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Immunity; Sewer System; *Nullum Tempus*; Proprietary Function; Statute of Limitations

Town of Littleton v. Layne Heavy Civ., Inc., ___ N.C. App. ___ (No. COA17-1137, Halifax– 8/21/18)

- ***Holding*- A municipality's operation and maintenance of a sewer system is a proprietary function, and thus the doctrine of *nullum tempus occurrit regi* is inapplicable. Trial court correctly ruled in favor of all defendants because the applicable statutes of limitation barred each of plaintiff-Town's claims.**

- ***Key Excerpt*–** Plaintiff-Town appealed two orders granting summary judgment in defendants' favor in a dispute over a sewer rehabilitation project: the trial court ruled in defendants' favor as the applicable statutes of limitation barred each of plaintiff-Town's claims. Plaintiff-Town argued error because the sewer project constituted a governmental function, to which statutes of limitation would not apply under the doctrine of *nullum tempus*. The Court disagreed with plaintiff-Town's argument. "Defendants properly pleaded the applicable statutes of limitation as a defense against each of plaintiff's claims. The undisputed facts describe a sewer system maintenance project, which is a proprietary function. Thus, *nullum tempus* does not apply to Plaintiff's claims, and the statutes of limitation control. The trial court did not err in granting summary judgment to Defendants because of the expiration of the applicable statutes of limitation."

Noting that the standard of review was *de novo*, the Court initially stated, "Causes of action based on negligence, fraud, negligent misrepresentation, breach of contract, breach of warranty, and professional malpractice are each subject to a three-year statute of limitation. [G.S.] 1-15(c), -52 (2017). A cause of action based on unfair and deceptive trade practices is subject to a four-year statute of limitation. [G.S.] 75-16.2 (2017). Plaintiff filed its suit more than four years after all claims arose. Its suit would therefore be barred unless the doctrine of *nullum tempus* applies."

. . . .

"As in sovereign immunity cases, whether the subject matter of the suit is governmental or proprietary will determine whether the courts must apply *nullum tempus* or the appropriate statutes of limitation. *See id*. Generally, '[i]f the undertaking

of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing.' Britt v. City of Wilmington, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952). 'The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines.' Harrison v. City of Sanford, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676, *disc. review denied*, ___ N.C. ___, 639 S.E.2d 649 (2006); see also Union Cty. v. Town of Marshville, ___ N.C. App. ___, ___, 804 S.E.2d 801, 805 (2017) (municipality not entitled to immunity because operation and maintenance of sewer system is proprietary in nature), *disc. review denied*, ___ N.C. ___, 814 S.E.2d 101 (2018); Bostic Packaging, Inc. v. City of Monroe, 149 N.C. App. 825, 829, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002) (municipality not immune from tort liability in the operation and maintenance of a sewer system)."

"Plaintiff contends that the facts of this case compel us to follow McCombs v. City of Asheboro, 6 N.C. App. 234, 170 S.E.2d 169 (1969). Plaintiff interprets McCombs as holding that the construction of a sewer system is a governmental function, thus entitling the City … to governmental immunity, and, by analogy, entitles Plaintiff to the protection of *nullum tempus*. However, Plaintiff's reliance on McCombs is misguided for two reasons. First, McCombs refrained from deciding whether the City of Asheboro's construction of a new sewer line was a governmental or proprietary function. *See id*. at 242, 170 S.E.2d at 175 ("Conceding, *arguendo*, that [Plaintiff's allegation that the Defendant was engaged in a proprietary function in the construction of a sewer line] is sufficient to save the complaint from demurrer on the ground of governmental immunity, we are of the opinion that the complaint must fail [because there are no facts alleged constituting negligence of the defendant]."). Second, McCombs is distinguishable from the case *sub judice* because the defendant in McCombs was constructing new sewer lines, *id*. at 237, 170 S.E.2d at 172, whereas here, Plaintiff was maintaining sewer system assets in need of repair."

"The final report expressly acknowledged the purpose of the project was to rehabilitate more than 35,000 linear feet of sewer collection lines and nearly 120 manhole covers; replace or build multiple pump stations; and conduct '[m]iscellaneous repairs to short line segments.' Defendant Mack Gay's final report on the project states that the main purpose of the project was to reduce inflow and infiltration of storm water into the sewer system. The evidence Defendants submitted in support of its summary judgment motions established that one of the purposes of the project was to reduce costs of running the sewer system. This evidence tended to show that the project would eliminate expenses incurred per gallon of inflow and infiltration, which were estimated to cost $0.09 per gallon per year. Additionally, the project would also eliminate Plaintiff's potential liability for sewage spills resulting from rainwater penetrating the system, which, under state law, could have cost up to $25,000.00 per day."

