

# Municipal Law Notes

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**Procedure; Jurisdiction; Mootness;  
Failure to Exhaust Administrative and  
Judicial Review; Void *Ab Initio***

McFadyen v. New Hanover Cty., \_\_\_ N.C. App.  
\_\_\_ (No. COA18-840, New Hanover— 8/18/20)

- ***Holding***- Given plaintiff-county director of elections' failure to comply with statutory requirement regarding filing of action in Superior Court of Wake County, Court of Appeals vacates orders, which were void *ab initio* because Superior Court of New Hanover County did not have jurisdiction over the dispute, and dismisses the appeal.
- ***Key Excerpt***- “[G.S.] 163-22(l) requires that any appeal from the State Board of Elections (‘SBE’) be filed in the Superior Court of Wake County. Failure to comply with this statutory requirement deprives any other court of jurisdiction to hear the dispute. Where a court lacks jurisdiction over a case, any action made by the court related to that case is void *ab initio* and a nullity, leaving any appeal based on the court’s void actions moot. Here, [plaintiff] appealed his purported termination as a county director of elections (‘county director’) by the SBE in the Superior Court of New Hanover County, in

contravention of [G.S.] 163-22(l). As a result, the Superior Court of New Hanover County was without jurisdiction, and all of its actions related to the case are void and vacated, rendering [the] appeal moot.”

The Court initially observed, “Although [plaintiff] was a county employee, the county had no legal power to terminate him; that decision rested solely with the SBE. *See* [G.S.] 163-35(b) (2014). There is a statutory procedure for that termination and it expressly identifies when the SBE’s action becomes a final agency decision. *Id.* Decisions of the SBE related to the performance of its duties are subject to judicial review exclusively in the Superior Court of Wake County. *See* [G.S.] 163-22(l) (2014) (‘Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the [SBE] rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file his petition in the Superior Court of Wake County.’). [Plaintiff] seeks judicial review of a decision ‘rendered in the performance of [SBE’s] duties . . . under [Chapter 163]’ as this controversy arises out of the purported termination of [plaintiff] as a county

director. See [G.S.] 163-35(b) (2014) (“The county board of elections may, by petition signed by a majority of the board, recommend to the Executive Director of the [SBE] the termination of the employment of the county board’s director of elections. . . . [T]he State Executive Director shall render a decision as to the termination or retention of the county director of elections.”)

....

“[Plaintiff] could have challenged the SBE’s action by appealing to the Superior Court of Wake County according to the judicial review process established by law, but he instead filed his *Complaint* in New Hanover County. The failure to exhaust the administrative and judicial review process bars a later collateral attack on the SBE’s decision. Frazier v. N.C. Cent. Univ., ex rel. Univ. of N.C., 244 N.C. App. 37, 44, 779 S.E.2d 515, 520 (2015). The law does not permit litigants to challenge a state agency decision by bypassing judicial review and suing the administrative agency and third parties whose actions ‘happen to stem from decisions of an administrative agency.’ Vanwijk v. Prof’l Nursing Servs., Inc., 213 N.C. App. 407, 410, 713 S.E.2d 766, 768 (2011). [Plaintiff’s] failure to properly appeal through the judicial review process established by statute means the Superior Court of New Hanover County lacked jurisdiction to hear the matter.”

The Court observed, “An order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored.’ State v. Sams, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986). ‘[A] void judgment “is in legal effect no judgment,” as “[i]t neither binds nor bars any one, and all proceedings founded upon it are worthless.”’ Boseman v. Jarrell, 364 N.C. 537, 557, 704 S.E.2d 494, 507 (2010) (quoting Hart v. Thomasville Motors, Inc., 244 N.C. 84, 90, 92 S.E.2d 673, 678

(1956)).” The Court held the trial court’s orders to be void and without legal effect, issued without jurisdiction, as under G.S. 163-22(l) only the Superior Court of Wake County had jurisdiction to hear the matter. Since the underlying orders were vacated, the Court dismissed the appeal.

- **Synopsis**— Appeal by plaintiff from orders entered March and April 2018. Vacated and dismissed. Opinion by Judge Murphy, with Judge Collins concurring. Judge Dietz concurring by separate opinion.

### ***Nota Bene* (N.B.)**

#### **Other Recent Decision of Note**

**Executive Order; Preliminary Injunction; Appeal Seeking Stay of Order and Review; Mootness** N.C. Bowling Proprietors Association, Inc. v. Cooper, \_\_\_ N.C. \_\_\_ (No. 314PA20, Wake— 9/25/20) (Justice Davis entered an order for the Court stating, “Plaintiff has filed a lawsuit questioning the authority of defendant Governor Roy Cooper to enforce section 8(A) of Executive Order 141 against plaintiff . . . and its 75 member entertainment facilities. See Exec. Order 141, § 8(A) (May 20, 2020). The trial court entered an interlocutory order granting a preliminary injunction on 7 July 2020 (preliminary injunction order). Defendant sought a stay of the order and its review, and this Court allowed both the stay and review. Defendant recently issued an executive order that superseded and replaced the provisions of Executive Order 141 challenged in this case. See Exec. Order 163, § 6(8) (Sept. 1, 2020). Executive Order 163 allows bowling centers to resume operations under certain specified safety protocols. See *id.* § 6(8)(b)(i)–(xi). Since the challenged restriction in Executive Order 141 is no longer in effect against plaintiff, we dismiss this appeal as moot, vacate the 7 July 2020 preliminary injunction order, and remand to Superior Court, Wake County.”)