No. 8A-25-1 SIXTEENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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DURHAM GREEN FLEA MARKET, Petitioner-Appellant, v. CITY OF DURHAM, Respondent-Appellee	)	From Durham County 22CVS3973 From Court of Appeals COA24-246

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RESPONDENT-APPELLEE CITY OF DURHAM'S
MOTION TO DISMISS APPEAL

****

Relief Sought

Respondent-Appellee the City of Durham ("Respondent City") – pursuant to N.C. R. App. P. 37(a) -- moves the Court to dismiss the purported appeal of right of Petitioner Durham Green Flea Market ("Petitioner DGFM") which is based on the now-repealed N.C. Gen. Stat. § 7A-30(2) and the dissenting opinion in *Green Flea Market v. City of Durham*, No. COA24-246, 2024 WL 4941065 (N.C. App. Dec. 3, 2024) [App. 1]. In support of its motion, Respondent City shows the Court the following.[1]

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[1] In accordance with N.C. R. App. P. 37(c), Respondent City informed Petitioner DGFM's attorney of Respondent City's intention to file this motion to dismiss. Petitioner DGFM's attorney stated that Petitioner DGFM opposes the motion and will file a response.

Argument

The Court of Appeals' Dissenting Opinion Does Not Create an Appeal of Right to the Supreme Court.

The North Carolina General Assembly repealed N.C. Gen. Stat. § 7A-30(2) which used to provide an automatic right to appeal to the Supreme Court based on a dissent in a Court of Appeals' opinion. As rewritten, G.S. 7A-30 now reads as follows:

> **§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.**
>
> Except as provided in G.S. 7A-28, an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:
>
> (1) Which directly involves a substantial question arising under the Constitution of the United States or of this ~~State, or~~ State.
>
> ~~(2) In which there is a dissent when the Court of Appeals is sitting in a panel of three judges. An appeal of right pursuant to this subdivision is not effective until after the Court of Appeals sitting en banc has rendered a decision in the case, if the Court of Appeals hears the case en banc, or until after the time for filing a motion for rehearing of the cause by the Court of Appeals has expired or the Court of Appeals has denied the motion for rehearing~~."

Current Operations Appropriations Act of 2023, N.C. Sess. Law 2023-134, § 16.21(d) (the "Act"). The Act's repeal of dissent-based appeals of right is effective when the Act becomes law and "**applies to appellate cases filed with the Court of Appeals on or after that date**." *Id.* at § 16.21.(e) (emphasis added).

The Act became law on October 3, 2023. *See id.* at p. 625. Therefore, no dissent-based right to appeal exists for cases "filed with the Court of Appeals" on or after October 3, 3023. S*ee Taylor v. Bank of America, N.A.*, 385 N.C. 783, 791, 898 S.E.2d 740, 747 n.3 (2024) ("The repeal of N.C.G.S. § 7A-30(2) only applies to cases filed with the Court of Appeals on or after 3 October 2023").

What does "filed with the Court of Appeals" mean? The appellate rules and this Court's jurisprudence let us know the answer. In a dissent-based appeal that was decided after the effective date of the Act, this Court explained that the Act did not apply because the case was both filed and docketed at the Court of Appeals before the effective date. *Bottoms Towing & Recovery, LLC v. Circle of Service*, 386 N.C. 359, 372, 905 S.E.2d 14, 23 n.1 (2024) ("The General Assembly repealed the portion of N.C.G.S. § 7A-30 that conferred a right to appeal to the Supreme Court based on a Court of Appeals dissent. Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d). This appeal was **filed and docketed at the Court of Appeals before the effective date of that act**.") (emphasis added). Based on the language in *Bottoms Towing & Recovery, LLC v. Circle of Service*, a case is "filed with the Court of Appeals" when is it both filed and docketed there.

The appellate rules define what "filed" means. Under the appellate rules, "[a]n item is filed in the appellate court electronically when it is received by the electronic-filing site. An item is filed in paper when it is received by the clerk, except that motions, responses to petitions, the record on appeal, and briefs filed by mail are deemed filed on the date of mailing as evidenced by the proof of service." N.C. R. App. P. 26(a). Thus, under the appellate rules and *Bottoms Towing & Recovery, LLC v. Circle of Service,* a case is "filed with the Court of Appeals" within the meaning of the Act when the record on appeal is received through electronic filing site or mailed and docketed. Petitioner DGFM's appellate case was not "filed with the Court of Appeals" before the effective date of the Act's repeal.

