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## Coates' Canons Blog: City of Albemarle v. Nance: Mountain or Molehill?

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This past July the North Carolina Court of Appeals issued an opinion that has provoked a wide variety of responses from local government attorneys. Some fear that the opinion might require local governments across the state to completely revamp how they exercise many corporate powers. Others are less concerned and believe that the opinion is so narrow that it will have only minor effects on a handful of local governments. Read on to learn why the case is causing such disparate reactions . . .

The case in question is confusingly titled *State of North Carolina on Relation of City of Albemarle v. Nance, et al.* Although the state is nominally the plaintiff, the real party at issue is the city of Albemarle, which in 2017 had initiated a public nuisance action against the owners and operators of a local hotel. The action was filed by outside counsel, not by the appointed city attorney.

The trial court dismissed the action because the city council had not adopted a resolution or ordinance authorizing the retention of outside counsel in the matter as required by the city's Code of Ordinances. The Court of Appeals agreed and affirmed the dismissal of the city's nuisance action for lack of standing.

The result generated much discussion among local government lawyers. Some thought this case was of little long-term consequence because it involved merely a city failing to follow its somewhat unusual local rules concerning litigation. More were concerned that the case set a troubling requirement for a local government board to explicitly approve all litigation and possibly other corporate actions including contracting and code enforcement.

Before we can speculate on the impact of the decision, we need to understand the Court of Appeal's reasoning. The court based its ruling on a combination of statutory law and the city's Code of Ordinances.

G.S. 160A-12 describes how a municipality may exercise its corporate powers:

*All powers, functions, rights, privileges, and immunities of the corporation shall be exercised by the city council and carried into execution as provided by the charter or the general law. A power, function, right, privilege, or immunity that is conferred or imposed by charter or general law without directions or restrictions as to how it is to be exercised or performed shall be carried into execution as provided by ordinance or resolution of the city council.*

Article IV, Section 4.3 of the Albemarle Code of Ordinances states in part:

*It shall be the duty of the City Attorney to prosecute and defend suits against the City; . . . The Council may employ other legal counsel from time to time, in addition to the City Attorney, as may be necessary to handle adequately the legal affairs of the City.*

The Court of Appeals interpreted these two provisions to require the city council to adopt an ordinance or a resolution to exercise its authority to retain outside counsel. Despite arguments to the contrary by the city, the court found no evidence in the record that the city council had taken any formal action concerning the retention of the outside counsel that filed the suit on its behalf. The court concluded that the city's failure to properly exercise its authority to retain outside counsel meant that the city lacked standing to continue the action brought by that outside counsel.

Responding to arguments that the requirement of a formal vote prior to pursuing litigation was impractical, the Court of Appeals said that the city was bound by the rules it created for itself:

*Albemarle's ordinances define the proper party to initiate an action for the city. "[B]y enacting [such an] ordinance, the [council] must follow the procedures it has set therein. If such procedures are inconvenient, the [council] should change*

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them, not ignore them.” [Quoting *Town of Kenansville v. Summerlin*, 70 N.C. App. 601, 602, 320 S.E.2d 428, 430 (1984)]

In other words, if the city wants its city attorney or manager to be able to retain outside counsel, it must amend its ordinances so that the authority to retain outside counsel is not limited to the city council.

Now that we know the reasoning behind the decision, what’s its impact?

In its Petition for Discretionary Review filed with the N.C. Supreme Court, the city characterized the decision as “earth-shattering:”

*The lower court’s decision was the first decision by any North Carolina court, ever, holding that a municipality is required to vote prior to filing any lawsuit in order to establish subject matter jurisdiction. The Court of Appeals opinion as decided would require a municipality to affirmatively plead it complied with any and all internal rules it has about hiring an attorney or filing suit in order to establish standing to sue. It is wrong as a matter of statutory interpretation, and accepting it would be earth shattering for municipalities in our state. This is especially so when considering that city councils meet only once a month and the business of running a municipality, including but not limited to the power to sue, is a day to day operation.*

Not surprisingly, the defendants disagreed. In their response to the city’s petition, the defendants did their best to characterize the decision as a big nothing burger:

*This opinion does not attempt to apply a new legal standard across the state nor require a vote in all circumstances involving litigation. The ruling at its core merely states, if the municipality has a rule, it must follow its own rule. . . . The Court of Appeals limited its decision to only those situations in which outside counsel is involved because only in that situation is the Albemarle City Council required to pass a resolution.*

So which is it? An impractical requirement for all local governments in the state to formally vote on every legal matter? Or a narrow ruling that turned on a unique provision in one city’s code?

As is often the case, reality probably lies somewhere in between these extremes.

The defendants are certainly correct in that on its face the decision appears to be very limited. The court focused on the provision in Albemarle’s code that assigned the authority to retain outside counsel to the city council and no other city official. Local governments with similar language in their codes must pay heed to this decision and either start voting on the retention of outside counsel or change their codes to permit the delegation of that authority. (My colleague Frayda Bluestein explains here how local governing boards are free to delegate responsibilities to other officials so long as a statute does not specifically require action by the board itself.) But local governments without the same language in their codes would not be required to begin voting on the retention of outside counsel.

That said, the Albemarle decision also could be read more broadly to apply to any exercise of corporate authority that is assigned to the governing board by a local government’s code. Local government attorneys and their boards should examine their codes to make sure that there are no corporate powers that their codes reserve for their boards but in practice have been delegated to other local government officials.

Also remember that if the relevant state statutes and code provisions are silent as to how a local government may exercise a particular authority, then the default under G.S. 160A-12 is that the governing board must exercise that authority. As Frayda instructs in her blog post, boards are free to delegate such authority to other officials. The Albemarle decision suggests that if a board has not done so then the resulting action by other officials may be deemed unauthorized.

What’s the bottom line? The Albemarle decision may not be as traumatic to local governments as the plaintiffs suggest. But the decision should encourage local government attorneys and their clients to review their local codes and amend them as needed to make sure that their codes conform to their current corporate practices and vice-versa.

Of course, that bottom line may change if the N.C. Supreme Court chooses to review the case. Stay tuned . . .



## Links

- [www.nccourts.gov/documents/appellate-court-opinions/state-of-nc-on-relation-of-city-of-albemarle-v-nance](http://www.nccourts.gov/documents/appellate-court-opinions/state-of-nc-on-relation-of-city-of-albemarle-v-nance)
- [stanlyjournal.com/2019/07/25/city-of-albemarle-loses-2-year-battle-with-downtown-hotel/](http://stanlyjournal.com/2019/07/25/city-of-albemarle-loses-2-year-battle-with-downtown-hotel/)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-12.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-12.html)
- [library.amlegal.com/nxt/gateway.dll/North%20Carolina/albemarle\\_nc/cityofalbemarlenorthcarolinacodeofordina?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:albemarle\\_nc](http://library.amlegal.com/nxt/gateway.dll/North%20Carolina/albemarle_nc/cityofalbemarlenorthcarolinacodeofordina?f=templates$fn=default.htm$3.0$vid=amlegal:albemarle_nc)