IN THE
SUPREME COURT OF ARKANSAS

CONVENT CORPORATION, Individually and on Behalf of all Others Similarly Situated — **APPELLANT**

v. **NO. CV-20-216**

CITY OF NORTH LITTLE ROCK ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity — **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE ALICE GRAY, CIRCUIT JUDGE

APPELLANT'S REPLY BRIEF

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I. Appellees' contention that Convent non-suited its Constitutional Claims is a misstatement of fact.

Convent did not, as Appellees claim, "non-suit" its original complaint. In its Order entered on July 9, 2015, the Circuit Court dismissed Convent's constitutional claims based on a purported failure to exhaust administrative remedies **Add. 667, R. 1810.** On April 30, 2017, Convent filed a Motion for Voluntary Dismissal of Claim for Declaratory Judgment. **Add. 73, R. pt 2, 254.** This was a dismissal of only the Declaratory Judgment action. Therefore, Appellee's claim that Convent non-suited its constitutional claims is somewhat disingenuous. The Circuit Court's Order entered on July 9, 2015 dismissing Convent's constitutional claims (**Add. 667, R. 1810)** is an appealable order and is properly before this Court.

II. The Circuit Court correctly held that the City Council's condemnation action should reviewed according to the substantial evidence standard.

While the Appellees assert that the Circuit Court used the "wrong standard of review" (SoC1-2), they did not file any cross appeal regarding this, or any other ruling of the Circuit Court. In the absence of a cross appeal, the issue is not properly before the Court and the Circuit Court's ruling on the issue should not be reconsidered.

The Appellees' argument that the council's decision was subject to a *de novo* trial in circuit court is based on an erroneous reading of Arkansas Code Annotated §

14-56-425. To affirm Appellee's contention, the Court would have to ignore a phrase in the statute which limits its applicability to decisions under Subchapter 4, Municipal Planning. *See Clark v. Pine Bluff Civil Service Comm'n*, 353 Ark. 810, 120 S.W. 3d 541 (2003). *See also* **AB5-12.** The statute which authorizes a municipality to remove or raze buildings is Arkansas Code Annotated § 14-56-203 which is under Subchapter 2, Building Regulations. The Circuit Court correctly ruled that the standard of review for Convent's appeal of the City Council's decision is the substantial evidence standard.

Additionally, In reviewing an administrative decision by an agency or governing body, the Court should determine "whether the order or decision under review violated any rights under the laws or Constitution of the United States or of the State of Arkansas." *E.g., Harness v. Arkansas PSC*, 60 Ark. App. 265, 269-270, 962 S.W.2d 374, 375 (1998).

III. The Court's review of the condemnation decision should be limited to the record of the administrative proceedings.

Next, in their Brief, pg. 19, Appellee's rely on responses to Convent's Discovery requests to support the finding that the property was a nuisance. The court's review of the City Council's determination should be limited to the record of the administrative proceeding. The extraneous discovery information cited in Appellee's Brief contains information that was not part of the administrative proceeding and which the Council members would not have been aware of when

they made their decision. Ms. McHenry was not present at the Council meeting, did not provide any testimony, and was not available for cross-examination. This information obtained through discovery was not part of the administrative record and such extraneous and later obtained information cannot be considered as substantial evidence to support the City Council's decision.

IV. The City Council must develop adequate findings of fact and conclusions of law to enable to the Court to review its decision.

Appellee's argument that the City had no duty to provide findings of fact and conclusions of law is pretty much an admission that Appellees believe they do not have a duty to provide due process or to develop an adequate record at the administrative level. The principles in the cases cited by Convent in its Brief are applicable to any administrative proceeding. If the City is not required to develop adequate findings to demonstrate compliance with constitutional requirements or sufficient factual findings to show that its decision is supported by substantial evidence, how is the Court to review these issues?

Furthermore, there is case law that supports this requirement applies to situations where the Administrative Procedures Act (APA)

.does not apply. In *Mosley v. McGehee School Dist.*, 30 Ark. App. 131, 783 S.W.2d 871 (1990), the Court of Appeals held that the Workers Compensation Commission, whose proceedings are not governed by the APA (Ark. Code Ann. 25-15-202), must make "findings of fact with sufficient clarity and detail that [the court] may

determine whether they are supported by substantial evidence in the record before [the court]." *Id.* at 873. The City Council should do no less.