Petitioner DGFM's appellate case has a "file date" of March 22, 2024, and a "docket date" of April 2, 2024, according to the Court of Appeals' docket sheet. Docket Sheet, *Durham Green Flea Mkt. v. City of Durham*, No. COA24-246. [App. 18]. Therefore, Respondent DGFM's appellate case was not "filed with the Court of Appeals" until April 2, 2024, after the Act's repeal became effective on October 3, 2023. Consequently, Petitioner DGFM has no dissent-based appeal of right.

Asserting that it does have an appeal of right, Petitioner DGFM would have this Court believe that an appellate case is "filed with the Court of Appeals" before the Court of Appeals receives a single document. Petitioner DGFM's theory is that it is the date a notice of appeal is filed in the trial court that is the relevant date to determine whether a dissent-based right to appeal exists. (Resp.'s Not. of Appeal and Conditional Pet. for Disc. Rev. p. 3). Petitioner DGFM's notice of appeal was filed in the Durham County Superior Court on June 30, 2023, (Rp. 193), before the October 3, 2023, effective date of the repeal of dissent-based appeals. (*Id.*).

Petitioner DGFM tries to support its theory by arguing: (1) the Court of Appeals acquires appellate jurisdiction over a case when the notice of appeal is filed; (2) it is the filing of the notice of the appeal that triggers the stay under N.C. Gen. Stat. § 1-294 instead of the docketing of the record because the perfection of a properly perfected appeal relates back to the date the notice of appeal was filed; (3) the General Assembly intended to tether the effective date of the repeal of dissent-based appeals to the notice of appeal; and (4) not using the date a notice of appeal is filed in the trial court as the relevant date to determine whether a dissent-based right to appeal exists

could lead to an "absurd" result in the scenario where a notice of appeal is filed in the trial court before the Act's October 3, 2023, effective date but, because an extension of time is granted, the record on appeal is not docketed in the Court of Appeals until after the effective date. (Resp.'s Not. of Appeal and Conditional Pet. for Disc. Rev. p. 3). Petitioner GSFM's arguments and theory are meritless.

First and foremost, the clear and unambiguous words of the Act make the date that an appellate case is filed with the Court of Appeals the relevant date to determine whether a dissent-based right to appeal exists, not the date a notice of appeal is filed in the trial court. The plain meaning of the words that the legislature chose is the first consideration for statutory construction. *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895–96 (1998).

If the legislature really intended to tether the effective date of the Act to notices of appeal, the legislature would have simply used different words. The legislature would have written that the Act applies to notices of appeals filed on or after the effective date of the Act rather than writing that the Act applies "to appellate cases filed with the Court of Appeals on or after that date."

Second, Petitioner DGFM is incorrect that the Court of Appeals acquires appellate jurisdiction over a case when a notice of appeal is filed in the trial court. Instead, "[u]ntil the case has been docketed in the appellate court, the appellate court does not formally acquire jurisdiction over the record." *Lawing v. Lawing*, 81 N.C. App. 159, 171, 344 S.E.2d 100, 109 (1986)(*citing Avery v. Pritchard*, 93 N.C. 266 (1885)); *see also Craver v. Craver*, 298 N.C. 231, 237, 258 S.E.2d 357, 361 n.6 (1979)

("...[U]ntil a record on appeal is filed and docketed, there is nothing pending before the appellate division."); *see also* N.C. R. App. P. 25(a) (lower tribunals retain jurisdiction to hear motions to dismiss appeals for failure to take timely action until an appeal is filed in the appellate court).

Third, Petitioner DGFM is incorrect that the filing of a notice of appeal gives rise to the stay under N.C. Gen. Stat. § 1-294. The stay does not arise until an appeal is perfected. N.G. Gen. Stat. § 1-294 ("**When an appeal is perfected** as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from ...") (emphasis added). An appeal is not perfected until it is docketed in the appellate division. *Swilling v. Swilling*, 329 N.C. 219, 225, 404 S.E.2d 837, 841 (1991).

Fourth, the legal fiction that the proper perfection of an appeal relates back to the date the notice of appeal was filed is about establishing when the trial court is divested of jurisdiction and the trial court proceedings on the judgment appealed from are stayed under N.C. Gen. Stat. § 1-294. The legal fiction has nothing to do with the reality of when an appellate case is "filed with the Court of Appeals."

