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Land Use; Development Approvals; Subdivisions; Off-Site Improvements; Attorneys' Fees; Exactions; Mandamus

TAC Stafford, LLC v. Town of Mooresville, 2022-NCCOA-217 (No. COA21-229, Iredell—4/5/22)

- ***Holding***— Under 160A-372, the General Assembly has only authorized municipalities to require a developer to consider existing or planned streets when it plats streets or highways within its subdivision. Alternatively, a municipality may require a developer to provide funds to be used to construct roads both within and outside of a subdivision: if the municipality selects this alternative, it undertakes to build these roads itself and forgoes the option of compelling the developer to build its own roads within the development. Defendant-Town, which pursued neither of these authorized courses of action, lacked statutory authority to withhold development approvals for plaintiff's subdivision or condition such approvals on the completion of off-site improvements.

- ***Key Excerpt***— Defendant-Town appealed from the trial court's August 2020 order granting of summary judgment to plaintiff, denying defendant-Town's motion for summary judgment, and issuing a writ of mandamus "requiring [defendant-Town] to take all necessary steps to authorize the issuance of development approvals for the Stafford Subdivision without regard to construction of the [o]ff-[s]ite [i]mprovements[.]" Defendant-Town also appealed from the trial court's subsequent February 2021 order granting in part plaintiff's motion for reimbursement of fees and denying defendant-Town's motion to stay. (Plaintiff cross-appealed from that order denying in part its motion for reimbursement of expenditures and recovery of attorneys' fees and costs. The Court affirmed the first (August 2020) order: as to the subsequent (February 2021) order, the Court affirmed in part, reversed in part, and remanded to the trial court.

The Court observed that in the order granting plaintiff's motion for summary judgment, the trial court relied on Buckland v. Town of Haw River, 141 N.C. App. 460, 463, 541 S.E.2d 497, 500 (2000) (interpreting 160A-372(a) and holding *inter alia* that "a municipality's subdivision ordinance may require a developer to consider

existing or planned streets when it plats streets or highways *within* its subdivision, but the statute does not empower municipalities to require a developer to build streets or highways *outside* its subdivision") to support its conclusion that G.S. 160A-372 "does not permit the Town to require [Plaintiff] to make off-site changes, in the manner in which it seeks, as a condition of the Town issuing development approvals." The Town argued that Buckland was both legally and factually inapposite, and therefore did not constitute controlling authority here. The Court disagreed.

Rejecting defendant-Town's urging of a broad construction, the Court stated, "[W]e are only at liberty to adopt a broad construction of [G.S.] 160A-372 if its language is ambiguous…. The Town does not identify any such ambiguity in the plain text of [G.S.] 160A-372; instead, the Town merely identifies what it would prefer that the statute provide. Section 160A-372 clearly does not authorize the Town to condition approval of the Subdivision or to withhold the issuance of COs [certificates of occupancy] on the completion of off-site improvements. The plain text of [G.S.] 160A-372 makes clear that our General Assembly has only authorized the Town to 'require a developer to consider existing or planned streets when it plats streets or highways *within* its subdivision[.]' Buckland, 141 N.C. App. at 463, 541 S.E.2d at 500 (emphasis added). Alternatively, the Town 'may require a developer to *provide funds* to be used to construct roads *both within and outside of* a development. If the municipality selects this alternative, it undertakes to build these roads itself and [forgoes] the option of compelling the developer to build its own roads within the development.' *Id.* at 464, 541 S.E.2d at 500–01 (emphases added) (citation omitted). But here, the Town pursued neither of these authorized courses of action, and thus lacked statutory authority to withhold development approvals for the Subdivision or condition such approvals on the completion of off-site improvements."

The Court found no merit in the Town's argument as to attorney's fees. "The Town argues that the trial court erred in awarding attorneys' fees to Plaintiff pursuant to [G.S.] 6-21.7 because the limitations on the Town's authority pursuant to [G.S.] 160A-372 and Buckland are not 'unambiguous.' For purposes of [G.S.] 6-21.7, '"unambiguous" means that the limits of authority are not reasonably susceptible to multiple constructions.' [G.S.] 6-21.7. In support of this argument, the Town again advances its claim, which we have already rejected, that Buckland does not control the outcome of this case because the Traffic Provision [the final clause of G.S. 160A-372(a)] is a grant of authority that is legally distinct from the Within Provision [the first clause of G.S. 160A-372(a)]…. Buckland does not support the Town's claimed authority to act as it has in this case. Moreover, Buckland's analysis is not ambiguous, and the Town's assertions to the contrary fail to persuade. Because the Town 'violated a statute or case law setting forth unambiguous limits on its authority,' *id.*, the trial court did not err in awarding attorneys' fees to Plaintiff."