V. Appellees should be barred from raising the issue of standing because they failed to raise it at the administrative level and named Convent as the owner of the property throughout the administrative proceeding.

It is somewhat concerning that the City sought the Court's permission to supplement the addendum with its Motion on this issue but not with Convent's Response and Brief which can be found at pages 48 and 51 of part 2 of the record. Due to the number of bases for standing, these arguments can only be summarized in the space permitted here.

Because Appellees never raised the issue of property ownership or standing at the administrative level, they should be barred from raising that issue on appeal. The Arkansas Supreme Court has specifically held that, where the government has initiated an action against a party, the issue of standing may not be raised for the first time on appeal. *State v. Houpt*, 302 Ark. 188, 788 S.W.2d 239, 240-41 (1990).

Being fully aware of the ownership of the property at the time of the administrative proceedings, the City referred to Convent Corporation as the owner of the property throughout its file and the condemning resolution states that the property is "owned by Convent Corp." The statements in the record indicating Convent is the owner of the property were made by the City and are, therefore, properly taken as an admission of that fact. By naming Convent Corporation as the

owner in the administrative condemnation action, the City ceded the issue of standing. *Beebe v. Fountain Lake School Dist.*, 365 Ark. 536 231 S.W.3d 628, 635 (2006).

Being fully aware of the ownership and status of the taxes on the property, the City initiated and prosecuted the administrative condemnation against Convent and litigated this matter in both state and federal court as if Convent was the property owner for more than 17 months before raising the issue of standing. Convent redeemed the property and has expended significant resources defending the property. Therefore, Defendants should be estopped from challenging Convent's standing at this time. The doctrines of Judicial Estoppel,[1] Equitable Estoppel,[2] Waiver[3] and Laches[4] bar Appellees' from challenging Convent's standing at this late date in the proceedings.

Indeed, by proceeding against Convent, the City Council conferred standing upon Convent and now, at the appellate level, argues against itself asserting that it

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[1] *E.g., Dupwe v. Wallace,* 355 Ark. 521, 140 S.W.3d 464, 477 (2004).

[2]*E.g., American Casualty Co. of Reading PA., v. Hambleton*, 233 Ark. 942, 349 S.W. 2d 664 (1961) (*citing Geren v. Caldarera*, 99 Ark. 260, 138 S.W. 335 (1911)).

[3] *E.g., Smith v. Walt Bennett Ford, Inc*., 314 Ark. 591, 864 S.W.2d 817 (1993).

[4] *E.g., Goforth v. Smith*, 338 Ark. 65, 991 S.W. 2d 579, 586 (1999).

proceeded against the wrong party. Interestingly, while now arguing that it proceeded against the wrong party, the City has not acted to set aside the condemnation order nor to amend it.

VI. At the time of condemnation, Convent had the right to redeem the property and, therefore, had a legally cognizable interest giving it standing to challenge the condemnation action.

A party whose economic interest may be impaired by an order is an aggrieved party and has standing to appeal an adverse decision affecting the property. *E.g., Forrest Const. Inc. v Milam*, 345 Ark. 1, 43 S.W.3d 140, 144 (2001)(citing *Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996)).

The application of the case cited by Appellees, *Freeman v. Freeman*, 2013 Ark.App. 693, 430 S.W.3d 824, (2013), is limited. The Arkansas Supreme Court has held that "a redemption deed from the State is in effect a mere payment of taxes and does not purport to convey any title." *Buckeye Retirement Co. LLC., LTD. V. Walter*, 2012 Ark. App. 257, 404 S.W.3d 173, 177, (2012) (citing *Gott v. Moore*, 218 Ark. 800, 802, 238 S.W.2d 754, 756 (1951)). The state holds "the title solely for the payment of the taxes charged and chargeable thereon." *Buckeye Retirement Co. LLC., LTD.*, 2012 Ark.App. 257, 404 S.W.3d at 178 (citing 72 Am.Jur.2d *State & Local Taxation* § 907 (2001)). A seizure by the state of a property for unpaid taxes does not extinguish property rights existing at the time of the seizure. Indeed, upon payment of the taxes, property rights are restored to the owner, even if it is not

the owner who redeems the property. *Mabrey v. Millman*, 208 Ark. at 292, 186 S.W.2d 28, 30 (1945).