Finally, if the scenario where a notice of appeal is filed before the October 3, 2023, effective date of the Act but the record of appeal is not docketed until after that date means that there would be no dissent-based right to appeal, that result would be consistent with the legislative intent to get rid of such appeals. If that result is "absurd" as Petitioner DGFM argues, the appropriate remedy is for the legislature to fix the law. The appropriate remedy is not for Petitioner DGFM to invite this Court

to engage in judicial activism by legislating from the bench to ascribe an unintended meaning to the words that the legislature chose.

Conclusion

For the foregoing reasons, Respondent City's motion to dismiss the purported dissent-based appeal of right should be granted.

This the 16th day of January 2025

/s/ Electronically submitted
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N.C. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed and served via email as follows

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This the 16th day of January 2024

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No. 8A-25-1 DISTRICT 16

SUPREME COURT OF NORTH CAROLINA

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DURHAM GREEN FLEA MARKET,	)	
	)	From Durham County
Petitioner,	)	2CVS3973
	)	
vs.	)	From the Court of Appeals
	)	COA24-246
CITY OF DURHAM,	)	
	)	
Respondent.	)	
	)	

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Contents of Appendix

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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-246

Filed 3 December 2024

Durham County, No. 22CVS3973

DURHAM GREEN FLEA MARKET, Petitioner,

v.

CITY OF DURHAM, Respondent.

Appeal by petitioner from order entered 9 June 2023 by Judge James E. Hardin Jr. in Durham County Superior Court. Heard in the Court of Appeals 9 October 2024.

Perry, Perry, & Perry, PA, by Robert T. Perry, for petitioner-appellant.

Durham City Attorney's Office, by John P. Roseboro and Aarin K. Miles, for respondent-appellee.

GORE, Judge.

Petitioner, Durham Green Flea Market ("DGFM"), appealed the decision of the Board of Adjustment for the City of Durham and Durham County ("BOA") that denied petitioner's appeal of a Notice of Violation ("NOV"). The Superior Court, Durham County, entered an Order on 9 June 2023: (1) affirming the BOA's administrative decision and (2) ordering petitioner to bring the property at issue into full compliance with a new site plan. Petitioner gave timely notice of appeal to this Court from the trial court's final Order. This Court has jurisdiction to hear and decide petitioner's appeal pursuant to N.C.G.S. § 7A-29. Upon review, we affirm.

In this case, respondent, City of Durham, issued a NOV to petitioner. The NOV indicated the violation: "Failure to comply with an approved site plan (D130045)." The NOV further specified, "[t]he above condition constitutes a violation of the Durham Unified Development Ordinance [("UDO")], Section 3.7.2, Applicability, Site Plan and 15.1.2 Violation (see attached). Correction of this violation will require the violator to remove all alterations inconsistent with the approved site plan within thirty (30) days of the receipt of this notice."

Upon receiving the NOV, petitioner filed an application for appeal of the NOV with the respondent's BOA. Petitioner alleged the NOV was issued in a discriminatory manner and was made contrary to respondent's policy (ordinance) and agreement with petitioner. The BOA held a hearing for this matter virtually on 22 September 2020. This case was continued, however, until the BOA resumed in-person hearings on 22 June 2022.

At the 22 June 2022 hearing, respondent's staff alleged the NOV:

> was [for] improvements to the property without site plan approval. There was a wide variety of things that was done to the property at the time that was without site plan approval, one of which was a permanent structure that covered handicap parking. . . . [S]o, we issued a [NOV] for numerous things. We didn't want to list just one thing because there were several different issues and things that [petitioner] has done to the property without site plan approval.

After a hearing on the NOV, the BOA voted 6 to 1 to uphold respondent's decision to issue a NOV to petitioner. The dissenting voter reasoned, "I cannot support

[respondent's] action due to the wording of the NOV . . . . [T]he NOV must list the violations. If there's 20 or 30, it must list 20 or 30. What this Notice is is a boilerplate form that doesn't meet the standards."

Petitioner appealed the BOA's decision to Superior Court, Durham County. The trial court determined that the NOV was properly issued by respondent's staff and that petitioner's due process rights were not violated. The trial court further ordered petitioner "to bring the property . . . into full compliance with a site plan, approved by the Durham City-County Planning Department, within thirty-six (36) months of the filing of the Order."

