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Public Enterprises;
Water and Sewer Impact Fees

Quality Built Homes, Inc. v. Town of Carthage, ___ N.C. App. ___ (No. COA15-115-2, Moore– 12/30/16) (***unpublished***), *disc. review allowed*, ___ N.C. ____ (No. 315PA15-2, 5/3/17)

- ***Holding***– On remand from the N.C. Supreme Court, ____ N.C. ___, 789 S.E.2d 454 (No. 315PA15, 8/19/16), N.C. Court of Appeals in December 2016 holds *inter alia* that claims for refunds of impact fees are subject to 10-year statute of limitations and that Town's estoppel defense is inapplicable. On May 3, 2017, the North Carolina Supreme Court allowed plaintiff-Town's petition for discretionary review.

- ***Key Excerpt***– The Court of Appeals agreed with plaintiffs' contention that their claims for refunds of the impact fees are subject to the ten-year statute of limitations pursuant to G.S. 1-56. *See* G.S. 1-56 ("An action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued.") "'North Carolina courts have held that ultra vires claims for charging fees without statutory authority have a ten-year statute of limitations.' Tommy Davis Constr. Inc. v. Cape Fear Public Utility Auth., No. 7:13-CV-2-H., 2014 WL 3345043, at *3 (E.D.N.C. July 8, 2014) (unpublished) (citing Amward Homes, Inc. v. Town of Cary, 206 N.C. App. 38, 59, 698 S.E.2d 404, 419–20 (2010), *aff'd by an equally divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011), and Durham Land Owners Ass'n v. Cnty. of Durham, 177 N.C. App. 629, 640–41, 630 S.E.2d 200, 208 (2006)), *aff'd* 807 F.3d 62 (4th Cir. 2015). In affirming the federal district court's decision in Tommy Davis Construction, the Fourth Circuit relied on this Court's recent opinion in Point South Point Properties, LLC v. Cape Fear Public Utility Authority, ___ N.C. App. ___, 778 S.E.2d 284 (2015), regarding which statute of limitations applies to state law claims like those brought in the instant case…."

The Court of Appeals held that the trial court erred in granting summary judgment based on the doctrine of estoppel by acceptance of benefits. "[I]n the instant case, the General Assembly

clearly contemplated that even if a party received a 'benefit,' *i.e.*, 'development or a development permit,' in exchange for paying an illegal fee, the party should still receive a recovery of that fee. *See* [G.S.] 160A-363(e) ('If the city is found to have *illegally exacted* a . . . fee . . . *for development or a development permit* not specifically authorized by law, the city shall return the . . . fee . . . plus interest . . . .' (emphasis added)). In other words, because plaintiffs would be legally entitled to receive development approval but for the requirement of the illegal impact fee, the doctrine of estoppel by acceptance of benefits does not apply. To hold otherwise would render section 160A-363(e) meaningless, because no party could ever seek a refund under that statute had they originally received a 'benefit' in exchange for first paying the illegal fee. Lastly, '[e]quity will not interfere where a statute applies and dictates requirements for relief.' Lankford v. Wright, 347 N.C. 115, 122, 489 S.E.2d 604, 608 (1997) (Mitchell, C.J., dissenting) (quoting 27A Am. Jur. 2d *Equity* § 246 (1994))."

The Court of Appeals then turned to a consideration of "whether plaintiffs are entitled to attorneys' fees and costs pursuant to [G.S.] 6-21.7, in light of the fact that the Supreme Court has held that 'the impact fee ordinances on their face exceed the powers delegated to [defendant] by the General Assembly . . . .' Quality Built Homes, ___ N.C. at ___, 789 S.E.2d at 459 (citation omitted)." *See* G.S. 6-21.7 ("In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court *may* award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court *shall* award attorneys' fees and costs.") (Emphasis added.)

The Court of Appeals stated, "Plaintiffs contend that defendants' use of the illegal impact fees for other purposes was an abuse of discretion, making an attorneys' fee award in their favor mandatory. However, in the instant case, because the trial court erred as a matter of law by granting summary judgment in favor of defendant, it necessarily did not reach the issue of whether to grant attorneys' fees to plaintiffs, the losing parties at the trial court level. Therefore, given that the Supreme Court has already determined that defendant 'acted outside the scope of its legal authority' in imposing illegal impact fees, we remand to the trial court to determine whether that 'act . . . constituted an abuse of discretion before the [trial] court is required to award attorney's fees.' Etheridge [v. Cnty. of Currituck], 235 N.C. App. [469] at 479, 762 S.E.2d [289] at 297 [(2014)]. If the trial court so finds, it shall then award reasonable attorneys' fees and costs to plaintiffs and, if it does not so find, the court shall determine whether, in its discretion, an award of attorneys' fees and costs is appropriate in this case."

- ***Synopsis***− On remand from Supreme Court's order in Quality Built Homes, Inc. v. Town of Carthage, ____ N.C. ___, 789 S.E.2d 454 (No. 315PA15, 8/19/16), reversing and remanding the unanimous decision of the Court of Appeals in Quality Built Homes, Inc. v. Town of Carthage, ___ N.C. App. ___, 776 S.E.2d 897 (No. COA15-115, 8/4/15) (***unpublished***), for consideration of unresolved issues. Opinion by Judge Bryant, with Judge Stephens and Judge Dietz concurring. On February 3, 2017, plaintiff-Town filed a petition for discretionary review in this matter. On May 3, 2017, the North Carolina Supreme Court allowed plaintiff-Town's petition for discretionary review (No. 315PA15-2).

