Dec. 2020/Jan. 2021 Volume XL, Nos. 6-7

Procedure; Motion to Dismiss; Declaratory Judgment; Monument; Standing

United Daughters of the Confederacy, N.C. Div., Inc. v. City of Winston-Salem, __ N.C. App. __ (No. COA19-947, Forsyth– 12/15/2020)

- ***Holding*– In action wherein plaintiff's complaint sought declaratory judgment as to statue it did not claim to own, divided panel of Court of Appeals holds that trial court did not err in dismissing complaint with prejudice on the basis of Rule 12(b)(6). Where the allegations in plaintiff's complaint—taken as admitted—failed to allege an injury in fact, trial court did not err in granting defendants' motions to dismiss the complaint for failure to state a claim.**

- ***Key Excerpt*–** The majority held that the trial court did not err by granting defendants' Rule 12(b)(6) motions to dismiss plaintiff's complaint for lack of standing. The majority, citing Street v. Smart Corp., 157 N.C. App. 303, 578 S.E.2d 695 (2003), initially disagreed with plaintiff's argument that the trial court erred by dismissing the complaint with prejudice. "[E]ven assuming *arguendo* that it was improper to dismiss the complaint with prejudice on the basis of Rule 12(b)(1), it was not improper to do so on the basis of Rule 12(b)(6), which operates as an adjudication on the merits. Defendants did indeed move for dismissal pursuant to both [. . .] and the trial court granted dismissal on both bases. We therefore hold that the trial court did not err in dismissing the complaint with prejudice pursuant to Rule 12(b)(6), and that any error in doing so pursuant to Rule 12(b)(1) was rendered harmless as a result."

Turning to the issue of standing, the majority rejected plaintiff's contention that the trial court erred in dismissing the complaint based on a lack of standing. Plaintiff primarily contended that dismissal was inappropriate because it was entitled to adjudicate the issue of ownership rights in the statue. The majority initially observed that the complaint, on its face, established no basis for ownership, or any other interest, in a statue which plaintiff did not claim to own, and which was located on privately-owned property. Citing Neuse River Found., Inc. v. Smithfield

Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002), the majority stated that to establish standing, one must show three things: injury in fact (a concrete and actual invasion of a legally protected interest); the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision. The majority emphasized that to pursue a declaratory judgment as to rights in a statue, plaintiff must show, at the very least, that it possessed some rights in the statue; that is, a legally protected interest invaded by defendants' conduct. The majority found plaintiff's cited case, Metcalf v. Black Dog Realty, LLC, 200 N.C. App. 619, 684 S.E.2d 709 (2009), inapposite to the present case. "In Metcalf, we specifically held that the plaintiffs failed to show standing. The only reason their claim was permitted to proceed was the counterclaim filed by the defendant raised identical legal issues. In the instant case, as in Metcalf, plaintiff has failed to show standing. However, here, there is no counterclaim keeping plaintiff's complaint alive. Further, aside from acknowledging their role in funding the erection of the statue over a century ago, plaintiffs alleged no ownership rights to the statue. Every case and statute cited by plaintiffs stands for the principle that, when a city or county acts in the manner described in plaintiff's complaint, *the owner of affected property* has rights that are implicated. Plaintiff has failed to demonstrate or allege any legal interest in the statue." (Emphasis in original.)

The majority closed by stating, "What matters here, and what was relevant to the trial court's consideration, was one question: Whether plaintiff, in its complaint, alleged standing. Viewing the allegations in plaintiff's complaint as true, we hold that the complaint fails to allege an actual ownership right or legal interest in the statue. Notwithstanding plaintiff's contentions on appeal as to what defendants did or the implications thereof, nowhere in plaintiff's complaint was a legal interest alleged. This is the first element of standing, and it is key: A plaintiff must allege an 'injury in fact.' *See* Neuse River Found., Inc., 155 N.C. App. at 114, 574 S.E.2d at 51–52. Plaintiff failed to do so."

