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

Cheatham v. Town of Taylortown, ___ N.C. App. ___ (No. COA16-1057, Moore– 8/1/17)

- ***Holding***– The procedure set out in G.S. 160A-441 through -450 and a properly adopted ordinance cannot be circumvented; plaintiffs must exhaust the administrative remedies available provided by statute before recourse may be had to the courts. If administrative remedies specifically provided by statute are not exhausted before alternative recourse is sought through the courts, the court lacks subject matter jurisdiction and the action must be dismissed.

- ***Key Excerpt***– Plaintiff argued that the motion to dismiss for lack of subject matter jurisdiction under G.S. 1A-1, Rule 12(b)(1) for failure to exhaust administrative remedies should have been denied, because the Town's attempts to enforce its minimum housing standards: (1) violated the "Bundle of Rights" given to all property owners under the law of the land (describing these rights as the owner's right to enter, use, sell, lease, or give away the land as one chooses) (2) obstructed justice; and (3) violated procedural due process. The Court held, "We disagree to the extent [the Town's] enforcement efforts were made pursuant to the Ordinance. [Plaintiff's] suit was properly dismissed for failure to exhaust administrative remedies as to any efforts made after 19 June 2015 – the effective date of the Ordinance. However, the trial court incorrectly determined that all of [plaintiff's] claims arose out of [the Town's] attempts to enforce the Ordinance, which is factually incorrect as [the Town] adopted the Ordinance after alleged wrongs in the complaint took place."

The Court stated, "Under the Ordinance, [plaintiff] did not exhaust his administrative remedies before seeking judicial review as required by statute. The proper course of action for a person aggrieved under the Ordinance would be to 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)."

"Instead of following this procedure, [plaintiff] ignored [G.S.] 160A-441 *et seq*. and the Ordinance, attempting to collaterally attack the minimum housing standards enforcement proceedings through this independent action. Thus, as he failed to follow statutory procedure, to the extent his claims arose after 19 June 2015 out of [the Town's] attempts to enforce the Ordinance, it was proper for the trial court to dismiss this action for lack of subject matter jurisdiction. *See Axler v. Wilmington*, 25 N.C. App. 110, 111, 212 S.E.2d 510, 511-12 (1975) (dismissing the action because the plaintiff failed to exhaust the administrative remedies available in [G.S.] 160A-446)."

"However, [plaintiff's] claims arising prior to the Ordinance's enactment on 19 June 2015 do not arise out of [the Town's] attempts to enforce the Ordinance. Thus, the trial court's determination that [plaintiff's] 'claims arise out of [the Town's] attempts to enforce its Minimum Housing Ordinance' is in error. We remand for the trial court to reconsider whether [plaintiff's] claims arising on or prior to 19 June 2015 may be subject to dismissal under either Rule 12(b)(1) or 12(b)(6) of the North Carolina Rules of Civil Procedure."

Synopsis− Appeal by plaintiff from an April 2016 order allowing defendant-Town's motion to dismiss for lack of subject matter jurisdiction. Affirmed in part; remanded for further consideration in part. Opinion by Judge Murphy, with Judge Calabria and Judge Dietz concurring.

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

Personnel; Immunity; Litigation; Reimbursement Wray v. City of Greensboro, ___ N.C. ___ (No. 255A16, 8/18/17) (In a 5-2 decision, North Carolina Supreme Court holds that plaintiff-former police chief's complaint, seeking indemnification and reimbursement for incurred legal expenses from litigation arising after his resignation, sufficiently alleged both the essence of a contract claim and that plaintiff was sued for actions taken within the course and scope of his employment during the time he was police chief. "[A]n allegation of a valid contract is an allegation of waiver of governmental immunity. Here plaintiff adequately pleaded a contract action: that he had an employment relationship with the City that included the obligation on the part of the City to pay for his defense and that the City failed to do so." The matter was remanded for further proceedings. "Although we hold that dismissal of the complaint was not warranted, like the Court of Appeals, we express no opinion on the merits of plaintiff's contract action." (Appeal from decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 433 (2016), which had reversed trial court's May 2015 order of dismissal. Affirmed. Opinion by Justice Hudson. Justice Ervin dissenting, joined by Justice Beasley.))

Land Use; Dumpster-Screening Requirement; Nonconformity; Notice of Violation NCJS, LLC v. City of Charlotte, ___ N.C. App. ___ (No. COA16-1096, Mecklenburg− 8/15/17) (Petitioners owned industrially zoned property, wherein sits a warehouse constructed in 1970 that is divided into six leasable units. Two leaseholder-owned dumpsters, unscreened from public view, currently abut the warehouse. The Charlotte Zoning Ordinance ("CZO"), via a 1984 amendment, requires that dumpsters be screened on three sides by a fence. Further, section 12.303 provides that "the provision of this Section must be met at the

time that land is developed or land and structures are redeveloped." Upon receiving a zoning notice of violation (NOV), NCJS appealed to the zoning board of adjustment, arguing that its property was neither developed nor redeveloped, since enactment of the 1984 dumpster-screening amendment, as required to trigger its application. "Because we hold the City Board misinterpreted the CZO by concluding that NCJS's [unscreened] dumpsters were 'nonconforming structures' without determining whether Section 12.303's dumpster-screening requirement was triggered, and thus misapplied the CZO by subjecting NCJS's dumpsters to the regulations governing nonconforming structures, which provides for the termination of a legal nonconformity when a nonconforming structure is moved, we reverse the superior court's order affirming the City Board's decision. Additionally, because the local zoning authority failed to satisfy its burden of proving the existence of a current zoning violation, we remand this case to the superior court for further remand to the City Board with the instruction to rescind the NOV issued against NCJS." (Appeal by petitioners from April 2016 order affirming Board of Adjustment's decision. Reversed and remanded. Opinion by Judge Elmore, with Judge Inman and Judge Berger concurring.))

