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Public Nuisances; Abatement; Filing of Action; Resolutions; Exercise of Powers

State ex rel. City of Albemarle v. Nance, ___ N.C. App. ___, 831 S.E.2d 605 (No. COA18-916, Stanly– 7/16/19), *disc review denied*, ___ N.C. ___ (No. 327P19, 2/28/20)

- ***Holding*- In City's action alleging defendants' use of hotel constituted a public nuisance pursuant to G.S. 19-1 & 2.1, defendants filed a motion to dismiss for lack of subject matter jurisdiction. Upon hearing, defendants argued G.S. 160A-12 required the Council to have passed a resolution authorizing the filing of the complaint. The trial court found as fact that no such resolution been presented to, heard, or adopted by the Council. The City appealed from trial court's order, which *inter alia* granted defendants' motions to dismiss. The Court of Appeals affirmed, and the Supreme Court of North Carolina denied the petition for discretionary review.**

- ***Key Excerpt*–** The Court initially noted that the City gave notice that it was appealing the order granting the October 2017 motion to compel. "'The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.' N.C. R. App. P. 28(a). Where a party 'does not set forth any legal argument or citation to authority to support [the] contention, [it is] deemed abandoned.' State v. Evans, __ N.C. App. __, __, 795 S.E.2d 444, 455 (2017). This issue was not addressed in the City's appellate brief and it has abandoned this issue. The trial court's order entered 30 October 2017 is final."

The Court then addressed the issue of subject matter jurisdiction. "'If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.' Woodring v. Swieter, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006) (quoting Coker v. DaimlerChrysler Corp., 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (internal quotation marks omitted)). 'Wherever a nuisance is kept, maintained, or exists, as defined in this Article, *the Attorney General, district attorney, county, municipality, or any private citizen of the county* may maintain a civil

action in the name of the State of North Carolina to abate a nuisance.' [G.S.] 19-2.1 (2017) (emphasis supplied)."

"Cities may exercise the powers delegated to them by the General Assembly issuing a city charter and are operated as municipal corporations. [G.S.] 160A-11, 160A-12 (2017). As municipal corporations, cities are required to exercise these powers as are delegated and provided in statutes by ordinance or resolution of the city council. *Id*."

"[The City's] adopted ordinances set out the duty of the city attorney to 'prosecute and defend suits against the City.' The ordinances also provide that the '*Council may employ other legal counsel* from time to time, in addition to the City Attorney, as may be necessary to handle adequately the legal affairs of the City.' City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3 (emphasis supplied)."

The Court observed, "The Nances do not contest the statutes and the City's charter allow the City to file and maintain a civil action for a public nuisance. They argue the city council did not vote and resolve to exercise its authority in this action. Without the city council's ordinance or resolution, the Nances argue the City has produced no evidence to show that the formal process to file suit was initiated, approved, or resolved by the city council. We agree."

"It is undisputed, and the trial court found, that no notice, meeting, minutes, or vote of the city council was resolved, given, or taken to initiate a public nuisance action against the Nances. The City's private counsel asserted before the trial court that the city council had 'discussed the case' and 'assumed' the proper action would be taken by the State Bureau of Investigation ["SBI"] and chief of police 'to let them follow through with whatever they thought was best to do,' and to maintain it as a criminal proceeding, as it is common practice in other cities and counties to 'just file[] a Chapter 19.'"

"The notice letter seeking to abate the alleged public nuisance did not come from one of the entities or public individuals on [G.S.] 19-2.1's enumerated list of those empowered or authorized to bring and maintain a public nuisance abatement action: 'the Attorney General, district attorney, county, municipality, or any private citizen of the county.'"

Noting that the police chief signed the notice letter, the Court stated, "Contrary to the council's assumption, neither the SBI nor the chief of police is included in this list.... Further, nothing in the record indicates the letter was drafted by any party that could have maintained such an action. Even if Chief Bowen had been acting as a private citizen of the county, no evidence in the record shows a bond being posted, as is required when a private citizen initiates the action. [G.S.] 19-2.1."

Determining that the civil action was not properly initiated by the Council, the Court stated, "It was discussed by the council and letter notice was initiated by the chief of police, without any reference to being drafted by or on behalf of the city attorney or outside counsel for the City. Albemarle's ordinances require that either the city attorney or outside counsel selected by the council prosecute this action. In order to bring suit through outside counsel, the city council must adopt a resolution. City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3; [G.S.] 160A-12. The city council was on notice of this requirement, yet no evidence of compliance has been produced. The city attorney's

signature or joinder to this action after it was initiated does not appear on any of the pleadings or documents."