Dissent– Judge Tyson dissented. Judge Tyson stated, in reviewing the allegations made in the light most favorable to plaintiff and taking assertions as true, that, "The majority's opinion erroneously affirms the trial court's order granting Defendants' Rule 12(b)(1) and (6) motions to dismiss and holds the United Daughters of the Confederacy, North Carolina Division, Inc. ('the Daughters') do not possess standing and their complaint fails for lack of subject matter jurisdiction. [G.S.] 1A-1, Rule 12(b)(1) (2019). The majority's opinion then presumes jurisdiction and standing, yet dismisses the Daughters' complaint with prejudice for failure to state a claim upon which relief can be granted. [G.S.] 1A-1, Rule 12(b)(6) (2019)."

. . . .

"The superior court clearly possesses jurisdiction and Daughters possess standing on multiple grounds to assert the declaratory judgment action and claims to survive dismissal under Rule 12(b)(1). [G.S.] 1-277; 7A-27 (2019); *see* Goldston [v. State], 361 N.C. [26] at 30, 637 S.E.2d [876] at 879 [(2006)]. The Daughters possess the individual standing of its members and Chapters and representational standing to seek a declaratory judgment and other relief. River Birch Assocs. [v. City of Raleigh], 326 N.C. [100] at 130, 388 S.E.2d [538] at 555 [(1990)]. The trial court's order of dismissal 'with prejudice' to the contrary is clearly erroneous. When the complaint is 'liberally construed' it

does not appear 'beyond doubt' the Daughters' complaint asserts 'no set of facts' to support their claims and entitlement to relief. *See* Dixon [v. Stuart], 85 N.C. App. [338] at 340, 354 S.E.2d [757] at 758 [(1987)]. The Daughters' allegations clearly assert an 'injury in fact' from Defendants' actions. *See* Neuse River Found., Inc., 155 N.C. App. at 114, 574 S.E.2d at 51-52. The trial court granting of either of Defendants' Rule 12(b)(1) or 12(b)(6) motions with prejudice was error."

- ***Synopsis***– Appeal by plaintiff from May 2019 order. Affirmed in a 2-1 decision. Judge Bryant wrote the opinion, joined by Judge Arrowood. Judge Tyson dissented.

Land Use; Permits; Planning Director's Decision; Interlocutory Determinations; Appeals

Ashe Cnty. v. Ashe Cnty. Plan. Bd., ___ N.C. ___ (No. 249PA19, 12/18/2020)

- ***Holding***- **In action involving dispute between petitioner County Board of Commissioners and respondents County Planning Board and Appalachian Materials, LLC—arising from Appalachian Materials' application for the issuance of a permit pursuant to Ashe County's Polluting Industries Development (PID) Ordinance authorizing Appalachian Materials to operate a portable asphalt production facility on a thirty-acre tract of property—Supreme Court of North Carolina holds that Court of Appeals erred by concluding that an interlocutory assessment of a local government staff member constituted a final, binding decision.**

- ***Key Excerpt***– The Court determined, "A careful review of the Planning Director's 22 June 2015 letter establishes that it is not, in whole or in part, any sort of final determination. For that reason, we believe that this case, rather than being controlled by Meier [v. City of Charlotte, 206 N.C. App. 471, 698 S.E.2d 704 (2010)] and S.T. Wooten Corp. [v. Board of Adjustment of Zebulon, 210 N.C. App. 633, 711 S.E.2d 158 (2011)], more closely resembles Raleigh Rescue Mission, Inc. v. Board of Adjustment of City of Raleigh (In re Historic Oakwood), 153 N.C. App. 737, 571 S.E.2d 588 (2002). As a result, we hold that the Court of Appeals erred by holding that Ashe County lost its right to challenge the issuance of the permit to Appalachian Materials because it failed to appeal the 22 June 2015 letter to the Planning Board."