In holding that the doctrine of *nullum tempus* was inapplicable to plaintiff-Town's claims and that accordingly the trial court did not err in granting summary judgment in defendants' favor, the Court concluded its opinion by stating, "The record before us shows that there is no genuine issue as to any material fact and Defendants were entitled to a judgment as a matter of law. The evidence describes a maintenance project on a city-operated sewer system to reduce the infiltration and inflow of storm water. This maintenance would reduce costs to Plaintiff in its running of the sewer system and would reduce any waste water spills. Because the operation and maintenance of a sewer system is a proprietary function, Plaintiff's maintenance project was a proprietary function."

- ***Synopsis***– Appeal by plaintiff from June 2017 and July 2017 orders. Affirmed. Opinion by Judge Berger, with Judge Elmore and Judge Inman concurring.

Land Use; Asphalt Plant; Standing; Special Damages

Henion v. County of Watagua, ___ N.C. App. ___ (No. COA17-1107, Watagua– 8/7/18) (***unpublished***)

- ***Holding***- **Where petitioners appealed an order affirming Board of Adjustment's decision to grant a high-impact land use permit for the construction of an asphalt plant, there is no standing when the record does not contain sufficient evidence to sustain a finding that the petitioner would suffer a diminution in property value distinct from the rest of the community.**

- ***Key Excerpt***– Petitioners Henion appealed an order affirming the County Board of Adjustment's decision to grant a high-impact land use permit, to respondents-Hamptons, for the construction of an asphalt plant. Respondents-Hamptons sought to dismiss petitioners' intervention into the granting of the permit on the basis that petitioners lacked standing for their challenge: petitioners countered that they would suffer special damages and accordingly had standing. Petitioners asserted that they had standing to appeal because they had demonstrated special damages (pursuant to G.S. 160A-393, which governs a trial court's review of local government decision-making boards): the special damages allegedly arose as a direct result of the operation of the proposed asphalt plant, including a reduction in the value of their property and their loss of the use and enjoyment thereof. Petitioners argued that these special damages gave them standing, and, ultimately, the Court of Appeals' jurisdiction over this matter. The Court disagreed.

"As discussed by this Court before, our Supreme Court held in Mangum v. Raleigh Board of Adjustment [362 N.C. 640, 669 S.E.2d 279 (2008)] that 'the petitioners in [Mangum] had standing to maintain their suit where the petitioners: (1) challenged a land use that would be unlawful without a special use permit; (2) alleged they would suffer special damages if the use is permitted; and (3) provided evidence of increased traffic, increased water runoff, parking, and safety concerns, as well as the secondary adverse effects that would result from the challenged use.' [Cherry v. Wiesner, 245 N.C. App. 339] at 348, 781 S.E.2d [871] at 878[, *disc. review denied*, 369 N.C. 33, 792 S.E.2d 779 (2016)] (citing Mangum, 362 N.C. at 643-44, 669 S.E.2d at 282-83). For example, in Mangum, evidence of potential 'vandalism, safety concerns, littering, trespass, and parking overflow' were presented and determined sufficient to grant standing. Mangum, 362 N.C. at 645, 669 S.E.2d at 283–84. Conversely, there is no standing when the record does not contain sufficient evidence to sustain a finding that the petitioner would suffer a diminution in property value 'distinct from the rest of the community.' *See* Lloyd v. Town of Chapel Hill, 127 N.C. App. 347, 350-51, 489 S.E.2d 898, 900-01 (1997)."

"Here, the evidence tended to show that [petitioners] have only alleged that special damages will result due to the proximity of their property to the asphalt plant. [Petitioners] testified at the hearing before the Board that 'their property would suffer a diminution of property value if the asphalt plant was allowed to operate.' [Petitioners] further relied on the testimony of Louis Anthony Zeller ('Zeller'), executive director of the Blue Ridge Environmental Defense League. Zeller presented a study that generally showed that property values were negatively affected by nearby asphalt plants. However, this evidence was inadmissible. Section 160A-393(k)(3) allows certain competent evidence, which would otherwise not be admissible under the rules of evidence as applied in the trial courts of this State, but such evidence shall not include the opinion testimony of lay witnesses as to how '[t]he use of property in a particular way would affect the value of other property.' [G.S.]

160A-393(k)(3) (2017). Zeller was therefore unable to provide opinion testimony as to how 'the use of property in a particular way would affect the value of other property' as Zeller was a lay witness and was not qualified as an expert. *See id*."

. . . .

"Conversely, Timothy J. Ragan ('Ragan'), a licensed and certified real estate appraiser, testified before the Board that he '[did] not think their property value would be affected by the asphalt plant in a negative way.' Furthermore, Ragan testified that Zeller's study 'did not' conform to the Uniform Standards of Professional Appraisal Practice because it was 'strictly based on tax assessments that were done' and appraisers must base their 'opinions related to property values on actual sales that have occurred in the marketplace and the market's reaction to a certain situation.' Therefore, [petitioners] have failed to sufficiently establish with credible evidence that 'their property value would suffer a diminution of property value if the asphalt plant was allowed to operate.' This bald assertion alone confers neither standing on [petitioners] to challenge the granting of the Land Use Permit, nor jurisdiction on this Court to review their challenge."

