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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-142

Filed 04 April 2023

Mecklenburg County, No. 19CVS16070

CLAUDIA T. CRAIG and PAMELA L. YOUNG, Plaintiffs,

v.

TOWN OF HUNTERSVILLE; EPCON KINNAMON PARK, LLC; and THE  
COURTYARDS AT KINNAMON PARK CONDOMINIUM ASSOCIATION, INC.,  
Defendants.

Appeal by plaintiffs from orders entered 19 July 2021 by Judge Lisa C. Bell in  
Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January  
2023.

*Murray Law Firm PLLC, by David William Murray, for plaintiffs-appellants.*

*Johnston Allison & Hord, PA, by B. David Carson and Kathleen D.B. Burchette,  
for defendant-appellee Epcon Kinnamon Park, LLC.*

*Cranfill Sumner, LLP, by Patrick H. Flanagan and Steven A. Bader, for  
defendant-appellee Town of Huntersville.*

*Burr & Foreman, LLP, by Henrietta Golding, Pro Hac Vice, and Brooke R.  
Watson, Pro Hac Vice, for defendant-appellee The Courtyards at Kinnamon  
Park Condominium Association, Inc., no brief.*

GORE, Judge.

# CRAIG V. TOWN OF HUNTERSVILLE

## *Opinion of the Court*

Plaintiffs Claudia T. Craig and Pamela L. Young own three adjacent tax parcels (the “Craig Property”) in Huntersville, North Carolina. This action concerns a gravel road easement, which plaintiffs use to access their properties. Defendant Town of Huntersville (the “Town”) is a municipal corporation organized under the laws of North Carolina. Defendant Epcon Kinnamon Park, LLC, (“Epcon”) has development rights and owns portions of parcels located across from the Craig Property, and the property upon which the disputed portion of the gravel road easement is located. Defendant The Courtyards at Kinnamon Park Condominium Association, Inc. (the “Association”) is alleged to be responsible for the maintenance of the area along where the gravel road easement is located.

Plaintiffs appeal from two Orders, one granting the Town’s motion to dismiss and the other granting in part Epcon’s motions to dismiss. Upon review, this Court has jurisdiction to review the first Order only to the extent that it involves the issue of sovereign immunity. Appeal of the other order is interlocutory and from which there is no right of immediate appeal; we accordingly dismiss it. We thus affirm in part and dismiss in part.

### **I.**

#### **A.**

The real property at issue was originally owned by C.W. Kinnamon and Johnsie Kinnamon. Over time, the Kinnamons divided the land and sold parcels to different persons and entities. In 1968, the Kinnamons sold three parcels which

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make up the Craig Property to Donald and Harriet Hill. In the conveying deed, the Kinnamons granted the Hills an ingress/egress easement in an adjacent gravel road.

The Hills subdivided their land into the existing three parcels. Plaintiffs bought these parcels from the Hills in three separate sales in 1992, 1995, and 2000.<sup>1</sup> Since the first sale in 1992, plaintiffs have used the gravel road easement to access and leave the Craig Property. The easement has also been used by their visitors, service vendors, and emergency personnel.

In 2015, Epcon bought property located east of plaintiffs' parcels. Epcon bought this property from two sellers, and the purchase included the gravel road. Epcon then obtained a rezoning of the property to allow for construction of The Courtyards at Kinnamon Park ("CKP"), an active adult community.

Epcon began construction of CKP in or around 2016. As part of the plan approved by the Town in 2015, Epcon was to construct a new public street, which would cross the gravel road easement and connect to a preexisting Gilead Grove Road to allow access to CKP from the west.

Epcon completed this project in November 2016. On or about 22 November 2016, Epcon offered the Gilead Grove Road extension for dedication to the Town. To date, the Town has not accepted the dedication.

**B.**

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<sup>1</sup> Plaintiffs Craig and Young jointly own one parcel and Craig owns the other two.

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Plaintiffs filed their Complaint and issued Summonses on 16 August 2019 alleging claims for declaratory judgment, substantial interference with easement, violation of easement, private nuisance, trespass, and permanent injunction. Defendant Association filed an answer on 4 November 2019. Defendants Epcon and the Town each filed motions to dismiss in lieu of answering on 4 November 2019.

On 4 February 2020, the trial court held a hearing on the motions to dismiss. On 15 February 2021, the trial court advised the parties of its decision to grant the Town's motion in full and grant Epcon's motion in part. In response, plaintiff filed a motion for reconsideration on 25 February 2021 and requested a hearing under the local rules; however, the trial court did not conduct a hearing.