The Court stated, "Unlike the communications at issue in Meier or S.T. Wooten Corp., the letter that the Planning Director sent to Appalachian Materials on 22 June 2015 was not couched in anything resembling 'determinative' or 'authoritative' terms. On the contrary, the record that is before us in this case reflects that the Planning Director explicitly stated that he *did not* possess the authority to issue a PID Ordinance permit until all of the necessary conditions had been met and that, as of 22 June 2015, all necessary conditions *had not* been met. In this sense, the Planning Director's 22 June 2015 letter was nothing more than a 'recommendation' that was being provided at that preliminary stage of the review process and constituted something *less than* a decision in Appalachian Materials' favor in light of the Planning Director's inability to make such a decision. In addition, the 22 June 2015 letter did not affect the rights of the parties given that no permit was issued or denied and no action was authorized or 'prohibited because of the transmission of that communication. As a result, the facts of this case are much

more similar to those at issue in In re Historic Oakwood than either Meier or S.T. Wooten Corp., all of which we believe to have been correctly decided." (Emphasis in original.)

The Court further emphasized, "In addition, we also conclude that *no part* of the 22 June 2015 letter constituted a final, binding decision that Ashe County had to appeal to the Planning Board in order to preclude any part of that letter from having a binding effect. We agree with Ashe County that the Court of Appeals' determination that the chart attached to the 22 June 2015 letter constituted a final and binding decision with respect to the setback requirements suggests that an interlocutory appeal must be taken from any staff assessment addressing the extent to which an applicant has satisfied any particular ordinance requirement regardless of whether that staff assessment was otherwise appealable in order to avoid being bound by it. Any such decision would invite the prosecution of multiple, piecemeal appeals from land-use decisions made by local government staff, a practice that this Court has repeatedly discouraged at the appellate level. *See, e.g.*, Veazey v. City of Durham, 231 N.C. 357, 363–64, 57 S.E.2d 377, 382 (1950) (stating that '[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders' and that '[t]he rules regulating [interlocutory appeals] are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer "'right and justice . . . without sale, denial, or delay"' (*quoting* N.C. Const. art. I, § 35)). As is the case at the appellate level, the adoption of a requirement that parties take interlocutory appeals in order to avoid the risk of being precluded from taking action at a later time risks the introduction of unnecessary delay, confusion, and expense into the land-use regulation process. Nothing in either Meier or S.T. Wooten Corp., both of which involved determinations that were final, rather than interlocutory, in nature, requires such a result, and we disclaim any suggestion that existing law makes the taking of interlocutory, land-use-related appeals necessary in order to avoid giving such interlocutory determinations binding effect or that interlocutory land-use decisions may never be changed regardless of the nature of the relevant circumstances. *See* Russ v. Woodard, 232 N.C. 36, 41, 59 S.E.2d 351, 355 (1950) (stating that '[a]n interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is subject to change by the court during the pendency of the action to meet the exigencies of the case') (cleaned up). As a result, for all of these reasons, we reverse the Court of Appeals' decision with respect to the issue of whether Ashe County was precluded from challenging the issuance of the PID Ordinance permit to Appalachian Materials on the grounds that it failed to seek review of the statements that the Planning Director made in the 22 June 2015 letter." (Emphasis in original.)

The Court closed its opinion by stating, "The Court of Appeals addressed a number of additional issues in its opinion, including whether Appalachian Materials' application was sufficiently complete at the time that it was submitted to the Planning Director to trigger the application of the permit choice statutes, whether the Planning Director was authorized to deny Appalachian Materials' permit application on the basis of the moratorium statute, whether the proposed asphalt plant was located within 1,000 feet of a commercial building, and whether the Planning Board

