

No. 55A23

EIGHT-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

JOSEPH ASKEW; CHARLIE)
 GORDON WADE III, and)
 CURTIS WASHINGTON,)
 Plaintiffs,)
 Appellants,)
)
 v.)
)
 CITY OF KINSTON, A Municipal)
 Corporation,)
 Defendant,)
 Appellee.)

From N.C. Court of Appeals
22-407

From Lenoir
19CVS525

PLAINTIFF-APPELLANTS' NEW BRIEF

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PLAINTIFF-APPELLANTS' NEW BRIEF

ISSUE PRESENTED

Whether the Court of Appeals erred in requiring plaintiffs to exhaust administrative remedies prior to bringing direct constitutional claims under Article I, Section 19.

STATEMENT OF THE CASE

Plaintiff commenced this action in the Lenoir County Superior court by filing a complaint on 5 June 2019. (R p 2). On 12 August 2019 the defendant filed a Motion to Dismiss in lieu of an Answer. (R p 54). After briefing and oral arguments on the matter, the Trial Court denied the defendant's Motion to Dismiss on 3 December 2019 (R p 56). On 19 December 2019 the defendant filed an Answer to the complaint. (R p 57).

After the parties engaged in discovery, the defendant filed a Motion for Summary Judgment on 2 July 2021. (R p 76). After briefing and oral arguments, on 29 September 2021 the trial court granted the defendant's motion for summary judgment as to all claims. (R p 108). The trial court did not state any facts and did not cite any legal basis for granting the defendant's motion for summary judgment. (R p 108).

On October 8 2021, plaintiffs timely filed an appeal to the North Carolina Court of Appeals from the trial court's order that granted summary judgment for the defendant and against the plaintiffs as to all claims. (R p 109).

On 29 December 2023 the North Carolina Court of Appeals affirmed the trial court's order granting summary judgment against the plaintiffs' constitutional equal protection and substantive due process claims against

the City of Kinston. *Askew v. City of Kinston*, No. COA22-407, 2022 N.C. App. LEXIS 944 (Ct. App. Dec. 29, 2022).

On 2 February 2023, the plaintiff-appellants timely filed Notice of Appeal from the Court of Appeals' decision to the North Carolina Supreme Court in the basis of substantial questions arising under the Constitution pursuant to N.C.G.S. 7A-30(1).

On 24 March 2023, the defendant filed a Motion to Dismiss the plaintiffs' appeal.

On 20 October 2023, the North Carolina Supreme Court issued an order retaining jurisdiction of the constitutional law questions raised by the plaintiffs on the issue of whether the Court of Appeals erred in requiring plaintiffs to exhaust administrative remedies prior to bringing direct constitutional claims under Article I, Section 19.

On 17 November 2023, the plaintiff-appellants' filed a Motion to Extend the time for filing the plaintiff-appellants' opening brief. On 17 November 2023, the Supreme Court issued an order that extended the time for filing the appellants' opening brief until 27 November 2023.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

On 2 February 2023, the plaintiff-appellants timely filed Notice of Appeal from the Court of Appeals decision in *Askew v. City of Kinston*, No. COA22-407, 2022 N.C. App. LEXIS 944 (Ct. App. Dec. 29, 2022), to the North Carolina Supreme Court on the basis of substantial questions arising under the Constitution pursuant to N.C.G.S. 7A-30(1).

On 20 October 2023, the North Carolina Supreme Court issued an order retaining jurisdiction of the constitutional law questions raised by the plaintiff on the issue of whether the Court of Appeals erred in requiring plaintiffs to exhaust administrative remedies prior to bringing direct constitutional claims under Article I, Section 19.

Standard of Review

“We review a trial court's order granting or denying summary judgment de novo.” *Craig v. New Hanover Cnty. Bd. of Educ*, 363 N.C. 334, 337, 678 S.E.2d 351 (2009). “Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Craig v. New Hanover Cnty. Bd. of Educ*, 363 N.C. 334, 337, 678 S.E.2d 351 (2009).