Examining the record, the Court further observed, "While the City's outside counsel asserted at oral argument that both he and previous trial counsel were hired pursuant to a resolution of the city council, no evidence of this authority exists in the record. Without such evidence, the council's discussion, assumptions, and common practice do not convey nor carry their burden to prove standing. Neuse River Found. Inc. [v. Smithfield Foods, Inc.], 155 N.C. App. [110] at 113, 574 S.E.2d [48] at 51 [(2002)]. 'The [city council] never attempted to obtain nor received the required ... vote prior to filing this [civil] action. Without the required vote, the [council] lacked the authority to commence legal proceedings against [the Nances] and does not possess standing.' Peninsula Prop. Owners Ass'n, Inc. v. Crescent Res., LLC, 171 N.C. App. 89, 97, 614 S.E.2d 351, 356 (2005)."

"Albemarle's ordinances define the proper party to initiate an action for the city. '[B]y enacting [such an] ordinance, the [council] must follow the procedures it has set therein. If such procedures are inconvenient, the [council] should change them, not ignore them.' Town of Kenansville v. Summerlin, 70 N.C. App. 601, 602, 320 S.E.2d 428, 430 (1984) (citation omitted). The City must follow the requirements of the statutes and charter, and the ordinances and procedures it established. Here, it has failed to do so. *Id*."

- ***Synopsis*—** Appeal by plaintiff from October 2017 order and May 2018 orders. Affirmed. Opinion by Judge Tyson, with Judge Inman and Judge Young concurring. On February 28, 2020, the Supreme Court of North Carolina denied plaintiff's petition for discretionary review.

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

Public Enterprises; Sewer Service Availability Fees; Undeveloped Properties; Local Act Boles v. Town of Oak Island, ___ N.C. ___ (No. 290A19, 2/28/20) (*per curiam)* (Owners of undeveloped parcels challenged sewer service availability fees levied by defendant-Town pursuant to a 2004 local act, enacted to help service debt incurred in constructing a sewer system. (Specifically, the Town was authorized to "impose annual fees for the availability of sewer service within" its sewer treatment district and to impose such sewer service availability fees upon the "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment" within the district. 2004 N.C. Sess. Laws 117, 117, ch. 96, §§ 3 & 4.) The trial court entered an order granting summary judgment for the Town. Reversing and remanding the trial court's order for further proceedings, a divided panel of the Court of Appeals concluded that defendant-Town exceeded its statutory authority by imposing the sewer service availability fees on plaintiffs' undeveloped property that could not or does not benefit from the availability of the sewer system. The Supreme Court of North Carolina reversed in a *per curiam* opinion.) (Appeal by defendant-Town pursuant to G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 830 S.E.2d 878 (No. COA18-806, Brunswick— 7/2/19) (*see* MLN July/Aug. 2019, p. 3), reversing and remanding May 2018 order in which trial court had granted Town's motion for summary judgment. On February 28, 2020, the Supreme Court of North Carolina *per curiam* reversed the Court of Appeals' decision. ***Note***: The League participated as *amicus curiae* in this case on behalf of the Town.)

Eminent Domain; Just Compensation; Amend Complaint; Voluntary Dismissal City of Charlotte v. University Financial Properties, LLC, ___ N.C. ___ (183PA16-2, 2/28/20) (The issue presented here was whether the Court of Appeals erred by concluding that the trial court did not have the authority to consider plaintiff's motions to amend its complaint to reduce its just compensation deposit after defendant attempted to voluntarily dismiss its claim for additional compensation. The Supreme Court of North Carolina affirmed *per curiam*, stating, "Justice Davis did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See* Piro v. McKeever, 369 N.C. 291, 291, 794 S.E.2d 501, 501 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote). " (On discretionary review under G.S. 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App.___, 818 S.E.2d 116 (No. COA17-388, Mecklenburg– 7/3/18), reversing and remanding trial court's September 2016 order.))

