

# **Bond Case Briefs**

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## **PUBLIC CONTRACTS - NORTH CAROLINA**

### **Southern Power Company v. Cleveland County**

**United States Court of Appeals, Fourth Circuit - January 14, 2022 - F.4th - 2022 WL 128488**

Power company brought action seeking a declaration that its agreement with a North Carolina county constituted an enforceable contract.

The United States District Court adopted report and recommendation of United States Magistrate Judge and granted county's motion to dismiss for lack of jurisdiction. Plaintiff appealed.

The Court of Appeals held that:

- Agreement was not a binding contract when signed by parties;
- Contract formation occurred after passage of law mandating that municipal contracts with private entities include a recapture provision allowing a municipality to recover cash incentives already paid if the private entity breaches the agreement;
- Agreement violated law and thus was not a valid contract, such that there was no contractual waiver of governmental immunity;
- County acted in a governmental, rather than proprietary, capacity, such that county was entitled to governmental immunity; and
- Plaintiff was precluded from using equitable estoppel to enforce contract that violated law.

Unilateral agreement providing that county would make substantial cash payments to power company if company built and operated natural gas plant, a decision left to company's sole discretion, was not a binding contract under North Carolina law when the parties signed the agreement, but rather was only an offer by county when signed; agreement required nothing from power company, county could have withdrawn offer at any time before it was accepted by performance, and both power company and county could have torn up agreement the day after they signed it without any repercussions.

Under North Carolina law, contract formation occurred upon power company's performance and acceptance of unilateral contract providing that county would make substantial cash payments to power company if company built and operated natural gas plant, a decision left to company's sole discretion, such that formation occurred after passage of law mandating that municipal contracts with private entities include a recapture provision allowing a municipality to recover cash incentives already paid if the private entity breaches the agreement, even though parties signed contract weeks before legislature enacted statute.

Agreement between county and power company for construction and operation of a natural gas plant called upon county to do things that only a governmental entity could do, such as expediting processing of all applications for permits required by county and waiving fees for permitting, inspection, development or other fees normally charged by county for development and/or industrial projects, and therefore county acted in a governmental, rather than proprietary, capacity, such that county was entitled to governmental immunity from power company's equitable estoppel claim.

Under North Carolina law, power company was precluded from using equitable estoppel to enforce contract providing that county would make substantial cash payments to power company if company built and operated natural gas plant, and thus county was entitled to governmental immunity from suit, since contract violated statute mandating that municipal contracts with private entities include a recapture provision allowing a municipality to recover cash incentives already paid if the private entity breaches the agreement.