.E.2d 289, 291-92 (1997).

[21] More importantly, whether the County violated state law in regulating land use is not determinative of whether TCP's substantive due process rights were violated. If state law is transgressed, state courts are open to redress that violation and remedy an unlawful deprivation of property. We have repeatedly stated that "governmental actions that are violative of state law are properly challenged in state courts which exist, in part, to protect citizens from abuses of state law." *Front Royal*, 135 F.3d at 288. *See also Sylvia*, 48 F.3d at 829; *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir.1995). And the fact that state courts are available to redress and correct violations of state law "belies the existence of a substantive due process claim." *Sylvia*, 48 F.3d at 829. As previously discussed, the North Carolina courts were available for TCP to challenge the County's actions. But TCP did nothing to pursue its claim in state court. TCP cannot now argue that the County's alleged violation of state law infringed its substantive due process rights.

[22, 23] This conclusion is entirely consistent with our opinion in *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir.1983), where a developer claimed that Greenville County's failure to issue him a building permit for construction of low-income housing violated due process. In *Scott*, the South Carolina Supreme Court had previously concluded that there was "no basis for the intrusion by the County Council into the zoning certificate and building permit process" at issue. *Scott*, 716 F.2d at 1419 (quoting *Scott v. Carter*, 273 S.C. 509, 257 S.E.2d 719, 722 (1979)). Greenville County's action was not related to any legitimate interest such as protecting the health or welfare of county residents. This court therefore concluded that, even if Scott failed to prove racially discriminatory motivation in the county's decisions, summary judgment for the county was inappropriate because Scott's property interest had been "taken from him by manifest arbitrariness and unfairness." *Scott*, 716 F.2d at 1421. In contrast, Ashe County's actions in this case were far from arbitrary—they were grounded in rational health and safety concerns.[9]

V.

[24] States and localities possess "traditional and primary power over land and water use." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001). Indeed, state and local governments have established political and judi-

9. TCP also alleges that the PIDO is unconstitutionally vague or indefinite. A law is unconstitutionally vague if it is not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," and if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). We agree with the district court that the PIDO is sufficiently clear and that people of common intelligence can determine the meaning of its terms.

cial procedures to resolve just the sort of question presented by this case. North Carolina law did not run afoul of the Fourteenth Amendment's basic guarantee of due process. To go further and essentially require that law to guarantee outcomes is to constitutionalize what remains at heart a local democratic dispute. We decline to do so, lest we wrest decisions from the very people who will be most affected by them.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

RGC (USA) MINERAL SANDS, INCORPORATED, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

International Association of Machinists and Aerospace Workers, Respondent-Intervenor.

National Labor Relations Board, Petitioner,

International Association of Machinists and Aerospace Workers, Petitioner-Intervenor,

v.

RGC (USA) Mineral Sands, Incorporated, Respondent.

Nos. 01-1174, 01-1371.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 2, 2001.

Decided Feb. 22, 2002.

Employer petitioned for review of order of the National Labor Relations Board (NLRB), 2001 WL 44225, which found that employer had engaged in unfair labor practices, and that its employees had staged an unfair labor practice strike, and NLRB cross-petitioned for enforcement of order. The Court of Appeals, Michael, Circuit Judge, held that: (1) substantial evidence supported finding that employer had retaliated against employees for engaging in protected concerted activity when it assigned certain employees to swing shifts; (2) employer could not rely on its claimed authority under collective bargaining agreement (CBA) to take such actions as a defense to unfair labor practice charge; and (3) substantial evidence supported determination that strike was an unfair labor practice strike.

Petition denied, cross-petition granted, and order enforced.

1. Labor Relations ⚷680

Court of Appeals reviews findings of fact by the National Labor Relations Board (NLRB) only to determine whether they are supported by substantial evidence in the record as a whole.

Judge Grant

1 at the beginning of a case.
2 And secondly in comparing the harm to the
3 Plaintiff - - balancing the harm to the Plaintiff versus a
4 potential prejudice to the Defendants, it falls that there
5 will be greater prejudice to the Defendants in this
6 situation if the County is not able and Defendants are not
7 able to respond and put on their case to respond to the
8 allegations set forth in these complaints. You heard - -
9 THE COURT: I will readily admit that I do
10 not fully understand the - - and know the appellate rules.
11 But would you not have an opportunity if I were to deny your
12 Motion to Set Aside the Default to appeal that ruling?
13 MR. MCREE: I think we would have the
14 opportunity but I would point out to Your Honor that any - -
15 as the case I cited to you, any reasonable doubt - -
16 THE COURT: I understand.
17 MR. MCREE: - - should fall on the side of
18 the parties seeking relief.
19 THE COURT: Well, I'm going to do that.
20 For one reason, it will give us on the trial bench some
21 clarity as to how we are to proceed in this particular
22 situation where it never happens again. So I'm going to
23 deny your Motion to Set Aside the default. And you can
24 appeal my ruling and then the Court of Appeals can give us
25 some clarity on how we are to proceed on that.

WESTLAW

10A Fed. Prac. & Proc. Civ. § 2685 (3d ed.)

Federal Practice & Procedure
Federal Rules Of Civil Procedure

§ 2685Court's Entry of a Default Judgment—Discretion

Federal Rules Of Civil Procedure Federal Practice & Procedure *(Approx. 29 pages)*

The Late Charles Alan Wright , Arthur R. Miller , Mary Kay Kane , Richard L. Marcus[a133], Adam N. Steinman[a134]

Federal Rules of Civil Procedure
Chapter 8. Judgment
Mary Kay Kane[a409]
Rule 55. Default
C. Default Judgments

Link to Monthly Supplemental Service

§ 2685 Court's Entry of a Default Judgment—Discretion

Primary Authority
Fed. R. Civ. P. 55

Forms
West's Federal Forms §§ 4661 to 4665

When an application is made to the court under Rule 55(b)(2) for the entry of a judgment by default, the district judge is required to exercise sound judicial discretion in determining whether the judgment should be entered.[1] The ability of the court to exercise its discretion and refuse to enter a default judgment is made effective by the two requirements in Rule 55(b)(2) that an application must be presented to the court for the entry of judgment and that notice of the application must be sent to any defaulting party who has appeared. The latter requirement enables the defaulting party to show cause to the court why a default judgment should not be entered or why the requested relief should not be granted.[2] This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right,[3] even when defendant is technically in default and that fact has been noted under Rule 55(a). Furthermore, as is discussed more fully later, Rule 55(c) enables the court to exercise its discretion a second time by setting aside a default in appropriate circumstances.[4]

In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record before it.[5] Among these are the amount of money potentially involved;[6] whether material issues of fact[7] or issues of substantial public importance are at issue;[8] whether the default is largely technical;[9] whether plaintiff has been substantially prejudiced by the delay involved;[10] and whether the grounds for default are clearly established[11] or are in doubt.[12] Furthermore, the court may consider how harsh an effect a default judgment might have;[13] or whether the default was caused by a good-faith mistake[14] or by excusable[15] or inexcusable[16] neglect on the part of the defendant. Plaintiff's actions also may be relevant; if plaintiff has engaged in a course of delay or has sought numerous continuances, the court may determine that a default judgment would not be appropriate.[17] Finally, the court may consider whether it later would be obliged to set aside the default on defendant's motion,[18] since it would be meaningless to enter the judgment as a matter of course if that decision meant that the court immediately would be required to take up the question of whether it should be set aside.

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SELECTED TOPICS

Default Judgment

Opening or Setting Aside Default

Secondary Sources

"Excusable Neglect" Warranting Relief from Default Judgment

24 Am. Jur. Proof of Facts 2d 705 (Originally published in 1980)

...Default judgments are a generally recognized judicial tool, utilized primarily as a means of preventing procrastinating parties from causing unnecessary delays in a court's calendar or in the actual tr...

Scope and character of meritorious defense as condition of relief from judgment

174 A.L.R. 10 (Originally published in 1948)

...The present annotation, as its title indicates, is concerned with questions relating to the nature and characteristics of a meritorious defense, where the showing of the existence of such a defense is ...

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers

21 A.L.R.3d 1255 (Originally published in 1968)

...This annotation will review those cases where it was sought to set aside a default or default judgment on the basis that the defaulting party's attorney was mistaken as to the time or place for appearance.

See More Secondary Sources

Briefs

Brief of the Plaintiff-Appellee

2012 WL 5179406
Robert T. STOOKSBURY, Jr., Plaintiff-Appellee, v. Michael ROSS et al, Defendants-Appellants.
United States Court of Appeals, Sixth Circuit.
October 09, 2012

...Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellee Robert T. Stooksbury, Jr. makes the following disclosure: 1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below...

Brief of Appellee

2000 WL 35543918
UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, Plaintiff/Appellee, v. PROGRESS RAIL SERVICES CORPORATION, an Alabama corporation, Defendant/Appellant.
United States Court of Appeals, Eighth Circuit.
January 01, 2000

...FN1. Although the index is not paginated, Union Pacific has cited to the appendix in that manner as required by FRAP 28(e). The page numbering by Union Pacific excludes the dividers placed in the appen...

Corrected Brief of Appellants

2012 WL 4054284
Robert T. STOOKSBURY, Jr., Plaintiff-Appellee, v. Michael L. ROSS, et al., Defendants-Appellants.

sufficiently served with process, and against a defendant, who filed a motion to dismiss the complaint two days late, would be denied. Hazzard v. Weinberger, D.C.N.Y.1974, 382 F.Supp. 225, affirmed without opinion C.A.2d, 1975, 519 F.2d 1397.

