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Minimum Housing Ordinance; Failure to Exhaust Administrative Remedies; Subject Matter Jurisdiction

Cheatham v. Town of Taylortown, ___ N.C. App. ___ (No. COA18-625, Moore– 2/19/19) ("Cheatham II") (***unpublished***), *disc. review denied*, *appeal dismissed,* ___ N.C. ___ (No. 388P18-2, 6/11/19)

- ***Holding*- In plaintiff's action challenging enforcement of minimum housing ordinance, trial court did not err by dismissing plaintiff's case for lack of subject matter jurisdiction.**

- ***Key Excerpt–*** Plaintiff appealed from an order granting defendant-Town's motion to dismiss plaintiff's complaint with prejudice. Defendant-Town contended, and the trial court ruled, that plaintiff failed to exhaust the administrative remedies set forth in G.S. 160A-441 *et seq*. The Court agreed.

The Court initially set forth a brief summary of plaintiff's appeal in Cheatham v. Town of Taylortown ("Cheatham I"), ___ N.C. App. ___, 803 S.E.2d 658 (2017) (***unpublished***). "Cheatham I distinguished defendant's enforcement actions that took place before and after 19 June 2015, the effective date of Taylortown's current minimum housing ordinance. *Id*. at ___, 803 S.E.2d at 662."

"The Court held that the trial court did not err by dismissing the portion of plaintiff's appeal arising after the effective date of the ordinance pursuant to [G.S. 1A-1,] Rule 12(b)(1) because plaintiff failed to exhaust his administrative remedies delineated in the ordinance before seeking judicial review, as required by statute. *Id*. at ___, 803 S.E.2d at 661-62. However, because the trial court ruled plaintiff's claims arose out of Taylortown's minimum housing ordinance, adopted '[o]n 19 June 2015 ... pursuant to [G.S.] 160A-441 through 160A-450 (2015)[,]' *id*. at ___, 803 S.E.2d at 660, our Court remanded 'for further consideration as to enforcement actions occurring on or *prior* to 19 June 2015, the effective date of the Ordinance.' *Id*. at ___, 803 S.E.2d at 662 (emphasis added)."

Upon remand, the trial court in the autumn of 2017 found that defendant-Town "did in fact have in place a Minimum Housing Ordinance prior to June 19, 2015, and

on that date, the Town adopted a new Minimum Housing Ordinance. Plaintiff's claims, both prior to and after June 19, 2015, arise out of the Town's attempts to enforce its Minimum Housing Ordinance." Accordingly, the trial court concluded that plaintiff failed to exhaust administrative remedies as to the Town's enforcement efforts, by failing to appeal to the Board of Adjustment, G.S. 160A-446, and dismissed his complaint for lack of subject matter jurisdiction.

In affirming, the Court of Appeals stated, "The General Assembly enacted [G.S.] 160A-441 *et seq*. to ensure 'minimum housing standards would be achieved in the cities and counties of this State[,]' Harrell v. City of Winston-Salem, 22 N.C. App. 386, 391, 206 S.E.2d 802, 806 (1974), by conferring 'upon cities and counties the power to exercise their police powers by adopting and enforcing ordinances ordering a property owner to repair, close, or demolish dwellings that are determined to be unfit for human habitation and therefore dangerous and injurious to the health and safety of the public.' Newton v. City of Winston-Salem, 92 N.C. App. 446, 449, 374 S.E.2d 488, 490 (1988) (citation omitted)."

"Pursuant to this power, '[G.S] 160A-443 authorizes a public officer,' as defined in [G.S.] 160A-442(7), 'to enforce ordinances relating to unfit and unsafe dwellings by ordering the repair, alteration, or improvement of dwellings or the removal or demolition of such buildings.' Harrell, 22 N.C. App. at 391, 206 S.E.2d at 806. '[T]he administrative remedies which are available to a property owner who is aggrieved by an order of a public officer' are delineated in [G.S.] 160A-446. *Id*."