The Court remanded to the trial court for further proceedings to determine the sum of Plaintiff's direct payments to the Town and to assess the amount of Plaintiff's recovery. The Court noted initially, "[W]e agree with the Town's interpretation of the text of [G.S.] 160A-363(e). Although the statute is silent as to whether the Town must be the recipient of the funds to

be returned, the Town cannot 'return' that which it has not received. Thus, we affirm the trial court's conclusion of law that funds paid to entities other than the Town were not 'exacted' by the Town." At the same time, the Court also observed that "[p]laintiff may have paid more directly to the Town than the trial court determined. As such, even though we affirm the trial court's conclusion of law concerning the meaning of an exaction pursuant to [G.S.] 160A-363(e), we nevertheless must reverse the 23 February 2021 order as regards its specific conclusion on the amount of total expenditures that the Town 'exacted' from Plaintiff. On remand, the trial court shall conduct additional proceedings to determine precisely how much Plaintiff paid directly to the Town, and thus how much Plaintiff is entitled to recover from the Town, with interest, pursuant to [G.S.] 160A-363(e)."

The Court rejected plaintiff's mandamus argument, wherein plaintiff contended *inter alia* that the trial court erred in concluding that the remaining claims were rendered moot by the issuance of a writ of mandamus, and by dismissing those claims with prejudice. The Court emphasized, "[W]ith the exception of the motion for litigation costs and attorneys' fees pursuant to [G.S.] 1-263 and [G.S.] 6-21.7, every claim Plaintiff raised in its complaint was resolved by the issuance of the writ of mandamus. Plaintiff sought declaratory judgments on several issues relating to the Town's lack of authority to withhold development approvals, which were resolved by mandamus. Plaintiff also raised constitutional arguments regarding substantive and procedural due process, which the trial court determined were unnecessary to address as the 'matter [wa]s resolved through statutory interpretation[.]' Lastly, Plaintiff raised several contractual claims, each of which aimed to relieve Plaintiff of its off-site improvement obligations under the MMA [Mitgation Measures Agreement]. Further, Plaintiff pleaded in its petition for a writ of mandamus that '[t]here is no alternative legally adequate remedy available to [Plaintiff] other than the issuance by this Court of a writ of *mandamus*, because State law and the Ordinances require lots within the Subdivision to have COs [certificates of occupancy] prior to occupancy of residences located thereon.'"

The Court held that the trial court did not err in dismissing any remaining claims as moot. "'A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Courts will not entertain or proceed with a cause merely to determine abstract propositions of law.' Roberts v. Madison Cty. Realtors Ass'n, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) (citations and internal quotation marks omitted). Here, the trial court correctly determined that Plaintiff's claims, other than the motion for litigation costs and attorneys' fees, were rendered moot by the issuance of the writ of mandamus, in that each claim sought relief from the Town's requirement of off-site improvements as a condition of development approval. Because the issuance of the writ of mandamus provided the relief that Plaintiff sought, at that point, further determination of Plaintiff's remaining claims could not have any practical effect on the existing controversy."

- **Synopsis—** Appeal by defendant-Town from August 2020 and February 2021 orders. Affirmed in Part; Reversed in Part and Remanded. Judge Zachary wrote the opinion, with Judge Wood and Judge Griffin concurring.

Procedure; Mandate; Law of the Case; Permits; Asphalt Plant

Appalachian Materials, LLC v. Watauga Cnty., 2022-NCCOA-280 (No. COA21-117, Watauga— 5/3/22) ("Appalachian II")

- ***Holding—*** Court of Appeals' prior mandate in first appeal constituted law of the case. Respondent could have petitioned Court of Appeals to reconsider that decision or could have raised issue in petition for discretionary review, but did neither.