Witt v. Arizona ex rel. Eyman, D.C.Ariz.1972, 343 F.Supp. 392.

Kocenko v. Buskirk, D.C.Pa.1972, 56 F.R.D. 14.

U.S. ex rel. Mercer v. Kelly, D.C.Pa.1970, 50 F.R.D. 149.

Hanley v. Volpe, D.C.Wis.1970, 48 F.R.D. 387.

Wallace v. De Werd, D.C.Virgin Islands 1969, 47 F.R.D. 4.

In de Antonio v. Solomon, D.C.Mass.1967, 42 F.R.D. 320, the court refused to enter a default against defendant for failure to plead, when instead he asserted the privilege against self-incrimination.

In U. S. v. Wagner, D.C.N.Y.1964, 235 F.Supp. 854, the court granted the United States a default judgment against defendant who failed to answer before the time to do so expired, and who made no attempt to excuse his failure to answer.

In ICC v. Smith, D.C.Pa.1949, 82 F.Supp. 39, defendant's counsel had been in court three times and had made clear defendant's position and plaintiff relied on a motion for default judgment without introducing evidence to support its prayer for an injunction against future violations of Interstate Commerce Commission regulations. Although defendant had not filed an answer within the time required or entered an appearance until after the motion for default judgment was filed, the district court denied a motion for a default judgment without prejudice and proceeded to a final hearing on the merits.

See also
Johnson v. State, App.1987, 739 P.2d 411, 413, 112 Idaho 1112, **citing Wright, Miller & Kane.**

Lawler Mobile Homes, Inc. v. Ellison, Ala.App.1978, 361 So.2d 1092, 1094, **citing Wright & Miller.**

Citizens Nat. Bank Grant County v. First Nat. Bank in Marion, 1975, 331 N.E.2d 471, 477, 165 Ind.App. 116, **citing Wright & Miller.**

2

Allow to show cause
Case v. Winters, Alaska 1984, 689 P.2d 467, 470, **citing Wright, Miller & Kane.**

3

Not as of right
Bermudez v. Reid, C.A.2d, 1984, 733 F.2d 18, 21, citing Wright, Miller & Kane, certiorari denied 105 S.Ct. 232, 469 U.S. 874, 83 L.Ed.2d 161.

Maggette v. Dalsheim, C.A.2d, 1983, 709 F.2d 800.

Eastern Elec. Corp. of New Jersey v. Shoemaker Const. Co., 652 F. Supp. 2d 599, 604 (E.D. Pa. 2009), **citing Wright, Miller & Kane.**

The entry of default does not automatically entitle the non-defaulting party to entry of a default judgment regardless of the fact that the effect of the entry of a default is to deem the allegations admitted; rather, the decision to enter a default judgment is discretionary. Penpower Technology Ltd. v. S.P.C. Technology, 627 F. Supp. 2d 1083 (N.D. Cal. 2008).

A party who has made a proper showing for a default judgment against a defendant who failed to plead or otherwise defend against the complaint is not entitled to a default judgment as of right; rather, the entry of default is left to the sound judicial discretion of the district court, with a preference for disposal of cases on the merits whenever practicable. Sentry Select Ins. Co. v. LBL Skysystems (U.S.A.), Inc., D.C.Pa.2007, 486 F.Supp.2d 496.

A party is not entitled to a default judgment as a matter of right, even when defendant is technically in default. Settlement Funding, LLC v. Garcia, 533 F. Supp. 2d 685 (W.D. Tex. 2006).

Mere entry of default by the clerk does not in itself warrant the entry of a default judgment by the court; rather, the court must find that there is sufficient basis in the pleadings for judgment to be entered. GMAC Commercial Mortgage Corp. v. Maitland Hotel Assocs., D.C.Fla.2002, 218 F.Supp.2d 1355.

Even if the entry of a default has been made by the court clerk, granting a default judgment is not automatic; rather, it is left to the sound discretion of the court. PepsiCo, Inc. v. Triunfo-Mex, Inc., D.C.Cal.1999. 189 F.R.D. 431.

Hicks v. Brysch, D.C.Tex.1997, 989 F.Supp. 797.

Erwin DeMarino Trucking Co. v. Jackson, D.C.N.Y.1993, 838 F.Supp. 160.

Robinson v. Griffith, D.C.La.1985, 108 F.R.D. 152, 156, **citing Wright, Miller & Kane.**

Court has discretion to require proof of the necessary facts to support a valid cause of action and if those facts are lacking the court can choose not to enter a default judgment. Peerless Indus., Inc. v. Herrin Illinois Cafe, Inc., D.C.Mo.1984, 593 F.Supp. 1339.

Indian Political Action Comm. v. Tribal Executive Comm. of Minnesota Chippewa Tribe, D.C.Minn.1976, 416 F.Supp. 655.

Hanley v. Volpe, D.C.Wis.1970, 48 F.R.D. 387.

Wallace v. De Werd, D.C.Virgin Islands 1969, 47 F.R.D. 4.

Henry v. Metropolitan Life Ins. Co., D.C.Va.1942, 3 F.R.D. 142.

See also
Ricks v. Weinrauch, App.1987. 360 S.E.2d 535, 536, 293 S.C. 372, **citing Wright, Miller & Kane.**

Feeney v. Abdelahad. 1978. 372 N.E.2d 1315, 1316, 6 Mass.App. 849, **citing Wright & Miller**.

4

Rule 55(c)
See §§ 2692 to 2700.

5

Numerous factors
In Ackra Direct Marketing Corp. v. Fingerhut Corp., C.A.8th, 1996, 86 F.3d 852, the court ruled that a default judgment for failure to defend was appropriate when the party's conduct includes willful violations of court rules, contumacious conduct, or intentional delays. This case utilized Rule 55(b), rather than Rule 37, although it appears that the default was entered as a sanction. Thus, it may be questionable authority.

The entry of a default judgment against the alleged victims of a bar fight was warranted in an action seeking a declaration that the insurer was not obligated to defend or indemnify its insured in an underlying state-court lawsuit arising out of the bar fight; the insurer's interest in clarity and finality would have been substantially undermined if the court's ruling could not be applied to the alleged victims of the fight, and the alleged victims did not have any litigable defenses to the insurer's request for a declaratory judgment. Great American E & S Ins. Co. v. John P. Cawley, Ltd., 866 F. Supp. 2d 437 (E.D. Pa. 2011).

Painters' industry pension fund, whose trustees were fiduciaries and plan administrators for multiemployer employee benefit pension plans, was entitled to a default judgment as to the liability of a proprietor of an unincorporated business for his failure to timely pay contributions to the fund and to supply records necessary to permit the fund to determine if the proprietor was making the required payments, as required under the terms of the labor

Vested Rights

CHAPTER 19

When development regulations are adopted or amended, projects that are either under way or already in existence may be inconsistent with the new requirements. An issue then arises—must the development conform to the preexisting or the new regulation?

This problem involves two closely related issues. The first is whether a landowner has a statutory or constitutional right to complete work or continue a land use that is contrary to newly adopted standards. That issue is one of vested rights and it is the subject of this chapter. The second issue is what local governments can do through the ordinance itself to allow, restrict, or terminate situations that do not conform to new ordinance requirements. This issue, regarding limits on nonconformities, is discussed in Chapter 20.

Defining the point at which a development secures legal protection from changes in ordinance requirements has been subject to substantial litigation and legislation in North Carolina. There are three methods to establish a vested right to continue development even though requirements change. The first is to secure a judicially established common law vested right by making substantial expenditures in good faith reliance on a valid government approval, with substantial detriment if compliance with the current law is mandated.[1] The second is to qualify for a statutory vested right. The legislature has created three statutory vested rights. The first is based on the issuance of a building permit. The second is based on local government approval of site specific or phased development plans that can vest development rights for two to five years. The third is approval of a development agreement that can require the application of existing ordinances to a project for up to twenty years. The third method for establishing a vested right to ongoing development amidst changed mandates is for the ordinance itself to expressly state that development may continue under previous requirements. This is accomplished with language indicating that amendments to the ordinance shall apply prospectively.

1. For a review of North Carolina case law before the creation of the statutory vested right, see PHILIP P. GREEN, JR., THE DOCTRINE OF "VESTED RIGHTS" IN NORTH CAROLINA ZONING LAW 3–4 (1986). For a national overview, see CHARLES L. SIEMAN ET AL., VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS (1982).

It is also important to note that any vested rights that do exist, like all other land use regulatory approvals, run with the land.[2] They are not a personal or contractual right of the landowner or occupant that can be shifted to some other parcel of land.[3] Rather, the right is attached to the parcel for which the right or permit is secured and may be exercised by subsequent owners of that parcel.

Common Law Vested Rights

The common law vested right balances two legitimate interests. On one side is the landowner's right to rely on a specific representation by a government. On the other side is the public interest in having current land use regulations uniformly applied in the community.[4]

2. Several land use statutes make this explicit. Sections 153A-344.1(f)(1) and 160A-385.1(f)(1) of the North Carolina General Statutes (hereinafter G.S.) provide that the statutory site specific development plan and phased development plan vested rights attach to and run with the land rather than being a personal right of the landowner. G.S. 153A-349.11 and 160A-400.30 require that development agreements be recorded in the county where the affected property is located and that the burdens and benefits of such agreements be binding on and inure to all successors in interest to the original parties to the agreement. This limitation is otherwise usually implied. *See generally* 3 ARDEN H. RATHKOPF AND DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING, § 61-50 (Edward H. Zeigler Jr., ed. 2006). *But see* BBC Land & Dev., Inc. v. Butts Cnty., 281 Ga. 472, 640 S.E.2d 33 (2007) (as vested rights require substantial expenditures by person claiming the right, since subsequent purchasers have made no such expenditures, they have no vested rights).

