

STATE OF MICHIGAN
COURT OF APPEALS

DAVID MARTIN,

Plaintiff-Appellee,

v

NILES HOUSING COMMISSION, NILES
HOUSING COMMISSION BOARD OF
DIRECTORS, SCOTT CLARK, GEORGIA
BOGGS, and JESSICA MILLAR,

Defendants-Appellants.

and

CITY OF NILES, NILES CITY COUNCIL, and
TERRY EULL,

Defendants.

UNPUBLISHED
February 7, 2012

No. 299983
Berrien Circuit Court
LC No. 2008-000378-CZ

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendants appeal by right the trial court's order denying their motion for summary disposition on the basis of governmental immunity in this action arising from the termination of plaintiff's employment as executive director of the Niles Housing Commission (NHC) by the NHC Board of Directors (NHC Board). We reverse and remand to the trial court for entry of an order dismissing plaintiff's tort claims against the individual NHC Board members on the basis of governmental immunity afforded by MCL 691.1407(5).

"The applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). We also review questions of statutory construction de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002). The sole issue raised in this appeal is whether the individual members of the NHC Board are entitled to absolute immunity from tort liability under MCL 691.1407(5) for their actions in terminating plaintiff's employment. MCL 691.1407(5) provides:

A judge, a legislator, and the elective or *highest appointive executive official of all levels of government* are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority. [Emphasis added.]

To determine whether the NHC is a “level of government,” this Court considers whether the NHC “shares many aspects of governance with other political subdivisions traditionally considered levels of government,” such as a defined geographical area, the power to tax, the power of eminent domain, and whether the decisions made by the entity “have a wide effect on the community not unlike decisions made by other political subdivisions.” *Nalepa v Plymouth-Canton Comm Sch Dist*, 207 Mich App 580, 587; 525 NW2d 897 (1994). As this Court explained in *Davis v Detroit*, 269 Mich App 376, 380-381; 711 NW2d 462 (2006), where a city or township department or entity is granted autonomous powers beyond those granted by the Legislature, by way of city charters or ordinances, the entity is a level of government. But where the department or entity is at “the complete disposal of the township board” or other governing body such as a city council and “can neither exist nor act without the board’s [or council’s] authorization,” it is the township or the city that is the level of government and not the department or entity so controlled. *Grahovac v Munising Twp*, 263 Mich App 589, 594; 689 NW2d 498 (2004); see also *Davis*, 269 Mich App at 380-381.¹

We agree with the trial court that the NHC constitutes a “level of government” within the meaning of MCL 691.1407(5). *Davis*, 269 Mich App at 380-381. The NHC has authority granted to it by city ordinance beyond that afforded by the Legislature. It has the power of eminent domain, and it operates a public housing development, making day-to-day management decisions, thus making decisions with the potential to have a wide effect on the community. While any contracts it enters into are subject to approval by the Niles City Council, NHC is not wholly dependent on the City Council for its existence and ability to act, as was the case with the volunteer fire department in *Grahovac*, 263 Mich App at 594.² Thus, the NHC is a “level of government” for purposes of the immunity afforded by MCL 691.1407(5).

¹ Accordingly, in *Grahovac*, 263 Mich App at 594, this Court concluded that a township’s volunteer fire department was not a separate level of government where its ability to act was wholly dependent on township authorization and where it lacked any power to levy taxes, make decisions having a wide effect on members of the community, the power of eminent domain, or “broadly based jurisdiction or extensive authority similar to that of a judge or legislator.” Conversely, in *Davis*, this Court determined that both the Detroit water and sewerage department and the Detroit fire department were levels of government because each was granted autonomous authority by the Detroit City Charter and the Detroit City Code. *Davis*, 269 Mich App at 381.

² Plaintiff presents no authority, and we find none, to suggest that merely because the NHC must operate in accordance with applicable laws, including federal laws and requirements, it cannot constitute a “level of government” for purposes of MCL 691.1407(5). Indeed, innumerable departments and agencies that receive state or federal funds must do so.

We next determine who constitutes the “highest appointive executive official” of the NHC. The trial court concluded that it was the executive director, exclusively, who meets that definition. We disagree. Considering the NHC Board’s broad executive authority, including appointing and removing an executive director, we conclude that the Board, composed of individual members, is entitled to immunity as “highest appointive executive officials” of the NHC within the meaning of the statute.³

In *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 592-596; 640 NW2d 321 (2001), this Court determined that individual members of the Ypsilanti Township Board were each protected from liability by the immunity afforded by MCL 691.1407(5) to the extent that they were acting within the scope of their legislative authority when they eliminated the line-item funding for the position of administrative assistant to the township supervisor. Certainly, while *Armstrong* does not offer significant analysis on the issue, it plainly holds that multiple individuals were entitled to immunity under MCL 691.1407(5). Similarly, this Court has also afforded immunity to all of the individual members of a school board, as the elective executive officials of the district under MCL 691.1407(5), upon finding that the school district is a level of government within the meaning of that provision. *Nalepa*, 207 Mich App at 587-588. Clearly, then, the trial court’s reasoning that only a single official is entitled to immunity under MCL 691.1407(5) is contrary to binding precedent.

City of Niles Ordinance 182 confers broad authority on the NHC Board relating to housing facilities and conditions within the City. It requires that the NHC Board meet at regular intervals and conduct its business according to its by-laws. It permits, but does not require, that the NHC Board appoint a director. Further, the by-laws adopted by the Board provide for the appointment of an Executive Director who “shall serve at the pleasure” of the Board, and who shall have “general supervision” of the operations of the NHC expressly subject to the direction and of the Board. Accordingly, we conclude that the executive decision-making authority of the NHC lies with the Board, which has oversight and authority over the director, who operates under its direction. Consequently, the members of the NHC Board constitute the “highest appointive executive official” of the NHC, and are therefore absolutely immune from tort liability for acts undertaken within the scope of their executive authority. MCL 691.1407(5); *Nalepa*, 207 Mich App at 587-588.

We observe that whether the NHC Board members were acting within the scope of their executive authority “depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official’s authority, and the structure and allocation of powers in the particular level of government.” *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988). Here, Niles Ordinance 182 expressly permits the NHC to appoint a director,

³ We need not determine whether the executive director is also a “highest appointive executive official” of the NHC entitled to immunity under MCL 691.1407(5).

who serves at the Board's pleasure. Thus, plainly, the NCH Board members were acting within their executive authority by voting not to retain plaintiff in that position.⁴

We reverse and remand for entry of an order dismissing plaintiff's tort claims against the individual NHC Board members on the basis of governmental immunity afforded by MCL 691.1407(5). We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Stephen L. Borrello

⁴ We observe further that the state of mind of board members in casting their vote to terminate plaintiff's employment is not relevant in determining whether the action taken was within the scope of the board member's authority. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143-144 n 10; 560 NW2d 50 (1997). Accordingly, any allegation that the NHC Board members may have "had an improper motive and purpose . . . along with an unlawful intent is meaningless," where the action taken – terminating plaintiff's employment – is plainly within the scope of their executive authority. See e.g., *Armstrong*, 248 Mich App at 595-596.