NO. COA01-225

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

DEPARTMENT OF TRANSPORTATION,
Plaintiff

v.

Moore County
No. 99 CVS 410

GEORGE HILLIARD,
Defendant

Appeal by plaintiff from order entered 27 October 2000 by Judge A. Moses Massey in Moore County Superior Court. Heard in the Court of Appeals 11 February 2002.

Attorney General Roy Cooper, by Assistant Attorneys General Fred Lamar and Lisa C. Glover, for the State.

Cunningham, Dedmond, Petersen & Smith, LLP, by Marsh Smith, and Moser, Schmidly, Mason & Roose, LLP, by Stephen S. Schmidly, for defendant-appellee.

EAGLES, Chief Judge.

The North Carolina Department of Transportation ("NCDOT") appeals from the trial court's order denying its motion to strike George Hilliard's ("defendant") second defense and to dismiss his counterclaim. The issues raised in this appeal are substantially similar to those raised in *Department of Transp. v. Blue*, ___ N.C. App. ___, 556 S.E.2d 609 (2001). In light of our holding in *Blue*, we affirm in part and reverse and remand in part.

A brief recitation of the facts follows: Transportation Improvement Program R-210 ("TIP R-210") was a NCDOT project intended to improve portions of United States Highway 1 from south of State Road 1853 near Lakeview, North Carolina, to State Road 1180 near Sanford, North Carolina. NCDOT began planning for the State-funded project in 1989 and the planning process included public hearings and public input. In 1991, NCDOT prepared and published a Draft Environmental Impact Statement ("DEIS") evaluating the environmental impact of various alternative routes for TIP R-210. Ultimately, NCDOT selected the route designated "Alternative A." NCDOT issued a news release announcing the selection on 22 April 1992. In accordance with the North Carolina Environmental Policy Act ("NCEPA"), G.S. § 113A-1 *et seq.*, NCDOT prepared and published a Final Environmental Impact Statement ("FEIS") approving its selection of "Alternative A" on 1 December 1995. Thereafter, on 21 March 1996, the United States Federal Highway Administration ("FHWA") issued a Record of Decision ("ROD") affirming its approval of NCDOT's selection of "Alternative A" as the "environmentally preferred alternative."

Defendant owned property located within the right-of-way of "Alternative A." After unsuccessfully attempting to negotiate a purchase price for defendant's property, NCDOT filed a condemnation action on 12 April 1999. On 5 May 2000, defendant filed an answer and counterclaim alleging that NCDOT "engaged in arbitrary and capricious agency action and [] abused its agency discretion" ("defendant's second defense") and that NCDOT violated NCEPA and

the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, by preparing an inadequate FEIS, *inter alia* ("defendant's counterclaim").

On 1 June 2000, NCDOT filed a motion to strike defendant's second defense pursuant to G.S. § 1A-1, Rule 12(f) and to dismiss defendant's counterclaim pursuant to G.S. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6). A hearing on NCDOT's motion was held during the 21 August 2000 Civil Session of Moore County Superior Court, the Honorable A. Moses Massey presiding. By order entered 27 October 2000, the trial court denied NCDOT's motion. NCDOT appeals.

Before reaching the merits of NCDOT's appeal, we must deal with several preliminary matters. First, we note at the outset "that denial of a motion to dismiss is interlocutory; however, issues involving sovereign immunity are immediately appealable." *McFadyen v. Freeman*, 127 N.C. App. 202, 204, 487 S.E.2d 782, 783 (1997). Here, NCDOT argues that the sovereign immunity defense bars defendant's second defense and counterclaim. Thus, the trial court's denial of NCDOT's motion to dismiss is properly before this Court.

Secondly, NCDOT has the authority to acquire title to land that it deems necessary and suitable for road construction pursuant to G.S. § 136-19(a). "In enacting this statutory scheme, the legislature has implicitly waived [NCDOT's] sovereign immunity to the extent of the rights afforded in [G.S.] § 136-19[]." *Ferrell v. Dept. of Transportation*, 334 N.C. 650, 655, 435 S.E.2d 309, 313

(1993). Accordingly, NCDOT's sovereign immunity argument fails, and we hold that the defense is inapplicable here.

