No. 55A23 EIGHT-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

JOSEPH ASKEW and CURTIS WASHINGTON,

Plaintiffs-Appellants,

v.

CITY OF KINSTON,

Defendant-Appellee.

From Lenoir County
No. 22-407

****

DEFENDANT-APPELLEE CITY OF KINSTON'S NEW BRIEF

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ISSUE PRESENTED

I. Are Plaintiffs required to exhaust their administrative remedies prior to bringing direct claims under the North Carolina Constitution where the administrative remedy provides for judicial review of constitutional issues?

STATEMENT OF THE CASE

On 5 June 2019, Plaintiffs-Appellants Joseph Askew ("Askew") and Curtis Washington ("Washington") (collectively, "Plaintiffs") filed a verified Complaint against Defendant-Appellee City of Kinston ("Defendant," the "City," or "Kinston"), in Lenoir County Superior Court, asserting two claims: (1) violation of Plaintiffs' right to equal protection under Article I, Section 19 of the North Carolina Constitution; and (2) violation of Plaintiffs' right to substantive due process under Article I, Section 19 of the North Carolina Constitution.[1] (R p 2). Plaintiffs sought the following relief: (1) a declaratory judgment declaring Kinston's actions unconstitutional; (2) various forms of injunction preventing Kinston from demolishing each Plaintiff's property; and (3) compensatory damages in excess of $25,000.

On 12 August 2019 Defendant filed a Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) for lack of standing, failure to exhaust administrative remedies, and ripeness and pursuant to Rule 12(b)(6) for failure to state a claim, identifying the adequate state remedy doctrine as barring Plaintiffs' direct constitutional claims. (R p 54). The

[1] A third Plaintiff, Charlie Gordon Wade, filed a voluntary dismissal without prejudice prior to the conclusion of proceedings before the trial court.

trial court denied Defendant's Motion to Dismiss on 3 December 2019. (R p 56). On 19 December 2019, Defendant filed its Answer to Plaintiffs' Complaint. (R p 57).

After the parties engaged in discovery, Defendant filed a Motion for Summary Judgment on 2 July 2021. (R p 76). On 29 September 2021, the trial court granted Defendant's motion for summary judgment as to all claims. (R p 108). On 8 October 2021, Plaintiffs appealed the trial court's ruling to the North Carolina Court of Appeals. (R p 109). On 29 December 2022, the Court of Appeals affirmed the trial court's order, holding that the trial court lacked jurisdiction to hear Plaintiffs' claims because Plaintiffs failed to exhaust their administrative remedies. *Askew v. City of Kinston*, 287 N.C. App. 222, 230, 883 S.E.2d 85, 91 (2022) .

On 2 February 2023, Plaintiff-Appellants appealed the Court of Appeals' decision to the North Carolina Supreme Court, raising multiple issues on appeal. Defendant moved to dismiss Plaintiffs' appeal on 24 March 2023, on the basis Plaintiffs failed to file and serve a new appellate brief in accordance with the North Carolina Rules of Appellate Procedure.

On 18 October 2023, the North Carolina Supreme Court issued an order denying Defendant's motion to dismiss, but expressly limited its review only of this matter to 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. After the parties obtained leave from this Court to extend the time for filing their new appellate briefs, Plaintiffs filed their opening brief on 27 November 2023. Defendant now timely submits its new brief for this Court's consideration.

STATEMENT OF THE FACTS

The City of Kinston has had longstanding problems with neighborhood blight and vacant, dilapidated houses and buildings. (R p 96). These structures create safety concerns and have profound negative impacts on the surrounding communities. (R p 96). Vacant and abandoned properties are linked to increased rates of crime and declining property values, among other negative impacts on the neighborhoods where these buildings are located. (R p 96). To remediate the dangerous conditions that accompany burned, collapsing, unsafe, unoccupied buildings, especially in residential neighborhoods, Kinston inspectors initiate the condemnation process for those buildings and attempt to get owners to repair them. (R pp 96-97) However, if the owners are unable or unwilling to repair the building, Kinston will complete the condemnation process and order the building demolished. (R pp 96-100)

Condemnation of Unsafe Structures

Under N.C.G.S. § 160A-426 (2019), building inspectors have the authority to declare a building unsafe upon the determination that the building is "dangerous to life… because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay,

unsafe wiring or heating system, inadequate means of egress, or other causes." N.C.G.S. § 160A-426(a), App. p. 1. After a notice is posted "to a conspicuous place on the exterior wall of the building," the inspector must also notify the owner that:

> (1) That the building or structure is in a condition that appears to meet one or more of the following conditions:
>
> a. Constitutes a fire or safety hazard.
>
> b. Is dangerous to life, health, or other property.
>
> c. Is likely to cause or contribute to blight, disease, vagrancy, or danger to children.
>
> d. Has a tendency to attract persons intent on criminal activities or other activities which would constitute a public nuisance.
>
> (2) That a hearing will be held before the inspector at a designated place and time, not later than 10 days after the date of the notice, at which time the owner shall be entitled to be heard in person or by counsel and to present arguments and evidence pertaining to the matter; and
>
> (3) That following the hearing, the inspector may issue such order to repair, close, vacate, or demolish the building or structure as appears appropriate.

N.C.G.S. § 160A-428 (2019), App. p. 3.

Section 160A-429 provides for a hearing before the inspector that results in a written order to the owner to "remedy the defective conditions by repairing, closing, vacating, or demolishing the building or structure"

or taking other necessary steps ordered by the inspector. N.C.G.S. § 160A-429 (2019), App. p. 5. The inspector sets a period of time, not less than 60 days, for the owner to remedy the conditions, unless there is imminent danger to life or other property, where a feasible lesser period for corrective action may be ordered. N.C.G.S. § 160A-429, App. p. 5. A city is thereafter permitted to "cause the building or structure to be removed or demolished." N.C.G.S. § 160A-432(b) (2019); App. p. 7. Pursuant to N.C.G.S. § 160A-430 (2019), property owners may appeal the building inspector's order by giving written notice within 10 days to the inspector and City Clerk. *See* N.C.G.S. § 160A-430, App. p. 6.