“When examining a summary judgment motion, all inferences of fact... must be drawn against the movant and in favor of the party opposing the motion.” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379 (1975). “This standard requires us to refrain from weighing the evidence or making credibility determinations. *Howerton v. Arai Helmet, Ltd.* 358 N.C. 440, 471, 597 S.E.2d 674 (2004) (explaining that when reviewing a motion for summary judgment, it is not the function of the court to weigh conflicting record evidence and that issues legitimately called into question" should be preserved for resolution by a jury.

STATEMENT OF THE FACTS

A. Summary

Plaintiffs Joseph Askew and Curtis Washington are African-American. (R p 2). They each own property in the City of Kinston, North Carolina. (R p 2). The plaintiffs assert constitutional law claims under the equal protection clause and the substantive due process clause of the North Carolina Constitution. (R pp 19-25).

To establish the plaintiffs' substantive due process claim plaintiffs allege that the City of Kinston does not have guidelines nor criterion for which properties will be placed on a special list of properties to be demolished. (R pp 19-25). Plaintiffs further alleged that the City of Kinston does not have guidelines nor criteria for which properties can be removed from the list of properties to be demolished. (R pp 19-25). Plaintiffs allege that the City of Kinston has therefore acted arbitrarily in making decisions to place certain properties on the list for demolition. (R pp 19-25). Plaintiffs also allege that the City of Kinston has therefore acted arbitrarily in making decisions to remove certain properties from the list for demolition without any guidelines or criterion for doing so. (R pp 19-25).

To establish the plaintiffs' equal protection claim, plaintiffs allege that the City of Kinston has targeted for demolition buildings owned by African-Americans. (R pp 19-25). Plaintiffs further alleged that the City of Kinston

has targeted African-American neighborhoods for demolition of buildings. (R pp 19-25). Plaintiffs allege that each plaintiff's building was targeted for demolition because each plaintiff is African-American and/or because each plaintiff's building is in an African-American neighborhood that has been targeted by the defendant City of Kinston. (R pp 19-25).

B. Substantive Due Process

The evidence that supports and establishes the substantive due process claim is established in large part by the testimony of the defendant's planning director Adam Short, and by the City council minutes, and by the defendant's discovery responses.

Adam Short testified that he and four others, not the city council, met to establish "special" rules for the creation of a list of one hundred fifty six (156) buildings to be demolished by the defendant City of Kinston. Adam Short testified as follows:

Q. ... with regard to how the list was created, were there any specific guidelines that the building inspectors or anyone creating the list - were there any specific guidelines they had to follow in determining what homes should be on that list or what properties, I'll say, should be on that list?

A. Yes.

Q. Okay, what were they?

A. The initial assessment was for any properties that had been burned, evidence of structural collapse, or roof collapse or of structurally unsound.

Q. How did the City of Kinston go about compiling that list with these criteria?

A. At the time, our inspectors went out and, you know, canvassed the community to create the list. Their objective was to seek out properties with the criteria that I previously listed. (S p 964, Short).

Q. Were they confined to a certain area of Kinston? Were they supposed to be seeking out properties throughout all of Kinston?

A. It was assumed, I would assume, or presumed that the entire city would be canvassed.

Q. Now the three criteria you gave me earlier, is there a memo or something that that gives them their more or less instructions or marching orders for how to compile this list?

A. No, sir. (S p 966, Short).

Q. So the three criteria that you gave me...how do you know that was the original criteria that they were given?

A. Because I was in the meeting where that directive was given.

Q. Are you the one that gave that directive?

A. No, I don't believe so.

Q. Do you remember who gave that directive that that would be the criteria?

A. Probably Tony Sears, city manager.

Q. Okay, in that meeting, it sounds like you were present; Tony Sears was present; and Jackie Rogers, Jason Baker, and Greg Dempsy were present. Was anybody else present in that meeting?

A. I don't believe so. David Reef was present as city attorney or representing the city attorney's office. I'm sorry.

Q. Okay, and -- so is a meeting with the five of you and the city attorney involved, is that something that normally occurs or was this something, like, special where the five of you got -- specifically got together to just specifically begin this initiative?

A. I would say in this case it was special. It had not happened to that point and that just reiterates the fact that council, our city council, made it a priority and by them making it a priority, it

became a priority for us, so we -- we set forth to, you know, make good on that policy that they wanted more demolition, so that's where it started. (S p 966-968, Short).