Petitioner presents two issues for review: (1) whether the trial court erred in concluding that petitioner's due process rights were not violated; and (2) whether the trial court abused its discretion by ordering petitioner to bring the property at issue into full compliance with a new site plan within thirty-six (36) months of the filing of the Order.

> The standard of review depends on the issues presented on appeal. When the issue is (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. However, if a petitioner contends the board's decision was based on an error of law, de novo review is proper.

Lipinski v. Town of Summerfield, 230 N.C. App. 305, 308 (2013) (cleaned up) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13 (2002)). "In reviewing a superior court order from an appeal of an agency decision, this Court has

a two-fold task: (1) determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) decide whether the court did so properly." *Kea v. Dep't of Health & Hum. Servs.*, 153 N.C. App. 595, 602 (2002) (cleaned up).

First, we address petitioner's due process arguments that the NOV "was not implemented in a fair manner" because: (1) respondent's staff failed to adhere to UDO § 15.2.1.A and 15.2.1.C; (2) the NOV was insufficient to inform petitioner in advance of the basis of the proceedings against petitioner; and (3) petitioner was not given notice and opportunity to be heard. In reviewing this claim, the superior court properly employed the de novo standard of review. *See* N.C.G.S. § 150B-51(b)(1)–(4), (c) (2023). We are unpersuaded by petitioner's arguments.

The UDO specifies, in relevant part: "When a violation is discovered, and is not remedied through informal means, written notice of the violation shall be given." UDO § 15.2.1.A. "Where the language of a[n] [ordinance] is clear and unambiguous, there is no room for judicial construction, and the courts must give [the ordinance] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575 (2002) (cleaned up). The plain language of this section does not mandate the use of "informal means" before written NOV is given—it provides that when a violation is discovered, "informal means" are permitted. North Carolina General Statutes § 160D-404(a) ("Notices of Violation") contains no such limitation—it imposes no superseding requirement that informal means be

exhausted before written NOV is issued.

Petitioner contends respondent's staff improperly issued the NOV because it failed to adhere to UDO § 15.2.1.C, which requires, in relevant part: "The notice shall include a description of the violation and its location, the measures necessary to correct it[.]" The NOV in question does, however, include these necessary components. The written NOV describes the violation: "Failure to comply with an approved site plan (D130045)[,]" includes attached images with location for reference, and specifies, "correction of this violation will require" removal of "all alterations inconsistent with the approved site plan[.]"

Petitioner generally argues respondent's NOV was "not implemented in a fair manner" because the NOV was insufficient to inform petitioner in advance of the basis of the proceedings against petitioner, and petitioner was not given sufficient opportunity to be heard. We disagree.

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Emp. Sec. Comm'n of N. Carolina*, 349 N.C. 315, 322 (1998) (citing *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985)). "Moreover, the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)).

The facts before us are like those in *Lipinski*, a case in which we held the "petitioner had adequate notice of the purpose and scope of the hearing" and was

"given notice and an opportunity to be heard[ ]" at a subsequent hearing. 230 N.C. App. at 309. Here, the NOV listed the violation and provided contact information with the option to reach respondent's staff directly to inquire about the violation at issue. Petitioner had two opportunities to be heard on the violation. At a quasi-judicial hearing, an attorney appearing on their behalf presented argument and testimony.

Based upon the record, N.C.G.S. § 160D-404(a), and UDO § 15.2.1, the trial court properly concluded that petitioner's due process rights were not violated.

In the second issue presented, petitioner argues the trial court abused its discretion by ordering petitioner to bring the property at issue into full compliance with a new site plan within thirty-six (36) months of the filing of the Order. We disagree.

Here, the trial court affirmed the BOA's order, which states, "[T]he requirements for reversing the [NOV] in [this case] have NOT been met, and that appeal is DENIED." The written NOV required compliance with an approved site plan "within thirty (30) *days* of the receipt of this notice." The Order of the trial court affirmed the BOA's decision and provided petitioner with additional time to bring their property into compliance. Petitioner has not shown an abuse of discretion where the trial court implemented a three (3) *year* window to bring the site into compliance instead.

For the foregoing reasons, the NOV was issued in compliance with N.C.G.S. §

160D-404(a), UDO § 15.2.1.C, UDO § 15.2.1.A, and in a fair manner in compliance with the due process. The trial court applied the appropriate standard of review, properly upheld the BOA's decision, and did not abuse its discretion in expanding the time constraints for petitioner to bring their site into compliance.