"The record shows Taylortown adopted a minimum housing ordinance pursuant to [G.S.] 160A-441 through 160A-450 on 25 July 1995 ('the 1995 ordinance'), which set out the necessary procedures for the city to follow in minimum housing cases. On 19 June 2015, Taylortown adopted a new minimum housing ordinance to replace the 1995 ordinance. The proper course of action for an individual who is aggrieved under the 1995 ordinance is the same procedure delineated in the 2015 ordinance. The aggrieved person should: 'present the case at a minimum housing hearing pursuant to [G.S.] 160A-441 *et seq*., and then, if he remained unsatisfied, to appeal that decision to the Board as permitted by statute. [G.S.] 160A-446. If his appeal to the Board was unsuccessful, he would then have the ability to seek review in Superior Court by proceedings in the nature of certiorari. *Id*. [G.S.] 160A-446(e).' Cheatham I, ___ N.C. App. at ___, 803 S.E.2d at 662. Plaintiff failed to follow this procedure. Instead, he attempted to collaterally attack the minimum housing standards enforcement proceedings through this independent action. In so doing, he failed to exhaust the administrative remedies available to him through [G.S.] 160A-446, which cannot be circumvented."

- ***Synopsis***– Appeal by plaintiff from order entered December 2017. Affirmed. Opinion by Judge Arrowood, with Judge Dillon and Judge Murphy concurring. On June 11, 2019, the Supreme Court of North Carolina denied defendant's petition for discretionary review and dismissed defendant's notice of appeal based upon a constitutional question.

Condemnation: Beach Renourishment; Easement; Fair Market Value

Town of Nags Head v. Richardson, __ N.C. __ (No. 244A18, 6/14/19) (*per curiam*)

- In a *per curiam* opinion, Supreme Court of North Carolina states, "For the reasons

stated in the majority opinion, this Court affirms the decision of the Court of Appeals. Further, to clarify the remand order, the sole issue on remand is the fair market value of the easement or, as presented to the jury, 'What was the fair market value of the 10-year beach nourishment easement on the Richardsons' property taken by the Town of Nags Head at the time of taking?'. *See* [G.S.] 40A-64(b)(ii) (2017) ('If there is a taking of less than the entire tract, the measure of compensation is ... the fair market value of the property taken.')." (For a summary of the decision of the Court of Appeals, *see* MLN July/Aug. 2018, p. 6.)

- ***Synopsis***– Appeal pursuant to G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 874 (2018), reversing a judgment notwithstanding the verdict entered October 2016 and remanding for a new trial. Affirmed. (Justice Davis did not participate in the consideration or decision of this case.)

Public Enterprises;
Sewer Service Availability Fees;
Undeveloped Properties; Local Act

Boles v. Town of Oak Island, ___ N.C. App. ____ (No. COA18-806, Brunswick– 7/2/19)

- ***Holding***- **Owners of undeveloped parcels challenged sewer service availability fees levied by defendant-Town pursuant to a 2004 local act, enacted to help service debt incurred in constructing a sewer system. (Specifically, the Town was authorized to "impose annual fees for the availability of sewer service within" its sewer treatment district and to impose such sewer service availability fees upon the "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment" within the district. 2004 N.C. Sess. Laws 117, 117, ch. 96, §§ 3 & 4.) The trial court entered an order granting summary judgment in favor of defendant-Town. Reversing and remanding for further proceedings, a divided panel of the Court of Appeals concluded that defendant-Town exceeded its statutory authority by imposing the sewer service availability fees on plaintiffs' undeveloped property that could not or does not benefit from the availability of the sewer system.**

- ***Key Excerpt***– The majority stated, "'As creations of the legislature, municipalities have only those powers delegated to them by the General Assembly.' Quality Built Homes, Inc. v. Town of Carthage, 369 N.C. 15, 16, 789 S.E.2d 454, 455 (2016). 'The General Assembly delegates express power to municipalities by adopting an enabling statute, which includes implied powers essential to the exercise of those which are expressly conferred.' *Id*. at 19, 789 S.E.2d at 457 (quotation marks and alteration omitted). Otherwise, '[a]ll acts beyond the scope of the powers granted to a municipality are invalid.' *Id*."

  ….

  "[A]lthough the Session Laws do not define the term 'availability' for purposes of imposing the sewer service availability fees, it is clear that the enabling Session Laws do not, as a matter of law, apply to Plaintiffs' undeveloped property."

  "'In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning.' Fid. Bank v. N.C. Dep't of Revenue, 370 N.C. 10, 19, 803 S.E.2d 142, 149 (2017). The plain meaning of the unambiguous, undefined word 'availability' is 'the quality or state of being available….'" (Citation omitted.)