- ***Key Excerpt—*** This matter concerned Respondent-County's denial of petitioner's application for a permit to build an asphalt plant. This is the second appeal. The opinion in the first appeal can be found at Appalachian Materials, LLC v. Watauga County, 262 N.C. App. 156, 822 S.E.2d 57 (2018) ("Appalachian I"; holding that the trial court erred by affirming respondent-County's denial of the permit based on one of the grounds relied upon in its decision.) The issue here in this second appeal concerned whether the trial court on remand erred by ordering issuance of the permit without considering respondent-County's other grounds for denying the permit, grounds which were *not* previously considered by the trial court or by the Court of Appeals in the first appeal.

Respondent-County argued that the trial court erred by ordering issuance of the permit without first considering the alternate grounds it relied upon in denying petitioner's application which were never considered in the first appeal. The Court initially observed, "It is true that our Supreme Court has explained that an appellee does not waive future consideration of alternative legal grounds by failing to ask our Court to consider them under Rule 10(c), disavowing a contrary holding of our Court … [in City of Asheville v. State, 369 N.C. 80, 87 n. 11, 794 S.E.2d 759, 766 n. 11 (2016)]."

The Court then stated, "But our Supreme Court has also held that a trial court is compelled to follow the mandate of our Court. *See* In re S.M.M., 374 N.C. 911, 914, 845 S.E.2d 8, 11 (2020) ('It is well established that the mandate of an appellate court is binding upon the trial court and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered.' (internal quotation marks and brackets omitted)). And we construe our mandate in Appalachian I to direct the Superior Court to order the issuance of the permit. For instance, just prior to the Conclusion section, we expressly held that the Superior Court erred in affirming the County's denial: 'Accordingly, we hold that the trial court erred in affirming the Board's decision to uphold the denial of Appalachian's permit application.' Appalachian I, 262 N.C. App. at 164, 822 S.E.2d at 63."

The Court continued by emphasizing, "We could have held that the Superior Court merely erred by agreeing with the County that the nearby facility was an educational facility, thus allowing the court on remand to consider the County's other grounds for denying the application. But we did not. Also, we ended our opinion with the word "REVERSE" rather than "VACATE". *See, e.g.*, Carolina Mulching Co. v. Raleigh-Wilmington Inv'rs II, LLC, 272 N.C. App. 240, 250, 846 S.E.2d 540, 547 (2020) (Dillon, J., dissenting) (discussing the difference between 'vacate' and 'reverse'), *aff'd*, 378 N.C. 100, 2021-NCSC-79. In sum, our mandate that the court on remand act 'consistent with [our] opinion,' an opinion which held that the court had

previously erred in affirming the denial of the permit, and that we were reversing (rather than vacating) the trial court's order, expresses our intent that on remand the Superior Court was to direct the County to issue the permit."

The Court concluded its opinion by stating, "It may be that our mandate in Appalachian I was too sweeping based on the language quoted above from our Supreme Court's City of Asheville opinion. But our prior mandate is the law of the case. The County could have asked us to reconsider our mandate in the first appeal. The County could have presented this issue in its petition to our Supreme Court for discretionary review. But the County did neither. We, therefore, conclude that the Superior Court had no choice but to order the issuance of the permit based on our mandate in Appalachian I." (In a footnote, the Court observed, "The County's petition to our Supreme Court for discretionary review of Appalachian I only presents the issue whether we were correct on the definition of 'educational facility.'")

- ***Synopsis***— Appeal by Respondent-County from August 2020 order. Affirmed. Judge Dillon wrote the opinion, with Judge Murphy and Judge Gore concurring.