Procedure; Injunction Bond; Voluntary Dismissal of Action Van-Go Transp., Inc. v. Sampson Cty, ___ N.C. App. ___ (No. COA16-849, Sampson− 8/1/17) (Appeal involving examination of the issue of when a defendant is entitled to recover on an injunction bond, previously posted by the plaintiff, after the plaintiff voluntarily dismisses the lawsuit. Plaintiff Van-Go Transportation, Inc. appealed from the trial court's order awarding damages to defendants County and En-Route Transportation Services, Inc. The Court of Appeals affirmed based upon conclusion that the trial court properly ruled that Van-Go's voluntary dismissal was equivalent to an admission that it wrongfully enjoined Defendants. "[T]he general rule articulated in Blatt [*v.* Southwell, 259 N.C. 468, 471, 130 S.E.2d 859, 861 (1963)] is controlling on the present facts. Accordingly, the trial court did not err in holding that Defendants had been wrongfully enjoined by Van-Go." *See* M. Blatt Co. v. Southwell, 259 N.C. 468, 471, 130 S.E.2d 859, 861 (1963) ("no right of action accrues upon an injunction bond until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision.") Court also holds that Van-Go failed to show that the award of damages to the County was improper. (Appeal by plaintiff from May 2016 order denying plaintiff Van-Go's motion for release of the injunction bond and awarding defendants the proceeds of the bond. Affirmed. Opinion by Judge Davis, joined by Chief Judge McGee and Judge Murphy.))

Land Use; Nonconformity Adjustment; Trucking Operations; Noise Cox v. City of Kannapolis, ___ N.C. App. ___ (No. COA16-1183, Cabarrus− 8/1/17) (***unpublished***) (Petitioner appealed from the trial court's order denying his petition for *certiorari* and affirming the Board of Adjustment's decision denying his request for a certificate of nonconformity adjustment. In appealing, petitioner argued that the trial court erred by affirming the Board's decision, because its conclusions of law were unsupported by its findings of fact. (Petitioner began using the property for certain trucking operations, in an area shortly thereafter zoned RM-2, Residential Medium Density, where trucking operations were not a permitted use.) The Court affirmed. "Based on our review of the record, we are satisfied that the Board's findings were legally sufficient and based on adequate evidence. *See* Dockside Discotheque [v. Bd. of Adjustment of Southern Pines], 115 N.C. App. [303] at 308, 444 S.E.2d [451] at 453 (affirming board's decision where "a complete understanding of the issues presented c[ould] be had from the record on appeal") [*disc. review denied*, 338 N.C. 309, 451 S.E.2d 634 (1994)]. The evidence from the

public hearing supported the Board's finding as to the noise level factor, and this finding was — by itself — sufficient to support the Board's denial of [petitioner's] request for a certificate of nonconformity adjustment." (Appeal by petitioner from August 2016 order, denying his petition for *certiorari* and affirming the Board's decision. Affirmed. Opinion by Judge Davis, with Judge Bryant and Judge Stroud concurring.))

Torts; Defamation; Personnel Wynn v. Tyrrell Cnty. Bd. of Educ., ___ N.C. App. ___ (No. COA16-1130, Tyrrell− 5/16/17) (***unpublished***) (Affirming trial court's order dismissing plaintiff-former employee's defamation claim pursuant to G.S. 1A-1, Rule 12(b)(6). "[Plaintiff's] allegations are deficient in several ways. [Plaintiff] fails to identify with any degree of specificity the substance of the allegedly defamatory statements made by members of the Board. Although the gist of the statements—that [plaintiff] embezzled funds from the school system—is set forth in the complaint, the allegations are otherwise devoid of further relevant factual enhancement. Significantly, the complaint does not identify which members of the Board made the allegedly defamatory statements; nor does the complaint allege the specific individuals to whom those statements were made. Instead, [plaintiff] merely refers to statements that 'Defendants' made to 'third parties.' Such conclusory allegations constitute a complete failure to identify the speaker or speakers of the alleged statements, much less the recipients. What is more, the complaint does not even hint at the time or the place of the alleged defamatory statements. Lacking all relevant factual detail, [plaintiff's] vague and conclusory allegations preclude judicial determination of whether the statements were defamatory. In short, the complaint fails to state when who said what to whom. Accordingly, [plaintiff's] claim for defamation *per se* was properly dismissed.") (Appeal by plaintiff from January 2016 order granting defendant-Board's motion to dismiss. Affirmed. Opinion by Judge Zachary, joined by Judge Bryant and Judge Inman.))