NORTH CAROLINA

ASHE COUNTY

BEFORE THE ASHE COUNTY
WASTERSHED REVIEW BOARD

APPEAL OF FINAL ORDER, REQUIREMENT AND DECISION DATED JULY 7, 2017 BY THE ASHE COUNTY WATERSHED ADMINISTRATOR	POINT BRIEF: WHEN IS SUBDIVISION REQUIRED UNDER CHAPTER 155?

Introduction

The County staff raised their concern about subdivision in the First Set of Comments.

The appellant responded, saying that no subdivision is proposed.

This brief addresses when a subdivision is required by Chapter 155 and the consequences of subdividing land not in conformity with Chapter 155

Facts in Proceeding

The undisputed facts are: **(1)** proposed asphalt plant facility signed a document labeled lease for only a portion of an existing lot of record, **(2)** Dr. Cecile's affidavit the proposed asphalt plant facility leased 3.58 acres of the existing lot of record, **(3)** the names of the parties on the purported are Radford Properties, Inc. and Appalachian Materials, LLC, **(4)** the quarry is operated by Radford Quarries of Boone, Inc., **(5)** Mr. Miller's testimony was that the purpose of the purported lease was to keep separate two different businesses – the existing quarry and the proposed asphalt plant facility – operated by two separate companies – Radford Quarries and Appalachian Materials - separate for liability and other purposes, **(6)** the purported lease provided stated:

(a) the tenant will use or operate the land as an asphalt plant;

(b) the tenant will obtain insurance coverage and names landlord as an additional insured;
(c) the tenant pays all charges for utilities supplied to the leased property;
(d) the tenant indemnifies the landlord and pays attorney fees;

and (7) the quarry was issued a general NPDES permit for quarries (Pet. Ex. 2) and the proposed asphalt plant facility was issued a different general NPDES permit for "asphalt paving mixtures and blocks" (Rec. Ex. 8).

Mr. Goddard testified that the quarry and the asphalt plant are different uses and did not know what a common use was under Chapter 155. Attachment A.

County Law

1. "No watershed protection permit shall be issued except in conformity with the provisions of this chapter." County Law (C.L.), § 155.37(A).

2. Chapter 155 regulates all subdivisions in the protected watershed. C.L. §§ 155.15 through 155-19. "Subdivision" includes "all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose of sale or building development." C.L. § 155.02 ("Subdivision").

3. The definition of "subdivision" in Chapter 155 is the same definition that was found in general state law before 2005. Compare C.L. § 155.03 (Subdivision) with G.S. § 153A-335. A copy of G.S. § 153A-335 is attached to this point brief as Attachment B.

Points

1. Adam Lovelady in his book Land Subdivision Regulation in North Carolina (2015) states: "Subdivision regulations can apply to building sites and **leased premises** as well as lots for sale." pp. 19-20 (emphasis added). A copy of these pages from Mr. Lovelady's book is attached as Attachment C.

    a. "If a tract is clearly divided into sites for building development, it qualifies as a subdivision." Id.

    b. "A commercial site plan of less than the total tract may qualify." Id.

c. "The platting of a mobile home park – even a park where the lots are leased to renters who place their own mobile home there – is considered a subdivision under the applicable definition." Id. (relying upon Jones v. Davis, 163 N.C. App. 628(2004), *aff'd*, 359 N.C. 314(2005) (construing the exact definition of subdivision found in Chapter 155).

2. Consistent with Mr. Lovelady's analysis, the test in Chapter 155 is whether a lot or tract is "devoted to **a common use.**" C.L. 155.02 "Lot".

3. Section 155.18(B) provides "No building or other permits shall be issued for erection of a structure on any lot not of record at the time of adoption of this chapter until all requirements of this chapter have been met."

Conclusion

1. Given the undisputed evidence, if the purported lease is valid, it subdivided asphalt plant lot or tract from the remaining lot or tract not in conformity with the provisions of Chapter 155.

2. The appellant argued that PIDO buffers were measured from the asphalt plant site. Concluding that the lot is devoted to a common use - quarry and asphalt plant- is inconsistent with the appellant's prior arguments and prior application of PIDO.

This the 15th day of February, 2018.

WOMBLE BOND DICKINSON (US) LLP

By: _____
John C. Cooke

Attorneys for the Ashe County Watershed Administrator

a real estate expert. I mean --

MR. COOKE: When he got on the stand he was full of expert opinions on direct.

MR. JOHNSON: About his area of expertise.

MR. COOKE: He's the one that applied -- who prepared the applications.

CHAIRMAN HAFER: Would you like to rephrase the question, Mr. Cooke?

(Mr. Cooke laughs.)

(By Mr. Cooke)

Q. Isn't it true that there are two different uses being proposed for this single parcel, one which is a quarry and one which is going to be an asphalt plant?