Adam Short testified that the five persons met again to create special rules for the reduction of the list to fifty (50) buildings to be demolished. He testified as follows:

Q. At some point, the initial list of 150 plus properties was reduced to fifty, is that correct?

A. Yes.

Q. Okay, I've looked through the affidavits that I've seen and filed. I did not see the list of fifty. Do you have a list that just lists the last - - the final fifty?

A. To my knowledge, it was actually presented as a map to the city council. It was a Google map.

Q. So I guess my question, is there a list with the fifty that Is there a list?

A. I believe that Google map was based on a list that was populated into the map, yes.

Q. Okay, if I asked you for a -- for that list, is that something you can put your hands on and provide me a copy of the list of the -- of the fifty?

A. I could -- a copy of the map, I could have.

Q. Let's do this. Mark this Exhibit 1, please. (Plaintiff's Exhibit Number 1 marked for identification.) (S pp 979-980, Short).

Q Yes, sir; Mr. Short, I handed you what's been marked as Exhibit Number 1. Can and I'll report to you that I received this exhibit in the litigation and it's -- can you identify it? Do you know what it is? Can you identify this -- this exhibit?

A. It's a -- a list of properties, 156 properties.

Q. And this is the original list that was compiled by the building inspectors based on your instructions with the three criteria, correct?

A. Yes.

Q. Okay, at some point, this list was reduced to fifty, correct?

A. Yes, sir. (S p 981, Short).

Q. Tell me about the discussion that was had about reducing the list to fifty and how that came about?

A. So the criteria for our -- and obviously, with 150 properties, we wanted to, based on council direction to do more based on their increased funding, we wanted to be as effective and strategic with that funding as possible, so from that list of 150, it was reduced to roughly fifty properties based on several other additional criteria.

Q. What were those additional criteria?

A. Areas of high crime, areas of high visibility from a main thoroughfare, properties that were clustered, I believe it's in my statement. I'm having trouble recalling.

Q. Tell me about these additional criteria. How did it come about? I mean, was a conversation held? Did you send out a memorandum? Did you have a discussion? How did you -- how did you guys create this additional criteria?

A. Well, I think a lot of it is based on just our observations and our, you know, knowledge based on years of experience. I know areas of -- you know, that have high traffic counts, for example. I know where the schools are in Kinston. I -- and so does my staff. So I trust them to, you know, find that and make those determinations.

Q. Okay, so what I'm trying to figure out is you -- you listed additional criteria other than the first three criteria. At what point did -- did you come together and say, you know what; we need additional criteria, and how did that come about? Was it a meeting? Was it a letter, a memo? How did that come about?

A. It was meeting and I believe it was myself, the manager, the inspectors. Once we had that list of 150, you know, we're in discussions on ways to, you know, best and most effectively use that

money, and we felt it would be important to, you know, add more criteria that could further help benefit the community.

Q. And so I'm, you know -- and I'm just -- I'm just curious, like, in what you can remember. There's a meeting. Who came up with the idea that listing areas of high crime or high visibility from a main roadway or cluster? I mean where -- where does each of these criteria come from?

A. Well, I think some of it was, you know, collective suggestions from the group. I mean the manager was integrally involved in this process as it was a directive from the city council. I believe based on our -- you know, our work in the community and -- and wanting to be as effective as possible with those funds, it was important to use criteria that would also, I mean, when we're talking about slum and blight, blighting conditions can -- can be other things like areas of high crime, for example, and doing what we can to, you know, work in areas that -- more than just hitting the structural issues over and above that to, you know, have a -- have a greater impact with the funds that we -- we had.

Q. Okay, with the criteria that you've listed so far, the three initial criteria and now these initial -- these criteria, I don't -- did not hear in the criteria you gave me, and I haven't seen in any of the documentation that I've looked at any indication that the decision as to which properties would be demolished was based on the degree of dilapidation of the property. Is that safe to say that you did not have a criteria that based on the degree of dilapidation of the property, this particular property would be demolished first or second or third?