Thereafter, on 19 July 2021, the trial court entered two orders subject to the instant appeal: (i) an order granting the Town's motion to dismiss on the sole claim against it for declaratory judgment ("Town Order"); and (ii) an order granting Epcon's motion to dismiss, in part, on plaintiff's claims for declaratory judgment, permanent injunction, and trespass ("Epcon Order"). The Epcon Order limited plaintiffs to proceed in pursuit of monetary damages only for the claims of violation of easement rights and private nuisance.

Plaintiffs timely filed Notice of Appeal on 17 August 2021. The trial court entered an Order entering stay pending appeal on 14 October 2021.

**II.**

We must first examine whether this Court has jurisdiction over this

interlocutory appeal. “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted).

“Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citation omitted). This rule is “designed to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.” *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citation omitted). “There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.” *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382.

An order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is reviewable only under two sets of circumstances. First, Rule 54(b) specifically provides that if the judge entering the order determines that there is “no just reason for delay” and includes a statement to that effect in the judgment, the judgment will be final and immediately appealable. G.S. 1A-1, Rule 54(b). Second, if the interlocutory order “affects a substantial right” of the party appealing or “in effect determines the action and prevents a judgment from which an appeal might be taken” the party has a right to appeal under G.S. 1-277 or G.S. 7A-27.

*Cunningham v. Brown*, 51 N.C. App. 264, 266, 276 S.E.2d 718, 721 (1981). “Under either of these two circumstances, it is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal and our Court’s responsibility to review those grounds.” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

In this case, the record does not contain a Rule 54(b) certification; plaintiffs must demonstrate a substantial right to obtain immediate appellate review. “A right is substantial if it will be lost or irretrievably and adversely affected if the trial court’s order is not reviewed before a final judgment.” *Nello L. Teer Co. v. Jones Bros.*, 182 N.C. App. 300, 303, 641 S.E.2d 832, 835 (2007) (citation omitted).

“The ‘substantial right’ test for appealability is more easily stated than applied.” *Bailey*, 301 N.C. at 210, 270 S.E.2d at 434. “We take a ‘restrictive’ view of the substantial right exception and adopt a case-by-case approach.” *Wells Fargo Bank, Nat’l Ass’n v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014) (citation omitted). “It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). “Essentially a two-part test has developed – the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the party] if not corrected before appeal from final judgment.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736

(1990) (citation omitted).

“The appellant bears the burden of demonstrating that the order is appealable despite its interlocutory nature.” *Wells Fargo Bank*, 238 N.C. App. at 194, 767 S.E.2d at 376 (citation omitted). This requirement is codified in Appellate Rule 28(b)(4), which requires the appellant to include in their brief “a statement of the grounds for appellate review” that “shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.” N.C.R. App. P. 28(b)(4) (2022). “It is not the duty of this Court to construct arguments for or find support for an appellant’s right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.” *Wells Fargo Bank*, 238 N.C. App. at 194, 767 S.E.2d at 376 (citation omitted).

**A.**

We first address our jurisdiction to review the Town Order.

The Town filed a Motion to Dismiss in Lieu of Answer to plaintiffs’ Complaint pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(6), and 12(b)(7) of the North Carolina Rules of Civil Procedure. In support of their motion, the Town argued, *inter alia*: (i) the trial court lacks personal and subject matter jurisdiction over the Town because they have governmental immunity or sovereign immunity; and (ii) the Town has not waived their immunity by the purchase of liability insurance. The trial court granted

the Town’s motion based on Rules 12(b)(1), 12(b)(2), and 12(b)(6), and dismissed plaintiffs’ Complaint against the Town with prejudice.

Plaintiffs have demonstrated a substantial right based on the issue of governmental immunity. *Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018) (citation omitted) (“[O]ur Court has held that the *grant* of a motion to dismiss based on sovereign or governmental immunity is immediately appealable.”). “However, as stated by our Supreme Court, ‘[t]he denial of a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12(b)(6), Rules of Civil Procedure, G.S. 1A-1, is an interlocutory order from which no immediate appeal may be taken.’” *Lake v. State Health Plan for Teachers & State Emples.*, 234 N.C. App. 368, 370, 760 S.E.2d 268, 271 (2014) (alteration in original) (quoting *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982)). “Though our Supreme Court has not resolved the issue as to whether a motion to dismiss based on sovereign immunity is a motion under Rule 12(b)(1) or under Rule 12(b)(2), our Court has determined that the denial of a motion to dismiss based on sovereign immunity can be based on Rule 12(b)(2), and is, therefore, immediately appealable.” *Lake*, 234 N.C. App. at 370 n.3, 760 S.E.2d at 271 n.3 (citations omitted). Accordingly, we must dismiss plaintiffs’ “appeal as to any issues related to the trial court’s Rule 12(b)(6) ruling . . . as interlocutory, and address only those issues related to sovereign immunity and Rule 12(b)(2), as those issues relate to a substantial right and are immediately appealable.” *Id.* at 370-71, 760 S.E.2d at 271 (citation omitted).