A. That's correct, yes, there's two uses.

Q. By two different companies.

A. Yes.

Q. So it's not a common use, correct?

A. I --

Q. If you don't know, don't -- that's fine.

A. I don't know what you mean by common use.

Q. And this -- are you aware of any provision in Chapter 155 that exempts a quarry from complying with it?

A. No, sir, I'm not.
Q. Were you aware -- you testified about the level of inspections for this site. Were you aware that the asphalt -- that Ashe County citizens were complaining about sediment leaving the site?
A. Yes. I've become aware, I guess mostly by attending -- the paper and attending commissioners' meetings, that type of thing.
Q. And tell me, what outreach did you make to them?
A. I don't recall any outreach.
Q. Do you know of any outreach to them by the Cecile family?
A. I don't know of any, no.
Q. Give me just one minute. (Pause) Let's go back to Exhibit 26, please.
A. (Witness complies with request.)
Q. In -- in section -- in comment 8 there is a reference to existing development. You see that, sir?
A. Yes, sir.
Q. Did you all ever respond to comment 8?
A. So, the built-upon area shown on the map right there was the existing roads we showed. I could show you again if you want me to.
Q. Okay. Come on down.

Attachment B

§ 153A-335. "Subdivision" defined.

(a) For purposes of this Part, "subdivision" means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions when any one or more of those divisions are created for the purpose of sale or building development (whether immediate or future) and includes all division of land involving the dedication of a new street or a change in existing streets; however, the following is not included within this definition and is not subject to any regulations enacted pursuant to this Part:

(1) The combination or recombination of portions of previously subdivided and recorded lots if the total number of lots is not increased and the resultant lots are equal to or exceed the standards of the county as shown in its subdivision regulations.

(2) The division of land into parcels greater than 10 acres if no street right-of-way dedication is involved.

(3) The public acquisition by purchase of strips of land for widening or opening streets or for public transportation system corridors.

(4) The division of a tract in single ownership the entire area of which is no greater than two acres into not more than three lots, if no street right-of-way dedication is involved and if the resultant lots are equal to or exceed the standards of the county as shown by its subdivision regulations.

(b) A county may provide for expedited review of specified classes of subdivisions. (1959, c. 1007; 1973, c. 822, s. 1; 1979, c. 611, s. 2; 2003-284, s. 29.23(b); 2005-426, s. 4(b).)

Chapter 3

Defining Subdivision

Definition

The definition of land subdivision in North Carolina plainly includes the everyday concept of subdivision—the tract of land divided into lots for sale—but the statutory definition goes further. It includes language that broadens the definition to include certain actions related to site development and building. The statutes also outline specific exemptions from subdivision regulation (discussed in the next section).

As set forth in the General Statutes, "subdivision" is defined as

> all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions when any one or more of those divisions is created for the purpose of sale or building development (whether immediate or future) and shall include all divisions of land involving the dedication of a new street or a change in existing streets[.][1]

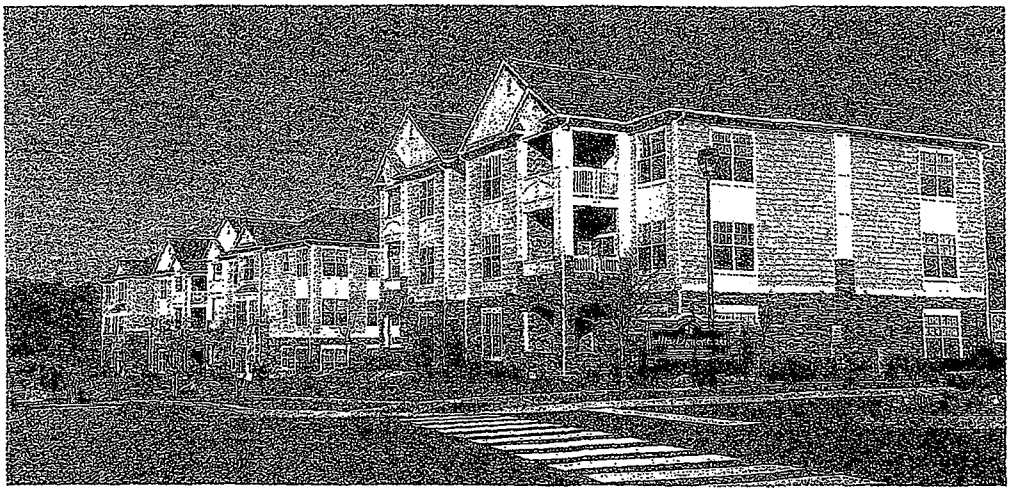
Even One Lot

If a landowner has fifty acres and decides to carve out one of those acres as a new parcel to sell or develop, that act is a subdivision subject to local regulation. In 2005, the enabling legislation was amended to clarify that a division is a subdivision if "any one or more of those divisions is created for the purpose of sale or building development." In other words, a landowner can trigger subdivision regulation just by carving off one small lot.