Under N.C.G.S. § 160A-393 (2019), property owners may then appeal the City Council's decision to the superior court by writ of certiorari. N.C.G.S. § 160A-393 was originally enacted in 2009. N.C. Sess. L. 2009-421, § 1.(a) (eff. Jan. 1, 2010). Adoption of Section 160A-393 greatly expanded issues that could be reviewed by courts in appeals of administrative action taken pursuant to Article 19 of that Chapter, governing "Planning and Regulation of Development," which includes the condemnation process and the city council's consideration of orders issued pursuant to N.C.G.S. § 160A-429. *See id.* § 160A-393(a)-(b).

Another avenue for appeal for a property owner aggrieved by a building inspector's decision is to the Commissioner of Insurance by filing written notice within 10 days after the order, decision, or determination, and following the administrative appeals process through the Building Code Council. *See* N.C.G.S. § 160A-434 (2019).

In determining whether a building is unsafe, a safety or health hazard, or unfit for human habitation, Kinston's inspectors apply the standards set forth in the statutes, North Carolina Building Code, and the City of Kinston Minimum Housing Code and other ordinances related to buildings and building regulation. (R p 98). The North Carolina State Building Code is incorporated into the City of Kinston's Code of Ordinances, Section 5-1, and Unified Development Ordinance, Section 2.2, by reference. (R pp 98-99).

Condemnation of Plaintiffs' Properties

Plaintiff Askew's son, Joseph Askew Jr. ("Askew Jr."), owned the adjacent properties at 110 North Trianon and 607 East Gordon Street when Kinston condemned them. (Doc. Ex. pp 667-71, 693-95). Plaintiff Askew purchased the properties by an Agreement signed in January 2019, using an instrument signed by him as "POA" for Askew Jr., his son,

which purportedly transferred the properties from his son to himself by his own signature. (Doc. Ex. pp 667-71, 693-95).

110 North Trianon Street

The building at 110 North Trianon Street was identified among a list of "Top 50" properties selected for condemnation in 2017, which was approved by the City Council. Buildings included on the "Top 50" list were selected based on the following criteria, with each one of the properties identified meeting at least one of the criteria, and many of the properties meeting several of the criteria, none of which was weighted any more heavily than the others:

- Dilapidated, blighted, and/or burned properties;
- Residential (noncommercial) properties;
- Vacant / unoccupied properties;
- Properties in proximity to a public use, such as a school or a park;
- Properties fronting on or in close proximity to a heavily travelled road;
- Properties in proximity to other qualifying properties (i.e., forming part of a "cluster" of dilapidated properties); and
- Properties in an area of police concern.

(R pp 98-99; *see also* Doc. Ex. pp 917-20).

The building at 110 North Trianon Street was condemned on 2017 November 28 as a structure that appeared dangerous for life, specifically, for liability to fire, bad condition of the walls, decay, and unsafe wiring.

(R p 28; *see also* Doc. Ex. pp 19-48). A re-inspection on 22 February 2018 indicated that no permits had been issued, no improvements had been made and no plan from the owner to carry out the improvements was submitted to the inspector. (Doc. Ex. p 39)

Plaintiff Askew submitted a handwritten request to Kinston City Council to "removed off the list for condemnation demolition" for this property and 607 E. Gordon St., a structure owned by Askew Jr. on an adjacent parcel. (Doc. Ex. 40) At a hearing set forth 26 March 2018, Plaintiff Askew appeared with a power of attorney for Askew Jr. that was not properly notarized, resulting in a delay in the hearing. (Doc. Ex. p 43) After a new hearing on 9 April 2018, the building inspector issued an order directing Askew Jr. to repair or demolish the building within 120 days. (Doc. Ex. p 42)

The building inspector re-inspected 110 North Trianon Street on 6 November 2018, and recommended "[m]oving forward with the condemnation process," noting that "[t]here has not been an observable improvement to the condition of the property," and a Notice of Authorization to Demolish was sent to Askew Jr. and the City Manager. (Doc. Ex. pp 46-48) Two months later, Plaintiff Askew asked the City

Council to reconsider its condemnation of 110 North Trianon during its 7 January 2019 meeting. His request, which was treated as an appeal even though he did not follow proper procedure for appeal to the City Council, was ultimately denied. (Doc. Ex. pp 609-11).

607 East Gordon Street

The building at 607 East Gordon Street was also identified among the "Top 50" properties in 2017 and was condemned on 28 November 2017 as a structure that appeared dangerous for life, specifically, for liability to fire, bad condition of the walls, decay, fire damage, and unsafe wiring. (R pp 102-03; *see also* Doc. Ex. pp 50-321). The same structure at 607 East Gordon Street was previously subject to an August 2000 condemnation order. (R p 103). At the time, the owner of record was Askew Investments. (R p 103). Relevant repairs were not made in 2000, but Kinston did not have the funds to carry out demolition. (R p 103)

Upon re-inspection in 2017, inspectors discovered that no substantial repairs to the building had been made since the 2000 condemnation. (R p 103) On 22 February 2018, the building inspector re-inspected 607 East Gordon Street and concluded that the dangerous conditions still existed, no permits had been issued, and no plans were

provided for the repair. (Doc. Ex. p 71) Beginning in July 2018, Plaintiff Askew began attempting repairs at 607 East Gordon Street and went through a series of follow-up inspections. (Doc. Ex. pp 73-78) However, Plaintiff Askew never completed identified repairs for 607 East Gordon Street or 110 North Trianon Street, and they have since been condemned. (R pp. 102-03; *see also* Doc. Ex. pp 76-78).