We must also dismiss plaintiffs’ appeal “to the extent that it is based on the denial of their motion to dismiss for lack of subject-matter jurisdiction, pursuant [to] Rule 12(b)(1).” *Id.* at 370 n.3, 760 S.E.2d at 271 n.3.

Plaintiffs also argue the trial court erred in granting the Town’s motion to dismiss their claims for declaratory judgment and declaratory relief based on the doctrines of justiciability, political question, and impossibility. Plaintiffs have not advanced any argument that the Town Order affects a substantial right based on these additional grounds. We must dismiss these additional issues for noncompliance with Appellate Rule 28(b)(4). *See N.C. DOT v. Cnty. of Durham*, 181 N.C. App. 346, 348, 638 S.E.2d 577, 578 (2007) (determining that “[t]he [appellant] properly cites authority for its appeal of the trial court’s denial of its motions to dismiss based on sovereign immunity . . .” but dismissing two additional issues where the appellant failed to show deprivation of a substantial right based on “failure to prosecute and motion for costs.”).

In sum, plaintiffs have shown that they are entitled to immediate appellate review of the trial court’s dismissal under N.C. R. Civ. P. 12(b)(2) for lack of personal jurisdiction on grounds that their claim is barred by sovereign or governmental immunity.

**B.**

We now turn to address whether the Epcon Order affects a substantial right and is subject to immediate appellate review.

Defendant Epcon filed a motion to dismiss all claims asserted by plaintiffs pursuant to N.C. R. Civ. P. 12(b)(6). After considering the pleadings and filings in this action, and oral arguments of counsel, the trial court dismissed plaintiffs' claims for declaratory judgment (Claim One), trespass (portion of Claim Three), and permanent injunction (Claim Four), but permitted plaintiffs' claims for violation of easement rights (Claim Two) and private nuisance (portion of Claim Three) to proceed in pursuit of money damages only.

**1.**

Plaintiffs first argue the Epcon Order affects a substantial right because the trial court "improperly precluded" them "from seeking, obtaining, or electing legally available remedies through its order." Plaintiffs cite *Jenkins v. Maintenance, Inc.*, 76 N.C. App. 110, 332 S.E.2d 90 (1985), for its purported holding that any order that precludes a potential remedy affects a substantial right. We reject this interpretation of *Jenkins* and are not persuaded the facts in this case demand a similar outcome. Such a broad rule conflicts with our application of the substantial right test, which as previously stated, is typically conducted by examining "the particular facts of . . . [each] case and the procedural context in which the order from which appeal is sought was entered." *Waters*, 294 N.C. at 208, 240 S.E.2d at 343.

In *Jenkins*, the plaintiffs conveyed a certain parcel of real property to the defendants Williams, which plaintiffs alleged was induced by fraud and misrepresentation. 76 N.C. App. at 112-13, 332 S.E.2d at 92. The defendants

Williams then conveyed the property at issue to co-defendant Maintenance, Inc. *Id.* at 113, 332 S.E.2d at 92. The plaintiffs’ complaint sought a judgment quieting title to the property, actual damages, and punitive damages. The trial court entered an interlocutory order granting summary judgment in favor of Maintenance, and the plaintiffs appealed to this Court. *Id.*

After conducting a fact specific inquiry, we held that the trial court’s order granting summary judgment did affect a substantial right and was immediately appealable because “Maintenance is the current owner of the property, [and] Maintenance is the only party through whom and from whom plaintiffs could obtain reformation of the deed and reconveyance of the property, a possible remedy in an action premised on fraud and misrepresentation.” *Id.* Thus, in *Jenkins*, the plaintiffs demonstrated the trial court’s order would “work injury if not corrected before final judgment[]” based on the particular facts and circumstances governing the case. *Id.* at 112, 332 S.E.2d at 92.