Finally, we recognize that both defendant's second defense and counterclaim allege that NCDOT violated NEPA. NEPA, which is generally inapplicable to the states, "sets forth the environmental policy of our federal government." *Blue*, ___ N.C. App. at ___, 556 S.E.2d at 617; *see also Buda v. Saxbe*, 406 F.Supp. 399, 402 (E.D. Tenn. 1974). Nevertheless, TIP R-210 was a State-funded project to be constructed with North Carolina Highway Trust Funds. While some federal funds were expended on planning for the project and NCDOT left open the option to later request federal funds, TIP R-210 was not federal in nature. *See Southwest Williamson County Community v. Slater*, 67 F.Supp.2d 875, 884-85 (M.D. Tenn. 1999), *aff'd and remanded*, 243 F.3d 270 (6th Cir. 2001) ("early coordination or compliance with the eligibility requirements for federal funding, or designing a project so as to preserve the option of federal funding in the future, standing alone, will not convert a project into a major federal action" under NEPA). "Because no major federal action was involved in TIP R-210, we hold that NEPA was inapplicable to NCDOT, a state agency, in this project. Consequently, defendants are barred from raising alleged violations of NEPA in this action." *Blue*, ___ N.C. App. at ___, 556 S.E.2d at 616.

Under its assignments of error, NCDOT argues that the trial court erred in denying its motion to strike defendant's second defense pursuant to G.S. § 1A-1, Rule 12(f). We disagree.

"A motion under Rule 12(f) is a device to test the legal sufficiency of an affirmative defense." *Blue*, ___ N.C. App. at ___, 556 S.E.2d at 615. "If there is any question as to whether an issue may arise, the motion [under Rule 12(f)] should be denied." *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108 (1978).

In his answer, defendant asserted as a defense that NCDOT abused its agency discretion and NCDOT's alleged violations of NCEPA made the condemnation of his land arbitrary and capricious. First, "allegations of arbitrary and capricious conduct or of abuse of discretion on the part of [NCDOT] render the issue subject to judicial review." *Dept. of Transportation v. Overton*, 111 N.C. App. 857, 859, 433 S.E.2d 471, 473 (1993). Additionally, this Court has held that a landowner's failure to assert a violation of NCEPA as a defense in his answer to a condemnation proceeding constitutes a waiver. *See State v. Williams and Hessee*, 53 N.C. App. 674, 680-81, 281 S.E.2d 721, 726 (1981). Here, defendant alleged in his answer that NCDOT abused its discretion, acted arbitrarily and capriciously, and violated NCEPA. Consequently, defendant is entitled to proceed with his second defense -- a review of whether NCDOT's condemnation action was arbitrary and capricious.

However, "[a]dministrative and judicial review of an environmental document is incidental to, and may only be undertaken in connection with, review of the agency action. *No other review* of an environmental document is allowed." G.S. § 113A-13 (emphasis

added). Since the environmental documents at issue in this case were all prepared during NCDOT's planning and selection of "Alternative A" for TIP R-210 in 1995, defendant may not obtain judicial review of those documents in this review of NCDOT's condemnation of defendant's land in 1999. *See Blue*, ___ N.C. App. at ___, 556 S.E.2d at 616-17. Hence, we affirm that portion of the trial court's order denying NCDOT's motion to strike defendant's second defense.

Next, NCDOT assigns error to the trial court's denial of its motion to dismiss defendant's counterclaim. After careful review, we reverse and remand.

Here, NCDOT filed a motion to dismiss defendant's counterclaim for lack of subject matter jurisdiction pursuant to G.S. § 1A-1, Rule 12(b)(1), *inter alia*. "Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 290, 517 S.E.2d 401, 403-04 (1999). "If a court has no jurisdiction, it can only dismiss the case." *Gainey v. Brotherhood*, 252 N.C. 256, 262, 113 S.E.2d 594, 599 (1960). Moreover, "[t]he issue of lack of subject matter jurisdiction can be raised at any time, even on appeal." *State v. Moraitis*, 141 N.C. App. 538, 541, 540 S.E.2d 756, 757 (2000).

In his counterclaim, defendant alleges that NCDOT violated NCEPA by preparing an inadequate FEIS, *inter alia*. "The North Carolina Environmental Policy Act ("NCEPA"), G.S. § 113A-1 *et seq.*, sets forth our State's environmental policy." *Blue*, ___ N.C. App.

at ___, 556 S.E.2d at 617. The primary purpose of NCEPA "is to ensure that government agencies seriously consider the environmental effects of each of the reasonable and realistic alternatives available to them." *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 383, 265 S.E.2d 890, 911 (1980). Pursuant to NCEPA, a State agency planning to expend public money on a government project that significantly affects the quality of the State's environment must issue an environmental impact statement ("EIS"). *See* G.S. § 113A-4. The requirement of the EIS is designed to provide a mechanism by which all affected State agencies raise and consider environmental factors of proposed projects. *See In re Appeal From Environmental Management Comm.*, 53 N.C. App. 135, 141, 280 S.E.2d 520, 525 (1981).