A. Well, it -- that kind of gets back to the initial criteria and, you know, being that it was structure -- structurally collapsed, burned or otherwise structurally unsound and, you know, I trust my staff to do their job and to assess these properties effectively and given those criteria and given my knowledge of the community and the area, I believed that to be the case, and I think if you -- it can be difficult to compare. I mean, in this list, its structural deficiencies are -- are really very similar on all of them and, like, a property that's been significantly burned has been significantly burned so.

Q. I guess what -- I guess what I'm trying to -- I'm trying to be clear on what I'm trying to say, okay. You reduced the list. Let's start with the list of fifty that you reduced it to, okay? You had a 150 some. You reduced it to 50. Now you have to make a determination as to which of these fifty are going to be torn down. You can't tear them all down at the same time, correct?

A. No, but eventually we would -- I mean that -- that was the whole process is we felt that it was within our capability to, within a fiscal year or two, you know, we could achieve fifty properties, possibly.

Q. Okay, all right, so the decision as to which properties would be -- would be torn down first, second, third, the decision as to in what order the properties would be torn down was based on factors other than the degree of the decay of the property itself?

A. Sure. (S p 982-98, Short).

Short further admitted the city council did not create an ordinance to establish guidelines or criteria for the placement or removal of the buildings from either list.

Q. Okay, does the City have any -- any written guidelines for how properties are deemed dilapidated?

A. The City does not, to my knowledge. (S p 980, Short).

In the defendant City of Kinston's discovery responses, the defendant also admits that it did not have guidelines for which properties would be removed from the list. Instead the City Council operated on a "case by case basis" without creating nor applying any guidelines or criteria for which properties would be removed from the list. (R S 906). The defendant was asked and responded as follows:

2. Has the defendant enacted an ordinance that establishes the guidelines for the building inspector's department to follow as to which properties were to be listed on the subsequent demolition list of approximately 50 properties. If yes, state the date of enactment and the words of the ordinance verbatim.

ANSWER: Objection. Defendant objects to this interrogatory on the ground that it is vague and ambiguous. Subject to and without waiving the stated objections, Defendant responds as follows:

No. (R S 906).

Moreover, in the response to interrogatories, the defendant admitted that it had not enacted an ordinance to establish the criteria for removal from the special list of 50 properties. (R S 906). Instead the decision is made on a “case by case basis.” The defendant was asked and responded as follows:

3. Has the defendant enacted an ordinance that establishes the guidelines for the city commissioners and the building inspector's department to follow as to the criterion to be used to determine which of the properties on the original demolition list of approximately 150 properties could be removed from the list. If yes, state the date of enactment and the words of the ordinance verbatim.

ANSWER: The City Council may also determine that buildings should be removed from the list on a case-by-case basis, under circumstances where there is good reason to believe that the property will be rehabilitated...(R S 906).

The plaintiffs assert that the absence of any guidelines or criteria allows for completely arbitrary decision making by the City Council. For instance, the city council removed one building from the list because the son of a City council member had purchased the building. The minutes state that “Councilmember Suggs stated that her son, Christopher Suggs, acquired one

of the homes on the list, 818 Tower Hill Road. There has been a lot of repair work in the neighborhood around the house. We have applied for a loan to get the repairs started.” (R p 32). The same meeting minutes show that the 818 Tower Hill Road property was “removed from the list”. (R p 33).

Another building that was located at 1321 Railfence was in significant disrepair and the Council minutes reflect that “the property on Railfence should have been intervened on several years ago to stop the decline. Trees are growing into the roof structure.” (R p 33). The City Council removed this property from the list of 50 scheduled for demolition, without any criteria or guidelines for doing so. (R p 33).

C. Equal Protection

Adam Short the City planner, admitted that targeting the African American neighborhood and engaging in “unequal treatment based on -- race would be certainly unfair and illegal for the City to do...” (R S 991).

Adam Short also admitted that the city targeted an African American neighborhood for demolition of buildings. Short admitted that the City targeted the buildings in the Tower Hill Road area, which is predominately African American.

Short was questioned and testified as follows:

Q. [By Attorney Bryant] I saw a reference in one of the -- in one of the minutes, I think it was a comment that you made, about beginning the demolition of properties on that list of fifty in the

Tower Hill Road area. Do you remember something like that to that extent that the City of Kinston decided it would target demolition in the Tower Hill Road area?

