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Public Enterprises: Authority; Charter Consolidation; Power to Levy Prospective Water and Sewer Fees

JVC Enterprises, LLC v. City of Concord, 2021-NCSC-14 (No. 31PA20, 3/12/21)

- ***Holding*- Supreme Court of North Carolina reverses Court of Appeals and holds that trial court correctly entered summary judgment in defendant-City's favor because 1986 local act gave City the power to levy prospective water and sewer fees.**

- ***Key Excerpt*–** In this matter, the Supreme Court reviewed a 1986 local act (ch. 861, 1985 N.C. Sess. Laws 112 (1986)), which amended the City's Charter, to determine whether defendant-City has the authority to collect water and sewer fees for services "to be furnished": if the City has such authority, then the trial court's grant of summary judgment for the City would be affirmed; if not, the decision of the Court of Appeals (which reversed the trial court) would be affirmed. (The decision of the Court of Appeals, 269 N.C. App. 13, 837 S.E.2d 206 (2019), is summarized in *MLN* Dec. 2019/Jan. 2020.) The Court opened its opinion by stating, "Here we must decide whether a series of local acts gives the City of Concord the authority to levy water and wastewater connection fees against plaintiff developers for services to be furnished. We hold that the language of these acts is clear and unambiguous in granting this authority to the City of Concord. Accordingly, we reverse the decision of the Court of Appeals and affirm the trial court's order granting summary judgment to the City and dismissing plaintiffs' claims with prejudice."

In initially addressing the standard of review, the Court made the following observation as to the scope of the appeal, "We review de novo an appeal of a summary judgment order. In re Will of Jones, 362 N.C. 569, 573 (2008). 'A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor.' Morrell v. Hardin Creek, Inc., 371 N.C. 672, 680 (2018). '[W]hen the record shows 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,' we will affirm an order granting summary judgment to that party. In re Will of Jones, 362 N.C. at 573.

Likewise, '[w]e review matters of statutory interpretation de novo[.]' Quality Built Homes Inc. v. Town of Carthage, 369 N.C. 15, 18 (2016) (*citing* In re Ernst & Young, LLP, 363 N.C. 612, 616 (2009))."

Turning to its analysis, the Court observed, "Section 2 of the 1986 Act provides: 'The Board of Light and Water Commissioners for the City of Concord shall be dissolved. All powers and duties of said Board shall become powers and duties of the City of Concord. All real and personal property and all assets owned by the Board of Light and Water Commissioners shall be held under the name and ownership of the City of Concord.' 1985 N.C. Sess. Laws at 118, § 2 (entitled "An Act to Revise and Consolidate the Charter of the City of Concord and to Repeal Prior Local Acts"). Section 6 provides: 'The following act is repealed: Chapter 744, Session Laws of 1977, except for Sections 5 and 6 of that act.' 1985 N.C. Sess. Laws at 119, § 6. We find no ambiguity or contradiction in this language. By its plain language Section 2 dissolves the Board of Light and Water and transfers all the powers and duties of the Board to the City. We determine that the language is plain and unambiguous and that 'shall become' effectively transferred the powers and duties of the Board to the City. As the trial court stated, '[t]he General Assembly was not required to use the word 'transfer' in order to transfer the powers of the Board.' Section 6 then repeals the bulk of the prior City Charter ensuring that there is only one active Charter for the City at a time. Nothing in Section 6 contradicts the language of Section 2 or renders Section 2 ambiguous. Because this language is clear and unambiguous, we 'eschew statutory construction in favor of giving the words their plain and definite meaning.' [State v.] Beck, 359 N.C. [611] at 614 [(2005)]."