Convent's property rights were not extinguished by the certification to the state. Until the property was sold, Convent had a right to redeem the property.[5] This "right to redeem" is a substantive property right and a legally cognizable interest. *See Givens v. Haybar, Inc.*, 95 Ark.App. 164, 234 S.W.3d 896 (2006).

VII. The "Salerno Rule" is not the correct standard for evaluating a facial challenge to a statute.

Defendants argue that the ordinance is constitutional if it would be constitutional under any set of circumstances one could conceive. This is known at the *Salerno Rule* and this rule has not been consistently followed, even by the United States Supreme Court. *U.S. v. Frandsen*, 212 F.3d 1231, n. 3, (11th Cir. 2000) (citing *City of Chicago v. Morales*, 527 U.S. 41, n. 22, 119 S.Ct. 1849 (1999) (plurality opinion) (Stevens, J., Souter, J., and Ginsburg, J.)). In a plurality opinion, Justice Stevens states, "[t]o the extent we have consistently articulated a clear standard for facial challenges, **it is not the Salerno formulation**, **which has never been the**

[5] *Talley v. City of North Little Rock*, 381 S.W.3d 753, 2009 Ark. 601 (2009) cited by Appellees is distinguishable because, at the time of the condemnation vote in that case, the property had been sold by the state land commission to another party and, therefore, Talley no longer had a right to redeem the property.

decisive factor in any decision of this Court, including Salerno itself . . .." *Morales*, 527 U.S. at 55 n. 22, 119 S.Ct. 1849 (emphasis added). In another case, Justice Stevens explained that "the Salerno rule" was actually dicta and **does not accurately reflect the Court's position on facial challenges.** *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174,1175-1176, 116 S.Ct. 1582 1583 (1996) (Memorandum opinion by Stevens, J. denying cert.).

The rule, as reflected by precedent and the Court's practices, is, as stated by Justice Stevens in *Janklow*: "the fact that a law might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid." *Id.* at 1174, 116 S.Ct. at 1583 (quoting *United States v. Salerno*, 481 U. S. 739, 745 (1987)). This is far short of a requirement that a challenger demonstrate there are no conceivable circumstances under which the law could be constitutionally applied. The *Salerno Rule* has been rejected in many cases. *E.g., Johnson v. United State*s, 135 S. Ct. 2551 (2015); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

VIII. *Ingram v. City of Pine Bluff, Samuels v. Meriweather, Pitchford v. Earle* and *Heidorf v. Town of Northumberland* are clearly distinguishable and do not support Appellee's contentions.

Ingram v. City of Pine Bluff, 133 S.W.3d 382, 355 Ark. 129 (Ark. 2003) was dismissed because Mr. Ingram failed to file his appeal in Circuit Court within the timeframe required by District Court Rule 9. There is no indication that the property

was seized prior to the notice or opportunity to appear. Mr. Ingram failed to appear at the council meeting. And, most significantly, Mr. Ingram was given an opportunity to "bring the building up to code" or, in other words, an opportunity to repair his property. *Id.* at 386, 355 Ark. 129. The fact that Mr. Ingram failed to appear at the city council meeting is significant because, had he appeared, questions then may have been raised as to the adequacy of the proceedings. Mr. Ingram's failure to attend made those issues irrelevant.

