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Public Enterprises; Impact Fees
Statute of Limitations

Quality Built Homes Inc v. Town of Carthage, ___ N.C. ___ (315PA15-2, 5/11/18)

- ***Holding***– For plaintiffs' claims pertaining to water and sewer impact fees, three-year statute of limitations for liabilities, G.S. 1-52(2), is applicable. Court of Appeals erred in determining that plaintiffs' claims were subject to the ten-year statute of limitations set out in G.S. 1-56.

- ***Key Excerpt***– This case marked the second time this matter has been before the Supreme Court. The Supreme Court remanded the Court of Appeals' prior decision in Quality Built Homes Inc. v. Town of Carthage, 242 N.C. App. 521, 776 S.E.2d 897 (2015) (unpublished) (Carthage I). In light of the Supreme Court's August 2016 determination that the Public Enterprise Statutes did not authorize water and sewer impact fees, the Supreme Court remanded the case to the Court of Appeals in order to allow its determination as to whether plaintiffs' claims were barred by the applicable statute of limitations or the doctrine of estoppel by the acceptance of benefits. 369 N.C. 15, 18 n.2, 22, 789 S.E.2d 454, 457 n.2, 459 (2016). On December 30, 2016, the Court of Appeals held *inter alia* that plaintiffs' claims against the Town were subject to the ten-year statute of limitations set forth in G.S. 1-56, Quality Built Homes Inc. v. Town of Carthage, __ N.C. App. __, 795 S.E.2d 436 (2016) (unpublished) (Carthage II).

The Court initially stated that, as it understood the record, the preliminary issue related to the statute of limitations was identifying the point in time at which plaintiffs' claims against defendant-Town accrued. "In Williams, this Court addressed the validity of an Orange County ordinance enacted pursuant to legislation adopted by the General Assembly 'authoriz[ing] transfer by the [Equal Employment Opportunity Commission] to Orange County of employment discrimination complaints filed with it originating in the county and transfer by [the Department of Housing and Urban Development] to Orange County of housing discrimination complaints arising in the county.' [Williams v.

Blue Cross Blue Shield of North Carolina], 357 N.C. [170] at 174-75, 581 S.E.2d [415] at 420 [(2003)]. After the plaintiff filed a complaint seeking relief for allegedly unlawful discrimination in violation of the ordinance, the defendant filed an answer that included a counterclaim seeking a declaration 'that the enabling legislation and the Ordinance violated Article II, Section 24(1)(j) of the North Carolina Constitution.' *Id*. at 177, 581 S.E.2d at 421. In holding that the defendant's challenge to the validity of the ordinance in question was not barred by the applicable statute of limitations, *id*. at 178, 581 S.E.2d at 422, predicated upon the plaintiffs' theory that 'the time period for [the defendant's] filing of a constitutional challenge to the Ordinance or the enabling legislation began to run on the date the enabling legislation or the Ordinance became effective,' *id*. at 178, 581 S.E.2d at 422, we explained that '[w]hen the enabling legislation and the Ordinance were first enacted, [the defendant] was just another employer in Orange County to which these new laws applied; any harm to [the defendant] was both prospective and speculative. The alleged wrongs to [the defendant] became apparent only upon enforcement of the Ordinance through the filing of lawsuits and proceedings against [the defendant].' *Id*. at 179, 581 S.E.2d at 423. In other words, this Court held in Williams that the defendant's challenge to the validity of the ordinance in question accrued when the ordinance was enforced against that party rather than at the time of initial enactment in reliance upon the 'continuing wrong' doctrine. *Id*. at 180-81, 581 S.E.2d at 424."

"In determining whether a plaintiff is entitled to challenge the validity of an ordinance as subjecting the plaintiff to what is tantamount to a continuing harm, 'we examine [the] case under a test that considers "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged."' *Id*. at 179, 581 S.E.2d at 423 (second alteration in original) (quoting Cooper v. United States, 442 F.2d 908, 912 (7th Cir. 1971)). For that reason, the reviewing court 'must examine the wrong alleged by [the plaintiff] to determine if the purported violation is the result of "continual unlawful acts," each of which restarts the running of the statute of limitations, or if the alleged wrong is instead merely the "continual ill effects from an original violation." *Id*. at 179, 581 S.E.2d at 423 (quoting Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981)). The Court emphasized, "Although the 'continuing wrong' doctrine has been treated, in some instances, as an 'exception' to the usual rules governing the operation of statutes of limitations, such a description of the doctrine in question is a misnomer given that the 'continuing wrong' doctrine does nothing more than provide that the applicable limitations period starts anew in the event that an allegedly unlawful act is repeated."

….