Observing that the Court of Appeals had concluded that the language of the 1986 Act was ambiguous because it "ostensibly both eliminates *and* transfers the powers of the Board afforded by the 1977 Charter," JVC Enters., 269 N.C. App. at 18 (emphasis in original), plaintiffs-appellees argued here that powers and duties cannot be repealed by Section 6 and transferred by Section 2 at the same time, thus urging the Supreme Court to interpret the relevant sections to mean that the powers and duties of the Board of Light and Water were not transferred to the City (but rather, upon dissolution of the Board, the City retained only the powers granted to it under the Public Enterprise Statutes). The Supreme Court concluded that this was not a reasonable reading of the statutory language. "The first sentence of Section 2 dissolves the Board of Light and Water. Had the General Assembly stopped there, the City would only have its general powers under the Public Enterprise Statutes in operating the water and sewer systems formerly belonging to the Board. But the General Assembly elected to do more than just dissolve the Board. It went on to specify that all the powers and duties of the Board 'shall become' powers and duties of the City. It would be unreasonable to read this second sentence of Section 2 as meaning that the Board's powers and duties vanish into the powers and duties already held by the City. Such a reading is flawed because it would render the second sentence a meaningless reiteration of the first sentence." (Citation omitted.)

In a footnote, in rejecting plaintiffs-appellees' arguments based on Clayton v. Liggett & Myers Tobacco Co., 225 N.C. 563, 566 (1945), the Court emphasized, "Here, the legislature specifically stated that the powers and duties of the Board shall become those of the City, and thus if the City acts under any of those powers

and duties, then it has not acted beyond the scope of authority granted to it by the legislature. The power to charge fees for services to be furnished is 'necessarily or fairly implied in or incident to the powers expressly conferred' by the transfer of the Board's powers to the City. *Id.* Furthermore, the General Assembly has more recently enacted [G.S.] 160A-4…. Thus, the legislature did not have to specifically name each power and duty of the Board in order to transfer those powers and duties to the City."

The Court determined the Court of Appeals also erred in its reliance upon the doctrine of constitutional avoidance. "Because we conclude that the language is plain and unambiguous, we need not address the arguments regarding constitutional avoidance, which, as a canon of interpretation, is only employed when there are two or more reasonable meanings of the statutory language at issue. *See* Abernethy [v. Board of Commissioners], 169 N.C. [631] at 636 [(1915)]."

The Court concluded its opinion by stating, "We conclude the 1986 Act transfers the Board's authority to collect water and sewer fees for services 'to be furnished' to the City, and thus, there is no genuine issue as to any material fact with respect to the City's legislative authority to charge these fees to plaintiffs for their developments. Therefore, the City is entitled to partial summary judgment as a matter of law."

- ***Synopsis–*** On defendant-City's petition for discretionary review pursuant to G.S. 7A-31 of a unanimous Court of Appeals' decision, 269 N.C. App. 13, 837 S.E.2d 206 (2019). Reversed. Opinion by Sr. Associate Justice Hudson. Justice Berger did not participate in the consideration or decision of this case.

Public Enterprises: Authority; Charter Consolidation; Power to Levy Prospective Water and Sewer Fees Bost Realty Co. v. City of Concord, ___ N.C. ___ (No. 32P20, 3/10/21) (Special Order) In this matter, the Supreme Court issued a Special Order providing, "Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in JVC Enterprises, LLC, et al. v. City of Concord, 2021-NCSC-14." (In December 2019, the Court of Appeals, 269 N.C. App. 109, 836 S.E.2d 344 (2019) (*unpublished*), had held, ""Plaintiffs' appeal and Defendant's cross-appeal involve procedural facts and legal issues that are substantially identical to those addressed in JVC Enterprises [No. COA19-308, filed concurrently with this opinion]. Both arise from lawsuits brought by former real estate developers alleging the City lacked authority to levy prospective water and sewer fees prior to construction and the provision of water and wastewater services, and both turn on the interpretation of a 1986 session law consolidating the City's charter. See 1985 N.C. Sess. Laws ch. 861 (1986)…. [T]he legal issues on appeal and cross-appeal in this case are identical to those resolved by our decision in JVC Enterprises. In accordance with that decision, we reverse the trial court's entry of summary judgment in favor of the City and remand for further proceedings not inconsistent with that opinion.") By Special Order of Supreme Court of North Carolina dated March 10, 2021. Justice Berger, recused.

