

NORTH CAROLINA  
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16 CVS 2801

2017 AUG -1 A 7:43

EDWARD R. FASANO and DEBRA L.  
FASANO, on behalf of a class of those  
similarly situated,

FORSYTH CO., C.S.C.  
BY           KC          

Plaintiffs,

v.

**ORDER**

TOWN OF KERNERSVILLE and  
WINSTON-SALEM – FORSYTH COUNTY  
CITY/COUNTY UTILITIES COMMISSION,

Defendants.

THIS MATTER, assigned to the undersigned pursuant to Rule 2.1 of the General Rules of Practice, is before the Court on Plaintiffs' Motion for Judgment on the Pleadings and Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings, each filed on or about 28 April 2017. Pursuant to the Stipulated Order Amending Case Management Order (the "CMO"), the parties submitted extensive briefing on these cross-motions. The Court further heard oral argument from counsel of record for the parties on 16 June 2017, and thereafter took the motions under advisement. After consideration of the Supplemental and Amended Class Action Complaint ("Complaint") and Answer thereto, the parties' cross-motions and briefing, the arguments of counsel, the additional authorities submitted at the hearing, and the other matters of record, the Court sets forth some of the facts for background purposes only and hereby makes the following conclusions:

1. Plaintiffs are citizens and residents of the Town of Kernersville, North Carolina, (“Kernersville”) and users of the Kernersville sanitary sewer system, as that term is defined in the Complaint.

2. Pursuant to 1996 Interlocal Agreement (Ex. A to the Complaint), as amended from time to time, Kernersville agreed to convey certain property rights to the City of Winston-Salem relating to its water and sewer services, and further agreed to allow the Winston-Salem Forsyth County City/County Utilities Commission (the “CCUC”) to manage its sanitary sewer and water systems. Under the 1996 Interlocal Agreement, the rates charged to users of the Kernersville sanitary sewer system include a rate multiplier based on the rate charged by the CCUC to users in the City of Winston-Salem.

3. Pursuant to the 2011 Agreement (Ex. B to the Complaint), Defendants were required to reduce the rate multiplier charged to users of the Kernersville sanitary sewer system from 2.487x to 1.2x beginning on 30 June 2012, unless a new agreement on the rate multiplier was reached prior to that date in accordance with the provisions of the applicable contracts and applicable law. Defendants were also required to disburse the funds held by the CCUC in the “Rate Differential Fund” to Kernersville on 30 June 2012, unless a new agreement was reached.

4. As of 30 June 2012, a new agreement had not been reached, as required by the 2011 Agreement, and Defendants continued to charge users of the Kernersville sanitary sewer system the rate multiplier of 2.487x for sewer services.

5. Plaintiffs have asserted claims against Defendants for breach of contract and unconstitutional takings, contending that Defendants were required to but did not reduce the rate

multiplier to 1.2x beginning on 30 June 2012, and did not disburse the Rate Differential Fund.<sup>1</sup> As a result, Plaintiffs allege that Defendants are liable to them (and other similarly-situated users of the Kernersville sanitary sewer system) for reimbursement for overcharges beginning on 30 June 2012. Plaintiffs further assert, among other things, that Defendants' purported efforts to establish a new agreement with respect to the rate multiplier were ineffective under the governing contractual provisions and North Carolina law. Plaintiffs contend that, based on the allegations in the Complaint and Answer thereto, and the annexed documents, they are entitled to judgment as a matter of law on their claims for breach of contract and takings without just compensation.

6. Defendants, in turn, assert that Plaintiffs have failed to state claims on which relief can be granted, that Plaintiffs' Complaint is barred by the statute of limitations, that Defendants took actions that lawfully altered the contractual requirement to reduce the rate multiplier to 1.2x beginning on 30 June 2012, and that Defendants are entitled to judgment as a matter of law on the defenses asserted in the Answer.

7. The relevant contractual documents and municipal resolutions are annexed to the Complaint and appropriate for the Court to consider in connection with the parties' Rule 12 motions. In addition, Defendants have admitted in their Answer that the relevant documents and municipal resolutions speak for themselves and are the best evidence of their terms. As a result of these and other allegations and admissions, the pleadings resolve all material factual issues

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<sup>1</sup> Count One of the Complaint asserts a breach of contract claim against Defendants. Count Three of the Complaint, as described by Plaintiffs in their papers and argued at the motions hearing, alleges unconstitutional takings without just compensation under the Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and the Law of the Land Clause, Article I, Section 19 of the North Carolina Constitution.

and only questions of law remain for decision as to Plaintiffs' claims for breach of contract and unconstitutional takings without just compensation.

