

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

Docket No. W-1125, Sub 9

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the matter of

Greater Kinnakeet Shores Home
Owners Inc. c/o Pat Weston,
P. O. Box 853, Avon, N.C. 27915

Complainant

v.

Outer Banks/Kinnakeet
Associates, LLC.

Respondent

Response to Motion to
Dismiss Complaint

NOW COMES Complainant, Greater Kinnakeet Shores Home Owners , Inc., and responds to the motion of Respondent, Outer Banks/Kinnakeet Associates LLC, to dismiss complaint for lack of standing and jurisdiction.

The wastewater collection and treatment system of Respondent, upon which its customers and ratepayers and property owners within the Kinnakeet Shores subdivision in Dare County, North Carolina depend for wastewater treatment services pursuant to Respondent's certificate of public convenience and necessity issued by this Commission, are currently under moratorium implemented by the North Carolina Division of Environmental Quality ("DEQ"). As justification for imposition of the moratorium, DEQ recites that the WWTP major treatment units are no longer functional. Both clarifiers, the tertiary filter, spray irrigation system, and

backup generator are not functional. Biosolids have not been removed from the plant for at least seven years.

DEQ has placed the WWTP on a sewer moratorium with no new sewer taps, sewer extensions and additional flow effective as of the date of the moratorium. This moratorium was not imposed because the sewage treatment plant or collection system has reached or has the near term potential to reach its capacity. The moratorium is imposed due to severe mismanagement and failure to keep the system in proper operating condition. Members of the homeowners association receive service from this practically dysfunctional WWTP. That alone satisfies any standing requirement.

As Complainant sets forth in its complaint of December 13, 2021, the conditions of the Respondent's WWTP resulting in the imposition of the moratorium, arise from years of neglect and failure of OBKA to undertake appropriate maintenance and to adequately fund operations of the system. The failures leading to the moratorium are nothing new, but only the last instances of a long pattern of mismanagement.

Respondent alleges, irrespective of these irrefutable contentions, that Complainants have no standing to bring this complaint and that the Commission lacks subject matter jurisdiction to address the complaint.

Paragraph 1. of the December 13, 2021 complaint states "HOA is the official agency that acts for and on behalf of property owners and utility consumers within the Kinnakeet Shores subdivision in Dare County , North Carolina."

Under the North Carolina Rules of Civil Procedure, a motion to dismiss "tests the legal sufficiency of the complaint. In ruling on a motion, the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). The function of a motion to dismiss is to test the law of a claim, not the facts which support

it. Resolution of evidentiary conflicts is thus not within the scope of the Rule.” *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979) (citations and quotation marks omitted). A motion to dismiss under Rule 12(b)(6) should be granted “*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*” *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970)) (citations and quotation marks omitted).

In re the Matter of Cube Yadkin Generation, LLC, v. Duke Energy Progress, LLC, 269 N.C. App. 1,8, 837 S.E.2d 144, 150 (2019). (Court of Appeals reverses the Commission’s order dismissing Complainant’s complaint seeking waiver from requirements of its Notice of Commitment form for Qualifying Facilities where complaint alleges facts that, if proved, could justify waiver.)

Respondent’s reliance upon evidence cited in its motion to dismiss taking issue with and attempting to limit the allegation in paragraph 1. of the Complaint cannot be considered by the Commission in ruling upon Respondent’s motion.

Moreover, even if the Commission were free to consider this evidence, it does not justify a determination of lack of standing. Members of the homeowners association and the association itself, are consumers of Respondent’s wastewater services and owners of property within Respondent’s service territory as identified in its certificate of public convenience and necessity that gives Respondent a monopoly to provide those services in its service territory and imposes upon Respondent public utility responsibilities. See, e.g. N.C. Gen. Stat. § 62-2. This is often referred to as the “regulatory compact.” The Commission is charged by statute with enforcing the obligations and responsibilities of public utilities under its jurisdiction set forth in the regulatory compact. Respondent has a responsibility to keep its facilities in adequate condition and repair. In addition, Respondent has a responsibility in compliance with this monopoly to provide new service to property owners within the service territory upon their request.