Public Enterprises: Authority; Charter Consolidation; Power to Levy Prospective Water and Sewer Fees Journey Capital, LLC v. City of Concord, ___ N.C. ___ (No. 33P20, 3/10/21) (Special Order) In this matter, the Supreme Court

issued a Special Order providing, "Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in JVC Enterprises, LLC, et al. v. City of Concord, 2021-NCSC-14." (In December 2019, the Court of Appeals, 269 N.C. App. 109, 836 S.E.2d 345 (2019) (*unpublished*), had held, "Plaintiffs' appeal and Defendant's cross-appeal involve legal issues that are substantially identical to those addressed in JVC Enterprises, and—outside the identity of the claimants—its procedural history is substantively identical to that of Bost Realty Co. v. City of Concord, No. COA19-309 (N.C. Ct. App. Dec. 17, 2019) (*unpublished*). All arise from lawsuits brought by former real estate developers alleging the City lacked authority to levy prospective water and sewer fees prior to construction and the provision of water and wastewater services, and all turn on the interpretation of a 1986 session law consolidating the City's charter. *See* 1985 N.C. Sess. Laws ch. 861 (1986). Thus, for the reasons stated in those companion opinions, we reverse the trial court's entry of summary judgment in favor of the City and remand for further proceedings consistent with our holding in JVC Enterprises [No. COA19-308, filed concurrently with this opinion].") By Special Order of Supreme Court of North Carolina dated March 10, 2021. Justice Berger, recused.

Public Enterprises: Authority; Charter Consolidation; Power to Levy Prospective Water and Sewer Fees Metro Development Group, LLC v. City of Concord, ___ N.C. ___ (No. 34P20, 3/10/21) (Special Order) In this matter, the Supreme Court issued a Special Order providing, "Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in JVC Enterprises, LLC, et al. v. City of Concord, 2021-NCSC-14." (In December 2019, the Court of Appeals, 269 N.C. App. 109, 836 S.E.2d 346 (2019) (*unpublished*), had held, "Plaintiffs' appeal and Defendant's cross-appeal involve legal issues that are substantially identical to those addressed in JVC Enterprises, and—outside the identity of the claimants—its procedural history is substantively identical to that of Bost Realty Co. v. City of Concord, No. COA19-309 (N.C. Ct. App. Dec. 17, 2019) (*unpublished*). All arise from lawsuits brought by former real estate developers alleging the City lacked authority to levy prospective water and sewer fees prior to construction and the provision of water and wastewater services, and all turn on the interpretation of a 1986 session law consolidating the City's charter. *See* 1985 N.C. Sess. Laws ch. 861 (1986). Thus, for the reasons stated in those companion opinions, we reverse the trial court's entry of summary judgment in favor of the City and remand for further proceedings consistent with our holding in JVC Enterprises [No. COA19-308, filed concurrently with this opinion]." By Special Order of Supreme Court of North Carolina dated March 10, 2021. Justice Berger, recused.

Procedure; *Quo Warranto* Action; Failure to Allege Standing, Motion To Amend Complaint; Dismissal

Crawford v. Town of Summerfield, 2021-NCCOA-73 (No. COA20-328, Guilford—3/16/21) (***unpublished***)

- ***Holding-*** In plaintiffs' *quo warranto* action, Court of Appeals holds that the trial

court: (1) did not err by dismissing complaint with prejudice, as plaintiffs' complaint failed to show proper standing to bring the claims as alleged and thus failed to state a claim for which the court could provide a remedy, and (2) did not abuse its discretion in denying their motion to amend complaint.

- ***Key Excerpt—*** Plaintiffs brought an action seeking a declaratory judgment that defendant-Town had violated G.S. 1-512 by using public funds to pay for defendant-Laughlin's attorney's fees in a *quo warranto* action challenging her right to serve on the Town Council. The trial court dismissed with prejudice for: (1) failure to properly allege standing; (2) failure to allege injury; and (3) in consideration of prior decisions concerning the same or similar underlying facts. Plaintiffs appealed from an order of the trial court denying their motion to amend their complaint to show standing and granting defendant-Town's motion to dismiss with prejudice. The Court held that as plaintiffs' complaint failed to properly allege standing and as the trial court did not abuse its discretion in denying their motion to amend complaint, the order would be affirmed.