- ***Synopsis***− Appeal by petitioners from March 2017 order. Dismissed. Opinion by Judge Berger, with Judge Elmore and Judge Inman concurring.

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

Real Property; Easements; Express and Implied Claims; Right-of Way; Prescriptive Easement; Remand; Appropriate Injunctive Relief Town of Carrboro v. Slack, ___ N.C. App. ___ (No. COA17-864, Orange─ 9/18/18) ("[Defendants] own a home on several acres of land in Orange County. There is a gravel road along the eastern edge of their property. That private drive has existed in one form or another since at least the 1940s. This appeal concerns who, if anyone, has an easement to use that gravel road to access other properties north of [defendants'] property. At the summary judgment hearing below, Plaintiffs asserted a slew of alternative legal theories touching on nearly every form of express and implied easement known to the law. We address each theory in turn below but ultimately conclude that the government plaintiffs—Carrboro, Chapel Hill, and Orange County—do not possess any easement rights over the [defendants'] property. We therefore reverse and remand that portion of the trial court's summary judgment order for entry of judgment in favor of [defendants]. We affirm the trial court's entry of summary judgment in favor of Plaintiff William Inman on his prescriptive easement claim, but vacate and remand the trial court's permanent injunction for further proceedings [to determine any appropriate injunctive relief in light of this opinion]. . . ." In the decision, the Court addresses theories of: 1) Express Easement Appurtenant; 2) Express Easement by Reservation; 3) Implied Easement by Dedication; 4) Implied Easement by Plat, and; 5) Implied Easement by Estoppel. (Appeal by defendants from May 2017 order. Reversed in part, affirmed in part, vacated in part, and remanded. Opinion by Judge Dietz, with Judge Elmore and Judge Hunter, Jr., concurring.)

Procedure; Motion to Intervene; Adequacy of Representation of Interests Letendre v. Currituck County, ___ N.C. App. ___ (No. COA18-163, Currituck─ 9/18/18) (***unpublished***) (In this case, the Court concluded that the interests of proposed intervenors-Longs were not adequately represented by defendant County and accordingly reversed and remanded the trial court's order. (The extensive background of this case appears in two prior opinions. *See* Letendre v. Currituck County. ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018) (COA17-1108) ("Letendre I"), *temporary stay allowed*, ___ N.C. ___, 814 S.E.2d 111 (2018); Long v. Currituck County, ___ N.C. App. ___, 787 S.E.2d 835, *disc. review dismissed*, 369 N.C. 74, 793 S.E.2d 222, *stay dissolved, writ of supersedeas denied, disc. review denied*, 369 N.C.

74, 793 S.E.2d 232 (2016).) The Court here observed, "In Long, … proposed intervenors herein, appealed two orders from the trial court which upheld the Currituck County Board of Adjustment's decision to allow plaintiff Elizabeth Letendre to build a 15,000 square foot project comprised of three buildings on her property adjacent to the Longs' property. *See* Long, ___ N.C. App. at ___, 787 S.E.2d at 836. The primary question before this Court was whether Currituck County had properly classified plaintiff's proposed project as a 'Single Family Dwelling' under the Currituck County Uniform Development Ordinance ('UDO'); this Court determined the project was not a Single Family Dwelling as defined by the UDO and reversed and remanded the trial court's order…. While the appeal was pending in Long, plaintiff obtained a building permit and began construction of her project. *See* Letendre I, ___ N.C. App. at ___, ___ S.E.2d at ___, *10 (2018). After this Court issued its opinion in Long, defendant Currituck County issued a Stop Work Order and Notice of Violation in compliance with this Court's opinion in Long. *Id*. at ___, ___ S.E.2d at ___, *1-2. On 27 March 2017, plaintiff Letendre filed this lawsuit against defendant Currituck County 'seeking a declaratory judgment, preliminary injunction, permanent injunction, monetary damages, and attorney fees.' *Id*. at ___, ___ S.E.2d at ___, *2. Plaintiff Letendre sought to enjoin defendant Currituck County from enforcing its UDO so that she could complete and use the project, or in the alternative, monetary damages for inverse condemnation of her property. *Id*. at ___, ___ S.E.2d at ___, *2, 56. On 25 May 2017, the Longs filed a motion to intervene in this case, plaintiff Letendre's action against defendant Currituck County, and on 18 September 2017, they filed an amended motion. On 9 October 2017, the trial court denied the motion 'in its original form and as amended[.]'" (Appeal by proposed intervenors from October 2017 order. Reversed and remanded. Opinion by Judge Stroud, with Judge Zachary and Judge Murphy concurring.))

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