Significantly, NCEPA does not contain an explicit judicial review provision. *See Blue*, ___ N.C. App. at ___, 556 S.E.2d at 617. However, this Court has held that judicial review of an alleged NCDOT NCEPA violation is available under the judicial review provisions of the North Carolina Administrative Procedure Act ("NCAPA"), G.S. § 150B-1 *et seq.* *See id.* We based this holding on the fact that NCDOT is expressly exempted from the contested case provisions of the NCAPA and that defendant cannot petition for a hearing before the Office of Administrative Hearings ("OAH"). *See id.* at ___, 556 S.E.2d at 618; *see also* G.S. § 150B-1(e)(8). This case is one where judicial review of an agency decision is available in superior court pursuant to G.S. § 150B-43

even when no prior proceeding was held before the OAH. *See Blue*, ___ N.C. App. at ___, 556 S.E.2d at 618.

Pursuant to G.S. § 150B-43, an aggrieved party may seek judicial review of an adverse agency determination. Prior to obtaining review under § 150B-43, a party must satisfy five requirements: "(1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute." *Huang v. N.C. State University*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992).

First, defendant here is aggrieved because (1) he owns land within the proposed route for "Alternative A" for TIP R-210, (2) he asserted his position as a taxpayer, and (3) he shares a sufficient geographical nexus to "Alternative A" so that he may be expected to suffer whatever adverse environmental effects TIP R-210 may have. *See Blue*, ___ N.C. App. at ___, 556 S.E.2d at 618. Second, defendant has a contested case because he alleged that NCDOT violated NCEPA in its decision concerning location of a highway. *See id.*; *see also Orange County*, 46 N.C. App. at 374-76, 265 S.E.2d at 906-07. Third, NCDOT's action was final when it issued the FEIS on 1 December 1995. *See Blue*, ___ N.C. App. at ___, 556 S.E.2d at 619; *see also Orange County*, 46 N.C. App. at 367, 265 S.E.2d at 903 ("an action to challenge the sufficiency of the environmental impact statement would be ripe when the Board of Transportation approved the location of the highway corridor following the

preparation of a final environmental impact statement [FEIS]"). Fourth, the available administrative remedies were exhausted. *See Blue*, ___ N.C. App. at ___, 556 S.E.2d at 619-20 (defendant had the opportunity to participate in NCDOT's decision making process; and a citizens' petition in opposition to "Alternative A" was before NCDOT pursuant to G.S. § 136-62). Finally, no other adequate procedure for judicial review of defendant's NCEPA challenge was provided by any other statute. *See id.* at ___, 556 S.E.2d at 620 ("Because review of an environmental document may be undertaken only in connection with review of the agency action for which the document was prepared, *see* G.S. § 113A-13 and 1 N.C.A.C. § 25.0605(f), section 136-108 does not provide an adequate procedure for judicial review of defendant[']s NCEPA challenge"). Thus, defendant has satisfied the five requirements under G.S. § 150B-43 for judicial review of an adverse agency determination.

G.S. § 150B-45 provides that

> [t]o obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.
>
> The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. A person who fails to file a petition within the required time waives the right to judicial review under this Article.

Defendant failed to file a petition with the superior court within thirty days of NCDOT's publication of the FEIS on 1 December 1995. *See Blue*, ___ N.C. App. at ___, 556 S.E.2d at 620-21 (service by

publication of a FEIS is sufficient). Defendant's failure to timely comply with the NCAPA's judicial review requirements is sufficient basis to dismiss defendant's counterclaim. *See id.* at ___, 556 S.E.2d at 621; *see also Citizens For Responsible Roadways v. N.C. Dep't of Transp.*, 145 N.C. App. 497, 550 S.E.2d 253 (2001). Since defendant failed to file his petition with the superior court within thirty days after he received notice of the agency decision, the trial court was without subject matter jurisdiction over defendant's counterclaim. Thus, the trial court erred in failing to dismiss defendant's counterclaim pursuant to Rule 12(b)(1). Accordingly, we reverse and remand this case to the trial court for entry of an order dismissing defendant's counterclaim.

In sum, we affirm that portion of the trial court's order denying NCDOT's motion to strike defendant's second defense; we reverse that portion of the order denying NCDOT's motion to dismiss defendant's counterclaim; and we remand to the trial court for entry of an order dismissing defendant's counterclaim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

Affirmed in part, reversed and remanded in part.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).