As set forth in detail in the complaint, Respondent has grossly failed to comply with its public service obligations and responsibilities. What could be worse than providing such poor

service that the environmental regulators have placed Respondent under a moratorium? Both clarifiers, the tertiary filter, spray irrigation system, and backup generator are not functional. Biosolids have not been removed from the plant for at least seven years. Consumers and ratepayers within Kinnakeet Shores need not wait until these serious service deficiencies result in a catastrophic shutdown of the system before they have standing to seek the Commission's assistance in rectifying these serious shortcomings.

Respondent pleads lack of funds and failure to have brought a request for a rate increase so as to properly operate its system. Rather than spend its funds in fulfilling its responsibilities, Respondent has engaged in incurring legal fees in order to file dilatory, scorched earth, frivolous pleadings.

Any single consumer of Respondent's services within the Kinnakeet Shores service territory has standing to file a complaint. All of the consumers within Kinnakeet Shores service territory are members of the homeowners association. Ms. Weston, who is listed on the complaint and who has verified it, (and whose name is legibly set forth on the verification) in addition to her leadership responsibilities within the homeowners association, is a consumer of Respondent's services and as a resident and homeowner within Respondent's services has standing to complain. The Homeowners Association itself is a customer of the Respondent, receiving and paying a monthly bill in its own name. The fourth quarter 2021 sewer invoice is attached. A complaint from any one consumer is more than sufficient to establish standing. The homeowners association, however, acting on behalf of itself and all property owners and consumers within Kinnakeet Shores only adds additional support to any standing requirement to bring this complaint.

In support of its motion to dismiss Respondent alleges that Complainant has alleged no cognizable injury and in fact Complainant "appears" to be alleging a claim that must be asserted by a property owner that has been denied a building permit as a result of the moratorium on new water wastewater connections. Respondent alleges that Complainant fails to allege the

identity of any property owner that would be a member of the Complainant that has been denied a building permit as a result of the moratorium on new wastewater connections. The complaint alleges far more than what “appears” to Respondent. A legitimate motion to dismiss due to deficiency in a pleading must be based on the actual allegations therein, not upon a strawman fabricated by the responding party so as to fit imagined facts to an otherwise unsupportable theory of defense. Nowhere in the complaint is there any reference to a “building permit.”

Respondent operates its system under a state imposed moratorium based on deficiencies set forth in the complaint and listed above. Nothing more is required for a complaint than allegations setting forth these facts. In addition, however, Complainant asserts that property owners within Respondent’s service territory are prohibited due to the moratorium from making use of their property for which they have incurred costs of acquisition and on which they pay taxes, due to Respondent’s failure to comply with its public service responsibilities. These property owners are not required to seek a building permit and receive a rejection from a municipal or county official as a prerequisite to asserting their claim against Respondent in this Commission. DEQ’s actions have precluded the need for that. The imposition of the moratorium makes this step an unnecessary undertaking. Even in the Superior Court¹, a member of the complainant class need not undertake an unnecessary act in order to have standing to state a claim upon which relief can be granted.

Respondent’s allegation that Complainant fails to allege the identify of any property owner that that has been denied a building permit is misleading. In paragraph 3. of the complaint, Complainant cites the letter submitted to the Commission from George E. Goodrich, “Several other builders find themselves in the same position as my company, we cannot move forward with our development plans for our properties until the moratorium is lifted.” Even if

¹ “Ordinarily, the procedure before the Commission is more or less informal, and is not as strict as in Superior Court, nor is it confined by technical rules.” *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 569, 126 S.E.2d 325, 332 (1962). In proceedings before the Commission, “[g]reat liberality is indulged in pleadings[,]” and “substance and not form is controlling.” *Id.*

there were no ability to identify any potential new connections to the system, the moratorium diminishes property values for existing homeowners and injures their financial interests.

In support of its motion, Respondent relies upon abbreviated, truncated, out of context sentences in the Articles of Incorporation of the homeowners association and other documents. While consumers and property owners within Respondent's service territory are not limited in bringing this complaint by any limitations in the powers and duties of Greater Kinnakeet Shores Home Owners Inc., even a cursory review of the Articles of Incorporation reveals that those articles clearly convey to the association authority to bring this complaint.