610 North Independence Street

The building at 610 North Independence Street, owned by Plaintiff Washington, was not included on the original "Top 50" list. (R p 103). It is a commercial building and would not be eligible based upon the criteria used to create the list. (R p 103). However, after the "Top 50" list was created, it was noticed that Plaintiff Washington's building is near collapse, which presented a potential danger to those around the building; accordingly, it was prioritized for the condemnation process. (R p 103).

The building at 610 North Independence Street was condemned on 18 November 2018 as a structure that that appeared dangerous for life, specifically, for liability to fire, bad condition of the walls, decay, and the roof collapsing. (R p 103; *see also* Doc. Ex. pp 322-30). After a hearing on

21 June 2019, the building inspector issued an order to abate, directing Plaintiff Washington to "remedy the defective conditions within 120 days" by repairing or demolishing the building. (Doc. Ex. 330) The repairs identified during the condemnation process for 610 North Independence Street were not completed by Plaintiff Washington, and the condemnation process is complete for this property. (R p 103; *see also* Doc. Ex. pp 322-30).

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT LACKED JURISDICTION TO HEAR PLAINTIFFS' CLAIMS BECAUSE PLAINTIFFS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

In its opinion issued on 29 December 2022, the Court of Appeals properly held that the trial court did not have jurisdiction to hear Plaintiffs' claims because Plaintiffs failed to exhaust their administrative remedies. *Askew*, 287 N.C. App. at 230, 883 S.E.2d at 91. In reaching its holding, the Court of Appeals relied on precedent set by this Court that "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be

exhausted before recourse may be had to the courts." *See id.* (quoting *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979)).

It is well-settled that judicial review "is generally available only to aggrieved persons who have exhausted all administrative remedies made available by statute or agency rule." *Corry v. N.C. Div. of HHS*, 2022-NCCOA-689, ¶ (quoting *Abrons Fam. Prac. & Urgent Care, PA v. N.C. Dep't of Health & Hum. Servs.*, 370 N.C. 443, 444, 810 S.E.2d 224, 226 (2018)). The doctrine of exhaustion of administrative remedies plays an important role in maintaining the efficiency and effectiveness of administrative agencies by preventing premature intervention by the courts. *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Examiners*, 2017 NCBC 66.

Without exhaustion of administrative remedies, the processes and procedures put in place by our General Assembly to facilitate and encourage dispute resolution without unnecessary court intervention would be effectively rendered useless. Individuals could completely disregard such procedures mandated by the legislature at their fancy and clog the court docket with matters that could be resolved in a more efficient and less costly fashion. Accordingly, this Court, in its wisdom,

long ago recognized the inherent value of requiring would-be plaintiffs to first exhaust their administrative remedies, where available, before filing suit in court. *See Presnell*, 298 N.C. at 721, 260 S.E.2d at 615.

This Court has held that a plaintiff *must* exhaust their administrative remedies before pursuing an action in court *unless* they can show that doing so would be futile or the remedy established by the administrative body would be inadequate. *Abrons Family Practice & Urgent Care, PA*, 370 N.C. at 451, 810 S.E.2d at 230. Pursuing an administrative remedy is only considered "futile" when it is useless to do so either as a legal or practical matter. *Id.* The administrative remedy is "inadequate" only if it cannot provide relief more or less commensurate with the claim. *Jackson for Jackson v. North Carolina Dept. of Human Resources*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 904 (1998).

In the present case, Plaintiffs contend the Court of Appeals erred because the administrative remedies doctrine is not applicable to this case, and, even if it were, the administrative remedies available to Plaintiffs under Chapter 160A were inadequate. Pl.'s New App. Br. at 27-28. Plaintiffs additionally argue that the relevant inquiry is whether they had an adequate state remedy which would bar their direct claims under

the North Carolina Constitution, and that because there is no adequate remedy, the Court of Appeals erred in holding it lacked jurisdiction to hear their constitutional claims. *Id.* at 22. The Court of Appeals did not err in either respect: Plaintiffs had effective administrative remedies and an avenue for judicial review provided by statute that Plaintiff should have exhausted before filing the instant action.

A. The Court of Appeals Properly Applied the Exhaustion of Administrative Remedies Doctrine to This Case.

Whether Plaintiffs have an adequate state remedy is a separate question from whether they are required to exhaust their administrative remedies. The adequate state remedy doctrine bars direct actions under the North Carolina Constitution where an adequate state remedy exists. *Swain v. Elfland*, 145 N.C. App. 383, 390, 550 S.E.2d 530, 536 (2001). A remedy is adequate if it (1) addresses the alleged constitutional injury and (2) provides the plaintiff an opportunity to "enter the courthouse doors[.]" *Taylor v. Wake Cty.*, 258 N.C. App. 178, 185, 811 S.E.2d 648, 654 (2018) (internal citations omitted) (quoting *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009)).

For instance, in *Rousselo v. Starling*, that Court held the plaintiffs were barred from bringing a direct constitutional claim for unreasonable

search because the same injury could be addressed through a trespass to chattel tort claim. 128 N.C. App. 439, 448, 495 S.E.2d 725, 731 (1998). Similarly, in *Alt v. Parker*, that Court held it did not have jurisdiction to hear the plaintiff's direct constitutional claim for unlawful seizure, which could instead be addressed through a false imprisonment tort claim. 112 N.C. App. 307, 317-18, 435 S.E.2d 773, 779 (1993). The adequate state remedy doctrine effectively acts to prevent the judiciary from unnecessarily deciding constitutional questions. *S&M Brands, Inc. v. Stein*, 2020 NCBC 23.

While both the exhaustion of administrative remedies and adequate state remedy doctrines serve to guide a party's access to the courts, they apply under different circumstances and have different implications for a party seeking to bring a claim. The former requires a party to exhaust all available administrative remedies before resorting to the courts, *Presnell,* 298 N.C. 715, 260 S.E.2d 611, while the latter bars direct constitutional claims where a case could be resolved through other claims or causes of action. *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002).

