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Land Use; Zoning Ordinance Regulating Short-Term Rentals; Registration and Lottery Process; Preemption; Severability Provision

Schroeder v. City of Wilmington, 2022-NCCOA-210 (No. COA21-192, New Hanover— 4/5/22)

- ***Holding*— In matter wherein plaintiffs filed declaratory judgment action challenging validity of zoning ordinance, with registration and lottery system for short-term rentals, and alleging violation of G.S. 160A-424(c)'s prohibition against ordinances "that would require any owner or manager of rental property to obtain any permit or permission from the city to lease or rent residential real property or to register rental property with the city," Court of Appeals affirms trial court's finding of violation of statute. Matter remanded for judgment providing that severable provisions of ordinance remain operative.**

- ***Key Excerpt*—** The Court initially stated, "The North Carolina Constitution establishes the State as sovereign, and local governments may exercise only those powers that our General Assembly 'deem[s] advisable' through legislative enactment. N.C. Const. art. VII, § 1. When a legal question arises regarding the scope of a local government's authority, it is the judiciary's duty to interpret the enabling law and apply it in accordance with the General Assembly's intent. And when a local government enacts an ordinance asserting powers that exceed those granted by the General Assembly, we are compelled to invalidate the unauthorized action." (Citations omitted.)

Plaintiffs disputed the authority of the City to enact a zoning ordinance restricting short-term rentals through a registration and lottery process, presenting several state law and constitutional law rationales therein. The trial court dismissed the constitutional challenges but agreed that the zoning ordinance was entirely invalid based on a statute, and its amended recodification, precluding local governments from "requir[ing] any owner or manager of rental property ... to register rental property with the local government." G.S. 160A-424(c) (2017)(recodified as amended at G.S. 160D-1207(c) (2021)). The trial

court stayed its judgment, and both parties appealed. Defendant-City challenged the judgment, and plaintiffs challenged the dismissal of their constitutional claims and the entry of a stay. The Court affirmed the trial court's judgment that the registration and lottery provisions of the ordinance were invalid under G.S. 160D-1207(c). The Court reversed the portion of the judgment striking provisions of the ordinance that were not prohibited by statute and were severable from the invalid provisions. As the holding rendered moot plaintiffs' constitutional challenges to the ordinance, the Court did not reach plaintiffs' cross-appeal.

The Court held that the trial court erred in invalidating the entire ordinance. "Though we hold that the trial court correctly concluded that the Ordinance is invalid to the extent that it is preempted by Section 160D-1207(c), we disagree that the entirety of the Ordinance fails as a result. Section 14 of the Ordinance states, 'if any ... portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed severable and such holding shall not affect the validity of the remaining portions thereof.' We will give effect to this clause to preserve any provisions that are 'not so interrelated or mutually dependent' on the invalid registration requirements that their enforcement 'could not be done without reference to the offending part.' Fulton Corp. v. Faulkner, 345 N.C. 419, 422, 481 S.E.2d 8, 9 (1997)."

"Several provisions of the Ordinance are so intertwined with the invalid registration requirement that they are likewise preempted by Section 160D-1207(c), namely: (1) the cap and distance requirements and their predicate registration provisions …; (2) the proof of shared parking or parking space rental and the submission of all shared parking agreements to the city attorney for approval prior to registration, as found in Sec. 18-331.5; (3) the registration termination provisions …; (4) the requirement that a registration number be posted in a short-term rental …; (5) Sec. 18-331.7's limited application to 'registered' uses only; and (6) the amortization of short-term rentals without a registration…."