Procedure; Personnel; Civil Service Board; Local Act; Request for Trial by Jury

City of Asheville v. Frost, ___ N.C. App. ___ (No. COA16-577, Buncombe- 5/2/17)

- ***Holding***− Where North Carolina Session Law 2009-401 specifically provides that a petitioner may request a trial by jury and then provides that the matter shall proceed "as any other civil action," the specificity of the session law controls and the trial court erred in denying petitioner-City's motion to strike respondent-police officer's demand for a jury trial.

- ***Key Excerpt***− The majority initially explained that Session Law 1953-757 established a Civil Service Board as part of the government of the City. 1953 N.C. Sess. Law 757, § 1. As amended in 2009, by an enactment entitled, "An act to revise the laws relating to the Asheville Civil Service Board", the General Assembly provided the following: "Within ten days of the receipt of notice of the decision of the Board, *either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo*. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact upon which the petitioner relies for relief. *If the petitioner desires a trial by jury, the petition shall so state*. . . . Therefore, the matter shall proceed to trial as any other civil action." 2009 N.C. Sess. Laws 401, § 7(g) (emphasis added). Hence, while "either party may appeal . . . for a trial de novo," the Session Law named petitioner as the party to designate whether a trial by jury is desired. *Id.* The majority rejected respondent's argument that a clause in the last sentence of that provision of the Session Law ("[t]here[after], the matter shall proceed to trial as any other civil action,") gave rise to a respondent's right to request a trial by jury.

The majority stated, "Session Law 2009-401 specifically provides for appeals to Buncombe County Superior Court from orders entered by the Asheville Civil Service Board and states that either party may appeal the decision of the Civil Service Board. But the session law designates only the petitioner as a party who may request a jury trial. This designation, that a petitioner may request a jury trial in appeals from decisions of the Civil Service Board to the Buncombe County Superior Court, is more specific than the right more generally conferred in Civil Procedure Rule 38, allowing any party to a civil action to demand a jury trial. Thus, pursuant to the construction favoring the rule tailored to a specific circumstance as controlling over a more generally applicable rule, the language of Session Law 2009-401 naming only the petitioner as the party who may request a jury trial is controlling over the more generally applicable right of any party to demand a jury trial, as provided in Civil Procedure Rule 38. *See* Westminster Homes, Inc. [v. Town of Cary Zoning Bd. of Adjustment], 354 N.C. [298] at 304, 554 S.E.2d [634] at 638 [(2001)]. Moreover, to read Session Law 2009-401's language that 'the matter shall proceed to trial as any other civil action' as an incorporation of the Rules of Civil Procedure, including the right of any party to demand a jury trial, would render the language designating only the petitioner as the party who may request a jury trial meaningless. This, too, violates our rules of statutory interpretation. *See* Lunsford [v. Mills], 367 N.C. [618] at 628, 766 S.E.2d [297] at 304 [(2014)]. Therefore, based on our well-established rules of statutory construction, only petitioner City of Asheville had the right to request a jury trial. Accordingly, we hold the trial court erred in failing to dismiss respondent Officer Frost's request for a jury trial, and the trial court's 22 December 2015 order is reversed."

- ***Dissent***− Judge Hunter, Jr. dissented. "The majority concludes North Carolina Session Law 2009-401 allows for a petitioner, and only a petitioner,

seeking a trial de novo, the right to a trial by jury. Under the majority's construction, the option to request a trial by jury is a unilateral right extended only to one party. Because the majority's textual construction resolves a statutory ambiguity in a manner which misapplied the cannons of statutory construction achieves an 'absurd' result, I respectfully dissent."

. . . .

"In concluding only a petitioner may request a jury trial, it seems the majority fails to consider the provision in its entirety. The majority instead focuses on the single statutory phrase, 'if the petitioner desires a trial by jury, the petition shall so state.' In interpreting that language, the majority neglects to consider the legislature couched that phrase between the opening words 'either party' and the closing sentence, '[t]herefore, the matter shall proceed to trial as any other civil action.' This final sentence, and especially the term 'civil action,' directs the reader to Rule 38 of the North Carolina Rules of Civil Procedure: '*[a]ny party* may demand a trial by jury of any issue triable of right by a jury.' [G.S.] 1A-1, Rule 38(b) (2016) (emphasis added)."

"Here, it naturally and logically follows our Rules of Civil Procedure apply. Our Legislature expressly provided 'either party' has the right to request a trial *de novo*. Our Legislature further provided this trial *de novo* to proceed as 'any other civil action.' Therefore, the invocation of Rule 38 indicates all the consequences of designating this mechanism for judicial review a 'civil action' are in effect here: especially the fundamental right to a trial by jury."

. . . .

"In concluding only a Petitioner has a right to a jury trial, the majority's construction superimposes the term 'only.' Their view is the Legislature intended for only one party, the petitioning party in the proceeding below, to have the right to a jury trial. It does not account for the situation where both parties petition for review. This leads to the illogical result in violation of the cannon of statutory construction prohibiting an interpretation that leads to an absurd result. At best, this interpretation results in a race between the City and the discharged employee to first appeal the Board's decision. At worst, this interpretation creates an incentive for a party to lose its proceeding in front of the Board. In order for a party to qualify as a petitioner, and have the right to a jury trial, a party must first lose before the Board." (Citation omitted.)

- ***Synopsis***− Appeal by petitioner-City from December 2015 order. Reversed. Opinion by Judge Bryant. Judge Dietz concurring in a separate opinion. Judge Hunter, Jr. dissenting.