A. I'm familiar with the Tower Hill Road area. I'm familiar with a lot of the issues that were present in that area, and as I mentioned previously, the clustering of demolitions was a priority, and I believe that was the nature of the discussion on Tower Hill Road.

Q. Would the Tower Hill Road area be considered to be an African-American -- predominantly African- American community?

A. Based on my knowledge of -- of Kinston, yes, that area is predominantly African-American. (R, S 992, Short).

The City of Kinston's targeting of buildings in the African American community is no secret. It has been readily admitted by Adam Short, the City of Kinston's City Planning Director. In the 18 June 2018 City Council meeting minutes he states that the City has "targeted" the "Tower Hill area", and that "he showed a map of the properties set to be demolished in the Tower Hill area" and stated that "this year we have done 17 demolitions, we expect 12 more to be completed by July 1st." (R S 576).

In the June 18 2018 City Council meeting, the minutes state as follows:

"Adam Short stated we had 50 properties targeted for demolition and it was suggested to have a targeted approach to have a big impact in one area. He showed a map of the properties set to be demolished in the Tower Hill area from Orion to Clay Street. This year we have done 17 demolitions, we expect 12 more to be completed by July 1st. Eighteen additional properties will be ready for demolition as of July 1st. We will spend most of the demo budget in the first couple of months in the fiscal year. We will have 27 properties that we need to demolish of the original list of 50." (Kinston City Council Minutes Monday, June 18, 2018). (R S 576).

Mr. Short has also admitted that he and the City of Kinston are working with specific persons to identify properties in the African American community and assist in their acquisition of the property. The City Council Minutes state as follows:

“Mr. Short stated he is in constant communications with Hope {Foundation} to help them find properties. We don’t own any properties with buildings on them, but if we have identified a house for condemnation, we share it with them. We look to see if it can be foreclosed and then conveyed, otherwise we can’t acquire it and sell it directly to them. Mr. Sears added that we work to help broker the acquisition of the properties.” (R S 577).

In his deposition, Short testified and confirmed he and four other men, not the city council, met in a room and created criteria that matched the African American community that they had targeted for demolition of buildings. (R S pp 982-987, Short).

Q. [By Attorney Bryant] Tell me about the discussion that was had about reducing the list to fifty and how that came about?

A. So the criteria for our -- and obviously, with 150 properties, we wanted to, based on council direction to do more based on their increased funding, we wanted to be as effective and strategic with that funding as possible, so from that list of 150, it was reduced to roughly fifty properties based on several other additional criteria.

Q. What were those additional criteria?

A. Areas of high crime, areas of high visibility from a main thoroughfare, properties that were clustered, I believe it’s in my statement. I’m having trouble recalling.

Q. Okay, well --

A. In vicinity to a public park or school was another.

Q. Tell me about these additional criteria. How did it come about? I mean, was a conversation held? Did you send out a memorandum? Did you have a discussion? How did you -- how did you guys create this additional criteria?

A. Well, I think a lot of it is based on just our observations and our, you know, knowledge based on years of experience. I know areas of -- you know, that have high traffic counts, for example. I know where the schools are in Kinston. I -- and so does my staff. So I trust them to, you know, find that and make those determinations.

Q. Okay, so what I'm trying to figure out is you -- you listed additional criteria other than the first three criteria. At what point did -- did you come together and say, you know what; we need additional criteria, and how did that come about? Was it a meeting? Was it a letter, a memo? How did that come about?

A. It was meeting and I believe it was myself, the manager, the inspectors. Once we had that list of 150, you know, we're in discussions on ways to, you know, best and most effectively use that money, and we felt it would be important to, you know, add more criteria that could further help benefit the community.

Q. And so I'm, you know -- and I'm just -- I'm just curious, like, in what you can remember. There's a meeting. Who came up with the idea that listing areas of high crime or high visibility from a main roadway or cluster? I mean where -- where does each of these criteria come from?

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Per Adam Short's admission, the five men who made up the additional criterion to reduce the list to 50, did so with knowledge of the characteristics of the community that they were affecting, and to address things "over and above" structural issues. (R S pp 982-987, Short).