3. Griffin v. Town of Unionville, No. 3:05-cv-514-RJC, 2008 WL 697634 (W.D.N.C. Mar. 11, 2008).

4. Under principles of equitable estoppel, a party is "prevented by his own acts from claiming a right to [the] detriment of [an]other party who was entitled to rely on such conduct and acted accordingly." BLACKS'S LAW DICTIONARY 494 (5th ed. 1979). As a general rule, estoppel does not operate against government units on zoning matters. Raleigh v. Fisher, 232 N.C. 629, 61 S.E.2d 897 (1950); Mecklenburg Cnty. v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977). However, the common law vested right is conceptually similar to the doctrine of equitable estoppel.

The common law vested right is established only when each of the four following tests are met: (1) the owner has made substantial expenditures; (2) the expenditures were made in good faith; (3) the expenditures were made in reliance on valid government approval, if such was required; and (4) the owner would be harmed without a vested right.[5] The cases that establish and apply each of these tests are discussed in this section. Table 19.1 summarizes them.

Applicability

North Carolina courts have long recognized that adoption, amendment, and repeal of land use ordinances are matters within a local governing board's legislative discretion.[6] Citizens, landowners, and neighbors have no vested right to existing zoning classifications. In *McKinney v. City of High Point*,[7] the court held that "[t]he adoption of a zoning ordinance does not confer upon citizens . . . any vested right to have the ordinance remain forever in force, inviolate and unchanged."[8] Similarly, the court dismissed neighbors' challenge of a Wilmington rezoning to a more intensive use, ruling that a zoning ordinance might "be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the

Table 19.1 **Overview of Common Law Vested Rights Cases in North Carolina**

Case	Court	Date	Basis for Result
Vested Right Held To Exist			
Supply Co.	Sup. Ct.	1932	Commencement of work under ordinance
Hastings	Sup. Ct.	1960	Completion of project
Smith	Sup. Ct.	1969	Reliance on approval
Thomasville	Ct. App.	1973	Good faith expenditures
Transland	Ct. App	1973	Completion of project
Campsites	Sup. Ct.	1975	No permits required
Sunderhaus	Ct. App.	1989	Expenditure relative to total cost
Coen	Ct. App.	1990	Expenditure of labor
Cardwell	Ct. App.	1992	Reliance on approval
Woodlief	Ct. App.	2006	Prior ordinance applicable
Robins	Sup. Ct.	2007	Provisions of ordinance
Sandy Mush	Ct. App.	2007	Building permit on hold during moratorium
Morris Communications	Sup. Ct.	2011	Work to relocate sign under way
Vested Right Held Not To Exist			
Fisher	Sup. Ct.	1950	Improperly issued permit
Stowe	Sup. Ct.	1961	No good faith
Warner	Sup. Ct.	1964	No reliance
Tadlock	Sup. Ct.	1964	No expansion allowed
Austin	Sup. Ct.	1966	No harm to owner
Keiger	Sup. Ct.	1972	No good faith
Westbery	Ct. App.	1977	Mistakenly issued permit
Pack	Ct. App.	1988	No expansion allowed
Russell	Ct. App.	1990	No detriment
Simpson	Ct. App.	1994	Zoning permit not a "building permit"
BFI	Ct. App.	1997	Pre-permit expenditures not reliance, no detriment
Koontz	Ct. App.	1998	No good faith
Kirkpatrick	Ct. App.	2000	No good faith
PNE	Ct. App.	2001	No good faith
Huntington Properties	Ct. App.	2002	No expenditures in reliance on approval
MLC	Ct. App.	2011	No valid permit
Wilson	Ct. App.	2011	Improperly issued permit

5. Browning-Ferris Indus. of S. Atl., Inc. v. Guilford Cnty. Bd. of Adjustment, 126 N.C. App. 168, 171–72, 484 S.E.2d 411, 414 (1997).

6. See Chapter 11 regarding the discretionary nature of legislative land use regulatory decisions.

7. 239 N.C. 232, 79 S.E.2d 730 (1954). In this case landowners sued the city for damages when the city built a water tank on a nearby lot in a residential zoning district. Public utilities were not a permitted use in the district. One of the owners' claims was that the zoning ordinance created a vested right to that district's remaining a residential area. *See also* Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972).

8. *McKinney*, 239 N.C. at 237, 79 S.E.2d at 734 (citations omitted). The court continued:

> A zoning ordinance is not a contract between the municipality and its citizens. The adoption of such ordinance is a valid exercise of the police power, which is not exhausted by its use. It being a law enacted in the exercise of the police power granted the municipality, no one can acquire a vested right therein. It is subject to amendment or repeal at the will of the governing agency which created it.

Id. Also, in *Marren v. Gamble*, 237 N.C. 680, 75 S.E.2d 880 (1953), the court in the previous year had noted that "a zoning ordinance does not vest in a property owner the right that the restrictions imposed by it upon his property . . . shall remain unaltered." *Id.* at 684, 75 S.E.2d at 883. These state cases are consistent with a long-standing federal constitutional law principle that newly adopted development and land use regulations can be applied to preexisting property rights. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (application of restrictions on location of brick-making operations); Reinman v. Little Rock, 237 U.S. 171 (1914) (application of regulations on location of livery stable); Mugler v. Kansas, 123 U.S. 623 (1887) (application of regulation on operation of a brewery). Also see the discussion of continuation of nonconformities in Chapter 20.

best interests of the public."[9] An expectation that a permit may be issued is not a property right that receives due process protection.[10] Property owners and neighbors therefore clearly have no abstract vested right to unchanging development regulations.

However, when property owners take action in reliance on a government's approval of an individual project under an ordinance, they may obtain a legal right—a vested right—to complete and use a project even if it is inconsistent with newly adopted ordinance requirements. The crux of the question is determining when a landowner's interest in development becomes a property right. Once it passes that threshold—once it *vests*—that interest becomes a protected right that can be restricted only within constitutional limitations.[11] Frequently the key question in a vested rights dispute is not whether a vested property right should be protected but, rather, precisely when such a right is created.[12]

Legal Basis

Early cases based the common law vested right on provisions of the ordinances involved. Later cases confirm that state and federal constitutions provide some protection from changes for projects in which parties have a vested right.

Most of the early cases on this issue turned on provisions in the ordinance itself and are thus more "nonconforming use" cases than "vested rights" cases.[13] In *Stowe v. Burke*,[14] the court acknowledged that as of 1961, a clear common law vested right had yet to be established in North Carolina jurisprudence.

The first North Carolina case finding a vested right to exist apart from the nonconforming use provisions of an ordinance was the 1964 decision of *Warner v. W & O, Inc.*[15] The court concluded that the landowner "[was] protected if, acting in good faith, he had made expenditures on the faith of the permit at a time when the act was lawful."[16] Although two more cases from the mid-1960s returned to the ordinance-based analysis of "completion/expansion" of a nonconforming use,[17] in 1969 the court in *Town of Hillsborough v. Smith*[18] firmly embraced the traditional common law vested rights analysis. In this opinion the court rejected the concept that the vested right was based on ordinance provisions such as those for nonconforming uses or variances in hardship situations.[19]

In *Godfrey v. Zoning Board of Adjustment*,[20] the court noted the constitutional foundation for vested rights:

> The "vested rights" doctrine has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances. The doctrine is rooted in the "due process of law" and the "law of the land" clauses of the federal and state constitutions.
>
> It has been said that the solution to the "vested rights" question "has required the reconciliation of the doctrine of separation of powers with the constitutional requirements of substantive due process, a balancing of the interests of the public as a whole and those of the individual property owners, and, in many cases, the elements of good faith and bad faith and resort to equity and equitable principles.[21]

9. Zopfi v. City of Wilmington, 273 N.C. 430, 434, 160 S.E.2d 325, 331 (1968).

10. PNE AOA Media, LLC v. Jackson Cnty., 146 N.C. App. 470, 481, 554 S.E.2d 657, 664 (2001).

11. The court in *Adams v. Village of Wesley Chapel*, 259 F. App'x 545, 551 (4th Cir. 2007), noted that a town must recognize vested rights to develop established under prior county zoning and that doing so is not an equal protection violation.

12. Another key question is how long a vested right exists once established. While statutory vested rights have explicit expiration dates, this is not the case with common law vested rights. One case has suggested that while a vested right does not have an unlimited life, the owner must be afforded a reasonable time to complete the project. Mays-Ott Co., Inc. v. Town of Nags Head, 751 F. Supp. 82, 87 (E.D.N.C. 1990).

13. *In re W. P. Rose Builders' Supply Co.*, 202 N.C. 496, 163 S.E. 462 (1932), involved an ordinance that exempted a particular project if construction was commenced within ninety days, and the case turned on what constituted "commencement." The court ruled that placement of a grease dispenser and goods to be sold constituted "starting" a gasoline filling station. The basis of the vested right was the ordinance provision itself, as the court noted: "It is deemed unnecessary to decide the constitutionality of the entire zoning ordinance . . . if, as a matter of fact, the property of the plaintiffs is exempt from the operation of the ordinance by the terms thereof." *Id.* at 498, 163 S.E. at 463 (1932).

14. 255 N.C. 527, 534, 122 S.E.2d 374, 379 (1961).

15. 263 N.C. 37, 138 S.E.2d 782 (1964).