The Court emphasized, "The remainder of the Ordinance does not require registration to be enforceable and gives effect to Wilmington's intent in enacting the Ordinance. For example, the requirement that each short-term rental operator provide one off-street parking space per bedroom does not require registration to be effective or enforceable; a customer may rent a short-term rental assuming compliance with this provision and inform Wilmington of a violation should parking prove inadequate. Similarly, the prohibition against cooking in bedrooms or the requirement that operators conspicuously post the non-emergency telephone number for the Wilmington Police Department are not grounded in any registry. We hold that the following provisions of the ordinance are *not* preempted by Section 160D-1207(c) and remain in effect: (1) the restriction of whole-house lodging to certain zoning districts … ; (2) the requirement that there be at least one off-street parking space per bedroom, whether on-site or off-site through shared parking or parking space rental agreements, *i.e.,* the remaining portions of Sec. 18-331.5 not held preempted above; (3) the prohibition against variances by the board of adjustment …; (4) requirements that short-term operators

comply with all applicable laws, disallow events and large gatherings, maintain adequate insurance, keep adequate records, ensure refuse is appropriately stored and collected, refrain from preparing and serving food, and prohibit cooking in individual bedrooms …; (5) the requirement that certain information unrelated to registration be posted in the rental … ; and (6) any provisions of the Ordinance not otherwise held preempted above." (Emphasis in original.)

The Court concluded, "[W]e hold that the trial court correctly interpreted Sections 160A-424(c) and 160D-1207(c) in concluding that the short-term rental registration regime enacted by Wilmington was preempted by those statutes. We also hold, however, that portions of the Ordinance, as identified above, are severable from the invalid registration provisions and remain operative. We therefore affirm the trial court's judgment in part, reverse the portion of the judgment declaring the entirety of the Ordinance invalid, and remand for entry of a judgment consistent with our holdings."

- ***Synopsis***— Appeal by defendant-City and cross-appeal by plaintiffs from October 2020 judgment and stay. Affirmed in part, Reversed in part, and Remanded; Cross-appeal dismissed. Judge Inman wrote the opinion, with Judge Zachary and Judge Carpenter concurring.

Procedure: Motion to Dismiss; Standing; Breach of Contract

The Soc'y for the Hist. Pres. of the Twenty-Sixth N.C. Troops, Inc. v. City of Asheville, 2022-NCCOA-218 (No. COA21-429, Buncombe— 4/5/22)

- ***Holding***— **In plaintiff's breach of contract action, plaintiff lacked standing and trial court did not err is dismissing complaint for failure to state a claim upon which relief could be granted.**

- ***Key Excerpt***— Initially addressing the issue of standing, the Court, citing the Supreme Court of North Carolina's recent decision in Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 2021-NCSC-6, ¶ 81-82, stated that to establish standing, a plaintiff must demonstrate the following: a legal injury ("at a minimum, the infringement of a legal right; not necessarily 'injury in fact' or factual harm," *id.*); the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision. The Court added, "In pursuing a declaratory judgment with respect to the rights in a statue, a plaintiff is required to 'show, at the very least, that it possessed some rights in the statue—a legally protected interest invaded by defendants' conduct.' United Daughters [of the Confederacy v. City of Winston-Salem by and through Joines], 275 N.C. App. [402] at 407, 853 S.E.2d [216] at 220 [(2020)]."

Rejecting plaintiff's standing argument as to the breach of contract claim, the Court stated, "A close comparison of the Donation Agreement and plaintiff's complaint bring us to the conclusion that plaintiff has not sufficiently demonstrated or alleged a legal injury. The Donation Agreement, which both parties agreed to, and plaintiff now asserts enforcement of, contemplated a limited duration and scope of restoring the monument, with plaintiff's contributions to be donated upon completion. Contrary to the plain language of the Donation Agreement, plaintiff's complaint and argument on appeal introduce

plaintiff's intent to preserve the monument. No portion of the Donation Agreement binds either party to engage in preservation efforts after the restoration work was completed…. Instead, the contract in this case was for the donation of restoration work, which was completed prior to defendant City's decision to remove the Vance Monument. Accordingly, as the trial court properly concluded, plaintiff's complaint did not sufficiently allege a breach of contract claim, and plaintiff has failed to satisfy the first element of standing to bring its breach of contract claim."