"As noted in Oak Island's answer to Plaintiffs' first set of interrogatories, in order to 'benefit from the availability' of Oak Island's sewer system, the owner of an undeveloped parcel of property would first be required to (1) obtain the requisite building permits; (2) construct a dwelling or building with a sewer system connection on the property; (3) have the improvements pass municipal inspection; (4) obtain a plumbing permit; (5) submit an application for service; and (6) meet any additional requirements governing the improvement of property set forth in the Town of Oak Island Code of Ordinances. Should the system have the capacity to add and serve the parcel, an owner of undeveloped property who wished to connect to the system would also have to pay the requisite fees to Oak Island in order to obtain the various permits. The complex, costly additional requirements—many of them conditional— that the owner of an undeveloped lot must fulfill in order to benefit from Oak Island's sewer services foreclose any conclusion that such services are 'present or ready for immediate use' by those owners."

The majority stated that its conclusion was supported by Ricks v. Town of Selma, 99 N.C. App. 82, 392 S.E.2d 437 (1990), *disc. review improvidently allowed*, 328 N.C. 567, 402 S.E.2d 400 (1991), in which a panel of the Court of Appeals addressed the validity of an availability charge in the context of water and sewer treatment services. "While the term 'available' was not explicitly defined in Ricks or the relevant statute, the facts that were held to evidence 'availability of service' are clearly distinguishable from those of the case at bar. In Ricks, the Town had extended water and sewer service to the plaintiffs' mobile home park; the plaintiffs *chose* to 'tap[] onto the municipal water service, but ... never connected any of their 41 housing units to the ... sewer system[,]' preferring instead to use their existing septic tanks. *Id.* at 83, 392 S.E.2d at 438. In other words, the Town's sewer services were *present and ready for immediate use* by the Ricks plaintiffs, who simply opted not to connect to the system. Moreover, unlike the undeveloped property in the present case, the plaintiffs' property in Ricks was already developed and generating sewage, and the Town had authorized the units' connection to the system." (Emphasis in original.)

….

"[P]laintiffs' undeveloped properties are not ones that '*could or do[] benefit from the availability of* Oak Island's sewer treatment services. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 4 (emphasis added). The undeveloped properties are not connected to or being served by the municipal sewer service, and 'have no guaranteed right to connect.' Thus, the sewer service is not available to the owners of such properties. Consequently, beyond the initial assessment imposed, Oak Island's additional and ongoing charges to Plaintiffs, as owners of undeveloped properties, for sewer service availability was not a valid exercise of statutory authority pursuant to Session Law 2004-96." (Citation omitted.)

- ***Dissent***— Concurring in part and dissenting in part by separate opinion, Judge Collins wrote, "Plaintiffs argue the fees are unauthorized by statute, unconstitutional, and violative of certain tax principles, and seek declaratory judgment and recovery of the fees. Because I conclude Plaintiffs' arguments lack merit, I would affirm the trial court's order granting summary judgment…. I therefore respectfully dissent. However, I concur with the majority that Plaintiffs failed to preserve for our appellate review any issue regarding their oral motions to amend or supplement their complaint."

In dissenting, Judge Collins observed,

"[The] undisputed averments compel the conclusion that the sewer service is present or ready for immediate use by all properties that are or can be served by the Town's sewage collection and treatment plant, including undeveloped parcels of property. Plaintiffs' parcels, while not presently served by the Town's sewage collection and treatment plant, 'can be served' by the Town's sewage collection and treatment plant when they are connected to the sewer lines in the future. Moreover, the Session Law contemplates the levying of fees upon owners of undeveloped parcels of property that indirectly benefit from the sewer system but are not currently connected to the system, and that could directly benefit from the system upon connection. Furthermore, as explained at oral argument, parcels which can never be developed — and thus can never be served by the sewage collection and treatment plant — can be exempted from paying Fees..... [T]he plain language of the Session Law in this case authorizes Fees to be imposed for the general availability of sewer service within the district, and specifically authorizes the district to include parcels of property that are not presently served by the Town's sewage collection and treatment plant, but could be.... [T]his Court need not engage in statutory interpretation of the Session Law's language, as it plainly authorizes Oak Island to impose Fees upon all owners of developed and undeveloped parcels of property within the Town's fee-supported sewer district as a result of sewer service being available within the district. *See* Lunsford v. Mills, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) ('If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.')."