erred by rejecting the Planning Director's determination that Appalachian Materials' application contained material misrepresentations. Each of these issues was discussed in detail in the briefs that the parties filed with this Court and, in view of our determination that Ashe County's failure to appeal to the Planning Board from the 22 June 2015 letter did not preclude the Planning Director from revisiting the issue of whether Appalachian Materials was entitled to the issuance of the requested permit following the issuance of the air quality permit, each of these issues must be resolved in order to fully address Ashe County's appellate challenge to the lawfulness of the trial court's order. In view of the fact that the Court of Appeals expressly relied upon Ashe County's failure to appeal from the 22 June 2015 letter to the Planning Board in rejecting its contention that the proposed asphalt plant violated the setback requirements of the PID Ordinance and the fact that all of these additional issues appear to us to be, to a greater or lesser extent, interrelated with the appeal-related issue that we have resolved earlier in this opinion, we conclude that the Court of Appeals should revisit each of these additional issues and decide them anew without reference to the fact that Ashe County did not appeal the 22 June 2015 letter. Although the 22 June 2015 letter did not constitute a final decision triggering the necessity for an appeal, we do not hold that that letter is irrelevant to the making of the necessary determinations on remand, with the parties remaining free to argue any legal significance that the letter may or may not, in their view, have. As a result, we hold that this case should be remanded to the Court of Appeals for reconsideration of each of these additional issues in light of our decision today."

- ***Synopsis***– Upon County's petition for discretionary review from decision of the Court of Appeals affirming November 2017 order. Reversed in part and remanded. Opinion by Justice Ervin.

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

Immunity; Interlocutory Appeal; Substantial Right; Firefighting Services; Governmental Function; Public Contracts; Lease; Fraud Providence Vol. Fire Dep't, Inc. v. Town of Weddington *et al*, ___ N.C. App. ___ (No. COA19-203, Union– 12/31/2020) (***unpublished***) (The Court reversed the trial court's order as to its denial of the motions to dismiss the fraud claims against defendant-Town and defendant-Mayor. "In the present case, the Town argues that contracting with a third party to provide fire protection services in its jurisdiction is a *governmental* function. Indeed, our Court has held that '[i]t is undisputed that [the fire department] is entitled to governmental immunity for conduct performed in the course of fighting a fire.' Pruett v. Bingham, 238 N.C. App. 78, 85, 767 S.E.2d 357, 363 (2014). However, the action that [plaintiff-]Providence claims is fraudulent is *not* providing fire protection services, but rather purchasing and leasing back real estate. Based on our review of our General Statutes, we conclude that the act of a town entering into contracts for the provision of firefighting services is governmental in nature. Section 69-25.6 of our General Statutes provides that '[m]unicipal corporations are hereby empowered to make contracts to carry out the purposes of this Article [concerning rural fire protection].' [G.S.] 69-25.6 (2013). [*See also* G.S. 69-25.8 (2013)]…. This is not to say that a town, acting in a governmental function, is immune from suit for the breach of those contracts. *See* Smith v. State, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). And certainly a theory for a breach is that the contracting governmental entity has

breached its contractual duty of 'good faith and fair dealing.' *See* Blondell v. Ahmed, 247 N.C. App. 480, 483, 786 S.E.2d 405, 407 (2016) (noting that in every contract there is an implied covenant of good faith and fair dealing), *aff'd per curiam*, 370 N.C. 82, 804 S.E.2d 183 (2017). But the question here is whether the Town may be sued *in tort* of fraud. And since the Town was engaged in a governmental function and has otherwise not waived its immunity, we must reverse the trial court's denial of the Town's motion to dismiss the fraud claims." (Emphasis in original.) In reversing the trial court's order as to the claims against defendant-Mayor, the Court observed, "The damage for which Providence seeks recourse is the termination of its contract to provide fire services for the Town of Weddington, an action approved by a vote of the Town Council; the Mayor did not vote on this action. Providence would have no claim whatsoever without the alleged actions of the Town and the Mayor after the Mayor's election, and Defendants were 'acting in a legislative capacity' in voting to terminate the contract. Vereen [v. Holden], 121 N.C. App. [779] at 782, 468 S.E.2d [471] at 473 [(1996)]. And the contract which obligated Providence to deed its fire station property to the Town was entered before the Mayor was elected and was approved by a different town council. Nor were the actions of the Town and the Mayor in regard to the vote to terminate the contract 'illegal acts.' *Id*. at 782, 468 S.E.2d at 473. Providence's claim includes over 100 paragraphs of factual allegations, but the essence of its fraud claim against the Mayor is this: while he was campaigning for office, before his election, he made misrepresentations of his intentions regarding the provision of fire protection services for the Town, and after his election, the Town Council voted to have another department provide fire protection services from the building previously owned by Providence. Even assuming that a candidate for a legislative or executive office could commit actionable fraud by promising one thing while campaigning and then pursuing a different path after election — a proposition that would invite a flood of fraud claims against elected officials at all levels — Providence's alleged claims in this case against the Mayor should have been dismissed based upon legislative immunity." The Court dismissed plaintiff-Providence's appeal, as it did not allege a deprivation of a substantial right. The Court dismissed the portions of the Town's and the Mayor's appeals regarding plaintiff-Providence's constitutional claims. The matter was remanded to the trial court for further proceedings as to the remaining claims. (Appeal by plaintiff and defendants from November 2018 orders. Affirmed in part, reversed in part, dismissed in part, and remanded. Judge Dillon wrote the opinion, with Judge Stroud and Judge Young concurring.))