16. *Id.* at 41, 138 S.E.2d at 785.

17. Austin v. Brunnemer, 266 N.C. 697, 147 S.E.2d 182 (1966); Town of Garner v. Weston, 263 N.C. 487, 139 S.E.2d 642 (1965).

18. 276 N.C. 48, 170 S.E.2d 904 (1969). *See also* River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990).

19. The court ruled:

> The defendants do not contend that, by reason of exceptional hardship, the municipal authorities should exercise a discretion granted to them by ordinance. Their contention is that they have a legal right to build, which right the city cannot take from them and for which no permit is authorized by the ordinance.

276 N.C. at 57, 170 S.E.2d at 911.

20. 317 N.C. 51, 344 S.E.2d 272 (1986).

21. *Id.* at 62, 344 S.E.2d at 274 (citations omitted). N.C. CONST. art. I, § 19, mandates due process of law in the deprivation of privileges and property. Other provisions of the state constitution also support a mandatory vested right. One is the provision on ex post facto laws. N.C. CONST. art. I, § 16. In *Stanback v. Citizens National Bank*, 197 N.C. 292, 148 S.E. 313 (1929), a case involving revocation of a trust, the court held that statutes might not be retroactively applied to disturb vested, as opposed to contingent, rights. On the other hand, the provisions of the state constitution prohibiting monopolies and exclusive emoluments have been applied to limit the vesting of property rights in nonconforming uses. N.C. CONST. art. I, § 32. Burden v. Town of Ahoskie, 198 N.C. 92, 150 S.E. 808 (1929); MacRae v. City of Fayetteville, 198 N.C. 51, 150 S.E. 810 (1929); Town of Clinton v. Standard Oil Co., 193 N.C. 432, 137 S.E. 183 (1927).

Requirements

To establish a common law vested right in North Carolina, the landowner or the developer must have made substantial expenditures in good faith reliance on a valid government approval, with resulting detriment if he or she is required to comply with the newly adopted requirements. Each aspect of this test must be met in order for a vested right to be established.

Substantial Expenditures

The provision for substantial expenditures, sometimes phrased as "a substantial beginning of construction," is necessary to establish that the owner would suffer undue losses if required to comply with the new requirements.[22] A generalized plan, idea, or concept to develop property is inadequate to establish a common law vested right. A substantial action must have been taken to carry out the plan, action that involves the expenditure of money, time, or effort.

Actual construction on site is not required to establish a substantial expenditure. In *Town of Hillsborough v. Smith*,[23] the defendants were in the process of instituting a dry cleaning business when a zoning ordinance was adopted restricting the property involved to residential use. The court ruled that physical construction on the site was not required to establish a vested right: "It is not the giving of notice to the town, through a change in the appearance of the land, which creates the vested property in the holder of the permit. The basis of the right . . . is his change of his own position in bona fide reliance upon the permit."[24] The expenditures and the binding contracts for the acquisition of land, construction materials, or equipment were held to be qualified expenditures.

On the other hand, actual construction on the site does not automatically establish a vested right, for there must still be substantial expenditures. For example, in *Austin v. Brunnemer*,[25] the petitioner purchased a lot to establish an auto body shop and garage. The lot was graded and fenced, and a sign was erected advertising the proposed use before the adoption of a zoning ordinance prohibiting that use. The court held that a vested right had not been established as a matter of law.

Also the requisite level of expenditure is not an absolute amount but is proportional to the cost of the project. In *Sunderhaus v. Board of Adjustment*,[26] the plaintiffs were installing a satellite dish television antenna in their yard. A trench had been dug and PVC pipe installed, but the dish itself and its concrete base had not been installed when the zoning ordinance was amended to preclude placement of the dish in the proposed location. The court concluded that, given the relatively small scale of the project, the digging of the trench constituted a significant amount of the work necessary for the entire project and a vested right had therefore been established.

Substantial expenditures of time, labor, and energy as well as expenditures of money or actual construction may be considered in establishing a vested right. For example, in *Randolph County v. Coen*,[27] a landowner had formed a partnership to initiate a business to sell heavy equipment, had secured the required business licenses, and had fully prepared the site. Site preparation in this instance involved only clearing and grading an area for parking heavy trucks and installing a small utility building and sign. The court held that, even though a significant expenditure of money had not been made before this initial zoning of the site, a significant expenditure of labor had been made and it constituted the substantial beginning required to establish a vested right.[28]

22. This is similar to a required showing of a materially changed position in a traditional estoppel analysis.

23. 276 N.C. 48, 170 S.E.2d 904 (1969). The detailed sequence of events was as follows: On May 3, 1968, the defendant received a building permit for the business. There was conflicting testimony on whether the owner was advised of the pending zoning adoption at this time. Constructive notice through newspaper advertisement was apparently available, and town officials testified that actual notice was provided. The defendant denied receiving any knowledge before June 11. This knowledge is a factor in the second portion of the vested rights test—that the expenditures be made in good faith. The jury found for the defendant on this factual question, and the court held the jury's finding to be binding. This case predates the 1985 legislation establishing a vested right upon issuance of a building permit. On May 22 the defendant purchased the property for $9,500 and entered into a contract for construction of a $15,000 building on the site; on May 23 the corners of the proposed building were staked; on May 24 an order for dry cleaning equipment was placed; on May 27 the zoning ordinance was adopted; on June 5 and 11 additional equipment was contracted for; on June 11 the town revoked the building permit; on July 8 work commenced with the bulldozing of an existing house on the lot; and on July 11 the town instituted litigation. Despite prevailing in the litigation, the plaintiff eventually abandoned plans for a commercial structure on the lot. A brick single-family ranch house was eventually constructed on the lot. *See also* Transland Props., Inc. v. Bd. of Adjustment, 18 N.C. App. 712, 198 S.E.2d 1 (1973). By contrast, see *Sterling Homes Corp. v. Anne Arundel County*, 116 Md. App. 206, 227–28, 695 A.2d 1238, 1249 (1997) (sufficient work must be completed on site for a member of the public to be aware of commencement of a permittable building).

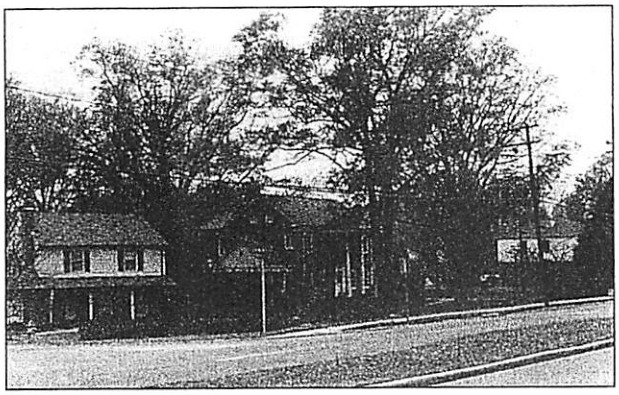
24. *Town of Hillsborough*, 276 N.C. at 55, 170 S.E.2d at 909.

25. 266 N.C. 697, 147 S.E.2d 182 (1966). Three years later the court in *Town of Hillsborough* distinguished *Austin* by noting that the owner had conceded that his activities before the adoption of the ordinance had not established a vested right.

26. 94 N.C. App. 324, 380 S.E.2d 132 (1989). Also see *Simpson v. City of Charlotte*, 115 N.C. App. 51, 443 S.E.2d 772 (1994), where it was alleged that an expenditure of $20,000 was made after receipt of a local quarry permit. The court remanded the case to the board of adjustment, ruling, "Whether these expenditures were substantial and made in good faith are questions of fact for the Board." *Id.* at 58, 443 S.E.2d at 777.

27. 99 N.C. App. 746, 394 S.E.2d 256 (1990). *See also* Even v. City of Parker, 1999 SD 72, 597 N.W.2d 670 (small expenditure by person of modest means sufficient for vesting).

28. Also see *Morris Communications Corp. v. City of Bessemer City Board of Adjustment*, 365 N.C. 152, 712 S.E.2d 868 (2011), where the court held efforts to secure state approval and a new lease consituted work sufficient to establish a vested right in a billboard relocation permit. In such instances, the court usually looks to whether there has been at least some physical activity on site, such as land clearing and grading. *See, e.g.*, Russell v. Guilford Cnty., 100 N.C. App. 541, 397 S.E.2d 335 (1990).



In the *Stowe* case, neighbors successfully prevented a developer from constructing apartment buildings on this Charlotte site.

Good Faith

The second requirement to establish a common law vested right is that the requisite substantial expenditures must have been made in good faith. A person acting with undue haste in a deliberate attempt to avoid compliance with a newly adopted zoning provision generally secures no vested rights.[29]

The leading North Carolina case on the good faith requirement is *Stowe v. Burke*,[30] which involved the construction of apartment buildings in Charlotte. The plaintiffs in this case had bought their land from the defendant developer, telling him that they wished to escape congestion near apartments. Their house was built near a vacant parcel of land. There was evidence that throughout the critical months of this controversy the defendant had continued to assure the plaintiffs that he would not develop apartments on this vacant parcel, even as he actively pursued plans to do just that.[31]

The court held that although the defendant had made substantial expenditures in reliance on valid building permits, no vested right had been established because the expenditures had not been made in good faith. The defendant's knowledge of both community opposition and a specific pending petition for rezoning, which if adopted would preclude the project, established the absence of good faith. His expenditures made at an extraordinary pace in a race to beat a potential rezoning were thus not considered to establish a vested right.