8. After reviewing the documents attached to the Complaint, and reviewing the relevant legal authorities, the Court agrees with Plaintiffs that Defendants unlawfully failed to take the action required by the 2011 Agreement of lowering the sewer rate multiplier charged to users of the Kernersville sanitary sewer system beginning on 30 June 2012. Accordingly, as a result of Defendants' failure to lower the rate multiplier charged to users of the Kernersville sanitary sewer system and to turn over the balance of the Rate Differential Fund, Defendants breached the terms of the 1996 Interlocal Agreement, as amended, including as amended by the 2011 Agreement, and, alternatively, the CCUC breached its contractual agreements with Plaintiffs and the other users of the Kernersville sanitary sewer system.

9. The Court further concludes that Defendants' actions resulted in unconstitutional takings without just compensation of Plaintiffs' property rights, as actionable under the United States and North Carolina Constitutions.

10. As for Defendants' defenses, the Court concludes that Plaintiffs have standing to pursue their breach of contract claim as intended third-party beneficiaries of the 1996 Interlocal Agreement, as amended, including as amended by the 2011 Agreement, and that Plaintiffs also have standing to pursue their breach of contract claims as direct beneficiaries of the contracts between the CCUC and Kernersville sanitary sewer system users.

11. Plaintiffs have standing under state and federal law, including 42 U.S.C. § 1983, to pursue their takings without just compensation claim.

12. Plaintiffs' claims are not barred by the doctrine of governmental immunity or the political question doctrine.

13. Plaintiffs' claims are not barred by the applicable statute of limitations because the 10-year limitations period in N.C. Gen. Stat. § 1-47(2) applies, meaning that Plaintiffs' action was timely filed. In the alternative, Plaintiffs' claims are not barred by any other potentially-applicable limitations period by application of the continuing wrong doctrine.

14. To the extent not more specifically addressed above, the Court finds and concludes that the remaining defenses asserted by Defendants fail as a matter of law, and that Plaintiffs are entitled to judgment on the pleadings as a matter of law on their claims for breach of contract and for takings without just compensation.

For the foregoing reasons, the Court hereby ORDERS, ADJUDGES, and DECREES that:

A. Plaintiffs' Motion for Judgment on the Pleadings is GRANTED.

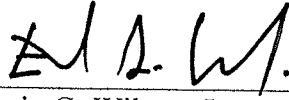
B. Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings is DENIED.

C. As a result of this ruling, Plaintiffs have established Defendants' liability for breach of contract (Count One of the Complaint) and for unconstitutional takings without just compensation under the United States and North Carolina Constitutions (Count Three of the Complaint), and Defendants' defenses as to liability on those claims are DISMISSED. At this time, it appears to the Court that the only remaining issues to be determined with respect to Count One and Count Three are class certification and the amount of damages and other relief to be awarded to Plaintiffs (and, potentially, the proposed Class).

D. In light of the aforementioned rulings, and without addressing the merits of the claim, Plaintiffs' claim for impairment of contract (Count Two of the Complaint) is DISMISSED AS MOOT, and no issues with regard to Count Two of the Complaint remain to be addressed.

E. Pursuant to and amending Paragraph 4 of the CMO, the parties are directed to confer and submit a proposed further case management order, addressing the remaining issues, within 15 days of entry of this Order or by 11 August 2017, whichever is later.

SO ORDERED, this the 24 day of July, 2017.



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Hon. Edwin G. Wilson, Jr.  
Superior Court Judge

**CERTIFICATE OF SERVICE**

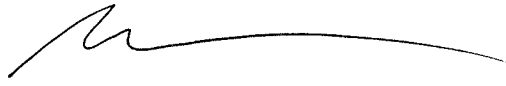
The undersigned hereby certifies that the foregoing document was served by first class mail, as follows:

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This the 27th day of July, 2017.

  
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Stephen M. Russell, Jr.