In the present case, the Court of Appeals' holding did not rely upon a finding that there was some adequate state remedy in tort or contract which would preclude Plaintiffs from *ever* bringing a direct constitutional claim involving the City's condemnation of their properties. *See Askew*, 287 N.C. App. at 230, 883 S.E.2d at 91. It did not hold that Plaintiffs' substantive due process and equal protection claims could be addressed in a manner which did not require the courts to decide a constitutional question. *See id.* Instead, and consistent with Defendant's position, the Court of Appeals pointed out only that Plaintiffs were required, under precedent established by this Court in *Presnell*, to first exhaust their administrative remedies as provided by N.C.G.S. §§ 160A-430 and 160A-393. *Id.* The Court noted that "Plaintiffs primarily seek to enjoin Defendant from demolishing Plaintiffs' properties," which was relief available through those avenues of appeal to the city council and *certiorari* review by the superior court. *See id.* The Court of Appeals thus correctly held that the exhaustion of administrative remedies doctrine barred Plaintiffs' claims.

B. Plaintiffs Cannot Demonstrate Their Administrative Remedy Was Futile or Inadequate.

Significantly, "[t]he party claiming excuse from exhaustion bears the burden of alleging both the inadequacy and the futility of the available administrative remedies." *Abrons*, 370 N.C. at 451, 810 S.E.2d at 231 (citation omitted). Here, Plaintiffs argue that they were not required to exhaust their administrative remedies prior to bringing suit because the available remedies are inadequate. Pl.'s New App. Br. at 28. Plaintiffs further contend that substantive due process claims such as theirs are not subject to exhaustion requirements, and that 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." *Id.*

Plaintiffs notably fail to address and rebut a key point of the Court of Appeals' decision, which has also been Defendant's argument all along – that Plaintiffs' administrative remedy *expressly includes* review of constitutional issues by the courts on appeal of an administrative body's decision concerning their property. *See Askew*, 287 N.C. App. at 229, 883 S.E.2d at 91. As set forth in more detail below, this opportunity to address Plaintiffs' constitutional claims during judicial review by the Superior

Court in nature of *certiorari* of the decision to condemn Plaintiffs' properties is precisely what makes Plaintiffs' administrative remedy adequate.

1. Plaintiffs' Administrative Remedy Is Adequate Because It Provides the Opportunity for Review of Their Constitutional Claims by the Court.

In support of their claim the administrative remedies provided by Chapter 160A are not "adequate," Plaintiffs point to two cases in which the Court of Appeals held that it did not have jurisdiction to review constitutional questions in the appeals of administrative decisions. *See Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985) (review of variance decision under N.C.G.S. § 160A-388 cannot address constitutionality of ordinance); *Guilford Cty. Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 441 S.E.2d 177 (1994) (review of conditional use permit decision under identical language in N.C.G.S. § 153A-340 cannot include takings claim by owner).[2]

[2] While *Sherrill* and *Seaboard Chem. Corp.* involve decisions by boards of adjustment concerning zoning and development ordinances pursuant to N.C.G.S. §§ 160A-388 (cities) and 153A-340 (counties), both statutes later became subject to the new judicial review provisions of N.C.G.S. § 160A-393, which applied expansively to all quasi-judicial proceedings under Chapter 160A, Article 19 and Chapter 153A, Article 18, upon its adoption. *See* N.C. Sess. L. 2009-421.

Critically, in both cases cited by Plaintiffs, the Court clarified that its review of constitutional claims as part of a statutory appeal was improper only because the particular statutory appeals process at issue specifically limited the scope courts' review of the administrative body's decision, and the courts lacked authority to decide the constitutionality of the ordinance. *See Sherrill,* 76 N.C. App. at 649, 334 S.E.2d at 105 (reasoning that "the superior court, and hence this Court… had the statutory power to review only the issue of whether the variance was properly denied. The constitutionality of the zoning ordinance is a separate issue not properly a part of these proceedings since the denial of the variance request never addressed the validity of the zoning ordinance."); *Seaboard Chem. Corp*., 114 N.C. App. at 10-11, 441 S.E.2d at 182 (noting that the relevant statutory appeals process in effect at the time "*d[id] not encompass the adjudication of issues of the type raised in the counterclaim*," including whether the administrative body's decision constituted an unconstitutional taking) (emphasis added).

Plaintiffs also rely on *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655 (1990). However, *Batch* did not concern any of the matters at issue here. Instead, this Court merely held in *Batch* that it was error for

the trial court to join the proceeding brought pursuant to a writ of certiorari with the cause of action alleged in the plaintiff's complaint. *Id.* at 11, 387 S.E.2d at 662. This Court reasoned that, because the standard of review the trial court was required to employ while sitting as a court of appeals was different from that applied in its role as a trial court, the court thus should have considered the matters separately. *Id.*.

The procedural aspect of the holding in *Batch* has been superseded by the enactment of N.C.G.S. § 160A-393.1 (2019), which provides expressly that civil actions for declaratory relief challenging the constitutionality of a decision may be joined with petitions for *certiorari* review of decisions of boards of adjustment. *See* N.C. Sess. L. 2019-111, § 1.7 (adding Section 160A-393.1) and § 3.2 (providing that § 1.7 "clarify[ies] and restate[s] the intent of existing law and appl[ies] to ordinances adopted before, on, and after the effective date"). Such actions may also be brought independently of a *certiorari* petition. *Id.*

However, before an independent civil action may be brought, Section 160A-393.1(b) still expressly requires exhaustion of remedies for review of administrative actions:

> (b) Civil Action. – Except as otherwise provided in this section for claims involving questions of interpretation, in lieu of any

> remedies available under G.S. 160A-388(b1), a person with standing, as defined in subsection (c) of this section, may bring an original civil action seeking declaratory relief, injunctive relief, damages, or any other remedies provided by law or equity, in superior court or federal court to challenge the enforceability, validity, or effect of a local land development regulation for any of the following claims:
>
> > (1) The ordinance, either on its face or as applied, is unconstitutional.
> > (2) The ordinance, either on its face or as applied, is ultra vires, preempted, or otherwise in excess of statutory authority.
> > (3) The ordinance, either on its face or as applied, constitutes a taking of property.
>
> If the decision being challenged is from an administrative official charged with enforcement of a local land development regulation, the party with standing must first bring any claim that the ordinance was erroneously interpreted to the applicable board of adjustment pursuant to G.S. 160A-388(b1). An adverse ruling from the board of adjustment may then be challenged in an action brought pursuant to this subsection with the court hearing the matter de novo together with any of the claims listed in this subsection.