"The essence of plaintiffs' claim against the Town is that the Town has exacted unlawful impact fee payments from them. In other words, 'the nature of the wrongful conduct and harm alleged,' Williams, 357 N.C. at 179, 581 S.E.2d at 423 (quoting Cooper, 442 F.2d at 912), in plaintiffs' complaint rests upon the Town's collection of water and sewer impact fees rather than the adoption of the impact fee ordinances. As was the case in Williams, plaintiffs did not sustain any direct injury at the time that the challenged impact fee ordinances were adopted. Instead, plaintiffs sustained the injury upon which their claims rest when plaintiffs were required to make impact fee payments in order to obtain approval for their development proposals. As a result, since plaintiffs' injury occurred when plaintiffs made the required impact fee payments to the Town, we conclude that Quality Built Homes' claims against the Town accrued on various dates between 1 May 2006 through 21 January 2009 and that Stafford Land's claims against the Town accrued on various dates between 20 December 2005 through 30 June 2009."

The Court then turned to identifying the statute of limitations applicable to plaintiffs' claims against the Town. "The gravamen of our previous decision in this case was that 'the Public Enterprise Statutes . . . clearly and unambiguously fail to give [the Town] the essential prospective charging power necessary to assess impact fees' and that, since '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.' Quality Built Homes, 369 N.C. at 22, 789 S.E.2d at 459. As a result, the essence of our earlier decision in this case was that the Town had acted unlawfully by assessing a water and sewer impact fee not authorized by [G.S.] 160A-314(a) (2015) (providing that '[a] city may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise'). In light of that fact, we have little difficulty concluding that the claim recognized in our prior decision in this case was, when viewed realistically, one resting upon an alleged statutory violation that resulted in the exaction of an unlawful payment which plaintiffs had an inherent right to recoup. Although the Court of Appeals reached a different conclusion in Point South Properties[LLC v. Cape Fear Public Utility Authority, 243 N.C. App. 508, 515, 778 S.E.2d 284, 289 (2015)] based upon the fact that [G.S.] 162A-88 did not provide an explicit statutory right to seek recovery of the challenged impact fees separate and apart from the statutory provisions governing the defendant's authority to charge the challenged impact fees, we do not believe that the applicability of the three-year statute of limitations set out in [G.S.] 1-52(2) hinges upon such a fine parsing of the relevant statutory language. At an absolute minimum, none of our prior decisions impose the limitation upon the applicability of the three-year statute of limitations set out in [G.S.] 1-52(2) upon which the Court of Appeals' decisions in Point South Properties and this case depend. As a result, we conclude that the three-year statute of limitations for liabilities set out in [G.S.] 1-52(2) applies in this case. Moreover, given that plaintiffs' claims against the Town accrued between 20 December 2005 and 30 June 2009 and given that plaintiffs filed their complaint against the Town more than three years after the Town exacted its last impact fee payment from plaintiffs, plaintiffs' claims against the Town are barred by the three-year statute of limitations set out in [G.S.] 1-52(2)." (Citations omitted; footnotes omitted.)

Regarding an argument pertaining to recent legislation, the Court stated, "Although the 2017 version of [G.S.] 1-52(15) 'deals more directly and specifically' with the nature of the claims that plaintiffs have asserted against the Town, and, although the General Assembly specifically described the 2017 addition to [G.S.] 1-52(15) as 'a clarifying amendment' that 'has retroactive effect and applies to claims accrued or pending prior to . . . the date' that the amended version of [G.S.] 1-52(15) became law, Ch. 138, sec. 11, 2017-4 N.C. Adv. Legis. Serv. at 180 (LexisNexis), we need not decide whether the amended version of [G.S.] 1-52(15) is entitled to retroactive effect, despite plaintiffs' contention that they have a vested property right in their claims against the Town, given our determination that plaintiffs' claims against the Town are governed by [G.S.] 1-52(2), which applies to 'a liability created by statute, either state or federal.'" (Citation omitted.)

The Court affirmed the Court of Appeals' conclusion that plaintiffs' claims against defendant-Town were not barred by the doctrine of estoppel by the acceptance of benefits. "In our opinion, Convent of the Sisters of Saint Joseph v. City of Winston-Salem has no application to the proper resolution of this case. In Convent, the plaintiff's predecessor in interest obtained a special use permit in accordance with the applicable zoning ordinance and received authorization to establish an otherwise prohibited elementary school pursuant to certain agreed-upon conditions set out in the applicable permit. 243 N.C. at 325, 90 S.E.2d at 885.