Godfrey v. Zoning Board of Adjustment,[32] although not ruling on the question directly, reiterated the necessity of good faith on the part of the landowner seeking the vested right. In a footnote the court reviewed the law in other states and noted that the trial court could properly conclude that application of the vested rights doctrine was inappropriate in this case because if the owner "incurred expenses with the knowledge that a lawsuit had been filed challenging the validity of the zoning ordinance amendment under which the landowner had obtained his building permit, he proceeded at his peril and thereby acquired no vested rights. . . ."[33]

In *Kirkpatrick v. Village Council of Pinehurst*,[34] the court held that an owner of a nonconforming use who makes expenditures related to a renovation and expansion of the nonconformity with knowledge that a subsequent rezoning, special use permit, or other approval would be necessary for that activity, does not have the good faith necessary for a vested right. Likewise, in *PNE AOA Media, LLC v. Jackson County*,[35] the court held that where a developer makes expenditures prior to receiving a necessary state permit, there is a lack of the requisite good faith to be vested relative to local ordinances.

North Carolina cases have held that expenditures made between the adoption and the effective dates of a rezoning are not made in good faith. In *Warner v. W & O, Inc.*,[36] the court's conclusions addressed expenditures made between the adoption and the effective date of a rezoning:

> The law accords protection to nonconforming users who, relying on the authorization given them, have made substantial expenditures in an honest belief that the project would not violate declared public policy. It does not protect one who makes expenditures with knowledge that the expenditures are made for a purpose declared unlawful by duly enacted ordinance; nor does it protect one who waits until after an ordinance has been enacted forbidding the proposed use and,

29. This is similar to a provision that a person claiming the vested right meet equity's clean hands requirement. Courts in some states also consider whether the local government has also acted in good faith. *See, e.g.* Geisler v. City Council, 769 N.W.2d 162, 168–69 (Iowa 2009); Commercial Props. Inc. v. Peternel. 418 Pa. 304, 311, 211 A.2d 514, 518–19 (1965); State *ex rel.* Humble Oil & Ref. Co. v. Wahner, 25 Wis. 2d 1, 15–16, 130 N.W.2d 304, 311–12 (1964).

30. 255 N.C. 527, 122 S.E.2d 374 (1961). *See also* Keiger v. Winston-Salem Bd. of Adjustment II, 281 N.C. 715, 190 S.E.2d 175 (1972).

31. The chronology in the case was as follows: On April 5, 1961, the planning commission recommended that the city council adopt single-family residential and limited duplex zoning for the property in question. The defendant had actual notice of the proposed ordinance. Notices of the public hearing on the zoning were published on April 24 and May 1, with the hearings held on May 12 and 19. On May 11 the defendant secured a lease of forty-five years to build apartments on the property. On June 6 he formed a corporation to carry out the project. On June 7 applications were filed for building permits for ten apartment buildings to house two hundred units. On June 19 the plaintiffs, by this time no longer relying on the representations of the defendant, petitioned the city to amend the zoning to exclusively single-family use. Notice of this petition was sent to the defendant, and a hearing was set for July 17. On July 7 the final building permits were issued. Work was then carried out at "an extra-ordinary rate of speed" so that by July 17, column footings had been completed for eight buildings and were more than half complete for the remaining two buildings. Some $56,000 had been spent in this period (of an estimated total cost of $2.6 million). On July 17 the city council adopted the single-family rezoning. Construction work was halted by court order on July 18.

32. 317 N.C. 51, 344 S.E.2d 272 (1986).

33. *Id.* at 66 n.2, 344 S.E.2d at 280–81 n.2.

34. 138 N.C. App. 79, 88, 530 S.E.2d 338, 344 (2000).

35. 146 N.C. App. 470, 554 S.E.2d 657 (2001).

36. 263 N.C. 37, 138 S.E.2d 782 (1964).

> after the enactment, hastens to thwart the legislative act by making expenditures a few hours prior to the effective date of the ordinance.[37]

The question of the impact of notice of a possible change in the regulations that has yet to be adopted is less certain. In some states, the rule is that expenditures made after public notice of a specific rezoning proposal could not have been made in good faith and thus could not lead to a vested right. This is sometimes referred to as a "pending ordinance" rule.[38]

Knowledge of a *specific* pending change in zoning is an important factor in establishing whether the expenditures have been made in good faith.[39] In *Koontz v. Davidson County Board of Adjustment*,[40] the court found no vested rights to install manufactured housing in a newly rezoned area of Davidson County. Here the developers entered into a contract to purchase land for the purpose of developing a mobile home community. Neighbors who opposed such a development then petitioned the county board of commissioners to rezone an area of the county (which included this site) to a zoning district that did not allow placement of manufactured housing. After notice of the public hearing on this proposed rezoning was published, the developers consulted the planning staff to determine what they needed to do to "get grandfathered." The developers subsequently proceeded to subdivide the land, record the plat, secure a zoning compliance permit, and install roads in the subdivision prior to the vote on the rezoning. Some ten days after the rezoning was adopted, the developers began to place manufactured housing units on the site. Upon suit by the neighbors, the court held that the developers did not have the requisite good faith and thus no vested rights:

> Because the rezoning proposal was set for public hearing, developers were aware the County Commissioners were seriously considering the petition. Despite this knowledge, developers actively sought and heeded advice on how to avoid or prevent the ordinance from halting their proposed development and unilaterally proceeded with their development activities. Therefore, developers did not exercise good faith reliance on a valid permit, as a matter of law, and thus they do not have a vested right to avoid the enacted zoning changes.[41]

Knowledge of a *possible* ordinance change, however, does not, in and of itself, prevent a person from making expenditures in good faith. In *In re Campsites Unlimited, Inc.*,[42] the court held that a generalized knowledge of impending zoning, as opposed to knowledge about a specific zoning proposal, did not constitute failure to act in good faith. *Thomasville of N.C., Ltd. v. City of Thomasville*[43] illustrates this point and the balancing of equities that is inherent in vested rights analyses. The plaintiff proposed to construct 100 subsidized apartment units, which was allowed by the current zoning. The plaintiff consulted with the city government, which subsequently sent written confirmation to the federal government that its zoning allowed this use. After the plaintiff applied for building permits, however, the city administratively delayed action on the permits and subsequently rezoned the property to allow only single-family uses.[44] The court ruled that the plaintiff had secured a vested

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37. *Id.* at 43, 138 S.E.2d at 786–87 (citations omitted).

38. EDWARD H. ZIEGLER JR., 4 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 50.04(1)(b) (4th ed. 1998). *See, e.g.*, 1350 Lake Shore Assoc. v. Healey, 861 N.E.2d 944 (Ill. 2006) (once proposed down-zoning amendment is introduced, further expenditures are not in good faith); Penn Twp. v. Yecko Bros., 420 Pa. 386, 391, 217 A.2d 171, 173–74 (1966).

39. Justice Sharp commented in 1972:

> When, at the time a builder obtains a permit, he has knowledge of a pending ordinance which would make the authorized construction a nonconforming use and thereafter hurriedly makes expenditures in an attempt to acquire a vested right before the law can be changed, he does not act in good faith and acquires no rights under the permit.

Keiger v. Winston-Salem Bd. of Adjustment II, 281 N.C. 715, 719, 190 S.E.2d 175, 178 (1972). This case involved construction of a 102-unit mobile home park in Winston-Salem. The case went to the state supreme court twice. The first time the court held that the board of adjustment had improperly denied a special use permit for the project but remanded the case for consideration of the effects of a subsequently adopted zoning amendment. *Keiger I*, 278 N.C. 17, 178 S.E.2d 616 (1971). In the second case the court held that the rezoning to a district that did not allow mobile home parks had been improperly adopted and thus did not preclude the development. *Keiger II*, 281 N.C. 715, 190 S.E.2d 175 (1972).

40. 130 N.C. App. 479, 503 S.E.2d 108, *review denied*, 349 N.C. 529, 526 S.E.2d 177 (1998).

41. *Id.* at 483, 503 S.E.2d at 110. Although not addressed by the court, presumably the investment in the roads subsequent to plat approval could have been used for site-built housing as well as manufactured housing, so that there would have been no element of detriment for application of vested rights based on that expenditure.

The situation of development initiated immediately prior to the adoption of a pending ordinance amendment is a common one nationally. See, for example, *Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.*, 2009 WI App 142, ¶¶ 35–45, 321 Wis. 2d 671, 690–95, 775 N.W.2d 283, 293–96. The plaintiff had initiated adult entertainment in an existing bar some ten days prior to adoption of a zoning amendment that would have precluded adult entertainment at that site. The owner acknowledged his attempt to get "grandfathered." The court held that no vested rights had been established, noting that reliance on an existing law is not reasonable when there is knowledge that the law is about to change; the requisite good faith reliance was absent under these facts. *See also* Thompson v. Vill. of Hinsdale, 247 Ill. App. 3d 863, 876, 617 N.E.2d 1227, 1237 (1993); Glickman v. Parish of Jefferson, 224 So. 2d 141, 145 (La. Ct. App. 1969); Hanchera v. Bd. of Adjustment, 269 Neb. 623, 628–29, 694 N.W.2d 641, 646 (2005); Biggs v. Town of Sandwich, 124 N.H. 421, 426, 470 A.2d 928, 931 (1984); Clackamas Cnty. v. Holmes, 265 Or. 193, 199, 508 P.2d 190, 193 (1973); H.R.D.E., Inc. v. Zoning Officer of Romney, 189 W. Va. 283, 288, 430 S.E.2d 341, 346 (1993).

42. 287 N.C. 493, 215 S.E.2d 73 (1975).