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

Procedure; Interlocutory Appeal; Permits; Attorneys' Fees Coates v. Durham County, 2022-NCCOA-171 (No. COA21-281, Durham— 3/15/22) ("Coates II") (***unpublished***) (The dispositive issues here were whether: (1) appellate review of the interlocutory 2018 Remand Order was proper, notwithstanding the Court's prior decision in Coates I (266 N.C. App. 271, 831 S.E.2d 392 (2019)) and in the absence of any indication further proceedings on remand to the Board of Adjustment were ever undertaken; and (2) the superior court erred in entering an award of attorneys' fees to petitioners under the version of G.S 6-21.7 effective in 2018 on the basis of the interlocutory 2018 Remand Order. Dismissing Respondent-County's appeal from the 2018 Remand Order, which remained interlocutory, the Court emphasized, "On the Record before us, there is no indication there has been a new public hearing; a new decision on this first application by the Board of Adjustment; any dismissal or withdrawal of that application; or an indication the Superior Court took any additional review of this matter following its remand to the Board of Adjustment…. [W]e must again conclude we do not have appellate jurisdiction to review the 2018 Remand Order in this case. This conclusion is compelled, if not for any other reason, by the fact we are bound by our prior ruling on the same issue in Coates I." (Citation omitted.) The Court vacated the 2020 Fee Order. "[I]n the absence of any determination the Board of Adjustment acted outside the scope of its authority in issuing the mSUP [minor Special Use Permit], at this point, there is no statutory basis for an award of attorneys' fees. *See* Etheridge [v. Cnty. of Currituck], 235 N.C. App. [469] at 479, 762 S.E.2d [289] at 297 [(2014)]. Thus, where there is no determination Petitioners successfully challenged the County's action in issuing the mSUP or that the Board of Adjustment acted outside of the scope of its legal authority, the Superior Court was not permitted to make an award of fees. Therefore, the Superior Court erred in awarding attorneys' fees and expenses to Petitioners pursuant to [G.S.] 6-21.7 (2018)." The Court concluded its opinion by stating, "The matter is further remanded to the Superior Court to determine whether any further proceedings in this case—including the underlying mSUP application and/or attorneys' fees—are still warranted and if so, to

require those proceedings, or, if not, to dismiss this matter." (Appeal by Respondent-County from August 2018 and November 2020 orders. Dismissed in part, Vacated in part, and Remanded. Judge Hampson wrote the opinion, with Judge Inman and Judge Murphy concurring.))

Procedure; Interlocutory Appeal; Permits; Attorneys' Fees Sarvis v. Durham County, 2022-NCCOA-183 (No. COA21-282, Durham– 3/15/22) (***unpublished***) (The Court initially stated, "This case—along with the companion case Coates v. Durham County COA21-281—requires us to review proceedings on an application for a Special Use Permit and subsequent appeal by certiorari to the Superior Court occurring in 2018 under statutes which were then in effect and which have since been amended or repealed and superseded. In particular, this includes review of the 2020 Fee Order awarding attorneys' fees under [G.S.] 6-21.7 as it existed prior to the 2019 amendment. *See* 2019 N.C. Sess. Law 111, § 1.11 (N.C. 2019). It bears mentioning that in our own review of 2019 N.C. Sess. Law 111, we observe that the Session Law reflects the General Assembly provided the amendment to Section 6-21.7 to 'clarify and restate the intent of existing law and apply to ordinances adopted before, on, and after the effective date.' 2019 N.C. Sess. Law 111, § 3.1. The Superior Court in its 2020 Fee Order—with the apparent assent of the parties—applied the prior version of the statute, which was still in place when this matter was first heard by the Superior Court in 2018. Indeed, on appeal, the parties continue to agree the prior version of Section 6-21.7 controls and no party has briefed the impact of the effective date of the 2019 amendment on this case. Consequently, whether the 2019 amendment to Section 6-21.7 operates retroactively to the case at bar—and if so, what impact it might otherwise have—is not before this Court, and we do not decide it. We further express no opinion on the impact, if any, of subsequent legislative amendments to the statutes involved in this case and limit our analysis solely to the arguments in this case." The Court held that respondent-County's appeal from the 2018 Remand Order was dismissed for lack of appellate jurisdiction as the Court was bound by Coates I, and the Superior Court's 2020 Fee Order was vacated. "[W]here there is no final determination Petitioners successfully challenged the County's action in issuing the mSUP or that the Board of Adjustment acted outside of the scope of its legal authority, the Superior Court was not permitted to make an award of fees." The Court remanded to Superior Court to determine whether any further proceedings were still warranted or for dismissal. (Appeal by Respondent-County from December 2018 and November 2020 orders. Dismissed in part, Vacated in part, and Remanded. Judge Hampson wrote the opinion, with Judge Inman and Judge Murphy concurring.))