In his affidavit, Askew asserts that "Exhibit A to this affidavit is a google map exhibit that shows where each and every property listed on the demolition list is located. It shows that the City of Kinston is demolishing buildings in the African American neighborhoods on the East side of Queen Street, which is the predominately African American section of the City of Kinston. The exhibit also shows that there are very few buildings listed for demolition from the west side of Queen street, in predominately Caucasian neighborhoods." (R pp. 23, 27).

There are community members who have signed a petition stating that they believe that the city has acted improperly in selecting the plaintiff Askew's property for demolition. (R S pp 850-865).

ARGUMENT

I.

The Court Of Appeals Erred In Requiring Plaintiffs To Exhaust Administrative Remedies Prior To Bringing Direct Constitutional Claims Under Article I, Section 19.

The North Carolina Court of Appeals decision affirmed the trial court order that granted summary judgment to the defendant City of Kinston on all

claims. *Askew v. City of Kinston*, No. COA22-407, 2022 N.C. App. LEXIS 944 (Ct. App. Dec. 29, 2022). The superior court did not state a reason for granting summary judgment. The Court of Appeals, however, did state a reason. The Court of Appeals held that plaintiffs were required to exhaust administrative remedies prior to bringing direct constitutional claims under Article I, Section 19. The Court of Appeals erred in requiring plaintiffs to exhaust administrative remedies prior to bringing direct constitutional claims under Article I, Section 19.

The Court of Appeals summarized plaintiff claims when it stated that “Plaintiffs allege that.... the decision to demolish Plaintiffs' property was based upon plaintiff's race; and that Defendant's refusal to remove plaintiff's property from the list of properties to be demolished is arbitrary and capricious.” *Askew v. City of Kinston*, 287 N.C. App. 222, 229, 883 S.E.2d 85, 91 (2022). The Court of Appeals acknowledged that “Plaintiffs have brought equal protection and substantive due process claims under North Carolina Constitution Article I, Section 19.” *Askew v. City of Kinston*, 287 N.C. App. 222, 228, 883 S.E.2d 85, 90 (2022). This constitutional provision states that:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin. *N.C. Const. art. I, § 19. Id.*

However, the Court of Appeals erroneously held that the plaintiffs could not bring a direct constitutional claim against the City of Kinston because there was an adequate state remedy pursuant to NCGS 160A and because the plaintiffs were required to exhaust administrative remedies in NCGS 160A prior to asserting a direct constitutional law claim against the City. The Court of Appeals stated that “[T]hese injuries are within the scope of the city council's review on direct appeal and the superior court's review on certiorari.” Id. In the decision, the Court of Appeals cited “N.C. Gen. Stat. § 160A-430 (authorizing the city council to hear an appeal without limitation); N.C. Gen. Stat. § 160A-393(k)(1) (authorizing the superior court to review a decision-making board's quasi-judicial decisions for constitutional violations).”

In summary and conclusion, the Court of Appeals held that “[b]ecause the statutes authorize the city council and the superior court to review Plaintiffs' injuries and grant the relief Plaintiffs seek, the statutory scheme provides Plaintiffs with the opportunity to enter the courthouse doors and present their claim and the possibility of relief, and therefore provides an adequate remedy.” *Askew v. City of Kinston*, 287 N.C. App. 222, 229, 883 S.E.2d 85, 91 (2022).

A. NCGS 160A Is Not An Adequate State Remedy For The Constitutional Claims Asserted By The Plaintiffs.

The Court of Appeals erred because NCGS 160A and the City's ordinance promulgated thereto, are not adequate state remedies for the constitutional claims asserted by the plaintiff. Therefore, plaintiff has a right to bring the direct constitutional claims.

The plaintiffs contend that the City of Kinston's invocation and application of the ordinance that was created pursuant to NCGS 160A is void in this instance because the municipality's decision to invoke the ordinance and the application of the ordinance was based upon the race of the plaintiffs.

The Court of Appeals erred because NCGS 160A does not provide an adequate state remedy for the constitutional claims asserted by the plaintiffs in this action.