Plaintiff next contended that the trial court erred in dismissing the complaint for failure to state a claim upon which relief could be granted. The Court disagreed. The Court observed that here "plaintiff had the burden of proving that a valid contract existed between the parties and that defendants breached the terms of that contract…. [T]he evidence presented was sufficient to establish that the contractual relationship between plaintiff and defendant City was complete. Nowhere in the Donation Agreement did defendant City grant any ownership rights in the Vance Monument to plaintiff; the Donation Agreement specifically contemplated a limited scope and duration. As defendant City aptly puts it, plaintiff's complaint seeks 'to read into the Donation Agreement a fifth obligation with which the City would be required to comply: maintaining the Vance Monument in place for all eternity.' Although there was sufficient evidence that a contract existed, there was insufficient evidence that defendant City breached the contract."

- ***Synopsis***— Appeal by plaintiff from April 2021 order. Affirmed. Judge Arrowood wrote the opinion, with Chief Judge Stroud and Judge Wood concurring.

Procedure; Subject Matter Jurisdiction; Standing; Civil Penalties; Subdivision; NCDOT Road Standards; Second Appeal; Attorney's Fees

Town of Midland v. Harrell, 2022-NCCOA-167 (No. COA21-46, Cabarrus— 3/15/22)

- ***Holding***— Mandatory permanent injunction and order of abatement remanded for additional findings and a more specific decree. Trial court's denial of defendants' motion for attorneys' fees, alleging Town had exceeded authority by imposing civil penalties while appeal was pending, remanded for further proceedings

- ***Key Excerpt***— This case involved a dispute between the Town and Harrell Land Development Company arising from substandard roads in a residential subdivision. This is the second appeal arising from this matter. *See* In re Harrell v. Midland Bd. of Adjustment, 251 N.C. App. 526, 796 S.E.2d 340 (2016) (*unpublished*) (upholding notice of zoning violation regarding substandard maintenance (not to NCDOT standards) of privately owned roads), *disc. review denied*, 369 N.C. 751, 800 S.E.2d 418 (2017). "In this appeal, Developers argue the trial court erred in: (1) granting summary judgment to the Town on the issue of civil penalties for Developers' failure to repair the roads; (2) granting the Town a permanent mandatory injunction and order of abatement requiring Developers to repair and maintain the roads; and (3) denying Developers' motion for attorney's fees. After careful review, we affirm the trial court's entry of summary judgment in the Town's favor regarding civil penalties. We remand the mandatory permanent injunction and order of abatement for additional findings of fact and a

more specific decree. Finally, we reverse the trial court's denial of Developers' motion for attorney's fees and remand for further proceeding." (As noted below, Judge Tyson voted to vacate the award of summary judgment for the Town.)

As to the issue of subject matter jurisdiction, the majority held that the trial court properly exercised jurisdiction in this case. "Based upon Midland's ordinances, Midland's Town Council was not required to adopt a resolution before the Town filed its complaint. Although the Town adopted a resolution two years after commencement of the suit, that resolution was not required to confer jurisdiction because Midland's ordinances alone granted the necessary authority…. Here, the Town filed suit pursuant to [G.S.] 160A-175(e) (2021), which provides 'the city may apply to the appropriate division of the General Court of Justice for a mandatory or prohibitory injunction and order of abatement[.]'. Unlike the City of Albemarle's ordinances, the Town's ordinances contain specific authorization to bring suit to recover civil fines assessed for violation of its provisions and to seek injunctive relief. And unlike the ordinance in dispute in [State *ex rel.* City of] Albemarle [v. Nance, 266 N.C. App. 353, 831 S.E.2d 605 (2019)], Section 23-7.6 of the Town's ordinances does not require approval by the Town's Council before filing suit and there is no issue relating to outside counsel in this case. Because the Town complied with its own ordinances in the execution of its municipal powers, we hold the trial court properly exercised jurisdiction over this matter."