N.C.G.S. § 160A-393.1(b) (2019) (now recodified at N.C.G.S. § 160D-1403.1(a)).

Section 160A-393 provides for certiorari review of all quasi-judicial proceedings of all "decision-making boards" under Chapter 160A, Article 19, while Section 160A-393.1 clarifies that civil actions for declaratory relief may be joined with or filed in lieu of petitions for certiorari review only in "certain cases": appeals of decisions of boards of adjustment

pursuant to N.C.G.S. § 160A-388(b1). *See* N.C.G.S. § 160A-393.1(b). Plaintiffs' case concerns quasi-judicial proceedings by the building inspector and city council, not a board of adjustment, so N.C.G.S. § 160A-393 applies to Plaintiffs, but N.C.G.S. § 160A-393.1 does not.

This Court has long held that different statutes dealing with the same matter or subject should be read *in pari materia*, to be construed together and harmonized where possible. *In re B.L.H.*, 376 N.C. 118, 125, 852 S.E.2d 91, 96 (2020) (citations omitted). It seems inescapable that the legislature intended Sections 160A-393 and 160A-393.1 to be sister statutes. Both regulate quasi-judicial proceedings of decision-making boards under Chapter 160A, Article 19. The fact that Section 160A-393.1, which allows civil actions independent of or parallel to administrative remedies in "certain cases," is limited to reviews of decisions of boards of adjustment, rather than expanded to the same extent as Section 160A-393 ("all decision-making boards") appears to be deliberate. That the General Assembly could have, but chose not to, allow original civil actions challenging the constitutionality of decisions by the building inspector and city council without or parallel to *certiorari* review, is powerful evidence that the General Assembly intended the continued use of

administrative remedies and review in *certiorari* as a first avenue to dispute such decisions.

In fact, at the time the cases cited by Plaintiffs were decided, the Court of Appeals found the administrative remedies at issue in those cases to be inadequate, because they were inadequate prior to enactment of Section 160A-393 in 2009 and the clarifications for review of board of adjustment decisions by adoption of Section 160A-393.1. The scope of issues assigned by the General Assembly to the review process omitted constitutional challenges, and the administrative bodies lacked authority, in many cases, to grant the relief sought. *See Seaboard Chem. Corp.*, 114 N.C. App. at 10-11, 441 S.E.2d at 182; *Swan Beach Corolla, LLC v. Cty. of Currituck*, 234 N.C. App. 617, 624-25, 760 S.E.2d 302, 308-09 (2014) (considering an administrative decision made prior to the 2009 enactment of N.C.G.S. § 160A-393 and noting that the administrative board had no power to grant the relief requested by plaintiff). Since then, the General Assembly has increased and clarified the scope of issues that could be addressed by the reviewing bodies and added to the administrative remedies available.

Regarding Plaintiffs' argument that substantive constitutional claims in particular are not subject to exhaustion requirements, Plaintiffs misstate the holding in *Town of Beech Mtn. v. Genesis Wildlife Sanctuary, Inc.* There, the Court of Appeals considered a Section 1983 claim and reasoned that the availability of a remedy at state law to address the plaintiff's substantive due process claims was irrelevant, as "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 247 N.C. App. 444, 458, 786 S.E.2d 335, 345 (2016) (quoting *Zinermon v. Burch*, 494 U.S. 113, 124 (1990)); *see also Edward Valves, Inc. v. Wake Cty.*, 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996) (holding that "[s]tate remedies are only relevant when a Section 1983 action is brought for a violation of procedural due process."). No such interplay between federal and state remedies is at issue in Plaintiffs' claims.

The cases relied on by Plaintiffs are easily distinguishable from the present case. Here, unlike the plaintiffs in the cases cited by Plaintiffs, Plaintiffs' administrative remedy included opportunity for review of constitutional issues by the courts. Specifically, pursuant to N.C.G.S. § 160A-393, which was in effect at the time the building inspector issued

his orders concerning Plaintiffs' properties, Plaintiffs could appeal the condemnations of their properties to the superior court. The superior court's scope of review specifically includes ensuring the rights of petitioners were not prejudiced because the administrative decision-making body's decisions were "in violation of constitutional provisions" or "arbitrary and capricious," among other issues. *See* N.C.G.S. § 160A-393(a)-(f). The statute provides a comprehensive scheme for review of the process afforded by the decisionmaker, including determination as to whether the decisionmaker was sufficiently impartial or otherwise erred according to several grounds for relief set forth in the statute. *See* N.C.G.S. § 160A-393(j)-(k). As such, all of Plaintiffs' constitutional claims could, and should, have been addressed through the processes specifically provided by Chapter 160A, which the Court of Appeals correctly found to be adequate and not futile.

This rationale is also consistent with precedent established by both decisions of the Court of Appeals and this Court. For instance, in *Johnston v. Gaston County*, the Court of Appeals held that administrative appeals processes that include opportunity for review of constitutional issues by the courts provide an adequate administrative

remedy for constitutional claims. 71 N.C. App. 707, 323 S.E.2d 381 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985). In reaching its decision, the *Johnston* Court specifically noted that the plaintiffs "could have adhered to state law procedure for processing property tax complaints and still have pursued violations of their federal (and state) constitutional rights" because although administrative tribunals cannot decide constitutional claims, "[t]he statute [(Chapter 105)] empowers this Court to make an inquiry into constitutional matters." *Id.* at 712, 323 S.E.2d at 384. Similar to the case at bar, the relevant statute in that case, N.C.G.S. § 105-345.2, specifically authorized the Court to review decisions by the administrative decision-making body that are "in violation of constitutional provisions… made upon unlawful proceedings; or… affected by other errors of law." *Id.* (quoting N.C.G.S. § 105-345.2).