Public Enterprises; Impact Fees; Interlocal Agreements; Judicial Notice of Public Documents Anderson Creek Partners, L.P., v. County of Harnett, ___ N.C. App. ___ (Nos. COA19-533 & 534, Harnett— 12/31/2020) (Plaintiffs-developers each filed an action seeking refunds for fees paid to Defendant-County for water and sewer services "to be furnished" to future real estate developments. (Each case was designated as exceptional, and the two were consolidated for a single decision in the trial court, as well as consolidated for appeal.) Plaintiffs-developers appealed from the trial court's order granting defendant-County's motion for judgment on the pleadings. Plaintiffs-developers contended that: (1) the trial court erred by taking judicial notice of an interlocal agreement between defendant-County and its water and sewer districts; (2) the pleadings presented material issues of fact with respect to whether defendant-County was authorized to charge fees for services "to be furnished;" and (3) the pleadings presented a viable unconstitutional conditions claim.

The Court of Appeals held that: (1) the trial court did not err in taking judicial notice of the interlocal agreements because the agreements are public documents; (2) there were no issues of material fact in the pleadings with respect to whether defendant-County had authority to charge prospective fees, as it could collect prospective fees by virtue of the 1998 joint interlocal agreement between defendant-County and the water and sewer districts; and (3) the capacity use fees collected by defendant-County were not subject to review under the unconstitutional conditions doctrine. Finding that defendant-County had the authority to charge prospective fees by virtue of the interlocal agreement, the Court stated, "The Districts . . . were authorized to collect prospective fees in 2016. Each of the Districts involved in this case are water and sewer districts created under chapter 162A of the North Carolina General Statutes and governed by the Harnett County Board of Commissioners. Water and sewer districts are bodies corporate and politic which are and were, at all times relevant to this case, authorized to 'contract and be contracted with' and to 'establish, revise and collect rates, fees or other charges and penalties for the use of or the services furnished or *to be furnished*[.]' [G.S.] 162A-88 (2015) (emphasis added). Unlike the versions of [G.S.] 153A-277 and 160A-314 in effect when the Developers were required to pay the Fees, [G.S.] 162A-88 'included the language "services furnished and to be furnished" and thus "plainly allowed the charge for prospective services[.]"' Kidd [Construction Group, LLC, v. Greenville Utilities Commission] ___ N.C. App. at ___, 845 S.E.2d [797] at 800 [(2020)] (quoting Quality Built Homes [Inc. v. Town of Carthage *I*], 369 N.C. [15] at 20, 789 S.E.2d [454] at 458 [(2016)]) (distinguishing [G.S.] 160A-314 (2015) and [G.S.] 162A-88 (2015)). Additionally, local government entities may generally cooperate through interlocal agreements to carry out their purposes. *See* [G.S.] 153A-275, 153A-278 (2015). Our Supreme Court has made it clear that a county may contract with another local government entity to enable the county to exercise authority given to that entity. Specifically, this issue has been addressed with respect to the County and its water and sewer districts. In McNeil v. Harnett County, our Supreme Court held that the 1984 Buies Creek Agreement—the prior interlocal agreement between the County and the Buies Creek District, one of the Districts in this case—properly enabled the County to exercise all 'rights, powers, and functions granted to water and sewer districts as found in [G.S.] 162A-88[.]' McNeill, 327 N.C. [552] at 559, 398 S.E.2d [475] at 479 [(1990)]. At all times relevant to this action, counties did not have the authority to collect prospective fees themselves. However, the Districts each had the authority to collect prospective fees and were free to contract with the County to enable the County to collect prospective fees by exercising the statutory authority of the Districts." (Upon plaintiffs' consolidated appeal from November 2018 order. Affirmed. Chief Judge McGee wrote the opinion, with Judge Stroud and Judge Brook concurring.))