43. 17 N.C. App. 483, 195 S.E.2d 79 (1973).

44. The detailed chronology was as follows: After the federal government approved the plaintiff's project on March 1, an adjoining landowner petitioned on March 8 to rezone the property to an exclusively single-family residential district. On March 15 the plaintiff exercised an option to purchase the property for $56,000 and applied for building permits. The city

right. Key factors were that the plaintiff had at no time misled the city or neighbors about its intentions; there was no evidence that the plaintiff had exercised undue haste or had been engaged in a race with the city to secure a vested right before the zoning could be changed; and expenditures had been made in reliance on valid permits. Also, all required application materials had been submitted, and the building permit normally would have been issued before public notice of the rezoning. Given the strong implications that the city's approvals had purposely been delayed, the court concluded that the balance of the equities favored the plaintiff.

Reliance on Valid Approval

To establish a common law vested right, any expenditures incurred must be made in reliance on an actual, legitimate approval of an individual project. The approval must be grounded in a site specific review and must be a formal approval as mandated by law. Such approvals include building permits, special or conditional use permits, certificates of zoning compliance, and preliminary plat approvals.[45] Expenditures made in generalized reliance on the existing zoning or advisory letters stating current regulatory requirements and expenditures made in order to secure government approval are not considered.[46]

Particular care is warranted in terms of "certificates of zoning compliance." While some jurisdictions have a separate and distinct permit for zoning compliance, many jurisdictions incorporate zoning compliance reviews as part of building permit reviews and issue a single building permit that may include a verification or certificate of zoning compliance. Such a regulatory approval that is mandatory before construction or other site work commences is necessary for vested rights purposes. A letter from staff advising that a proposed use is consistent with current zoning, which is often secured by developers in the course of acquiring and financing land purchases, is not a mandated approval that authorizes a specific development project and cannot be the basis of a common law vested right.[47] Likewise, an assurance from the staff that a buffer requirement would be waived is not an "approval" that can be the basis of a vested right.[48]

The question of whether the submission of a completed application (as opposed to the issuance of a permit) can trigger a vested right was raised in *Robins v. Town of Hillsborough*.[49] The plaintiff submitted a site plan for an asphalt plant on a site where such was a permitted use. The town, prior to acting on the site plan approval application, adopted a moratorium and subsequently amended the ordinance to remove asphalt plants as a permitted use.[50] The court of appeals held the applicant had a vested right to consideration of the application under the ordinance in effect at the time a completed

requested several technical changes and a bond before issuing the permits. All of the requested material and information was submitted by the plaintiff on March 30, but the permits were not issued because the city attorney was too busy to review the bond. On that afternoon the city attempted to pass an ordinance prohibiting the issuance of building permits on property for which a rezoning petition was pending, an ordinance the parties later agreed was invalid. Notice of the public hearing for the rezoning was first published on March 31, with the hearing set for April 10. The plaintiff initiated judicial action and on April 6, by court order, received building permits for the project. The city did not appeal the issuance of these permits. In reliance on these permits the plaintiff made additional expenditures, including entering into a $60,000 earth-moving contract and securing a $1.1 million construction loan with substantial penalty clauses. The rezoning was adopted on May 8, and the city then attempted to revoke the judicially issued building permits.

45. On plats, see *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990). The court there held that the construction of improvements pursuant to preliminary plat approval created a vested right to the completion of the project as approved. In *Browning-Ferris Industries of South Atlantic, Inc. v. Wake County*, 905 F. Supp. 312, 319 (E.D.N.C. 1995), the court found a vested right based on expenditures following approval of a site plan by the Morrisville town council. States vary as to just which forms of development approval are sufficient for vested rights claims. *See, e.g.*, The Vill. v. Del. Agric. Lands Found., 808 A.2d 753 Del. 2002) (diligent compliance with pre-permit process sufficient for vesting); Town of Largo v. Imperial Homes Corp., 309 So. 2d 571 (Fla. Dist. Ct. App. 1975) (approval of rezoning petition to allow construction of high-rise building sufficient for vesting); Metro. Dev. Comm'n v. Pinnacle Media, LLC, 846 N.E.2d 654 (Ind. 2006) (filing of building permit application insufficient to establish vesting for billboard); Abbey Rd. Group, LLC v. City of Bonney Lake, 167 Wash. 2d 242, 218 P.3d 180 (2009) (holding that filing of site plan application prior to building permit application insufficient for vested rights).

46. Professor Phil Green long ago noted that the claim to a vested right based on reliance of a particular set of land use regulations alone is "legal nonsense." PHILIP P. GREEN, JR., THE DOCTRINE OF "VESTED RIGHTS" IN NORTH CAROLINA ZONING LAW 5 (1986).

47. MLC Auto., LLC v. Town of S. Pines, ___ N.C. App. ___, 702 S.E.2d 68 (2010). *See also* Bd. of Supervisors v. Crucible, Inc., 278 Va. 152, 677 S.E.2d 283 (2009) (vested right cannot be based on zoning verification letter). Staff interpretations of land use regulations are discussed in more detail in Chapters 18 (rules of interpretation) and 21 (staff interpretations).

48. Wilson v. City of Mebane Bd. of Adjustment, ___ N.C. App. ___, 710 S.E.2d 403 (2011).

49. 361 N.C. 193, 639 S.E.2d 421 (2007). While expressly noting that there was no need to decide the common law vested right claim, in *Meares v. Town of Beaufort*, 193 N.C. App. 96, 100, 667 S.E.2d 239, 242 (2008), the court of appeals held that repeal of a contested provision in the town's Historic District Guidelines while the judicial review was pending did not moot the case, as the board of adjustment had ordered a new hearing on the initial application for a certificate of appropriateness and the applicant was entitled to a decision on the application based on the rules in effect at the time of that initial application.

50. The timing of the application and town action was as follows. The plaintiff contracted to purchase a nearly 5-acre site in the Hillsborough extraterritorial area and in January 2003 submitted a site plan for an asphalt plant on this site (this use being a permitted use subject to site plan approval). The application stirred considerable local controversy. The board of adjustment held three hearings in February, March, and April 2003 on the site plan application. Prior to the fourth hearing, the town council in April 2003 adopted a moratorium on permitting for asphalt plants (and other similar manufacturing operations). The town council then, in November 2003, amended the zoning ordinance to prohibit asphalt plants throughout the town and the extraterritorial area. In December 2003 the plaintiff closed on his purchase of the site. The board of adjustment terminated consideration of the plaintiff's application after the ordinance amendment banning the use was adopted.

application was submitted, and it reversed and remanded the matter for consideration under the terms of the ordinance in effect in at the time of application.[51] The North Carolina Supreme Court, however, decided the case on narrower grounds and without expressly reaching the vested rights question,[52] holding that the provision in the town ordinance that the board of adjustment "shall pass upon, decide, or determine" applications for site plan approval mandated that the board render a decision on the application. Since the board had dismissed the application without a decision upon adoption of the text amendment, the court remanded the case for decision by the board under the rules in effect at the time of application.[53]

Expenditures made on a mistakenly issued permit do not establish a common law vested right. In *Mecklenburg County v. Westbery*,[54] part of the property at issue was in a residential zoning district and part in an industrial district. The owner wanted to install a storage building that was permitted in the industrial district but not in the residential district. The building inspector mistakenly thought the site of the proposed building was in the industrial district portion of the lot, so a building permit was issued. In reliance on that permit the owner purchased and installed a $25,100 building.[55] The county then discovered the mistake, notified the owner that the structure was in violation of the zoning, and revoked the building permit. The court held that no vested right had been established because the use was illegal from its inception. Similarly, the court in *Wilson v. City of Mebane Board of Adjustment*[56] held that where a permit was issued without a buffer requirement mandated by the ordinance, the permit was void ab initio and any expenditures made pursuant to that permit could not be considered for a vested rights analysis. Also, reliance may not be made on an approval that is subject to litigation and is subsequently invalidated.[57]

Expenditures made on an illegal use do not establish a vested right even if they are made with the full knowledge of the local government. A case on zoning enforcement illustrates this point. The defendant in *City of Raleigh v. Fisher*[58] had purchased land from the city and constructed a residence on the site. The defendant operated a bakery and sandwich business from the house continuously thereafter, even though the site was in a residential zoning district. The defendant made an estimated business investment of $75,000 over the years. The city was aware of the use and collected a privilege tax on the business for nine years. At that point, however, the city directed the defendant to discontinue the business because of its inconsistency with the residential zoning requirements. The court held that no vested right to the business had been established, with Justice Sam Ervin writing:

> [A] municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past.
>
> Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.[59]

51. 176 N.C. App. 1, 625 S.E.2d 813 (2006). The court of appeals also held that a total ban of a particular use raised constitutional issues of arbitrary and capricious action and a denial of equal protection.

52. This distinction was noted by the court of appeals in *Sandy Mush Properties v. Rutherford County*, 181 N.C. App. 224, 638 S.E.2d 557, *remanded*, 361 N.C. 569, 651 S.E.2d 566, *aff'd*, 187 N.C. App. 809, 654 S.E.2d 253 (2007), *review dismissed*, 363 N.C. 577, 681 S.E.2d 339 (2009). When the supreme court remanded for reconsideration in light of the *Robbins* decision, the court noted *Robbins* as decided was not a vested rights case and thus had no impact on their prior decision regarding vested rights.

53. The court held that the town could not by legislative fiat dictate the outcome of this quasi-judicial process. The court pointed out that given this procedural requirement of the ordinance, it was unnecessary to address the constitutionality of the ordinance, and that portion of the court of appeals decision was vacated. On remand, the town heard and denied the application. The town and owner subsequently settled the case, with a reported $175,000 payment to the applicant to cover litigation costs.