The *Johnston* court reasoned that "[t]his division of review, saving constitutional issues for the courts, does not unduly hinder or restrict the taxpayer in asserting his rights. Moreover, it advances the important state interests of efficiency and conservation of judicial resources by giving expert administrative officials an opportunity to discover and redress" matters within their power. *Id.* Notably, this Court declined to

review the Court of Appeals' decision in *Johnston*, thereby allowing the Court's reasoning in that case to stand. *Johnston v. Gaston Cty.*, 313 N.C. 508, 329 S.E.2d 392 (1985).

Decades later, in *Barris v. Town of Long Beach*, 208 N.C. App. 718, 704 S.E.2d 285 (2010), a case cited by Plaintiffs, the Court of Appeals reached a similar holding as it did in *Johnston*. *See id.* at 721, 704 S.E.2d at 288-89 (observing that N.C.G.S. § 113A-123 provided for appeal of the administrative body's decision to the superior court and holding that the appellees failed to exhaust their administrative remedies because they did not follow the proper protocol to challenge the Town's CAMA permit application); *see also Leeuwenburg v. Waterway Inv. Ltd. Partnership*, 115 N.C. App. 541, 545, 445 S.E.2d 614, 617 (1994) ("[A] statute under which an administrative board has acted, which provides an orderly procedure for appeal to the superior court is the exclusive means for obtaining such judicial review.").

More recently, in 2018, this Court held that a trial court properly dismissed the plaintiffs' action for lack of jurisdiction because they failed to exhaust their statutory administrative remedies, even though one of their claims concerned a violation of Article I, Section 19 of the North

Carolina Constitution. *Abrons*, 370 N.C. 443, 810 S.E.2d 224. In so doing, this Court noted that there was an administrative remedy provided by statute which entitled the plaintiffs to judicial review of the administrative body's decision, after exhaustion of all available administrative remedies. *Id.* at 446-47, 810 S.E.2d at 227; *see also In re Remond,* 369 N.C. 490, 497-98, 797 S.E.2d 275, 280 (2017) (noting the plaintiff had followed the administrative appeals process available and the administrative body properly reserved the plaintiff's constitutional question for the Court of Appeals, in accordance with the relevant statute); *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276 (1992) (allowing a direct claim under the constitution *after* the plaintiff utilized his administrative remedies). Significantly, this Court held that "when any part of the relief sought is provided through an administrative process, a plaintiff *must* exhaust that process *prior* to seeking the same or related relief from the judicial system." *Abrons*, 370 N.C. at 453, 810 S.E.2d at 231 (emphasis added). Although *Abrons* concerned administrative appeals under the APA, the same reasoning can be applied to the present case. Accordingly, Plaintiffs' contentions that they were not required to exhaust their administrative remedies

because an administrative body could not have considered their constitutional claims are without any merit.

2. Plaintiffs' Administrative Remedy is Adequate Because It Could Provide the Primary Relief Sought by Plaintiffs – Reversal of the Decision to Condemn Their Homes.

Plaintiffs additionally contend that they seek monetary damages that are not recoverable through the process under Chapter 160A and that the lack of money damages renders that process an inadequate state remedy. Pl.'s New App. Br. at 26. However, this Court and the Court of Appeals have previously decided that administrative relief is not rendered inadequate so as to relieve a plaintiff from the exhaustion requirement merely because the plaintiff also requests monetary relief. *See Abrons*, 370 N.C. at 452, 810 S.E.2d at 231; *Jackson v. N.C. Dep't of Human Res. Div. of Mental Health, Developmental Disabilities, & Substance Abuse Servs.,* 131 N.C. App. 179, 189, 505 S.E.2d 899, 905 (1998).

Here, Plaintiff Askew initially requested that the City Council reverse the decision to condemn the building located at 110 North Trianon. Similarly, the relief requested in the Complaint by Plaintiffs also primarily seeks to prevent Kinston from demolishing Plaintiffs'

buildings. Specifically, Plaintiffs allege that they have "been injured by the City of Kinston's action of condemning their property, and/or placing their property on the list for demolition, and/or ordering the demolition of their property, and/or placing their property on a schedule for imminent demolition"; 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." (R pp 12-13) As the Court of Appeals recognized, "[Plaintiffs'] injuries are within the scope of the city council's review on direct appeal and the superior court's review on certiorari." *Askew*, 287 N.C. App. at 229, 883 S.E.2d at 92 (referring to N.C.G.S. § 160A-430 and N.C.G.S. § 160A-393(k)(1)).

The Court of Appeals specifically noted that the primarily relief sought by Plaintiffs – enjoining Defendant from demolishing Plaintiffs' properties – is "within the city council's authority on direct appeal [because] the council may revoke a condemnation order" and "also within the superior court's authority on certiorari review [because] the court may remand to the governing board with instructions to remove Plaintiffs' property from the demolition list." *Id.* Accordingly, Plaintiffs

had an adequate administrative remedy and were required to exhaust it before seeking recourse with the courts.

Plaintiffs failed to seek review of the many orders issued during the condemnation process by the building inspector, or, with respect to Plaintiff Askew's request to City Council, with the superior court in the nature of *certiorari* pursuant to N.C.G.S. § 160A-393, which would have allowed review of Plaintiffs' requests for reversal of the decisions to condemn their properties, as well as their constitutional claims. Plaintiffs' claims are thus barred for failure to exhaust their administrative remedies, which would not have been futile or inadequate for the reasons outlined above.