Developers argued error arising from the denial of their motion for attorney's fees, G.S. 6-21.7, incurred in contesting additional unlawful notices and penalties assessed during the pendency of the first appeal (i.e., from October 14, 2016 to June 8, 2017). The Court agreed. "While Developers' first appeal regarding the notice of violation was pending, the Town assessed nearly 200 civil penalties against them from 14 October 2016 to 8 June 2017. At that time, our General Statutes provided: 'An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from....' [G.S.] 160A-388(b1)(6) (2017). In July 2019, our legislature adopted an amendment to 'clarify and restate the intent of the existing law and apply to ordinances adopted before, on, and after the effective date.' S.L. 2019-111, S.B. 355, *An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State*, Part III, sec. 3.1 (July 11, 2019). Our General Assembly further amended Section 160A-388(b1)(6) to expressly prohibit the accrual of fines while a zoning enforcement action is pending. S.L. 2020-25, § 10 (recodified as § 160D-405(f) (2021) ('An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from and *accrual of any fines assessed* during the pendency of the appeal to the board of adjustment and any subsequent appeal in accordance with G.S. 160D-1402 or during the pendency of any civil proceeding authorized by law.' (emphasis added)))."

The Town's argument, that the previous version of the statute, G.S. 160A-388(b1)(6), was ambiguous because it was "reasonably susceptible to multiple constructions," was rejected. "Section 160A-388(b1)(6) made it clear the Town could not enforce a violation against a party while that same party's appeal of a notice of violation was pending. § 160A-388(b1)(6) (2017). We cannot comprehend a reading of

the word enforcement to exclude the imposition of civil penalties, fines, or punishments otherwise. *See* State v. Benton, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) ('It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law.'). By its own account, the Town issued civil citations in order to enforce the notice of violation…. We reverse the order denying Developers' motion and remand to the trial court to determine and make appropriate findings regarding what attorney's fees Developers reasonably incurred in challenging the civil penalties imposed during the pendency of their first appeal."

- ***Concurrence in part; Dissent in Part***— Judge Tyson dissented in part and concurred in part. "I vote to vacate in part and reverse in part the trial court's award of summary judgment. The trial court's mandatory injunction and order of abatement and the trial court's denial of Harrell Builders' attorney's fees are properly vacated, reversed, and remanded for further proceedings."

Addressing the issue of subject matter jurisdiction, Judge Tyson took issue with the majority's approach to City of Albemarle. Harrell Builders argued that the trial court lacked subject matter jurisdiction because the Town failed to show standing upon filing its complaint, as no resolution was adopted until two years after the commencement of the suit. "As the majority opinion notes, in City of Albemarle, the City Council was required to adopt a resolution to bring suit through outside counsel, pursuant to its own ordinances. City of Albemarle, 266 N.C. App at 361, 831 S.E.2d at 610-11. The city manager involved outside counsel prior to Albemarle's adoption of this new resolution. *Id.* at 354, 831 S.E.2d at 607. Because Albemarle had failed to follow our statutes and its own ordinances, this Court held Albemarle lacked standing to bring suit. *Id.* at 361, 831 S.E.2d at 611."

"This Court held subject matter jurisdiction is determined by 'the state of affairs existing at the time it is invoked.' Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC, 272 N.C. App. 643, 655, 847 S.E.2d 229, 238 (2020) (citation omitted). In Shearon Farms, this Court rejected the homeowners' association's standing because '[t]he affidavit that Shearon Farms sought to introduce into the trial record documented assignments that occurred *after* it commenced this lawsuit.' *Id.*"

"Harrell Builders argue the Town Council's resolution of authorization of the initial filing two years *after* the fact cannot remedy the Town's lack of standing or does not relate back to confer subject matter jurisdiction upon the Court. *See id.* I agree and vote to vacate the trial court's award of summary judgment for the Town. City of Albemarle, 266 N.C. App. at 361, 831 S.E.2d at 611." (Emphasis in original.)

- ***Synopsis***— Appeal by defendants from August 2020 and December 2020 orders. Affirmed in part; reversed in part; and remanded. Opinion by Judge Inman, joined by Chief Judge Stroud. Judge Tyson dissented in part and concurred in part.