In *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985) the court found that a statutory appeal of a zoning ordinance did not encompass the issue of whether the municipality's actions were unconstitutional. The court stated that "the issue of whether the zoning ordinance was unconstitutional as to plaintiff is not properly before this Court because the Board only had authority to grant or deny permit, and superior court, and this Court, had statutory power only to review issue of whether variance was properly denied".

In *Guilford Cty. Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 10-11, 441 S.E.2d 177, 182 (1994) the court held that a review of constitutional claims was not proper as part of a statutory appeal of a condemnation action and found that the plaintiff had to bring a direct action in superior court to get redress. The court stated that the statutory appeal process “does not encompass the adjudication of issues of the type raised in the counterclaim, that is, whether the denial of the special use permit constitutes a taking without the payment of just compensation”. *Guilford Cty. Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 10-11, 441 S.E.2d 177, 182 (1994).

In *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 L. Ed. 2d 651, 110 S. Ct. 2631 (1990) the court held that a petition for writ of certiorari to review a decision of the town denying a subdivision application was improperly joined with a cause of action alleging constitutional violations. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 L. Ed. 2d 651, 110 S. Ct. 2631 (1990).

The precedent has been clear. It is the exclusive province of the judicial branch to decide the issue of whether a governmental entity's actions have violated the constitutional rights of a citizen of the state.

“Where an aggrieved party challenges the constitutionality of a regulation or statute, administrative remedies are deemed to be inadequate and exhaustion thereof is not required.” *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999) citing *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998).

The development of the adequate state remedy doctrine by the North Carolina Supreme Court was not an abdication of the right to decide the constitutional limits of government action. Instead, it was an act of judicial restraint, a decision to refrain from rendering constitutional law opinions in matters where the harm can be adequately addressed through other than constitutional law claims. See *Rousselo v. Starling*, 128 N.C. App. 439, 448, 495 S.E.2d 725, 731 (1998) (holding that no direct constitutional claim for unreasonable search, which may be addressed through trespass to chattel tort claim); *Alt v. Parker*, 112 N.C. App. 307, 317-18, 435 S.E.2d 773, 779 (1993) (holding that there is no direct constitutional claim for unlawful seizure, which may be addressed through a false imprisonment tort claim); *Bailey v. Town of Beaufort*, No. 4:19-CV-60-FL, 2019 WL 6702651, at *7 (E.D.N.C. Dec. 6, 2019) (holding that equal protection claim under North Carolina constitution was barred to recover for sexual harassment when intentional infliction of emotional distress claims available).

In this instant action, the defendant City contends that it has a right to decide whether its conduct is constitutional, and then the plaintiff only has a right to follow the City's ordinance appeal process to challenge whether the City's conduct is constitutional. But however, "municipal hearing officers do not have jurisdiction to decide constitutional issues." *Fearrington v. City of Greenville*, 282 N.C. App. 218, 233, 871 S.E.2d 366, 378 (2022) citing *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998) (stating that "it is the province of the judiciary to make constitutional determinations").

The Court of Appeals decision is "contrary to well-settled law that the judiciary may determine the constitutionality of a statute, but an administrative board may not." *Wilson Cty. Bd. of Educ. v. Ret. Sys. Div.*, 891 S.E.2d 626, 633 (N.C. Ct. App. 2023), *citing Meads*, 349 N.C. at 670, 509 S.E.2d at 174; *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961). "Because it is the province of the judiciary to determine constitutional issues, any effort made by Petitioner to have the constitutionality of the Act determined by the [Board] would have been unsuccessful." *Wilson Cty. Bd. of Educ. v. Ret. Sys. Div.*, 891 S.E.2d 626, 633 (N.C. Ct. App. 2023).

An ordinance which gives the City the right to decide whether its conduct is constitutional is not an adequate state remedy. Instead it is an

inappropriate attempt to clothe itself with power that is exclusively within the province of the courts. As this very court has stated that “the [City]’s argument, however, ignores our well-settled rule that a statute’s constitutionality shall be determined by the judiciary, not an administrative board.” *Meads v. N.C. Dep’t of Agric.*, 349 N.C. 656, 509 S.E.2d 165, 174 (1998). (“Because it is the province of the judiciary to make constitutional determinations, any effort made by Meads to have the constitutionality of the buffer-zone regulations determined by the Pesticide Board would have been in vain. Accordingly, given the constitutional nature of this issue, the NCDA options were inadequate, and therefore Meads was not required to exhaust them.”) See also *Shell Island Homeowners Ass’n v. Tomlinson*, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999); *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961); *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985).