Article III(b) states, "The purposes for which the corporation is organized are: To enforce any and all covenants, restrictions and agreements applicable to the common areas, lot and dwelling units in the development and particularly any declarations of covenants and restrictions or similar declarations which may hereafter be made with respect to the development and which may hereafter be recorded in the Dare County registry." Article III(c) states, "The purpose for which the corporation is organized are: To make and perform any contracts and do any acts and things, and exercise any powers suitable, convenient, proper or incidental for the accomplishment of the objectives enumerated herein." Article III(d) states, "The purposes for which the corporation is organized are: To engage in any lawful act or activity for which corporations may be organized under Chapter 55A of the General Statutes of North Carolina; however, notwithstanding anything herein to the contrary, the corporation shall exercise only such powers as are in the furtherance of the exempt purposes of organizations set forth in section 501(c) of the Internal Revenue Code of 1954 and the regulations thereunder as the same now exist or as they may be hereafter amended from time to time." (emphasis added).

The Kinnakeet Shores consumers of Respondent's services have a contract or agreement with the Respondent. They are required to pay for the services they receive pursuant to tariffs approved by this Commission. They cannot receive wastewater services from anyone else. In

exchange for these payments, Respondent is required to maintain its facilities in sufficient operation and repair to provide these services without threat of disruption.

Complainant will not dwell on Respondent's allegations of procedural missteps. Allegations that the lines in the complaint on which the name and address of a person to whom response should be made and its representative are unlined are about as trivial and inconsequential as one could imagine. In the Commission's order serving complaint, it identifies Outer Banks/ Kinnakeet Associates, LLC as "Respondent." Complainant is not a plaintiff. The party against whom action is sought is more appropriately classified as a Respondent instead of a Defendant, as the order displays. These allegations of procedural delinquencies should be recognized as those coming from the party who signed two certificates of service seeking an extension of time to file answer, indicating that the pleadings had been served when they had not, and filed a verification without the signature of the party who ostensibly signed it. In response to paragraph 15 of the complaint which recites information set forth as a public record and viewable and recoverable through the Commission's docket search web site portal, Respondent responds with lack of sufficient information to admit or deny the allegations and therefore denies them.

Respondent is under a state imposed moratorium. Rather than interpose motions to strike, motions to dismiss, allegations of lack of standing and lack of subject matter jurisdiction on the part of the Commission, Respondent should be required to rectify its failures and explain why it has not lived up to its responsibilities to this point and what it will do in the future to have the moratorium lifted. Respondent's actions in response to the complaint of its consumers and ratepayers underscore the need for the Commission to proceed expeditiously with addressing the allegations in the complaint and provide the relief requested. Complainant reiterates that time is of the essence and repeats its request that delay leads to unavoidable consequences.

Respectfully submitted, this 11 day of February 2022.

Edward S. Finley, Jr.

/s/ Edward S. Finley Jr.

Edward S. Finley, Jr. PLLC

Attorney for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response to Motion to Dismiss was duly served upon parties of record either by depositing same in a depository of the United States Postal Service, first class postage prepaid, or by electronic delivery.

This the 11 day of February 2022

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OFFICIAL COPY

Feb 11 2022

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W-1125 Sub 9
 Attachment A
2021 Quarter 4
Sewer Invoice

OFFICIAL COPY

BILL TO
Pat Weston PO Box 853 Avon, NC 27915-0853

2021 QUARTER 4 SEWER INVOICE #	DATE	TOTAL DUE	DUE DATE		ENCLOSED
9298	12/31/2021	\$336.94	12/31/2021		

Feb 11 2022

DATE	ACCOUNT SUMMARY	AMOUNT
09/30/2021	Balance Forward	0.00
	Other payments and credits after 09/30/2021 through 12/30/2021	0.00
12/31/2021	Other invoices from this date	0.00
	New charges (details below)	336.94
	Total Amount Due	336.94

ACTIVITY	QTY	RATE	AMOUNT
Sewer Base 03	1	336.94	336.94

TOTAL OF NEW CHARGES 336.94
 BALANCE DUE **\$336.94**