August 2016 Volume XXXVI, No. 2

Public Enterprises;
Water and Sewer Impact Fees

Quality Built Homes v. Town of Carthage, ___ N.C. ___ (No. 315PA15, 8/19/16)

- ***Holding***– Municipalities lack general statutory authority to assess water and sewer impact fees.

- ***Key Excerpt***– "In this case we consider whether the Town of Carthage exceeded its municipal authority under the Public Enterprise Statutes, [G.S.] 160A-311 to -338 (2015), by adopting certain water and sewer 'impact fee' ordinances. Upon approval of a subdivision of real property, the ordinances trigger immediate charges for future water and sewer system expansion, regardless of whether the landowner ever connects to the system or whether Carthage ever expands the system. As creations of the legislature, municipalities have only those powers delegated to them by the General Assembly. When Carthage adopted the ordinances at issue here, it exercised power that it had not been granted. The impact fee ordinances are therefore invalid and, accordingly, we reverse the decision of the Court of Appeals."

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"The Court of Appeals affirmed the trial court's grant of summary judgment in favor of Carthage. Quality Built Homes Inc. v. Town of Carthage, ___ N.C. App. ___, 776 S.E.2d 897, 2015 WL 4620404 (2015) (unpublished). Applying 'broad construction' interpretation principles under [G.S.] 160A-4, the Court of Appeals concluded that Carthage acted within its delegated municipal authority to impose and collect the impact fees under the Public Enterprise Statutes, Quality Built Homes, 2015 WL 4620404, at *4-5 (citing, *inter alia*, [G.S.] 160A-4 (2013); Homebuilders Ass'n of Charlotte v. City of Charlotte, 336 N.C. 37, 43-44, 442 S.E.2d 45, 50 (1994); and Town of Spring Hope v. Bissette, 305 N.C. 248, 252, 287 S.E.2d 851, 854 (1982)), which enable municipalities to 'establish and revise . . . schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise,' [G.S.] 160A-314(a)."

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"Carthage asserts that under the Public Enterprise Statutes it has broad authority to 'collect monies' for the 'operation, maintenance and expansion' of its water and sewer systems, and that such authority extends to the collection of impact fees. Car-

thage claims that 'impact fees' fall squarely within its 'authority to charge "fees" or "charges"' under [G.S.] 160A-314. We disagree. While the enabling statutes allow Carthage to charge for the contemporaneous use of its water and sewer systems, the plain language of the Public Enterprise Statutes clearly fails to empower the Town to impose impact fees for future services."

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"These enabling statutes clearly and unambiguously empower Carthage to charge for the contemporaneous use of water and sewer services—not to collect fees for future discretionary spending. *See* Smith Chapel [Baptist Church v. City of Durham], 350 N.C. [805] at 811, 517 S.E.2d [874] at 878 [(1999)] (finding that the 'plain language' of [G.S.] 160A-314 is 'clear and unambiguous'). A municipality's ability to 'establish and revise' its various 'fees' is limited to 'the use of' or 'the services furnished by' the enterprise, which provisions are operative in the present tense. *See* Dunn v. Pac. Emp'rs Ins. Co., 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) ('Ordinary rules of grammar apply when ascertaining the meaning of a statute . . . .' (citations omitted))."

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"The language of the impact fee ordinances plainly points to future services, thus requiring Carthage to invoke prospective charging power. Both ordinances contemplate 'expanding' the systems, including 'plant' and 'storage expansion,' and the water impact fee is assessed on property that is '*to be* served' by the water system. The fees are not assessed at the time of actual use, but are payable in full at the time of 'final [subdivision] plat approval'—a time when water, sewer, or other infrastructure might not have been built and only a recorded plat exists. Moreover, Carthage charges the impact fees in addition to tap fees, which are assessed when a property owner actually connects to the system. Indeed, plaintiffs were required to pay some impact fees before improving or establishing a need for services on their property. *Cf.* Bissette, 305 N.C. at 251-52, 287 S.E.2d at 853 (concluding that an increased rate on all customers to fund a new treatment plant 'did not reflect any services yet to be furnished, but merely the same service which had previously been furnished')." (Emphasis in original.)

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"Furthermore, Carthage has the authority to charge tap fees and to establish water and sewer rates to fund necessary improvements and maintain services to its inhabitants, which is sufficient to address its expansion needs. *See* Bissette, 305 N.C. at 251-52, 287 S.E.2d at 853 (concluding that the town validly increased rates on all customers to pay for 'a necessary improvement to the already existing sewer system without which the Town could not continue to provide sewer service')."

