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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 ___ (No. COA18-625, Moore─ 2/19/19) ("Cheatham II") (***unpublished***)

- ***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 ___, 803 S.E.2d 658 (2017) (***unpublished***).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 ef-

forts, 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.

Land Use; Subject Matter Jurisdiction; Administrative Remedy; Quasi-Estoppel

Funderburk v. City of Greensboro, ___ N.C. App. ___ (No. COA18-632, Guilford─ 2/19/19) (***unpublished***)

- ***Holding***- **When a landowner fails timely to appeal a notice of violation to a board of adjustment as provided in the zoning ordinance, a landowner fails to exhaust the available administrative remedy, accordingly depriving the courts of subject matter jurisdiction to address the dispute.**

- ***Key Excerpt***− Plaintiff appealed from an order dismissing his claims against defendant-City arising from a zoning dispute due to failure to exhaust administrative remedies. Plaintiff contended that the trial court erred because the parties entered into an enforceable agreement resolving the dispute, thus creating a justiciable cause of action within the subject matter jurisdiction of the superior court. The Court of Appeals affirmed the trial court's order.

The Court first addressed plaintiff's failure to exhaust administrative remedies. "The Greensboro Land Development Ordinance is consistent with [G.S.] 160A-388(b1). Section 30-5-3 of the Ordinance provides that Notices of Violation may be appealed to the Greensboro Board of Adjustment within 30 days of receipt of notice."

"Plaintiff never appealed either the 27 January 2015 Notice of Violation or the [City's] July 2015 Letter. Plaintiff's failure to exhaust his administrative remedies deprived the trial court of subject matter jurisdiction in this matter."

The Court also rejected plaintiff's arguments regarding the doctrine of quasi-estoppel, wherein plaintiff asserted that the City's July 2015 Letter (stating its decision to allow him to continue a nonconforming use including storing no more than two commercial trucks upon the Property), as well as the April 2016 letter and discussions with City staff, precluded defendant-City's assertion that dump trucks were impermissible and thus barred defendant-City's collection efforts. "Plaintiff, by failing to appeal from the Notice of Violation, waived his right to contest that his commercial use of the Property is in violation of the City's zoning ordinances. By the time the City transmitted the July Letter, Plaintiff had lost his right to appeal by waiver."

"The July 2015 Letter offered a compromise independent of Greensboro's enforcement rights against Plaintiff: if Plaintiff would remove the specified industrial vehicles – *i.e.*, the dump trucks – from the Property within 60 days, Greensboro would allow the nonconforming commercial business to continue. More than eight months later, when the city attorney's office sent the April 2016 Letter, Plaintiff still had not removed all 'industrial scale equipment.' Because Plaintiff failed to appeal the Notice of Violation to the Board of Adjustment, he waived his right to dispute the decision – including the classification of his dump trucks as violating the zoning ordinance – in the courts."

"Plaintiff also argues that the doctrine of quasi-estoppel precluded the trial court from dismissing his claim. Plaintiff contends that city staff allowed him to store 'commercial' scale dump trucks, as opposed to 'industrial' scale dump trucks, on the Property. Plaintiff's argument is without merit because he waived his right to appeal the Notice of Violation prior to any further communications from city staff and because the trial court made no finding that the parties had agreed to distinguish between 'industrial' and 'commercial' vehicles."

"The July 2015 Letter specified that Plaintiff was violating the zoning ordinance because 'there are currently a number of large industrial size vehicles (dump trucks, large semis, and truck trailers, etc.) being stored at this location[.]' The April 2016 Letter again described 'prohibited industrial scale vehicles (dump trucks, large tractor trailers)' that Plaintiff had relocated from the Property to another prohibited location. The correspondence consistently asserted that dump truck storage violated the zoning ordinance and did not fall within the nonconforming use that city staff offered to allow Plaintiff to continue on the Property."

- ***Synopsis***−Appeal by plaintiff from order entered April 2018. Affirmed. Opinion by Judge Inman, with Judge Tyson and Judge Arrowood concurring.

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

Procedure; Motion to Intervene; Adequacy of Representation of Interests; UDO; Permits; Single Family Dwelling Letendre v. Currituck County ("Letendre II"), ___ N.C. App. ___ (No. COA18-163, Currituck─ 9/18/18) (***unpublished***), *disc. review denied,* ___ N.C. ___ (No. 352P18,