Law Enforcement; Police Department; Municipal Attorney; Representation of Criminal Defendants; Right to Conflict-Free Counsel; Potential Conflict of Interest State v. Lynch, ___ N.C. App. ___ (No. COA20-201, Lincoln─12/15/2020) (Defendant argued that: 1) the trial court failed to properly inquire into his trial counsel's conflict of interest (allegedly arising from trial counsel also being City Attorney); and 2) the trial court failed to properly inform defendant of the consequences of the conflict of interest. Upon citing *inter alia* N.C. R. Pro. Conduct 1.7(a) (2019)(entitled "Conflict of Interest: Current Clients") and State v. James, 111 N.C. App. 785, 789-91, 433 S.E.2d 755, 757-58 (1993), the Court stated, "We are guided by N.C. RPC 73 [13 April 1990; entitled "Conflicts of

Interests involving Attorneys for and on Governing Bodies"] and the rationale underpinning it and hold that a conflict of interest that cannot be waived arises where law enforcement officers testify against a defendant and the defendant's appointed counsel also advises the officers' department or its members and, in effect, represents the officers who are prosecuting witnesses against the defendant. Here, Defendant's objections and [trial counsel's] responses put the trial court on notice of a sufficiently particular possible conflict of interest such that the trial court was obligated to conduct an inquiry." The Court determined that the trial court failed to properly inquire into defense counsel's conflict of interest. "[I]ts inquiry was insufficient because it did not determine whether [trial counsel] advised the Lincolnton Police Department and, in effect, represented the police officers who testified against Defendant. When questioned, [trial counsel] admitted that he was the city attorney and indicated that he 'had no communication or contact with the Police Department concerning this case.' But the trial court failed to determine the extent to which [trial counsel's] role as city attorney required him to advise or represent the Lincolnton Police Department or its individual officers." (A significant portion of N.C. RPC 73 appears verbatim in the opinion.) The Court determined that the trial court impermissibly shifted the responsibility to inquire into the possible conflict to defendant. The Court additionally observed that the trial court focused much of its own questioning on how long defendant had known trial counsel was the city attorney and when he had raised such concern, facts deemed by the Court to be "immaterial to determining whether an actual conflict of interest existed." (Citation omitted.) Accordingly, the Court remanded the case for a hearing to determine whether there was a conflict of interest arising from trial counsel's representation of both defendant and the City and for further proceedings consistent with that determination. "Should the trial court determine that [trial counsel] advised or represented the Lincolnton Police Department or its members at any time relevant to this case, [trial counsel] labored under a conflict of interest that could not be waived and Defendant is entitled to a new trial. Should the trial court determine that [trial counsel] did not advise or represent the Lincolnton Police Department or its members at any time relevant to this case, no conflict of interest existed and the judgment entered upon Defendant's convictions shall be left undisturbed." (Appeal by defendant from August 2019 judgment entered upon jury verdicts. Remanded with instructions. Opinion by Judge Collins, with Judge Stroud and Judge Murphy concurring.))