In asserting that *Samuels v. Meriwether*, 94 F.3d 1163 (8th Cir. 1996) is controlling, Defendants ignore the fact that the North Little Rock City Council proceeded in a significantly different manner than the municipal defendant in the *Samuels* case. Samuels was given notice of specific violations to be corrected and the city permitted Samuels to make repairs prior to condemnation. *Id.* at 1165. The City sent a letter outlining twenty conditions found to be in violation of City ordinances. Three weeks later, the City notified Samuels by letter that the property was in violation of City Ordinance No. 1203. *Id.* Next, while the facts of exactly what type of hearing was provided to Samuels are not discussed in the opinion, it is clear that a "hearing" was provided. In the present case, a "hearing" was not provided despite Convent's request. *Id*. at 1167. Most importantly, in *Samuels*, the city specifically directed that the property be cleaned and repaired prior to condemnation. *Id*. at 1165. Indeed, it is apparent that the city did not condemn the property at the

"hearing" but instructed that repair work begin by a certain date—February 18. It was not until the owner had an opportunity to begin repairs and failed to do so that the property was condemned. *Id*. Thus, in *Samuels*, the property owner was provided notice of specific violations and was not only permitted to make repairs but was directed to do so prior to condemnation. The City only condemned the property after giving the owner 30 days to begin repairs. *Id.* If *Samuels* is "controlling," then it demonstrates the condemnation procedure in the present case was inadequate.

Appellees attempt to rely on *Pitchford v. City of Earle*, No. 3:06-cv-00140 (Nov. 2, 2007, E.D. Ark) and *Heidorf v. Town of Northumberland*, 985 F.Supp. 250, 257 (N.D.N.Y. 1997) to argue that, despite the fact that the Resolution passed by the City Council permits the property to be destroyed at any time without any further due process and that Plaintiff has been prohibited from using or repairing its building, it had not suffered a property deprivation until the building was actually demolished. Defendants reliance on these cases is misplaced. In *Pitchford*, the City's Resolution did not order that the property be destroyed, only that it be repaired. Additionally, the City did not have the funds to demolish the property. Therefore, in *Pitchford*, there was no imminent threat that the property would be destroyed. This is a significant difference from the present case. Also, of significance, the court noted that Pitchford had not asked for a hearing to challenge the resolution.

The *Heidorf* case actually provides more support for Convent's Fourth Amendment claim. This case notes that a meaningful interference with a property interest is a "seizure" under the Fourth Amendment. *Heidorf*, 985 F.Supp. at 257. This case further notes that a prior ruling of the United States Supreme Court in *Soldal v. Cook County, Illinois*, 506 U.S. 56, 113 S.Ct. 538 (1992) requires more under the Fourth Amendment reasonableness standard than a showing that the government provided due process. *Id.* at 259. The court cited the "need to conduct an independent review of the seizure for reasonableness in addition to any analysis regarding procedural due process. *Id.* (citing *Samuels*, 94 F.3d 1168).

IX. The City's ordinance enables the City's legislative body to determine guilt and punishment without any of the protections afforded by a judicial trial.

The purpose of the Bill of Attainder clause is to protect citizens from punishment inflicted by a legislative body without the safeguards of a judicial trial. The Resolution passed by the City Council in this matter clearly does just that.

Appellees argues that Convent was not punished. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." *Crain v. City of Mountain Home*, 611 F.2d 726 (8th Cir. 1979). Clearly the action by the City Council depriving Convent of its property and then subjecting it to a monetary fine without ever having provided a judicial trial is a Bill of Attainder.

Additionally, Appellees state that a person may be ticketed and tried in state district court. However, Appellees did not cite to any part of the Code which provides for such a trial. In fact, the Resolution states that the property shall be demolished and the fine is imposed. There is no mention of any further proceedings either in the Code or the Resolution.

X. The Circuit Court's ruling does indicate that the City's administrative procedures extend into Circuit Court.

Appellee's argue that the Court did not hold that the Rule 9 appeal is an extension of the City's administrative procedures. The ruling of the Circuit Court was that a proceeding in circuit court pursuant to District Court Rule 9 is an **administrative** remedy that must be exhausted prior to bringing constitutional claims. Referring to the appeal to circuit court pursuant to District Court Rule 9 as an administrative remedy, the City successfully argued in Circuit Court that Convent should not be permitted to raise its constitutional claims because it had not exhausted this alleged administrative remedy.

XI. The prospect of entering into a rehabilitation agreement is not permitted by the language of the Resolution and is not an adequate remedy for the City's failure to provide predeprivation due process.