Moreover, plaintiffs seek damages that are not recoverable through the ordinance process. This renders the ordinance process an inadequate state remedy. In *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 414-15, 858 S.E.2d 788, 794-95 (2021) this court stated that, “[f]inally, looking at whether an adequate state remedy exists, here plaintiff seeks monetary damages as well as injunctive relief through, inter alia, a permanent injunction.... The

remedy sought here cannot be redressed through other means, as an adequate state law remedy does not apply to the facts alleged by plaintiff.... Thus, plaintiff has alleged a colorable constitutional claim for which no other adequate state law remedy exists.” Id. 794-95 (2021).

B. The Exhaustion Of Remedies Doctrine Is Not Appropriate Terminology In The Context Of A Direct Constitutional Claim

The Court of Appeals confused the “exhaustion of remedies” doctrine with the “adequate state remedy” doctrine. The issue for direct constitutional claims is whether an adequate state remedy exists. The cases cited above establish the precedent that the statutory appeal process under N.C.G.S. 160A is not an adequate state remedy when the citizens are alleging constitutional violations.

In the instant case, the Court of Appeals decision uses the term “failure to exhaust administrative remedies” as the basis for its decision. But the issue is whether the City’s ordinance process is an adequate state remedy, not whether plaintiff must exhaust that process before filing a civil action. In the context of the “Exhaustion of Remedies Doctrine” the case law includes decisions that simply toll the statute of limitations while the administrative remedies are exhausted. Some of the exhaustion of administrative remedies cases allow a plaintiff to bring a civil action after the administrative process is exhausted.

In the “Adequate State Remedy Doctrine” developed by North Carolina courts, the existence of an adequate state remedy does not simply toll the statute of limitations nor does it allow a civil action to be pursued once the administrative process is completed. Instead, it is a jurisdictional issue and if an adequate state remedy exists, the constitutional claims can never be asserted in a separate civil action. In this instance, the administrative process is not an adequate state remedy and therefore does not preclude a direct civil action asserting violations of constitutional rights.

C. Substantive Due Process Claims Are Not Subject To An Exhaustion Requirement

Even if the exhaustion of administrative remedies issue were relevant to this case, as discussed previously herein, the City’s ordinance process is not an adequate state remedy. In addition, plaintiff’s substantive due process claims are not subject to an exhaustion requirement and therefore the Court of Appeals decision is also erroneous on that basis.

“While claims for violation of procedural due process may be subject to exhaustion requirements, substantive constitutional claims are not.” *Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, 234 N.C.App. 617, 629, 760 S.E.2d 302, 312 (2014), *Barris v. Town of Long Beach*, 208 N.C. App. 718; 704 S.E.2d 285; 2010 N.C. App. LEXIS 2429.

In an analogous case the court emphatically stated that “we hold the [Plaintiff’s] substantive due process claim is not barred by plaintiff’s ability to bring an inverse condemnation action.” *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 786 S.E.2d 335 (N.C. App., 2016).

CONCLUSION

The Court of Appeals erred when it affirmed the trial courts’ decision to grant summary judgment. The trial court did not state a reason for granting summary judgment. But the Court of Appeals upheld summary judgment by holding that the City’s ordinance was an adequate state remedy that precluded plaintiffs direct constitutional claim. The Court of Appeals erred because the municipal ordinance procedure was not an adequate state remedy for the constitutional violations alleged by the plaintiffs. Therefore, plaintiffs had a right to file a civil action to bring direct constitutional claims against the defendant City of Kinston. The decision of the Court of Appeals should be reversed.

This the 27th day of November 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)

Undersigned counsel hereby certifies that this brief complies with North Carolina Rule of Appellate Procedure 28(j), in that it is printed in 13-point Century Schoolbook font and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare this brief.

This the 27th day of November 2023.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has served the foregoing Plaintiff- Appellant's NEW BRIEF in the above-entitled action upon all other parties to this cause or their attorneys by electronic service.

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