In this case, plaintiffs’ perceived rights in the gravel drive easement forms the basis of each claim and the corresponding requested relief. “Our courts have held that an appeal from an interlocutory order involving access to an easement ordinarily does not implicate a substantial right.” *McColl v. Anderson*, 152 N.C. App. 191, 193, 567 S.E.2d 203, 205 (2002) (citations omitted). Moreover, plaintiffs fail to demonstrate that an order precluding them from obtaining alternative remedies—declaratory judgment and permanent injunction—“will clearly be lost or irremediably

adversely affected if the order is not reviewable before final judgment.” *Blackwelder v. State Dep’t of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983). Presuming the record does contain allegations that Epcon “plans to alter or damage the easement, . . . any damage to the easement or [plaintiffs’] property resulting from [defendant’s] use during this period can be rectified later by monetary damages if necessary.” *McColl*, 152 N.C. App. at 194, 567 S.E.2d at 205; *see also Miller v. Swann Plantation Dev. Co.*, 101 N.C. App. 394, 396, 399 S.E.2d 137, 139 (1991).

We determine that plaintiffs fail to demonstrate a substantial right on this basis.

**2.**

Next, plaintiffs claim a right to immediate review on grounds that delaying appeal of the Epcon Order would deprive them of their substantial right to avoid inconsistent verdicts in multiple trials.

“The avoidance of one trial is not ordinarily a substantial right.” *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (citations omitted). However, “the right to avoid the possibility of two trials *on the same issues* can be a substantial right.” *Id.* (ellipses omitted) (quotation marks and citation omitted). “Issues are the ‘same’ if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts.” *Hamilton v. Mortg. Info. Servs.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011) (citation omitted). However, “[t]he mere fact that claims arise from a single

event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding.” *Id.* at 80, 711 S.E.2d at 190. “It is well-established that before a substantial right is affected on this basis, it must be shown that the same factual issues are present in both trials *and* that plaintiffs will be prejudiced by the possibility that inconsistent verdicts may result.” *Nguyen v. Taylor*, 200 N.C. App. 387, 391, 684 S.E.2d 470, 473 (2009) (citation omitted).

Here, plaintiffs devote one sentence in their brief to support an argument that they are entitled to immediate appellate review on this basis; if they “are forced to proceed in litigation without the potential of declaratory and/or injunctive relief, the likelihood of an inconsistent verdict related to the Association, the likelihood of undergoing two trials and a repeat of the case, and the likelihood of plaintiffs obtaining an incomplete remedy is extremely high and prejudicial.” They cite one case, *Ussery v. Taylor*, for its general premise that such a substantial right exception exists and may be grounds to warrant immediate appellate review. 156 N.C. App. 684, 685, 577 S.E.2d 159, 160 (2003).

This, without more, does not satisfy the requirements of N.C.R. App. P. 28(b)(4). Plaintiffs do not discuss the factual nexus among all their claims, identify which facts relevant to the claims at issue would overlap, apply the case cited, nor do they advance any further argument in support of their position. Moreover, the appellant bears the burden of specifying why delaying the appeal until entry of final

judgment would pose the risk of irreparable prejudice; a conclusory assertion that prejudice would result does not suffice. *See Nguyen*, 200 N.C. App. at 391, 684 S.E.2d at 473.

We, therefore, lack jurisdiction to consider the Epcon Order subject to the instant appeal. *See Union Cnty. v. Town of Marshville*, 255 N.C. App. 441, 446-47, 804 S.E.2d 801, 806 (2017) (citation omitted) (dismissing appeal of an interlocutory order based on “the potential for inconsistent verdicts on the issues . . .” where the appellant “never explains how these inconsistent verdicts . . . could truly become realities[]” and reiterating that “[t]his Court will not construct [the] appellant’s arguments in support of a right to interlocutory appeal.”).

### III.

With our jurisdiction limited to reviewing the order dismissing plaintiffs’ claims against the Town on sovereign immunity grounds, we now turn to plaintiffs’ argument that the trial court erred in dismissing their declaratory judgment claim on that basis. Specifically, plaintiffs contend that the doctrine of sovereign or governmental immunity is inapplicable under the allegations of their Complaint. We disagree.