C. The Court of Appeals' Decision Should Be Affirmed, Regardless of Any Alleged Errors in Reasoning, Because the Result Was Correct.

Plaintiffs allege the Court of Appeals confused the exhaustion of administrative remedies doctrine with the adequate state remedy doctrine. Pl.'s New App. Br. at 27. To the extent this Court finds that the Court of Appeals did, as Plaintiff argues, use incorrect terminology and/or confuse the applicable standards for adequate state remedy and exhaustion of administrative remedies, this Court should nevertheless

affirm the holding of the Court of Appeals. As set forth above, despite any alleged error in reasoning, the conclusion reached by the Court of Appeals was correct and is consistent with precedent set by this Court. Accordingly, the Court of Appeals' holding that Plaintiffs' claims were barred for failure to exhaust their administrative remedies should be affirmed.

CONCLUSION

For the foregoing reasons, the City of Kinston respectfully requests that the Court affirm the decision of the Court of Appeals that the trial court's order be vacated and the case remanded to dismiss Plaintiffs' claims for lack of subject matter jurisdiction.

Respectfully submitted, this the 26th day of January, 2024.

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CERTIFICATE OF SERVICE

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APPENDIX

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's North Carolina General Statutes Annotated
Chapter 160A. Cities and Towns
Article 19. Planning and Regulation of Development (Refs & Annos)
Part 5. Building Inspection (Refs & Annos)

N.C.G.S.A. § 160A-426

§ 160A-426. Unsafe buildings condemned in localities

Effective: July 10, 2009
Currentness

<Text of section eff. until Jan. 1, 2021.>

(a) Residential Building and Nonresidential Building or Structure.--Every building that shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, shall be held to be unsafe, and the inspector shall affix a notice of the dangerous character of the structure to a conspicuous place on the exterior wall of the building.

(b) Nonresidential Building or Structure.--In addition to the authority granted in subsection (a) of this section, an inspector may declare a nonresidential building or structure within a community development target area to be unsafe if it meets both of the following conditions:

(1) It appears to the inspector to be vacant or abandoned.

(2) It appears to the inspector to be in such dilapidated condition as to cause or contribute to blight, disease, vagrancy, fire or safety hazard, to be a danger to children, or to tend to attract persons intent on criminal activities or other activities that would constitute a public nuisance.

(c) If an inspector declares a nonresidential building or structure to be unsafe under subsection (b) of this section, the inspector must affix a notice of the unsafe character of the structure to a conspicuous place on the exterior wall of the building. For the purposes of this section, the term “community development target area” means an area that has characteristics of an urban progress zone under G.S. 143B-437.09, a “nonresidential redevelopment area” under G.S. 160A-503(10), or an area with similar characteristics designated by the city council as being in special need of revitalization for the benefit and welfare of its citizens.

(d) A municipality may expand subsections (b) and (c) of this section to apply to residential buildings by adopting an ordinance. Before adopting such an ordinance, a municipality shall hold a public hearing and shall provide notice of the hearing at least 10 days in advance of the hearing.

Credits

Amended by Laws 1969, c. 1065, § 1; Laws 1971, c. 698, § 1; S.L. 2000-164, § 1, eff. Aug. 2, 2000; S.L. 2001-386, § 1, eff. Aug. 26, 2001; S.L. 2006-252, § 2.19, eff. Jan. 1, 2007; S.L. 2009-263, § 2, eff. July 10, 2009.

Editors' Notes

REPEAL

<This section is repealed by S.L. 2019-111, § 2.3, eff. Jan. 1, 2021. >

Notes of Decisions (10)

N.C.G.S.A. § 160A-426, NC ST § 160A-426

The statutes and Constitution are current through S.L. 2018-145 of the 2018 Regular and Extra Sessions, including through 2019-163, of the General Assembly, subject to changes made pursuant to the direction of the Revisor of Statutes.

End of Document

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Part 5. Building Inspection (Refs & Annos)

N.C.G.S.A. § 160A-428

§ 160A-428. Action in event of failure to take corrective action

Effective: July 10, 2009
Currentness

<Text of section eff. until Jan. 1, 2021.>

If the owner of a building or structure that has been condemned as unsafe pursuant to G.S. 160A-426 shall fail to take prompt corrective action, the local inspector shall give him written notice, by certified or registered mail to his last known address or by personal service:

(1) That the building or structure is in a condition that appears to meet one or more of the following conditions:

a. Constitutes a fire or safety hazard.

b. Is dangerous to life, health, or other property.

c. Is likely to cause or contribute to blight, disease, vagrancy, or danger to children.

d. Has a tendency to attract persons intent on criminal activities or other activities which would constitute a public nuisance.

(2) That a hearing will be held before the inspector at a designated place and time, not later than 10 days after the date of the notice, at which time the owner shall be entitled to be heard in person or by counsel and to present arguments and evidence pertaining to the matter; and

(3) That following the hearing, the inspector may issue such order to repair, close, vacate, or demolish the building or structure as appears appropriate.

If the name or whereabouts of the owner cannot after due diligence be discovered, the notice shall be considered properly and adequately served if a copy thereof is posted on the outside of the building or structure in question at least 10 days prior to the hearing and a notice of the hearing is published in a newspaper having general circulation in the city at least once not later than one week prior to the hearing.

Credits

Added by Laws 1969, c. 1065, § 1. Amended by Laws 1971, c. 698, § 1; S.L. 2000-164, § 2, eff. Aug. 2, 2000; S.L. 2009-263, § 4, eff. July 10, 2009.

Editors' Notes

REPEAL

<This section is repealed by S.L. 2019-111, § 2.3, eff. Jan. 1, 2021. >

Notes of Decisions (1)

N.C.G.S.A. § 160A-428, NC ST § 160A-428

The statutes and Constitution are current through S.L. 2018-145 of the 2018 Regular and Extra Sessions, including through 2019-163, of the General Assembly, subject to changes made pursuant to the direction of the Revisor of Statutes.