Public Enterprises; Capacity Fees; *Ultra Vires*; Interlocutory Appeals; Substantial Right; Writ of *Certiorari*

Daedalus v. City of Charlotte, 2022-NCCOA-203 (No. COA21-329, Mecklenburg– 4/5/22)

- ***Holding*– Trial court did not err in partially granting plaintiff's motion for summary judgment, as defendant-City's action of charging capacity fees for the fiscal years 2016-2018 was not authorized by the previous version of G.S. 160A-314(a) and was *ultra vires*.**

- ***Key Excerpt*–** Plaintiffs, developers/homebuilders who paid capacity fees in fiscal years 2016-2018 as a mandatory precondition of connecting to defendant-City's existing water and sewer infrastructure, filed a complaint in November 2018, alleging defendant-City's collection constituted an unlawful *ultra vires* action. In October 2020, the trial court issued an Order Partially Granting Plaintiffs' Motion for Summary Judgment and Partially Granting Defendant's Motion for Summary Judgment. As to the capacity fees collected during the fiscal years 2016-2018, the trial court found "there are no genuine issues of material fact[,]" and concluded the assessment and collection of capacity fees during that period were *ultra vires*. (As to Plaintiffs' Second Claim for Relief, regarding the collection of capacity fees during 2019-2020, the trial court found "there are genuine issues" of material fact, scheduling the matter for trial; however, the trial court also concluded defendant-City's assessment and collection of capacity fees were "not an exaction constituting a governmental taking and Plaintiffs have an adequate remedy at law." The Court of Appeals did not address the Second Claim for relief on appeal.) Rejecting defendant-City's argument *inter alia* regarding the existence of a substantial right, the Court granted defendant-City's petition for Writ of *Certiorari*. N.C. R. App. 21(1).)

The Court initially stated that "[t]he dispositive issue on appeal is whether the trial court erred, as a matter of law, in concluding Defendant's collection of capacity fees for fiscal years 2016-2018 was an *ultra vires* action."

Defendant-City argued the capacity fees it charged during fiscal years 2016-2018 were not *ultra vires* because defendant-City (1) provided users with contemporaneous service at the time they paid the capacity fee; and (2) used revenue from capacity fees to pay existing debt on revenue bonds. The Court initially reviewed the Supreme Court of North Carolina's holding in Quality Built Homes, Inc. v. Town of Carthage, 369 N.C. 15, 19, 789 S.E.2d 454, 458 (2016) and the version of G. S. 160A-314(a) in effect during fiscal years 2016-2018. The Court also reviewed Kidd Constr. Grp., LLC v. Greenville Utils. Comm'n, 271 N.C. App. 392, 845 S.E.2d 797 (2020).

Defendant-City contended its capacity fee was "distinct, in all material respects, from the fees in both Quality Built Homes and Kidd" as defendant-City collected the fee at the time a user requested service, not at the time the property owner sought building approval, and upon receipt of the fee defendant-City "reserved" specific capacity space. The Court observed, "Defendant's capacity fees are identical in relevant part to Greenville's capacity fees we held were *ultra vires*, as both fees were charged to pay for the capacity costs associated with serving new growth; the fees were paid at the time of the application for

a new service; and the service connection fees consisted of two components: a tapping fee and a capacity fee. Furthermore, Defendant cannot identify any contemporaneous use of the water and sewer system property owners receive for the payment of the fees. Although Defendant argues the fees were used to pay for existing debt on revenue bonds, Defendant's City Ordinance § 23-12 mandates *user rates* should be used to pay for this debt—not capacity fees. Likewise, the capacity fees were not used to pay for the actual cost of tapping into the system, as a separate tap fee covers that cost. Capacity fees, by Defendant's own admission, are merely deposited into Defendant's general water and sewer fund and 'carrie[d] forward over time' to 'fund future operations.'" (Emphasis in original.)

In closing its opinion, the Court stated, "[T]he undisputed evidence shows Defendant's fees were charged for future discretionary spending and not for contemporaneous use of the system or for services furnished. Therefore, in accordance, with Quality Built Homes and Kidd, we necessarily conclude Defendant's action of charging capacity fees for the fiscal years 2016-2018 was not authorized by the previous version of [G.S.] 160A-314(a) and was *ultra vires*.... [T]he trial court did not err in partially granting Plaintiff's Motion for Summary Judgment."

- ***Synopsis***— Appeal by defendant-City from March 2021 order. Affirmed. Judge Hampson wrote the opinion, with Judge Arrowood and Judge Carpenter concurring.