"While the Public Enterprise Statutes at issue here enable Carthage to charge for the contemporaneous use of its water and sewer systems, the statutes clearly and unambiguously fail to give Carthage the essential prospective charging power necessary to assess impact fees. Because the legislature alone controls the extension of municipal authority, the impact fee ordinances on their face exceed the powers delegated to the Town by the General Assembly, thus overstepping Carthage's rightful authority. *See* Smith Chapel, 350 N.C. at 812, 517 S.E.2d at 879 (holding that 'the [town's] ordinance on its face exceeds the express limitation of the plain and unambiguous reading of' the applicable Public Enterprise Statutes)."

"The ordinances are therefore invalid and, accordingly, we reverse the decision of the Court of Appeals, which affirmed the trial court's grant of summary judgment for the Town of Carthage. We . . . remand this case to the Court of Appeals for consideration of the unresolved issues." (In a footnote the Court observed, "Because of its resolution of the matter, the Court of Appeals did not reach the statute of limitations or estoppel issues. Moreover, the court overruled plaintiffs' argument that they are entitled to recover attorneys' fees and costs.")

- ***Synopsis***− On discretionary review pursuant to G.S. 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 776 S.E.2d 897 (2015). Reversed and remanded. Opinion by Justice Newby.

Public Enterprises; Easements; Encroachments; Statute of Limitations

Duke Energy Carolinas, LLC v. Gray, ___ N.C. ___ (No. 108PA14-2, 8/19/16)

- ***Holding***− N.C. Supreme Court overrules the decision of the Court of Appeals in Pottle v. Link, 187 N.C. App. 746, 654 S.E.2d 64 (2007), insofar as that opinion deemed G.S. 1-40 inapplicable to actions involving encroachments on easements. Removal of the encroachment is a recovery of real property lying outside the scope of G.S. 1-50(a)(3) (six years). Utility facilities crisscross the state above, on, and beneath the ground. Their accompanying easements are not always readily subject to routine inspection by the owning utility. The drafters of G.S. 1-50(a)(3) did not intend that a utility's right to maintain such easements could be successfully challenged in a time as short as six years. The twenty year statute of limitations is applicable. G.S. 1-40.

- ***Key Excerpt***− "Defendant Herbert A. Gray (defendant) owns real property located in Huntersville, North Carolina. Plaintiff Duke Energy Carolinas, LLC (plaintiff or Duke) owns an easement allowing construction of and access to its power lines. A portion of defendant's property encroaches on plaintiff's easement and defendant has failed to remove the encroachment upon plaintiff's request. We consider whether plaintiff has a right to eject defendant's encroachment from the easement. Defendant contends that [G.S.] 1-50(a)(3), which establishes a six-year statute of limitations for injury to any incorporeal hereditament, bars plaintiff's claim. We conclude that removal of the encroachment is a recovery of real property lying outside the scope of subdivision 1-50(a)(3). As a result, this action falls within the twenty-year statute of limitations set out in [G.S.] 1-40. Accordingly, we reverse the decision of the Court of Appeals."

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The Court stated that the key issue before the Court was whether the trial court and the Court of Appeals erred in identifying the applicable statute of limitations as being six years and accordingly barring plaintiff's claims. "Defendant argues that the appropriate limitation period is the six years set out in [G.S.] 1-50(a)(3), while plaintiff contends that the twenty-year statute of limitations found in [G.S.] 1-40 is proper. The former, set out in Chapter 1, Article 5 ('Limitations, Other Than Real Property'), applies to actions for 'injury to any incorporeal hereditament. [G.S.] 1-50(a)(3) (2015). The latter, set out in Chapter 1, Article 4 (Limitations, Real Property'), applies to 'action[s] for the recovery or possession of real property.' *Id.* [G.S.] 1-40 (2015). As a result, we must determine whether this action involves injury to an incorporeal hereditament or recovery of real property."

"We begin our analysis by considering the characteristics of an incorporeal hereditament, which has been defined as '[a]n intangible right in land, such as an easement.' *Incorporeal Hereditament, Black's Law Dictionary* (10th ed. 2014); *see also* Davis v. Robinson, 189 N.C. 589, 598, 127 S.E. 697, 702 (1925) ('An easement is an incorporeal hereditament, and is an interest in the servient estate.' (citations omitted)). Consistent with this definition, we have observed that '[a]n easement always implies an interest in the land. It is real property, and it is created by grant.' Davis, 189 N.C. at 600, 127 S.E. at 703 (citations omitted) (quoting Atl. & Pac. R.R. v. Lesueur, 2 Ariz. 428, 430, 19 P. 157, 158-59 (1888)); *see also Real Property, Black's Law Dictionary* (10th ed. 2014) ('Real property can be either corporeal (soil and buildings) or incorporeal (easements).'). Accordingly, the easement in this case, while an incorporeal hereditament, is also real property."