1/30/19) (In this case, the Court concluded that the interests of proposed intervenors-Longs were not adequately represented by defendant-County and accordingly reversed and remanded the trial court's order which had denied their motion to intervene. (The extensive background of this case appears in two prior appellate opinions. *See* Letendre v. Currituck County ("Letendre I"). ___ N.C. App. ___, ___ S.E.2d ___ (No. COA17-1108, Currituck─ 5/15/18), *disc. review denied*, ___ N.C. ___ (No. 178P18, 1/30/19); Long v. Currituck County, ___ N.C. App. ___, 787 S.E.2d 835, *disc. review dismissed*, 369 N.C. 74, 793 S.E.2d 222, *stay dissolved, writ of supersedeas denied, disc. review denied*, 369 N.C. 74, 793 S.E.2d 232 (2016) (*see MLN* June 2016, p.4).) The Court here observed, "In Long, … proposed intervenors herein, appealed two orders from the trial court which upheld the Currituck County Board of Adjustment's decision to allow plaintiff Elizabeth Letendre to build a 15,000 square foot project comprised of three buildings on her property adjacent to the Longs' property. *See* Long, ___ N.C. App. at ___, 787 S.E.2d at 836. The primary question before this Court was whether Currituck County had properly classified plaintiff's proposed project as a 'Single Family Dwelling' under the Currituck County Uniform Development Ordinance ('UDO'); this Court determined the project was not a Single Family Dwelling as defined by the UDO and reversed and remanded the trial court's order…. While the appeal was pending in Long, plaintiff obtained a building permit and began construction of her project. *See* Letendre I, ___ N.C. App. at ___, ___ S.E.2d at ___, *10 (2018). After this Court issued its opinion in Long, defendant Currituck County issued a Stop Work Order and Notice of Violation in compliance with this Court's opinion in Long. *Id*. at ___, ___ S.E.2d at ___, *1-2. On 27 March 2017, plaintiff Letendre filed this lawsuit against defendant Currituck County 'seeking a declaratory judgment, preliminary injunction, permanent injunction, monetary damages, and attorney fees.' *Id*. at ___, ___ S.E.2d at ___, *2. Plaintiff Letendre sought to enjoin defendant Currituck County from enforcing its UDO so that she could complete and use the project, or in the alternative, monetary damages for inverse condemnation of her property. *Id*. at ___, ___ S.E.2d at ___, *2, 56. On 25 May 2017, the Longs filed a motion to intervene in this case, plaintiff Letendre's action against defendant Currituck County, and on 18 September 2017, they filed an amended motion. On 9 October 2017, the trial court denied the motion 'in its original form and as amended[.]'" (Appeal by proposed intervenors from October 2017 order. Reversed and remanded. Opinion by Judge Stroud, with Judge Zachary and Judge Murphy concurring.))

Procedure; Land Use; UDO; Reversal of Preliminary Injunction Letendre v. Currituck County ("Letendre I"), ___ N.C. App. ___ (No. COA17-1108, Currituck─ 5/15/18), *disc. review denied*, ___ N.C. ___ (No. 178P18, 1/30/19) (Court of Appeals states, "This case arises from this Court's prior opinion issued on 21 June 2016 in Long v. Currituck County, ___ N.C. App. ___, 787 S.E.2d 835 (2016), which held that under Currituck County's Unified Development Ordinance § 10.51, Plaintiff's proposed 'project does not fit within the plain language of the definition of Single Family Dwelling, and thus is not appropriate in the SF District.' *Id.* at ___, 787 S.E.2d at 841. While Long was pending before this Court, Plaintiff was warned of the possible consequences of proceeding with construction of the project if the trial court's order in that case was reversed on appeal, but she decided to build the project anyway. After Defendant took action to comply with this Court's ruling in Long, issued on 21 June 2016, Plaintiff sought and obtained a preliminary injunction issued on 9 June 2017 which required Defendant to 'deem the home approved by the County building permit issued in March 2015 to be a single-family detached dwelling for purposes of the Currituck County Unified Development Ordinance' and to allow her to complete construction and occupancy of the project. Defendant appealed the preliminary injunction. Although Plaintiff's complaint includes many claims in her attempt to prevent Defendant from enforcing the Unified Development Ordinance in accordance with this Court's opinion in Long, ___

N.C. App. ___, 787 S.E.2d 835, Plaintiff has not demonstrated that she is likely to prevail on any of her claims, and therefore the preliminary injunction must be reversed." (Appeal by defendant-County from June 2017 order. Reversed and remanded. Opinion by Judge Stroud, with Judge Davis and Judge Arrowood concurring.))

Torts; Immunity; Law Enforcement; Gross Negligence; Resolution; Self-Retained Limit; Excess Liability Insurance Flood v. Crews, ___ N.C. App. ___ (No. COA17-740, Wake─ 7/17/18) (***unpublished***), *disc review denied*, ___ N.C. ___ (259P18, 1/30/19) (Court of Appeals holds that trial court correctly granted defendants' motion for summary judgment, dismissing plaintiff's claims with prejudice, in action wherein plaintiff-administrator alleged tort claims arising out of accident in which officer's patrol car collided head-on with decedent's motorized scooter; officer was speeding in the westbound lane of a two-lane road in silent pursuit of a speeding driver when the motorized scooter, driving in the opposite direction in the eastbound lane, without activating a turn signal abruptly turned left into officer's driving lane. "Even when viewed in the light most favorable to plaintiff, the forecasted evidence presented no genuine issues of material fact that [the officer's] conduct in pursuing the speeding driver was grossly negligent or malicious, or that defendants waived their immunity defense by the City's purchasing excess liability insurance or adopting the 1999 resolution." (Appeal by plaintiff-administrator from January 2017 order. Affirmed. Opinion by Judge Elmore, with Judge Inman and Judge Berger concurring.))