

# **Bond Case Briefs**

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## **UTILITIES - NORTH CAROLINA**

### **Fehrenbacher v. City of Durham**

**Court of Appeals of North Carolina - February 3, 2015 - S.E.2d - 2015 WL 426058**

Property owners petitioned for certiorari review of city-county board of adjustment's decision upholding city planning director's interpretation of a concealed wireless communications facility to include a 120-foot tall cellular tower disguised as a pine tree, located on church property. The Superior Court affirmed the board's decision. Property owners appealed.

The Court of Appeals held that:

- Record provided to trial court was adequate even though a substantial portion of the testimony before the board was not recorded due to equipment malfunction;
- Statute governing appeals of municipal body decisions allows trial court to direct that matters other than those submitted to the decision-making board be included in the record on appeal;
- Proposed cellular tower would not have been readily identifiable as a cellular tower; and
- Proposed cellular tower's secondary function as a tree would have been aesthetically compatible with church property's existing use.

Cellular company's proposed tower, designed to look like a 120-foot tall pine tree, was not readily identifiable as a cellular tower, as required to qualify as a concealed wireless communications facility under city ordinance governing approval of such facilities, even though it was substantially taller and five times wider at its base than average nearby trees. Tower had authentic looking bark and branches, national planning association recommended it as nearly indistinguishable from real trees, from many vantage points tower was not visible while from others it had appearance of an unusually tall tree, proposed height of tower was within maximum height limitation set by local ordinance, base of tower was concealed from sight by actual trees, and there was no evidence in record that a reasonable person's reaction to sight of an unusually tall tree would have been to conclude that it was a cellular tower.

The test for determining whether a wireless communications facility is readily identifiable as such, under city ordinance governing approval of concealed facilities, is not whether or how quickly a longtime resident or passing motorist would notice its true nature; rather, the test is whether the design serves a secondary function that helps camouflage the tower's function as a wireless communications facility.

Cellular company's proposed tower's secondary function as a tree, to be located on church property, was aesthetically compatible with the church property's existing use, as required to be considered a concealed wireless communications facility under city ordinance governing approval of such facilities, where church was located in a developing rural residential neighborhood, surrounded by houses and trees.