"Next, we review the nature of plaintiff's action. Plaintiff's easement gives plaintiff a property right to a degree of control over the use of an identified swath of land, specifically including 'the right to keep said strip of land free and clear of any or all structures.' Plaintiff alleges that the encroachment of defendant's home into that strip interferes with and invades its rights over that tract. While plaintiff has alleged an injury to its rights as possessor of the easement, the remedy plaintiff pursues is not damages for any injury to the easement. Instead, plaintiff wishes to regain control over the part of its easement now occupied by defendant's house. Because plaintiff seeks to recover full use of its easement, and because the easement is real property, we conclude that this action is for the recovery of real property. By definition, the statutes of limitation in Chapter 1, Article 5 do not apply to the recovery of real property. *See* [G.S.] 1-46 (2015) (stating that the limitations periods found in Article 5 are for 'actions, other than for the recovery of real property'). Consequently, we conclude that plaintiff's claim is subject to the section 1-40 twenty-year statute of limitations. For similar reasons, the ten-year statute of limitations for sealed instruments found in [G.S.] 1-47(2) is inapplicable because it too is contained in Chapter 1, Article 5 of the General Statutes."

"Not only do we conclude that this result is dictated by the language found in the applicable statutes and cases, we acknowledge that utility facilities crisscross the state above, on, and beneath the ground. Their accompanying easements are not always readily subject to routine inspection by the owning utility. We do not believe that the drafters of [G.S.] 1-50(a)(3) intended that a utility's right to maintain such easements could be successfully challenged in a time as short as six years."

"We reverse the decision of the Court of Appeals and conclude that the trial court erred in granting summary judgment in favor of defendant and Wieland upon finding that Duke's claims were barred by [G.S.] 1-50(a)(3). In addition, we overrule the decision of the Court of Appeals in Pottle v. Link, 187 N.C. App. 746, 654 S.E.2d 64 (2007), insofar as that opinion deemed section 1-40 inapplicable to actions involving encroachments on easements. Defendant's pending claims against other parties are unaffected by this result."

- ***Synopsis***− On discretionary review pursuant to G.S. 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 766 S.E.2d 354 (2014). Reversed and remanded. Opinion by Justice Edmunds. *Note*: The League participated as ***amicus curiae*** in this case.

Law Enforcement; Compliance with Established Procedures; Internal Operations

Tully v. City of Wilmington, ___ N.C. App. ___ (No. COA15-956, New Hanover− 8/16/16)

- ***Holding***− In a 2-1 decision, N.C. Court of Appeals holds that law enforcement officer adequately alleged a valid property and liberty interest in requiring defendant-City to comply with its own established promotional process.

- ***Key Excerpt***− "Plaintiff, a city police officer, appeals from the trial court's judgment on the pleadings in favor of Defendant, his employer, foreclosing Plaintiff's claims for violation of his State constitutional rights to substantive due process and equal protection as a result of Defendant's failure to comply with its own rules and policies regarding its promotion process. Because we hold that Plaintiff has alleged a valid property and liberty interest in requiring Defendant to comply with its own established promotional process, we reverse the order of the trial court."

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  "As an initial matter, we must clarify the bases for Tully's claims that his constitutional rights have been violated. Our review of the record reveals that, both in the trial court and on appeal, the City has consistently attempted to reframe Tully's claims as assertions of a property and liberty interest *in re-*

ceiving a promotion, a position that, as the City accurately observes, is not supported by precedent. However, Tully's actual claim is that the City violated Tully's constitutional rights *by failing to comply with its own policies and procedures regarding the promotional process*. In other words, as Tully states in his reply brief, he 'is *not arguing that he has an absolute property interest in being promoted*. Rather, he is arguing that if the government has a process for promotion of its employees, particularly law enforcement officers who are sworn to uphold and apply the law to ordinary citizens, *that process cannot be completely arbitrary and irrational* without running afoul of the North Carolina Constitution.' (Emphasis added)."

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"Although as noted *supra*, this appeal presents a matter of first impression in our State courts, courts in other jurisdictions have considered similar arguments made by government employees and have reached the same result we reach here. While not mandatory authority, these decisions present a convincing case supporting our adoption of the [United States v.] Heffner [420 F.2d 809 (4th Cir. 1969)] rule in this matter." (Citations omitted.)

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While the Court in Farlow [v. N.C. State Bd. of Chiropractic Exam'rs, 76 N.C. App. 202, 332 S.E.2d 696 (1984), *disc. review denied and appeal dismissed*, 314 N.C. 664, 336 S.E.2d 621 (1985)] considered prejudice, whereas the Heffner and [United States *ex rel.*] Accardi [v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L. Ed. 681 (1954)] decisions explicitly held that prejudice was irrelevant, this distinction is not pertinent here where Tully's appeal is before us from a dismissal on the pleadings. We cite Farlow merely to demonstrate that this Court has previously found the "rationale . . . sound" that a government entity should follow its own established procedures and rules to ensure equal treatment. *See id.* at 208, 332 S.E.2d at 700. In line with the reasoning discussed di, Heffner, and Farlow, we now hold that it is *inherently arbitrary* for a government entity to establish and promulgate policies and procedures and then not only utterly fail to follow them, but further to claim that an employee subject to those policies and procedures is not entitled to challenge that failure. To paraphrase Tully, if a government entity can freely disregard its policies at its discretion, why have a test or a grievance process or any promotional policies at all?" (Emphasis in original.)