Building Sites and Other Divisions

Subdivision regulations can apply to building sites and leased premises as well as lots for sale. As outlined above, the statute clearly includes divisions of "land into two or more lots, *building sites, or other divisions* . . . for the purpose of sale *or building development.*" The statute does not give additional clarification, and case law has not provided guidance for the scope of this provision. Even so, the implication is noteworthy: If a tract is clearly divided into sites for building development, it qualifies as a subdivision. A commercial site plan of less than the total tract may qualify. Reservation of out-parcels for future development may qualify. And, a long-term ground-lease of a clearly defined site that is part of a tract also may qualify.

1. Section 160A-376(a) of the North Carolina General Statutes (hereinafter G.S.); the county complement is G.S. 153A-335(a).



The definition of subdivision comprises more than just lots for sale—it also includes divisions of land into building sites for the purpose of building development, such as leased mobile home lots and multi-building commercial or apartment developments.

The platting of a mobile home park—even a park where the lots are leased to renters who place their own mobile homes there—is considered a subdivision under the applicable definition. When this question came before the N.C. Court of Appeals, it found that the phrase "'for the purpose of sale or building development' includes construction on subdivision lots, which are leased to third parties who place their own improvements on the property."[2]

The development of a multi-building apartment complex or office park also may be subject to subdivision regulation. To the extent that the development is a division of land into building sites for the purpose of building development, it would qualify as a subdivision.

The City of Charlotte, through its subdivision ordinance definition, clarifies the implications of the statutory definition. Under that ordinance, subdivision is defined as

> all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, or building development of any type, *including both residential and nonresidential multiple building site and multi-site projects even if there is no division of the underlying land* into separate parcels which is to be recorded with the register of deeds and also includes all divisions of land involving the dedication of a new street or a new street right-of-way or a change in existing streets[.][3]

Now or in the Future

The timing of sale or building development is irrelevant of purposes of defining a subdivision. The statute clearly states that the sale or building development related to the subdivision may be immediate or in the future.

2. Jones v. Davis, 163 N.C. App. 628 (2004), *aff'd*, 359 N.C. 314 (2005).
3. City of Charlotte Subdivision Ordinance § 20-6 (emphasis added).

found, among other things, that the nature of a proceeding—legislative or quasi-judicial—is determined by the type of decision to be made, not by the type of notice provided (in this case the proceeding was quasi-judicial, though the city argued it was legislative). When a decision-making board makes a quasi-judicial decision it must have competent, material, and substantial evidence in the record to support that decision. And, when the developer makes a prima facie showing of compliance with the subdivision standards, the developer is entitled to the subdivision plat.

Jones v. Davis, 163 N.C. App. 628 (2004) *aff'd*, 359 N.C. 314 (2005)

Definition

Neighbors contested an approved subdivision in which lots were leased to renters to place mobile homes there. The neighbors argued that the division of land did not meet the definition of subdivision. The N.C. Court of Appeals, citing *State v. Turner* (117 N.C. App. 457 (1994)) (discussed below), found that the phrase "'for the purpose of sale or building development' includes construction on subdivision lots, which are leased to third parties who place their own improvements on the property."

The neighbors also argued that the mobile home park ordinance, not the subdivision ordinance, should have controlled development. The mobile home park ordinance was not properly before the court for review, so the court did not consider the argument. Even so, the court reviewed the subdivision ordinance and found that it regulates the division of land, not the use of land.

Lanvale Properties, L.L.C. v. County of Cabarrus, 366 N.C. 142, 169 (2012)

Fees; schools; statutory interpretation; adequate public facilities

The county adopted an adequate public facilities ordinance that, in the court's view, required developers to pay a fee for school construction. As with prior school fee cases, the court found that the county lacked authority for a de facto school impact fee, which is not authorized under either the general police power or the zoning power. Moreover, the rules of statutory interpretation of city and county authority do not apply; those rules apply only when the statute is unclear. The court viewed the fee scheme as a "revenue generating mechanism that is disguised as a zoning ordinance."

The court emphasized that zoning and subdivision authority is distinct, even when those elements are combined into a unified development ordinance.

High Rock Lake Partners, L.L.C. v. NC DOT, 366 N.C. 315 (2012)

Driveway permits; exactions

The developer had plans for a sixty-lot residential subdivision on 188 acres. The property is a peninsula jutting into a lake and accessed by State Road 1135, a fourteen-foot-wide gravel road that crosses two sets of railroad tracks a quarter mile before it dead-ends into the property. NCDOT granted a driveway permit with the conditions that the developer widen and pave the railroad crossing, widen and pave the road from the crossing to property (quarter mile), and negotiate with third parties (the N.C. Railroad Co. and Norfolk Southern) to gain their consent for the crossing improvements. The third parties refused such approval, and the developer appealed, arguing that DOT lacked authority for the conditions.