Procedure; Dismissal; *Pro Se*; Emotional Distress Claims Carney v. Wake Cty. Sheriff's Ofc., ___ N.C. App. ___ (No. COA18-1299, Wake– 8/6/19) (***unpublished***), *disc review denied*, ___ N.C. ___ (No. 55P19-2, 2/28/20) (Plaintiff appealed the dismissal of her *pro se* lawsuit, and the Court determined that the trial court properly concluded that plaintiff's complaint failed to state any legal claim on which relief could be granted. G.S. 1A-1, Rule 12(b)(6). "In her appellate brief, [plaintiff] first argues that she pleaded a claim under one of two statutes, [G.S.] 14-196 and [G.S.] 50C-1. Neither of these statutes provides a basis for a civil cause of action for damages—one criminalizes the use of certain profane or threatening language in telephone calls, and the other provides a process for obtaining a civil no-contact order. [Plaintiff] next argues that her complaint asserts claims for negligent infliction of emotional distress or intentional infliction of emotional distress. But her complaint does not allege the elements of these tort claims nor include any allegations from which these elements could be inferred." (Appeal by plaintiff from September 2018 order. Affirmed. Judge Dietz wrote the opinion, with Judge Murphy and Judge Collins concurring. On February 28, 2020, the Supreme Court of North Carolina denied plaintiff's petition for discretionary review.))

Procedure; Interlocutory Appeals; Immunity; Reinsurance Coverage; Motion to Dismiss Estate of Seymour v. Orange Cty. Bd. of Ed., et al., ___ N.C. App. ___ (No. COA19-334, Orange– 3/3/20) (***unpublished***) (The Court observed that the trial court's interlocutory order affected the Board's substantial right to immunity. *See, e.g.*, Smith v. Phillips, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994) ("[W]hen [a] motion is made on the grounds of sovereign and qualified immunity, . . . a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity."). The Court stated that the ultimate question in this appeal was whether the trial court erred in denying defendant-County's motion to dismiss, and that such review of a denial of a motion to dismiss on the basis of immunity was *de novo*. White v. Trew, 366 N.C. 360, 362-63, 736 S.E.2d 166, 168 (2013). The Court held

that the trial court erred in denying defendant-County's motion to dismiss. Comparing the plain language of the clause at issue with plaintiff's complaint, the Court concluded that the Board's policy excluded coverage for the complained-of injury and the Board was therefore immune from plaintiff's suit. (Appeal by defendant-Board from January 2019 order. Reversed. Opinion by Judge Murphy, joined by Judge Stroud and Judge Zachary.))

Land Use; Administrative Remedies; Writ of Mandamus, *Bona Fide* Farm Exception Clement v. Cumberland Cty., ___ N.C. App. ___ (No. COA19-414, Cumberland– 1/7/20) (***unpublished*) (**Respondent's appealed an order which granted a petition for writ of mandamus sought by petitioners: pursuant to the writ, respondent-County was compelled to provide petitioners with a written zoning determination. On appeal, respondents argued that the trial court erred by: (1) denying their motions to dismiss brought under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, and (2) issuing the writ of mandamus sought by petitioners. Reversing, the Court held that the trial court lacked subject matter jurisdiction to rule on the petition for writ of mandamus. "Lloyd's response to Petitioners' April 16, 2018 zoning inquiry constituted an appealable, official decision. As the Cumberland County Planning and Inspections Director, Lloyd had the authority to issue a definitive interpretation of the Ordinance. In fact, Lloyd's response even acknowledges that he is tasked with making the determination. Second, Lloyd's response concerns the specific application of county zoning regulations in light of the *bona fide* farm purposes exemption, found in Section 153A-340. Third, the response concerns a specific set of facts—the application of Section 153A-340 to an ATV [recreational all-terrain vehicle] park located on a property entitled to the *bona fide* farm purposes exemption. Finally, the response was provided to Petitioners, who, as owners of property adjacent to the ATV Park, had a clear interest in the outcome of the dispute. Meier [v. City of Charlotte], 206 N.C. App. [471] at 478-79, 698 S.E.2d 704, 709-10 [(2010)] (finding an adjacent property owner to have a 'definite interest in the outcome' of a zoning dispute)…. Because Lloyd's response to Petitioners' April 16, 2018 zoning inquiry constituted an appealable, official decision, Petitioners were required by Section 1604 of the Ordinance to file their appeal with the Board of Adjustment within thirty days of receiving written notice of that decision. By failing to file an appeal with the Board of Adjustment, Petitioners did not exhaust their administrative remedies. Accordingly, Petitioners cannot subsequently create jurisdiction with the Superior Court 'by couching [their] claim in the guise of a mandamus proceeding.' Northfield Dev. Co. [v. City of Burlington], 165 N.C. App. [885] at 889, 599 S.E.2d [921] at 925 [(2004)]. To hold otherwise would undermine the quasi-judicial scheme intended by the General Assembly in Section 160A-388 and could lead to market uncertainty and costly economic waste by forcing Cumberland County to revisit a prior, official determination regarding a project which has presumably moved toward completion." (Appeal by respondents from December 2018 order. Reversed. Opinion by Judge Berger, with Judge Inman and Judge Hampson concurring.))