Plaintiffs first argued that the trial court abused its discretion by denying their motion to amend their complaint under G.S. 1A-1, Rule 15. The Court initially observed *inter alia*, "The trial court in this case articulated its reasoning for denying Plaintiffs' motion to amend in its Dismissal Order. While 'cognizant that findings of fact and conclusions of law are not congruent with orders on motions to amend and to dismiss,' the court chose to 'provide guidance for any reviewing Court regarding the propriety and necessity of' its decision to deny Plaintiffs' motion to amend and grant Summerfield's motion to dismiss.' The Dismissal Order explained, *inter alia*, 'The legal basis for denying [Plaintiffs' motion to amend] and for allowing [Summerfield's motion to dismiss] dovetails in law and in fact. First, the Motion to Amend, which seeks to amend [Plaintiffs' amended complaint], should not be allowed because justice does not so require. To the contrary, to allow the amendment and the filing of [a second amended complaint by Plaintiffs] would frustrate the ends of justice as related herein. Absent the [additional amendments proposed by Plaintiffs], [P]laintiffs lack standing to bring this action and have failed to allege actual injury or damages.'"

Continuing its analysis, the Court determined that the record supported a conclusion that plaintiffs failed to cure the defect in their complaint in a prior amendment, and unduly delayed in filing an amendment which actually cured the defect. "Plaintiffs filed their first complaint *pro se* on 30 May 2019, then amended their complaint over one month later on 5 July 2019—again *pro se*—as a matter of right before Summerfield filed a response. *See* [G.S.] 1A-1, Rule 15(a) ('A party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]'). Plaintiffs concede in their brief on appeal that their first complaint and their amended complaint 'admittedly failed to adequately allege their standing as taxpayers.' Plaintiffs then filed their motion to amend their complaint a second time on 28 October 2019, nearly four months after they filed the first amended complaint, almost two months after Summerfield filed its motion to dismiss and its answer, and only hours before the hearing on Summerfield's motion to dismiss.… Indeed, the trial court's decision to postpone the October 28 hearing on Summerfield's motion to dismiss until December 9 shows that the filing of Plaintiffs' motion to amend for a second time mere hours before the hearing was prejudicial to

Summerfield's readiness to argue its case." (Citation omitted.)

The Court emphasized, "….Plaintiffs retained counsel and sought to amend their complaint a second time only after Summerfield filed its motion to dismiss, which argued for dismissal based in part on Plaintiffs' failure to properly allege standing. Plaintiffs' motion to amend for a second time states that they did not retain counsel until 'early October 2019' and that newly retained counsel felt amendment was appropriate to 'clarify certain jurisdictional issues' unclearly raised in Plaintiffs' first *pro se* amended complaint, among other reasons. But this Court has made it clear that '[i]gnorance of the law is no excuse; a party does not need notice that she must allege standing because standing is a jurisdictional prerequisite and the complaining party bears the burden of alleging in its pleadings that it has standing.' Cherry v. Wiesner, 245 N.C. App. 339, 353, 781 S.E.2d 871, 881 (2016) (citation omitted); *see also* Rabon v. Hopkins, 208 N.C. App. 351, 354, 703 S.E.2d 181, 185 (2010) (affirming denial of leave to amend where the moving party offered no defensible explanation for why it failed to make a more timely motion to amend)." The Court further observed, "The trial court's decision to provide substantial guidance for any reviewing Court shows that it considered Plaintiffs' attempt to file a second amendment to cure the jurisdictional defects in their first two complaints to be untimely, prejudicial, and futile. We cannot say that the trial court committed a 'manifest abuse of discretion' in denying Plaintiffs' motion. Pruett [v. Bingham], 238 N.C. App. [78] at 86, 767 S.E.2d [357] at 363 [(2014)]."

Finally, plaintiffs contended the trial court erred by granting dismissal under G.S. 1A-1, Rules 12(b)(1) & (b)(6). Citing Energy Inv'rs Fund, L.P., v. Metric Constructors, Inc., 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000), the Court observed that plaintiffs failed to plead standing in their pleadings, and the trial court accordingly did not err by dismissing their complaint for failure to state a claim for relief. The Court added that, even treating as true each of the complaint's pleaded allegations, plaintiffs nonetheless failed to plead that they were the proper plaintiffs to bring the claim before the court.

- ***Synopsis***— Appeal by plaintiffs from January 2020 order. Affirmed. Opinion by Judge Griffin, with Judge Dietz and Judge Zachary concurring.