54. 32 N.C. App. 630, 233 S.E.2d 658 (1977). The court reached the same conclusion in *Eastern Outdoor, Inc. v. Board of Adjustment*, 150 N.C. App. 516, 564 S.E.2d 78 (2002). In yet another case, the court held that there were no vested rights established based on a mining permit that was subsequently revoked. The revoking agency discovered significant adverse impacts (the site would have been visible and audible from the Appalachian Trail) after permit issuance, and the court held that authority to modify the permit included authority to revoke it. Clark Stone Co., Inc. v. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, *review denied*, 359 N.C. 322, 603 S.E.2d 878 (2004). A prominent case from another state reaching the same result is *In re Parkview Associates v. City of New York*, 71 N.Y.2d 274, 525 N.Y.S.2d 176, 519 N.E.2d 1372 (1988). The ordinance here allowed for a 19-story building on the entire site at issue, but a permit was mistakenly issued that allowed a 31-story building on the portion of the lot more than 100 feet from the street. The city discovered the error and revoked the permit only after the steel superstructure and most mechanical work for the taller building had been completed. The court upheld the permit revocation. A subsequent variance petition was also ultimately denied, and some eight years after construction began the portion of the structure exceeding the actual height limit was removed.

55. The case was somewhat complicated by the fact that the permit was issued for a 40' x 60' storage building, and a 24' x 70' mobile home was actually installed for storage use.

56. ___ N.C. App. ___, 710 S.E.2d 403 (2011). The staff had mistakenly concluded that the ordinance in effect at the time of permit application, which allowed for waiver of the buffer, was applicable. However, a new ordinance that did not allow waiver of the buffer was adopted a year prior to the permit decision. Since the revised ordinance was applicable and the approval was inconsistent with that ordinance, the permit was void. *See also* Martel Inv. Group, LLC v. Town of Richmond, 982 A.2d 595 (R.I. 2009) (holding no vested rights established based on building permit erroneously issued without mandated development plan review).

57. Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 344 S.E.2d 272 (1986). *See generally* R.P. Davis, Annotation, *Rights of Permitee Under Illegally Issued Building Permit*, 6 A.L.R. 2d 960 (1949).

58. 232 N.C. 629, 61 S.E.2d 897 (1950).

59. *Id.* at 635, 61 S.E.2d at 902 (citations omitted).

Although no vested rights can be established based on an invalid permit, it is not uncommon in these situations for the landowner to seek a variance.[60] When the cost of rectifying the mistake is high, there is no evidence of bad faith on the part of the applicant, and there is little if any harm to neighbors, it is not uncommon for such a variance petition to be granted.[61]

The requirement of reliance also means that expenditures made before approval or as part of the approval process cannot be considered to establish a vested right because they could not have been made in reliance on the permit.[62]

The leading case for this proposition is *Warner v. W & O, Inc.*,[63] which involved a proposed fifty-unit apartment building in Asheville. As of the effective date of a rezoning that precluded multifamily housing, no substantial work had been done on the site, but the defendant had made substantial expenditures in securing financing and in designing the structure. In ruling that no vested right had been established, the court held that the expenditures for architectural drawings needed to secure a permit "were manifestly not made in reliance on the permit thereafter issued."[64] Expenditures made in reliance on the ordinance itself,[65] on letters from staff prior to permit approval,[66] or on a preliminary "conditional" approval have all been held not to give rise to vested rights.[67] Similarly, expenditures made on engineering studies and state permit applications for expansion of use create no vested right to that expansion.[68]

There is an exception to the requirement that expenditures be made in reliance on valid government approval when no such approval is required. This exception can be an important consideration when zoning is initially adopted. In the 1975 case *In re Campsites Unlimited, Inc.*,[69] the petitioner secured an option to purchase unzoned lakeside property for a campground. The property was purchased in January, and engineering and design expenses were subsequently incurred. Site grading began in March. In April initial zoning for the area was adopted by Stanly County. At that point some $275,000 of a total estimated project cost of $2.7 million had been expended. Because before April no permit had been required for the development, the court allowed the January, March, and other earlier expenditures to be considered and therefore held that a vested right to the campground use had been established. Such a situation is less likely to arise now because building permits have been mandatory statewide since 1985.[70] However, it remains a consideration when an area is being initially zoned and when land uses can be established without the necessity of a building or a structure.

An interesting question is raised when a project requires multiple permits and substantial expenditures are made after some but not all permits have been received. For example, an improvement permit may be secured for a septic tank for a proposed commercial use of a site, and the tank may be purchased and installed. Then before a building permit or other zoning approval has been secured for the commercial use, the site may be rezoned so that only residential use is allowed. To the extent that a vested right can be secured at all for a "partially" permitted project, it will apply only to

60. Variances are discussed in Chapter 17.

61. See, for example, *Stealth Properties, LLC v. Town of Pinebluff Board of Adjustment*, 183 N.C. App. 461, 645 S.E.2d 144, *review denied*, 361 N.C. 703, 653 S.E.2d 153 (2007). The court mandated issuance of a variance when a 10-foot mistake in the required setback was not discovered until after the permitted building was completed.

62. This general rule was somewhat unsettled by the proposition advanced by the court of appeals decision in *Robins*, discussed in the text above, that vesting can occur with a completed application rather than a permit decision. The supreme court adopted a different and narrower rationale in its resolution of that case. That decision, however, left the requirement that the town use the ordinance in effect at the time of application rather than the time of decision, albeit based on the particular fact pattern and local ordinance requirements.

63. 263 N.C. 37, 138 S.E.2d 782 (1964). On May 7, 1962, the defendant secured an option to purchase the site. After the defendant gave notice of exercising the option, a special proceeding was initiated on August 6 to carry out the sale (necessitated by the fact that the spouse of one of the owners was mentally incompetent). Building permits were secured on August 8. On August 9 the plaintiff, a neighboring property owner, initiated a petition to rezone the site to single-family residential use. The city council adopted the rezoning on September 13, effective September 28. Deeds conveying the property to the defendant were executed on September 26 and October 9.

64. *Id.* at 41, 138 S.E.2d at 786.

65. "One does not acquire a vested right to build, contrary to the provisions of a subsequently enacted ordinance, by the mere purchase of land in good faith with the intent of building thereon." Town of Hillsborough v. Smith, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969). *See also* McKinney v. City of High Point, 239 N.C. 232, 79 S.E.2d 730 (1954).

66. Wilson v. City of Mebane Bd. of Adjustment, ___ N.C. App. ___, ___ S.E.2d ___ (2011); MLC Auto., LLC v. Town of S. Pines, ___ N.C. App. ___, 702 S.E.2d 68 (2010).

67. Browning-Ferris Indus. of S. Atl., Inc. v. Guilford Cnty. Bd. of Adjustment, 126 N.C. App. 168, 172, 484 S.E.2d 411, 415 (1997).

68. Griffin v. Town of Unionville, No. 3:05-cv-514-RJC, 2008 WL 697634 (W.D.N.C. Mar. 11, 2008). The plaintiff operated an inert debris landfill with a lawfully issued special use permit. The plaintiff expended some $750,000 in applications to the state to expand the permitted wastes to include industrial solid waste. At the initial stages of the plaintiff's work, the town ordinance would have allowed industrial wastes to be added to the landfill authorized by the special use permit, but only if the operator secured an amendment to the special use permit. The town ordinance was amended to exclude industrial solid waste prior to the operator seeking a special use permit amendment or receiving a required franchise for an industrial waste landfill. The court held that the plaintiff could not rely on expenditures made prior to securing required town approvals in order to establish a vested right for an industrial waste landfill.

69. 287 N.C. 493, 215 S.E.2d 73 (1975). This case is discussed at some length in Michael B. Brough, The Nonconforming Use in North Carolina Zoning Law: Text and Model Ordinance (1976). The court in *MLC Automotive, LLC v. Town of Southern Pines*, ___ N.C. App. ___, 702 S.E.2d 68 (2010), emphasized that the *Campsites* exception is generally confined to situations where there is an absence of zoning.

70. G.S. 153A-351; 160A-411. See the discussion of statutory vested rights later in this chapter. Under current law, if a valid building permit is outstanding, there is a statutory vested right to complete the project. Whether a common law vested right exists is thus a moot question.

the ordinances and the regulations for which permits have actually been issued.[71] In *PNE AOA Media, LLC v. Jackson County,*[72] the court noted that where a developer makes expenditures prior to receiving a necessary state permit, there is a lack of the requisite good faith to be vested relative to local ordinances.

When a common law vested right is established based on reliance on a valid permit, it is important to note that the scope of what has been vested is limited to the scope of what was actually permitted. This limitation is illustrated by *Sandy Mush Properties v. Rutherford County.*[73] The dispute in this case revolved around the use of a 180-acre tract for a crushed rock quarry. In 2001 the plaintiff applied for three building permits (a modular office building, an office building, and a metal building) at the site of the proposed quarry. The county denied the permits based on a county-adopted moratorium on location of heavy industries near schools. While the moratorium was in litigation, the county issued building permits for these structures. Construction was initiated but later suspended. Eventually the moratorium was declared invalid and the question arose as to the scope of vested rights secured through the building permits. The plaintiff contended that the building permit for the office building constituted a statutory or common law vesting for the use of the property as a quarry. The court held, however, that the building permit only authorized construction of an office building (which by the terms of the permit could be used as offices for various uses) and did not purport to authorize any other use of the larger site. Thus the office building permit did not itself constitute a statutory vesting, nor could it serve as the basis for a common law vesting for the use of the site as a quarry.