- ***Synopsis–*** Appeal by plaintiffs from May 2018 order. Reversed and remanded. Opinion by Judge Zachary, with Judge Tyson concurring. Judge Collins concurred in part and dissented in part, by separate opinion.

Public Nuisances; Abatement; Filing of Action; Resolutions; Exercise of Powers

State ex rel. City of Albemarle v. Nance, ___ N.C. App. ___ (No. COA18-916, Stanly– 7/16/19)

- ***Holding-*** **In City's action alleging defendants' use of hotel constituted a public nuisance pursuant to G.S. 19-1 & 2.1, defendants filed a motion to dismiss for lack of subject matter jurisdiction. Upon hearing, defendants argued G.S. 160A-12 required the Council to have passed a resolution authorizing the filing of the complaint. The trial court found as fact that no such resolution been presented to, heard, or adopted by the Council. The City appealed from trial court's order, which *inter alia* granted defendants' motions to dismiss. The Court of Appeals affirmed.**

- ***Key Excerpt–*** The Court initially noted that the City gave notice that it was appealing the order granting the October 2017 motion to compel. "'The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.' N.C. R. App. P. 28(a). Where a party 'does not set forth any legal argument or citation to authority to support [the] contention, [it is] deemed abandoned.' State v. Evans, __ N.C. App. __, __, 795 S.E.2d 444, 455 (2017). This issue was not addressed in the City's appellate brief and it has abandoned this issue. The trial court's order entered 30 October 2017 is final."

  The Court then addressed the issue of subject matter jurisdiction. "'If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.' Woodring v. Swieter, 180

N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006) (quoting Coker v. DaimlerChrysler Corp., 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (internal quotation marks omitted)). 'Wherever a nuisance is kept, maintained, or exists, as defined in this Article, *the Attorney General, district attorney, county, municipality, or any private citizen of the county* may maintain a civil action in the name of the State of North Carolina to abate a nuisance.' [G.S.] 19-2.1 (2017) (emphasis supplied)."

"Cities may exercise the powers delegated to them by the General Assembly issuing a city charter and are operated as municipal corporations. [G.S.] 160A-11, 160A-12 (2017). As municipal corporations, cities are required to exercise these powers as are delegated and provided in statutes by ordinance or resolution of the city council. *Id*."

"[The City's] adopted ordinances set out the duty of the city attorney to 'prosecute and defend suits against the City.' The ordinances also provide that 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.' City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3 (emphasis supplied)."

The Court observed, "The Nances do not contest the statutes and the City's charter allow the City to file and maintain a civil action for a public nuisance. They argue the city council did not vote and resolve to exercise its authority in this action. Without the city council's ordinance or resolution, the Nances argue the City has produced no evidence to show that the formal process to file suit was initiated, approved, or resolved by the city council. We agree."

"It is undisputed, and the trial court found, that no notice, meeting, minutes, or vote of the city council was resolved, given, or taken to initiate a public nuisance action against the Nances. The City's private counsel asserted before the trial court that the city council had 'discussed the case' and 'assumed' the proper action would be taken by the State Bureau of Investigation ["SBI"] and chief of police 'to let them follow through with whatever they thought was best to do,' and to maintain it as a criminal proceeding, as it is common practice in other cities and counties to 'just file[] a Chapter 19.'"

"The notice letter seeking to abate the alleged public nuisance did not come from one of the entities or public individuals on [G.S.] 19-2.1's enumerated list of those empowered or authorized to bring and maintain a public nuisance abatement action: 'the Attorney General, district attorney, county, municipality, or any private citizen of the county.'"

Noting that the police chief signed the notice letter, the Court stated, "Contrary to the council's assumption, neither the SBI nor the chief of police is included in this list…. Further, nothing in the record indicates the letter was drafted by any party that could have maintained such an action. Even if Chief Bowen had been acting as a private citizen of the county, no evidence in the record shows a bond being posted, as is required when a private citizen initiates the action. [G.S.] 19-2.1."

Determining that the civil action was not properly initiated by the Council, the Court stated, "It was discussed by the council and letter notice was initiated by the chief of police, without any reference to being drafted by or on behalf of the city attorney or outside counsel for the City. Albemarle's ordinances require that either

the city attorney or outside counsel selected by the council prosecute this action. In order to bring suit through outside counsel, the city council must adopt a resolution. City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3; [G.S.] 160A-12. The city council was on notice of this requirement, yet no evidence of compliance has been produced. The city attorney's signature or joinder to this action after it was initiated does not appear on any of the pleadings or documents."