Although we held in Convent that, 'by accepting the benefits of the provisions of the zoning ordinance' the original purchaser 'waived any right he might have had to contest the validity of the ordinance,' *id*. at 325, 90 S.E.2d at 885, the fact that the plaintiff's predecessor obtained the right to engage in an otherwise prohibited activity pursuant to the special use permit does not govern the outcome in this case. Here, plaintiffs do not appear to have received any benefit from the payment of the challenged water and sewer impact fees that they would not have otherwise been entitled to receive. As we held in *Virginia-Carolina Peanut Co.* [v. Atlantic Coast Line Railroad], in an instance in which '[t]he only alternative was to submit to an illegal exaction or discontinue its business,' the payment of money 'under such pressure[ ] has never been regarded as a voluntary act.' 166 N.C. [62] at 74-75, 82 S.E. [1] at 5 [(1914)] (quoting Robertson v. Frank Brothers Co., 132 U.S. 17, 24, 10 S. Ct. 5, 7, 33 L. Ed. 236, 239 (1889))."

The Court concluded its opinion by stating, "[F]or the reasons set forth above, the Court of Appeals' decision is affirmed, in part, and reversed, in part, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Moore County, for further proceedings not inconsistent with this opinion, including the entry of an order determining the proper disposition of the water and sewer impact fees that Quality Built Homes paid into escrow in accordance with the consent order and addressing any other outstanding issues."

- ***Synopsis***− Appeal by defendant from unanimous, unpublished December 30, 2016 decision of the Court of Appeals, ___ N.C. App. ___ 795 S.E.2d 436 (2016) (unpublished), reversing and remanding October 2014 order allowing summary judgment in favor of defendant-Town. Decision of Court of Appeals affirmed in part, reversed in part, and remanded. Opinion by Justice Ervin.

Procedure; Standing; Amotion

Walker v. Hoke Cty., ___ N.C. App. ___ (No. COA 17-341, Hoke─ 6/19/18)

- ***Holding***− In action wherein plaintiff sought *inter alia* removal of various elected officials stemming from approval of transfer of property, Court of Appeals holds that because plaintiff was not a member of any of the boards from which he sought to remove members, trial court's order dismissing plaintiff's claims for lack of standing was correctly affirmed.

- ***Key Excerpt***− Affirming, the Court held that the trial court did not err by dismissing plaintiff's complaint for lack of standing pursuant to G.S. 1A-1, Rule 12(b)(1).

The Court initially stated, "Historically, 'taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials.' Goldston v. State, 361 N.C. 26, 31, 637 S.E.2d 876, 879-80 (2006). However, to establish an injury as a taxpayer, the individual must allege 'a misuse of public funds in violation of state statute,' instead of merely 'challenging the wisdom of the County's decision.' Reese v. Mecklenburg Cnty., N.C., 204 N.C. App. 410, 426, 694 S.E.2d 453, 464, *disc. rev. denied*, 364 N.C. 326, 700 S.E.2d 924 (2010)."

"In prior cases before our Supreme Court, taxpayers have been granted standing to bring an action against local and state government bodies when they have alleged an injury that is concrete, traceable, and particular to a specific action in violation of an applicable statute. *See* Goldston, 361 N.C. at 30-33, 637 S.E.2d at 879-81; McIntyre v. Clarkson, 254 N.C. 510, 513-14, 119 S.E.2d 888, 890-91 (1961) (holding a taxpayer had standing to facially challenge the constitutionality of a statute). Goldston v. State noted 'the right of a citizen and taxpayer to maintain an action in the courts to

restrain the unlawful use of public funds *to his injury* cannot be denied.' Goldston, 361 N.C. at 33, 637 S.E.2d at 881 (citation and quotation marks omitted) (emphasis added)."

The Court observed that here, plaintiff failed to establish standing for each of his claims for relief. Noting that plaintiff failed to allege that he was a taxpayer in his complaint, the Court emphasized, "even if we were to assume Plaintiff is a Hoke County taxpayer, he has not asserted a traceable, concrete, and particularized injury resulting from the transfer of the 500 acre tract of land between the parties named in his complaint. Even in the light most favorable to the non-moving party, we find no injury in fact under 'any set of facts to support his claim which would entitle him to relief.' Block v. County of Person, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000)."

The Court also addressed plaintiff's attempt to remove various elected officials stemming from transfer of the property. The Court determined that because plaintiff was not a member of any of the boards from which he sought to remove members, the trial court's order dismissing plaintiff's claims for lack of standing should be affirmed. "[S]tanding pursuant to [G.S.] 153A-77 and the common law removal procedure known as 'amotion' does not derive from taxpayer status, but instead from the county board of commissioners. Section 153A-77 provides in pertinent part: 'A member may be removed from office by the county board of commissioners for (i) commission of a felony or other crime involving moral turpitude; (ii) violation of a State law governing conflict of interest; (iii) violation of a written policy adopted by the county board of commissioners; (iv) habitual failure to attend meetings; (v) conduct that tends to bring the office into disrepute; or (vi) failure to maintain qualifications for appointment required under this subsection. A board member may be removed only after the member has been given written notice of the basis for removal and has had the opportunity to respond.' [G.S.] 153A-77(c) (2017)."