#### A.

“[A]n appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction[.]” *Martinez v. Univ. of N.C.*, 223 N.C. App. 428, 430, 741 S.E.2d 330, 332 (2012) (alterations in

original) (quotation marks and citation omitted). “We must review the record to determine whether there is evidence to support the trial court’s determination that exercising its jurisdiction would be appropriate.” *Id.* at 430-31, 741 S.E.2d at 332 (citing *Stacy v. Merrill*, 191 N.C. App. 131, 134, 664 S.E.2d 565, 567 (2008)). “[Q]uestions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo.” *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017) (quotation marks and citation omitted).

**B.**

“North Carolina has a well-established common law doctrine of sovereign immunity which prevents a claim for relief against the State except where the State has consented or waived its immunity.” *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990) (citation omitted). “The doctrine of governmental immunity, which resembles that of sovereign immunity, renders local governments such as counties and municipal corporations immune from suit for the negligence of [their] employees in the exercise of governmental functions absent waiver of immunity.” *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 571, 866 S.E.2d 647, 655 (2021) (alteration in original) (quotation marks and citation omitted).

“Nevertheless, governmental immunity is not without limit. [G]overnmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions. Governmental immunity does not, however, apply when the municipality engages in a proprietary function.” *Estate of Williams*

*v. Pasquotank Cnty. Parks & Rec. Dep't*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012)

(quotation marks and citations omitted).

In other words, while governmental immunity protects units of local government from suit for acts committed in [their] governmental capacity, if the entity in question undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations.

*Kinston Charter Acad.*, 379 N.C. at 571, 866 S.E.2d at 655 (alteration in original)

(quotation marks and citation omitted).

**1.**

Plaintiffs first argue the doctrine of governmental immunity does not bar a declaratory judgment action against a municipality because: (i) the action is seeking to vindicate a plaintiff's property rights and interests; and (ii) there is no other avenue through which the plaintiffs can protect their rights. Plaintiffs cite several cases in support of their assertion, principally *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276 (1992) and *Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014), *rev'd per curiam for the reasons stated in the dissenting opinion*, 368 N.C. 91, 773 S.E.2d 55 (2015).

However, the facts before us differ from those in *Corum* and *Sandhill Amusements*. Here, unlike *Corum*, plaintiffs' claim for declaratory relief is not "a direct cause of action under the State Constitution for alleged violations of" their



individual rights. 330 N.C. at 786, 413 S.E.2d at 292. Nor is this case like *Sandhill Amusements*, where this Court conducted a narrow, fact specific inquiry, and determined that a declaratory judgment was the only way plaintiffs could dispute the State's directives, "which effectively barred any future sale and current placement of their kiosks [(allegedly illegal video sweepstakes machines)]." 236 N.C. App. at 351, 762 S.E.2d at 675.

Consequently, plaintiffs may withstand a motion to dismiss based on sovereign or governmental immunity if it can be demonstrated that the alleged road dedication is a proprietary function, or that the Town has waived its immunity. *See Estate of Williams*, 366 N.C. at 198, 732 S.E.2d at 140.

**2.**

Plaintiffs alleged in their Complaint: "To the extent that governmental or sovereign immunity is applicable to plaintiffs' claims in this action, the Town has waived immunity through, but not limited to, engaging in a proprietary function or purchase of liability insurance." It is plaintiffs' contention that the allegations in their pleadings forecast a waiver or inapplicability of governmental immunity. Accordingly, they argue the allegations must be taken as true and are sufficient to survive a motion to dismiss. *See Lake*, 234 N.C. App. at 371, 760 S.E.2d at 271 (quotation marks and citation omitted).

We are not persuaded the trial court was limited in entering a ruling on this basis alone. In a case such as this, where "the defendant supplements his motion to

dismiss with an affidavit or other supporting evidence, the allegations [in the complaint] can no longer be taken as true or controlling and plaintiff[] cannot rest on the allegations of the complaint.” *Banc of Am. Sec. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) (alterations in original) (quotation marks and citation omitted).

The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court. Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

*Id.*

In reviewing the record on appeal, it is apparent that this action falls within the third category of cases: where both parties submit dueling affidavits addressing the issue of personal jurisdiction. The Town controverted the allegations in plaintiffs’ Complaint by filing an insurance policy in the affidavit of Lara Cagle on 10 December 2019 to support its contention that the Town had not waived governmental immunity through the purchase of insurance or otherwise for claims set forth in the Complaint. Plaintiff Craig then filed a Verification of Complaint on 3 February 2020.

“Under these circumstances, the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard

wholly or partly on oral testimony or depositions.” *Id.* at 694, 611 S.E.2d at 183 (*purgandum*). “If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror.” *Id.* (quotation marks and citation omitted). In this case, the trial court conducted a properly noticed hearing on 4 February 2020 where it considered the Town’s motion, the pleadings and filings in the action, and oral arguments of counsel.