When Convent was first notified of the City's intent to condemn the building, it stood ready, willing and able to make the necessary repairs. Convent sent its agent, Richard Livdahl to discuss the matter with city officials. **Add. 140-45, R. 199-204.**

He was informed that no permits would be issued to repair the building and this was confirmed in a letter from the assistant city attorney. **Add. 162, R. 221.** It became obvious to Mr. Livdahl that the City did not want the building repaired and that this was related to its prior use. **Add. 144, R. 203.** Convent had engaged someone to provide an estimate for the repairs and stood ready to make the required repairs. **Add. 314-27, R. 376-389.**

Appellees assert that Convent could have entered into a rehabilitation agreement while under a condemnation order. Based on Mr. Livdahl's contacts with the City, Convent had no reason to believe the City would approve any rehabilitation plan or that it would act in good faith in entering such an agreement. There is no guarantee, indeed it is highly unlikely, that Convent could have found a sponsor among the council members, particularly given the City Council's animosity towards this property based on its prior use.

Appellees contention regarding the availability of a rehabilitation agreement after condemnation is problematic for multiple reasons. First, it is entirely discretionary and, therefore, could itself be discriminatory, allowing elected officials to decide which properties maybe repaired and which may not. See *Shaffer v. City of Atlanta*, 223 Ga. 249, 251, 154 S.E.2d 241 (Ga. 1967). And, second, even in the circumstances where such a plan is approved, the condemnation order is not set

aside, leaving the City free to demolish the property at will,[6] even after repairs have been completed. It would have been foolhardy for the property owner to expend money to repair a building that the City could demolish at any time leaving the property owner with no recourse

Third, a rehabilitation plan, is not part of the ordinance. The fact that the City can deprive a person of their property rights and then, potentially, allow them to redeem these rights only on the whim of elected officials is constitutionally problematic. There are no standards to guide a property owner in preparing a plan that the council would approve nor to guide the council in the decision to approve or deny such a plan. Once the condemnation has occurred, the City has the right to demolish the structure and to impose a fine. Any action taken later does not undue the property deprivation. Therefore, the allowing of a rehabilitation plan is not a circumstance that makes the ordinance constitutional. *See Nev. Homebuilders Ass'n v. Clark County* , 121 Nev. 446, 117 P.3d 171, 173 (2005) (a statute must be interpreted "in a way that would not render words or phrases superfluous or make a provision nugatory") (internal quotation marks omitted). *Bourne Valley Court Trust v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir., 2016). Section 1.7.4 of the ordinance states that "condemned structures **shall** be removed destroyed and removed from the premises." **Add. 277, R. 339** (emphasis added). This does not

[6] See *Talley v. City of North Little Rock*, 2009 Ark. 601 (2009).

permit any other circumstances that would not result in the property being removed or destroyed.

Additionally, even if this were a meaningful remedy, it is a post-deprivation remedy. Both the state and federal constitutions require pre-deprivation due process which should include an opportunity to repair the property. \

Finally, in addition to the efforts by Mr. Livdahl prior to condemnation, counsel for Plaintiff attempted to negotiate such an agreement after the condemnation decision with the City Attorney's office but the officials refused to meet with Convent's counsel about it. The City's attorney indicated that the City would not set aside the condemnation order based on a rehabilitation plan. **Add. 1207, R. pt 3, 72.**

CONCLUSION

In their Brief, Appellees do not appear to defend the Circuit Court's dismissal of Convent's constitutional claims based on a failure to exhaust administrative remedies. The sparse administrative record in this matter is insufficient to meet the substantial evidence standard. Therefore, the condemnation decision should be set aside and the Court's dismissal of Convent's constitutional claims should be reversed.

Respectfully submitted,
/s/*Mickey Stevens*
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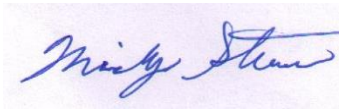
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Appellant's Brief by filing same with the electronic filing system (eflex) and US Mail to Marie Bernarde Miller, Assistant City Attorney, North Little Rock, Arkansas. A copy has also been delivered to the Circuit Court.



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