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Article 19. Planning and Regulation of Development (Refs & Annos)
Part 5. Building Inspection (Refs & Annos)

N.C.G.S.A. § 160A-429

§ 160A-429. Order to take corrective action

Currentness

<Text of section eff. until Jan. 1, 2021.>

If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall make an order in writing, directed to the owner of such building or structure, requiring the owner to remedy the defective conditions by repairing, closing, vacating, or demolishing the building or structure or taking other necessary steps, within such period, not less than 60 days, as the inspector may prescribe; provided, that where the inspector finds that there is imminent danger to life or other property, he may order that corrective action be taken in such lesser period as may be feasible.

Credits
Added by Laws 1969, c. 1065, § 1. Amended by Laws 1971, c. 698, § 1; Laws 1973, c. 426, § 68; Laws 1977, c. 912, § 13.

Editors' Notes

REPEAL

<This section is repealed by S.L. 2019-111, § 2.3, eff. Jan. 1, 2021. >

Notes of Decisions (5)

N.C.G.S.A. § 160A-429, NC ST § 160A-429
The statutes and Constitution are current through S.L. 2018-145 of the 2018 Regular and Extra Sessions, including through 2019-163, of the General Assembly, subject to changes made pursuant to the direction of the Revisor of Statutes.

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N.C.G.S.A. § 160A-430

§ 160A-430. Appeal; finality of order if not appealed

Currentness

<Text of section eff. until Jan. 1, 2021.>

Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order. In the absence of an appeal, the order of the inspector shall be final. The city council shall hear and render a decision in an appeal within a reasonable time. The city council may affirm, modify and affirm, or revoke the order.

Credits

Added by Laws 1969, c. 1065, § 1. Amended by Laws 1971, c. 698, § 1; Laws 1973, c. 426, § 69; S.L. 2000-164, § 4, eff. July 1, 2000.

Editors' Notes

REPEAL

<This section is repealed by S.L. 2019-111, § 2.3, eff. Jan. 1, 2021. >

Notes of Decisions (2)

N.C.G.S.A. § 160A-430, NC ST § 160A-430
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Part 5. Building Inspection (Refs & Annos)

N.C.G.S.A. § 160A-432

§ 160A-432. Enforcement

Effective: October 1, 2009
Currentness

<Text of section eff. until Jan. 1, 2021.>

(a) [Action Authorized.]--Whenever any violation is denominated a misdemeanor under the provisions of this Part, the city, either in addition to or in lieu of other remedies, may initiate any appropriate action or proceedings to prevent, restrain, correct, or abate the violation or to prevent the occupancy of the building or structure involved.

(a1) Repealed by S.L. 2009-263, § 1, eff. Oct. 1, 2009.

(b) Removal of Building.--In the case of a building or structure declared unsafe under G.S. 160A-426 or an ordinance adopted pursuant to G.S. 160A-426, a city may, in lieu of taking action under subsection (a), cause the building or structure to be removed or demolished. The amounts incurred by the city in connection with the removal or demolition shall be a lien against the real property upon which the cost was incurred. The lien shall be filed, have the same priority, and be collected in the same manner as liens for special assessments provided in Article 10 of this Chapter. If the building or structure is removed or demolished by the city, the city shall sell the usable materials of the building and any personal property, fixtures, or appurtenances found in or attached to the building. The city shall credit the proceeds of the sale against the cost of the removal or demolition. Any balance remaining from the sale shall be deposited with the clerk of superior court of the county where the property is located and shall be disbursed by the court to the person found to be entitled thereto by final order or decree of the court.

(b1) Additional Lien.--The amounts incurred by the city in connection with the removal or demolition shall also be a lien against any other real property owned by the owner of the building or structure and located within the city limits or within one mile of the city limits, except for the owner's primary residence. The provisions of subsection (b) of this section apply to this additional lien, except that this additional lien is inferior to all prior liens and shall be collected as a money judgment.

(c) [Nonexclusive Remedy.]--Nothing in this section shall be construed to impair or limit the power of the city to define and declare nuisances and to cause their removal or abatement by summary proceedings, or otherwise.

Credits

Added by Laws 1969, c. 1065, § 1. Amended by Laws 1971, c. 698, § 1; S.L. 2000-164, § 3, eff. Aug. 2, 2000; S.L. 2001-386, § 2, eff. Aug. 26, 2001; S.L. 2001-448, § 2, eff. Oct. 20, 2001; S.L. 2002-118, § 2, eff. Sept. 20, 2002; S.L. 2003-23, § 1; S.L.

2003-42, § 1; S.L. 2004-6, § 1, eff. June 14, 2004; S.L. 2007-216, § 2, eff. July 12, 2007; S.L. 2008-59, § 2, eff. July 7, 2008; S.L. 2009-9, § 2, eff. March 23, 2009; S.L. 2009-263, §§ 1, 3, eff. July 10, 2009.

Editors' Notes

REPEAL

<This section is repealed by S.L. 2019-111, § 2.3, eff. Jan. 1, 2021. >

N.C.G.S.A. § 160A-432, NC ST § 160A-432
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N.C.G.S.A. § 160A-434

§ 160A-434. Appeals in general

Currentness

<Text of section eff. until Jan. 1, 2021.>

Unless otherwise provided by law, appeals from any order, decision, or determination by a member of a local inspection department pertaining to the State Building Code or other State building laws shall be taken to the Commissioner of Insurance or his designee or other official specified in G.S. 143-139, by filing a written notice with him and with the inspection department within a period of 10 days after the order, decision, or determination. Further appeals may be taken to the State Building Code Council or to the courts as provided by law.

Credits
Added by Laws 1969, c. 1065, § 1. Amended by Laws 1971, c. 698, § 1; Laws 1989, c. 681, § 7A.

Editors' Notes

REPEAL

<This section is repealed by S.L. 2019-111, § 2.3, eff. Jan. 1, 2021. >

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