When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court. Under Rule 52(a)(2) of the Rules of Civil Procedure, however, the trial court is not required to make specific findings of fact unless requested by a party. When the record contains no findings of fact, it is presumed that the court on proper evidence found facts to support its judgment.

*Id.* (*purgandum*).

The Town Order filed 19 July 2021 does not contain findings of fact, and the record contains no specific request for findings. In such instances, a “lack of findings gives rise to a presumption that the [trial] judge, upon proper evidence, found facts sufficient to support his [or her] ruling . . . .” *Id.* at 695, 611 S.E.2d at 183 (quotation marks and citation omitted). While we must presume that the trial court’s determination regarding personal jurisdiction and the doctrine of governmental immunity is supported by sufficient findings of fact, “[i]t is this Court’s task to review

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the record to determine whether it contains any evidence that would support the trial judge’s conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendants’ due process rights.” *Id.*

Under § 160A-296, “[a] city shall have general authority and . . . [t]he power to *open new streets* and alleys, and to widen, extend, pave, clean, and otherwise improve existing streets, sidewalks, alleys, and bridges, and to acquire the necessary land therefor *by dedication and acceptance*, purchase, or eminent domain.” N.C. Gen. Stat. § 160A-296(a)(3) (2021) (emphasis added). In this section, the term “[c]ity” is interchangeable with the term “[t]own[.]” § 160A-1(2) (2021). Thus, the General Assembly has designated the activity of “road dedication” as a governmental function protected by governmental immunity. *See Bessemer Improv. Co. v. Greensboro*, 247 N.C. 549, 552, 101 S.E.2d 336, 339 (1958) (citations omitted) (“[T]he opening and closing of streets is a governmental function.”); *see also Rockingham Square Shopping Ctr., Inc. v. Madison*, 45 N.C. App. 249, 252, 262 S.E.2d 705, 707 (1980) (citations omitted) (The power provided by §160A-296(a)(3) “is to be exercised in the discretion of the governing body of the municipality acting in its governmental, rather than its proprietary capacity.”).

Nevertheless, the Town may elect to waive its governmental immunity by purchasing liability insurance. *Patrick v. Wake Cnty. Dep’t of Human Servs.*, 188 N.C. App. 592, 595, 655 S.E.2d 920, 923 (2008) (citing § 153A-435 (2005)). Included in the record is the Town’s insurance policy with Travelers Indemnity Company,

effective 1 July 2019, which provides:

PRESERVATION OF GOVERNMENTAL IMMUNITY –  
NORTH CAROLINA

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS INCLUDED IN THIS POLICY  
THAT PROVIDE LIABILITY COVERAGE

PROVISIONS

The following is added to each Section that provides liability coverage:

This insurance applies to the tort liability of any insured only to the extent that such tort liability is not subject to any defense of governmental immunity under North Carolina law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

The following is added to the CONDITIONS Section:

Preservation Of Governmental Immunity

Your purchase of this policy is not a waiver, under North Carolina General Statute Section 160A-485 or North Carolina General Statute Section 153A-435 or any amendments to those sections, of any governmental immunity that would be available to any insured had you not purchased this policy.

We have recently held that “this exact language precludes waiver and ‘preserves the defense of governmental immunity’ . . . .” *Est. of Ladd v. Funderburk*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 879 S.E.2d 731, 736 (2022) (quoting *Hart v. Brienza*, 246 N.C. App. 426, 434, 784 S.E.2d 211, 217 (2016)).

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The record contains competent evidence upon which the trial court determined that plaintiffs' claims against the Town were barred by the doctrine of governmental immunity. Thus, the trial court did not err in granting the Town's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.

**IV.**

The trial court's interlocutory dismissal of claims against the Town for reasons of justiciability, political question, and impossibility do not affect a substantial right, and we dismiss the portions of plaintiffs' appeal challenging those rulings. Similarly, plaintiffs have failed to show that the interlocutory dismissal of some claims brought against Epcon affect a substantial right, and we likewise dismiss those portions of the appeal. However, because dismissal on sovereign immunity grounds does affect a substantial right, we affirm the trial court's ruling on the Town's motion to dismiss based on governmental immunity after reaching the issue on the merits.

**AFFIRMED IN PART AND DISMISSED IN PART.**

Judges STADING and RIGGS concur.

Report per Rule 30(e).