"In reaching this holding, we emphasize that the questions before the trial court in ruling on the City's motion for judgment on the pleadings and now before this Court on appeal are *not* whether the City did violate its own promotional policies and procedures and whether Tully should prevail in this matter. Instead, the dispositive questions before us are whether Tully has sufficiently *alleged* claims of arbitrary and capricious action by the City in its failure to follow its own procedures and whether the City has established on the pleadings 'that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.' For the reasons discussed *supra*, we conclude that Tully has sufficiently alleged constitutional claims and that genuine issues of material fact remain to be resolved. Accordingly, to permit Tully to engage in discovery and present a forecast of evidence to support his allegations of arbitrary and capricious action in the City's failure to follow its own policies and procedures regarding promotions, we reverse the trial court's order." (Emphasis in original; citation omitted.)

- ***Dissent***- "The majority … acknowledges this is an issue of first impression, as our courts have never held that a governmental employer that fails to follow its own established procedures acts arbitrarily and, therefore, unconstitutionally. Because the City is acting as an employer rather than as a sovereign, and is vested with the power to manage its own internal operations, Tully's pleadings—although asserting what appears to be an unfair result in a standard process—do not state a viable constitutional claim."

"Tully alleged in his complaint that denying him a promotion 'due to his answers on the test and then determining that the reason was not grievable' was an 'arbitrary and irrational deprivation of property in violation of the North Carolina Constitution.' Tully now argues on appeal that he was subjected to an arbitrary and capricious *process* by the City's failure to follow its own established promotional procedures, an important distinction that was not alleged in Tully's complaint. Tully says in brief that 'he never had a true opportunity to grieve his denial of a promotion based on his answers to the Sergeant's test.' However, Tully's complaint alleges that he was given the opportunity to appeal the selection process and to be heard on his grievance, and was then 'informed that his grievance was denied, as the test answers were not a grievable item.' Nevertheless, Tully's allegations in his complaint tend to undercut his ultimate constitutional claims where the promotional process was followed and he was heard on his grievance through the internal grievance procedure." (Emphasis in original.)

"Tully contends he was arbitrarily discriminated against based on test results that he was not permitted to challenge and that such arbitrary and irrational treatment violated his liberty interests as protected by the North Carolina Constitution. Further, Tully argues that his lack of opportunity to adequately challenge his test results was in violation of the WPD's own regulations. While I recognize Tully's opinion of the unfairness of the result of the WPD's testing scheme (Tully's denial of a promotion), and his unsuccessful challenge to the result, it is not clear that Tully's claims have a basis in our state constitution. Further, the cases cited by Tully in support of his claims for constitutional review relate to the government acting as a *sovereign*, rather than as an *employer*, and are inapposite to the facts at hand." (Emphasis in original.)

"'[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising "the power to regulate or license, as lawmaker," and the government acting "as proprietor, to manage [its] internal operation."' Engquist v. Or. Dep't of Agric., 553 U.S. 591, 598, 170 L. Ed. 2d 975, 983 (2008). . . . ' "[T]he government as employer indeed has far broader powers than does the government as sovereign." ' *Id*. (quoting Waters v. Churchill, 511 U.S. 661, 671, 128 L. Ed. 2d 686, 697 (1994) (plurality opinion)). In Engquist, the U.S. Supreme Court explained this distinction as follows: '[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. Given the common-sense realization that government offices could not function if every employment decision became a constitutional matter, constitutional review of governmental employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign." 553 U.S. at 598–99, 170 L. Ed. 2d at 983–84 (alterations in original) (internal citations and quotation marks omitted)…."

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"As the 'government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large[,]' Engquist, 553 U.S. at 599, 170 L. Ed. 2d 984, the cases cited in the briefs submitted on behalf of plaintiff related to the government acting in its capacity as a sovereign are inapplicable here where the government acted as an employer in denying plaintiff a promotion."

"Because plaintiff cannot establish a valid property or liberty interest in obtaining a promotion or in the promotional process itself, nor can plaintiff establish that he was deprived of substantive due process or equal protection rights in failing to be so promoted, I dissent from the majority opinion."

- ***Synopsis***- Appeal by Plaintiff from May 2015 judgment. Reversed. Opinion by Judge Stephens, with Judge McCullough concurring. Judge Bryant dissenting.