"Removal by amotion is a 'quasi-judicial' procedure employed by the board or commission from which the member is being removed for cause. Russ v. Board of Education, 232 N.C. 128, 129-30, 59 S.E.2d 589, 591 (1950); *see also* Burke v. Jenkins, 148 N.C. 25, 61 S.E. 608 (1908). An amotion proceeding 'could not be taken without notice and an opportunity to be heard, except where the officer is removable without cause at the will of the appointing power.' Stephens v. Dowell, 208 N.C. 555, 561, 181 S.E. 629, 632 (1935) (citations omitted). Plaintiff has not alleged in his complaint or on appeal that he is a member of any elected or appointed office." (In a footnote, the Court added, "The most recent amotion proceeding in North Carolina was in 2013 in Berger v. New Hanover County Bd. of Comm'rs., 2013 NCBC 45, 2013 WL 4792508 (2013) (unpublished), where the New Hanover County Superior Court upheld the removal of a local County Commissioner and recognized the validity of the amotion procedure when 'accompanied by appropriate procedural safeguards and the Board's findings and conclusions were supported by sufficient competent evidence.' *Id*. at *11.")

- ***Synopsis***− Appeal by plaintiff from February 2017 order. Affirmed. Opinion by Judge Berger, with Chief Judge McGee and Judge Dietz concurring.

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

Land Use; Special Damages; Standing; Declaratory Judgment Action; Dismissal Cherry Cmty. Org. v. City of Charlotte, ___ N.C. App. ___ (No. COA16-1292, Mecklenburg− 2/6/18), *disc. review denied*, ___ N.C. ___ (No. 077P18, 5/9/18) (The Cherry Community Organization ("CCO") appealed from the trial court's order granting defendant-City's motion for summary judgment, granting

Midtown Area Partners II, LLC's ("LLC's") motion for summary judgment, and denying CCO's motion for summary judgment. Specifically, CCO argued: (1) the City's approval of an oral amendment made to LLC's rezoning petition violated its ordinance and was arbitrary and capricious; and (2) the City's violation of ordinances and G.S. 160A-383 rendered the zoning amendment null and void. The Court of Appeals concluded that CCO failed to show it had standing to maintain its declaratory judgment action and dismissed this appeal, without reaching the issues raised by CCO. "Even considering the record in the light most favorable to CCO, it has forecasted no evidence of special damages due to diminution in the value of their property. The loss of the waterfront view in Sanchez [v. Town of Beaufort, 211 N.C. App. 574, 710 S.E.2d 350 (2011)] was a portion of the loss in their land value, not a separate element on its own. CCO, on the other hand, points us to a change in its skyline view and presented no evidence of a loss in value. Simply stated, CCO's forecast of evidence of special damages consists of nothing more than conclusory, unsupported allegations that certain damages will ensue coupled with evidence that, at one point, the proposed development plan included a building that was taller than that which is permitted in the area. The latter point was rendered moot prior to CCO filing its complaint by [LLC's] decision to lower the height of its development to a compliant 100 feet. Therefore, CCO has failed to point us to any record evidence to meet its burden of production at summary judgment that CCO will suffer special damages distinct from the rest of the community by rezoning, nor can we find any. Accordingly, we conclude that CCO has failed to establish it has standing to maintain its action for declaratory judgment." (Emphasis in original.) (Appeal by plaintiff from August 2016 order granting defendants' motion for summary judgment. Modified and affirmed. Judge Murphy wrote the opinion. Judge Davis concurred in result only. Judge Hunter, Jr. concurred in a separate opinion. On May 9, 2018, the N.C. Supreme Court denied plaintiff's petition for discretionary review.))

Torts; Immunity; Failure to Plead; 42 U.S.C. 1983; Directed Verdict Lambert v. Town of Sylva, ___ N.C. App. ___ (No. COA17-84, Jackson– 5/1/18) (In plaintiff-officer's action alleging violation of constitutional rights to free speech and wrongful termination in violation of public policy, Court of Appeals holds, "Because the trial court granted directed verdict based upon a misapprehension of the law regarding plaintiff's claims under 42 U.S.C. § 1983 and erred in dismissing any claims based upon governmental immunity since it was never pled by defendant[-Town], we reverse the order granting directed verdict and remand for a new trial on all claims. On remand, before proceeding with another trial, the trial court should allow the parties to be heard on whether any necessary or proper parties should be joined, and the trial court should enter any appropriate orders regarding those parties so all parties may be joined before the matter is set again for trial. But again, we express no opinion on whether any necessary or proper parties should be joined; we address this issue only because the trial court's order addressed it and to provide procedural guidance on remand. (Appeal by plaintiff from June 2016 order of dismissal in favor of defendant-Town. Reversed and remanded. Opinion by Judge Stroud, with Judge Elmore and Judge Tyson concurring.))