Also, if expenditures in a lawful use are limited by other regulations, the vested right will only extend to that portion of the development for which the expenditures were actually made. This is illustrated by *Huntington Properties, LLC v. Currituck County.*[74] The plaintiff's predecessor in title had secured county approval for a 440-unit mobile home park but only installed 140 units due to permit limits related to its wastewater disposal system. The county subsequently amended its zoning ordinance to render the park nonconforming. The court held any vested rights of the plaintiff extended only to the 140 units actually in place.

Detriment

A final element of the analysis of common law vested rights is a requirement that conformance with the new ordinance requirements must be shown to be a detriment to the landowner. Although the courts do not often mention detriment expressly, it is an important aspect of the vested rights equation. If the owners can comply with the changed requirements without being harmed, they need not be treated any differently from other citizens, so the courts tend to require detrimental reliance before validating a vested right.

Russell v. Guilford County[75] provides an example of the application of this requirement. When the plaintiff acquired the property at issue, he believed that it was all zoned for residential use. Upon subsequently learning that part of the property was zoned for commercial use, he changed his plans in order to develop that portion commercially. Those plans were "conditionally" approved. He also sought a rezoning to have the residential portion changed to commercial zoning. The county, however, did the opposite and rezoned the commercial portion to residential use. The court of appeals ruled that no vested right had been established for the commercial development because the expenditures made when the owner believed the land to be zoned entirely residential, and expenditures that were consistent with residential zoning, could not be counted in determining whether substantial expenditures had been made. Because these expenditures could be applied to the permitted residential development, there was no harm to the owner caused by the rezoning and thus no vested right to a commercial development. A similar result was reached in *Browning-Ferris Industries of South Atlantic, Inc. v. Guilford County Board of Adjustment.*[76] An applicant seeking approval for a solid waste transfer station had received state permits (which subsequently were revoked) and had a site

71. "In those situations where multiple permits are required preliminary to the issuance of the building permit, and substantial obligations and/or expenditures are incurred in good faith reliance on the issuance of those permits, the party does acquire a vested right in those provision(s) of the ordinance or regulation pursuant to which the preliminary permit(s) was issued." Browning-Ferris Indus. of S. Atl., Inc. v. Guilford Cnty. Bd. of Adjustment, 126 N.C. App. 168, 172, 484 S.E.2d 411, 414 (1997). This issue was also alluded to in *Town of Garner v. Weston*, 263 N.C. 487, 139 S.E.2d 642 (1965). In this case the town extended its extraterritorial zoning to an area where the defendants were installing a mobile home park. Such use was not allowed by the town zoning. There was conflicting evidence as to how much work had actually been done at the time of the effective date of the zoning. That required water and sewer permits had not been secured was a factor in the trial court's finding that the use was not being made on the ordinance's effective date, a finding upheld by the supreme court. Also, in *Cardwell v. Smith*, 106 N.C. App. 187, 415 S.E.2d 770, *review denied*, 332 N.C. 146, 419 S.E.2d 569 (1992), expenditures to acquire other required permits after a special use permit was received were considered in establishing a vested right (as was the principal expenditure for land acquisition). The interplay of multiple permit requirements was also involved in *Martin-Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 432 S.E.2d 428 (1993), *aff'd per curiam*, 338 N.C. 602 (1995), though the case was not decided on those grounds. Also, in *Meares v. Town of Beaufort*, 193 N.C. App. 49, 667 S.E.2d 244 (2008), the court noted that compliance with zoning district dimensional standards (here a building setback requirement) and historic district standards were independent functions and an inability to comply with one was irrelevant for the other decision.

72. 146 N.C. App. 470, 554 S.E.2d 657 (2001).

73. 181 N.C. App. 224, 638 S.E.2d 557, *remanded*, 361 N.C. 569, 651 S.E.2d 566, *aff'd*, 187 N.C. App. 809, 654 S.E.2d 253 (2007). On appeal, the supreme court remanded this decision for reconsideration in light of the court's decision in *Robins*, discussed in the text above. On remand the court of appeals affirmed its prior holding. The court noted that the *Robins* decision expressly stated it was not a vested rights case but, rather, a question of town compliance with procedures mandated by its ordinance. Thus the court held *Robins* did not affect its prior holding.

74. 153 N.C. App. 218, 226–27, 569 S.E.2d 695, 701–02 (2002).

75. 100 N.C. App. 541, 397 S.E.2d 335 (1990).

76. 126 N.C. App. 168, 172, 484 S.E.2d 411, 415 (1997).

plan "conditionally" approved under the county zoning ordinance. The conditional approval was subject to twelve specific conditions and required the applicant to revise and resubmit the site plan. Prior to final approval of the site plan, the zoning ordinance was amended to require a special use permit for waste transfer stations. The court held that the requirement to obtain a special use permit in and of itself, absent a showing that the applicant was otherwise prejudiced or harmed, was not sufficient detriment to create a vested right.

Phased Developments

When phased developments are involved, the common law vested right applies only to that part of the previously approved project actually under way at the time of the ordinance change, unless the expenditures cannot be divided or allocated by phases.

In *In re Tadlock*,[77] the owner had begun work on a mobile home park of seventy-five units, to be built in three stages of twenty-five units each. The first stage had been surveyed, mapped, and graded and many of its home foundations, streets, and utilities installed when a Charlotte zoning ordinance was adopted that did not allow mobile home parks on the site. Fourteen units were completed. There had been no actual construction in stages two and three. The court allowed completion of the remaining eleven units in phase one of the park but held as a matter of law that the vested right did not apply to the subsequent phases, even though such use had been clearly intended by the owners and the site's value for other purposes was greatly reduced. The vested right attached only to the phase of the project that had been started when the ordinance was adopted.

The court reached the same conclusion in a case involving the expansion of an automobile junkyard, *Stokes County v. Pack*.[78] The owners had purchased ten acres in 1979 when the area was unzoned. In 1980 they cleared five acres for an automobile garage and salvage area. In 1982 they erected and began using a building for auto repairs. In March 1983 the county zoned the site for exclusive residential and agricultural use. The court ruled that with a phased development, the vested right to the project attached only to the phase substantially under way at the time of the ordinance change. Therefore the owners were allowed to complete the salvage yard on the five cleared acres but were not allowed to extend the business to the remaining five acres. This is consistent with the general rule that a nonconforming use may be completed but not expanded.[79]

The question of what constitutes completion of a project and what constitutes a subsequent phase is a factual inquiry that must be resolved on a case-by-case basis. Actual construction is not always the controlling factor in such a determination. For example, in *Transland Properties, Inc. v. Board of Adjustment*,[80] the petitioners had substantially begun physical construction of twelve of twenty-five planned condominium buildings when the Nags Head council amended the zoning ordinance to preclude condominium use. The town revoked the building permits for the remaining thirteen units. The court, however, held that a vested right existed for all twenty-five units because all of the land had been acquired, cleared, and graded; the streets and the sidewalks for all twenty-five units had been completed; and a water and sewer system for the entire twenty-five units had either been completed or was under way.[81] In a similar case, *Mays-Ott Co. v. Town of Nags Head*,[82] the court ruled that since two duplexes in a three-duplex project had been completed and most common-area improvements made, a vested right had been established for the third unit. In this instance the property was rezoned to remove "cottage courts" as a permissible use after the owner had secured a special use permit for the three-unit project. The owner built two units and then stopped construction for a year. The special use permit expired at the end of eighteen months, after which the town refused to renew it, even though the project met all current zoning requirements (other than the cottage court prohibition) regarding density, setbacks, lot width, and height. The court balanced the harm to the owner of not being allowed to proceed (a loss of $256,000) against the benefit to the town of compliance and allowed the project to be completed.

Duration

There is no case law in North Carolina as to the duration of a common law vested right.

They likely do not have perpetual life, however. By analogy, most ordinances provide that nonconforming status is lost with a period of disuse,[83] and the courts have uniformly upheld those limits. If holders of vested rights do not exercise reasonable due diligence in pursuing those rights, it is likely that they eventually expire, though not at an express predetermined date as is the case with the statutory vested rights, discussed below. Cases in other states have applied varying time limits for permissible reliance on common law vested rights, ranging from a few months to decades.[84]

77. 261 N.C. 120, 134 S.E.2d 177 (1964).

78. 91 N.C. App. 616, 372 S.E.2d 726 (1988), *review denied*, 324 N.C. 117, 377 S.E.2d 246 (1989).

79. *In re* Hastings, 252 N.C. 327, 113 S.E.2d 433 (1960).

80. 18 N.C. App. 712, 198 S.E.2d 1 (1973).

81. An approved plan that shows sections does not in itself create a phased development unless the property is actually being developed in separate stages. *In re* Campsites Unlimited, Inc., 287 N.C. 493, 215 S.E.2d 73 (1975).

82. 751 F. Supp. 82 (E.D.N.C. 1990). In this federal district court opinion, state law on vested rights was applied.

83. Termination of a nonconformity due to abandonment, discontinuance, or cessation of use is discussed in Chapter 20.

84. *See, e.g.*, Whitehead Oil Co. v. City of Lincoln, 245 Neb. 660, 515 N.W.2d 390 (1994) (vested right retained after 18 years of inactivity when subsequent zoning amendment is arbitrary); AWL Power, Inc. v. City of Rochester, 148 N.H. 603, 608–09, 813 A.2d 517, 523 (2002) (rights permanently vested when development was substantially completed but then