Examining the record, the Court further observed, "While the City's outside counsel asserted at oral argument that both he and previous trial counsel were hired pursuant to a resolution of the city council, no evidence of this authority exists in the record. Without such evidence, the council's discussion, assumptions, and common practice do not convey nor carry their burden to prove standing. Neuse River Found. Inc. [v. Smithfield Foods, Inc.], 155 N.C. App. [110] at 113, 574 S.E.2d [48] at 51 [(2002)]. 'The [city council] never attempted to obtain nor received the required ... vote prior to filing this [civil] action. Without the required vote, the [council] lacked the authority to commence legal proceedings against [the Nances] and does not possess standing.' Peninsula Prop. Owners Ass'n, Inc. v. Crescent Res., LLC, 171 N.C. App. 89, 97, 614 S.E.2d 351, 356 (2005)."

"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 them, not ignore them.' Town of Kenansville v. Summerlin, 70 N.C. App. 601, 602, 320 S.E.2d 428, 430 (1984) (citation omitted). The City must follow the requirements of the statutes and charter, and the ordinances and procedures it established. Here, it has failed to do so. *Id*."

- ***Synopsis***— Appeal by plaintiff from October 2017 order and May 2018 orders. Affirmed. Opinion by Judge Tyson, with Judge Inman and Judge Young concurring.

Nota Bene (N.B.)
Other Recent Decisions of Note

Personnel; Retaliatory Employment Discrimination Act (REDA); Workers' Compensation; Pretext; Nondiscriminatory Purpose Atkins v. Town of Wake Forest, ___ N.C. App. ___ (No. COA18-1167, Wake— 7/2/19) (***unpublished***) (Plaintiff was a police officer from February 2009 until his termination in January 2016: he commenced this action for retaliatory workplace discrimination, alleging that the Town terminated his employment because he filed a claim for workers' compensation benefits. The trial court granted summary judgment for the Town. Affirming, the Court of Appeals concluded that the trial court did not err, as there were no material issues of fact as to whether the Town's nondiscriminatory reasoning for terminating plaintiff's employment was merely a pretext. "It is clear that the evidence, taken in the light most favorable to the Town, is that the Town truly suspected Plaintiff lied to a co-worker during active duty and was committing workers' compensation fraud. But this Court, and the trial court below, is to review the evidence in the light most favorable to the nonmoving party…. [W]e agree with the [trial court] that the evidence in the light most favorable to the Plaintiff does not allow a reasonable inference that Plaintiff's supervisors engaged in a pattern of conduct to get rid of Plaintiff following his workers' compensation claim. That is, Plaintiff presented no evidence that rises above speculation that the Town's motive in terminating Plaintiff was due to the mere fact that he filed a claim for workers' compensation benefits. Rather, the

only reasonable inference is that the Town terminated Plaintiff for what the Town believed to be acts of dishonesty and misrepresentation, which are justifiable motives and fatal to a REDA claim." (Citation omitted.)) (Appeal by plaintiff from May 2018 order. Affirmed. Opinion by Judge Dillon, with Judge Berger and Judge Murphy concurring.))

Procedure; Dismissal; *Pro Se*; Emotional Distress Claims Carney v. Wake Cty. Sheriff's Ofc., ___ N.C. App. ___ (No. COA18-1299, Wake– 8/6/19) (***unpublished***) (Plaintiff appealed the dismissal of her *pro se* lawsuit, and the Court determined that the trial court properly concluded that plaintiff's complaint failed to state any legal claim on which relief could be granted. G.S. 1A-1, Rule 12(b)(6). "In her appellate brief, [plaintiff] first argues that she pleaded a claim under one of two statutes, [G.S.] 14-196 and [G.S.] 50C-1. Neither of these statutes provides a basis for a civil cause of action for damages—one criminalizes the use of certain profane or threatening language in telephone calls, and the other provides a process for obtaining a civil no-contact order. [Plaintiff] next argues that her complaint asserts claims for negligent infliction of emotional distress or intentional infliction of emotional distress. But her complaint does not allege the elements of these tort claims nor include any allegations from which these elements could be inferred." (Appeal by plaintiff from September 2018 order. Affirmed. Judge Dietz wrote the opinion, with Judge Murphy and Judge Collins concurring.))