AFFIRMED.

Judge FLOOD concurs.

Judge TYSON dissents by separate opinion.

No. COA24-246 – *Durham Green Flea Market v. City of Durham*

TYSON, Judge, dissenting.

The superior court unlawfully denied Durham Green Flea Market ("DGFM") its Due Process rights. The City and the court failed to comply with and enforce the statutory and city ordinance requirements for issuing a lawful notice of violation. The City also did not comply with the constitutional requirements to hold an impartial, quasi-judicial hearing, which the superior court affirmed. I respectfully dissent.

I. Background

The City of Durham issued a purported Notice of Violation ("NOV") to DGFM based upon the City of Durham's Unified Development Ordinance ("UDO") § 15.2.1.A. The UDO specifies "[w]hen a violation is discovered, and is not remedied through informal means, *written notice of the violation shall be* given." (emphasis supplied). When such a notice is issued, UDO § 15.2.1.C mandates it "*shall include a description of the violation and its location*, the *measures necessary to correct it*, the possibility of civil penalties and *judicial enforcement* action, and *notice of the right to appeal*." UDO § 15.2.1.C (emphasis supplied).

The NOV issued to DGFM wholly failed to comply with these mandates. The notice identified the sole alleged violation as a "failure to comply with an approved site plan" and stated, "[c]orrection of this violation will require the violator to remove all alterations inconsistent with the approved site plan" as the measures necessary to correct the purported violation.

DFGM timely appealed. At the Board of Adjustment hearing, the dissenter to the board's decision correctly identified the NOV as unlawful and inadequate:

> "I cannot support the City's action due to the wording of the Notice of Violation. . . . [I]n my opinion, the Notice of Violation must list the violations. If there's 20 or 30, it must list 20 or 30. What this Notice of Violation is [ ] a boilerplate form and it doesn't meet the standards. . . . [E]ven if there's numerous obvious violations going on, the City must follow the correct procedures."

I agree. The NOV failed to specify how DFGM had purportedly failed to comply with the site plan, which violates the UDO § 15.2.1.C's requirement for all notices to contain a "description of the violation[.]" The notice also failed to list the "measures necessary to correct it" or describe any specific measures DGFM could implement to be in full compliance. UDO § 15.2.1.C. These failures clearly conflict with the notice of violation requirements provided in UDO § 15.2.1.C, the mandates established in N.C. Gen. Stat. § 160D-1402(k) (2023), and the statutory rules of construction favoring the free use of property. *See Innovative 55, LLC v. Robeson Cty.*, 253 N.C. App. 714, 720, 801 S.E.2d 671, 676 (2017). DGFM was denied adequate notice and a fair hearing. The City of Durham violated DGFM's rights to Due Process under the law. U.S. Const., amend. XIV, § 1; N.C. Const. art. I, § 19.

II. Standard of Review

When reviewing a superior court's order regarding a quasi-judicial zoning board of adjustment's decision, this Court is tasked with "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2)

deciding whether the court did so properly." *Harding v. Bd. of Adjustment of Davie Cnty.*, 170 N.C. App. 392, 395, 612 S.E.2d 431, 434 (2005) (citations omitted). When reviewing whether a superior court's order regarding "a zoning board of adjustment's decision [was proper], [t]he scope of our review is the same as that of the trial court." *Id.* (citations and quotations omitted). The proper standard of review "depends upon the particular issues presented on appeal." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation omitted).

Where the petitioner alleges "'the Board's decision was based on an error of law, 'de novo' review is proper.'" *Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527-28 (2000) (quoting *JWL Invs., Inc. v. Guilford County Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717). "Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment,* 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (citation omitted).

III. Plain Language

"'[A] zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property.'" *Innovative 55*, 253 N.C. App. at 720, 801 S.E.2d at 676 (first quoting *Dobo v. Zoning Bd. of Adjustment of Wilmington*, 149 N.C. App. 701, 712, 562 S.E.2d 108, 115 (2002) (Tyson, J., dissenting), *rev'd per curiam*, 356 N.C. 656, 576 S.E.2d 324 (2003)); and then citing

City of Sanford v. Dandy Signs, Inc., 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983)).

When the language of an ordinance is clear and unambiguous, "the courts must give it its plain and definite meaning." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974). The "words should be given their natural and ordinary meaning, and need not be interpreted when they speak for themselves." *Grassy Creek Neighborhood All. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citations omitted).

The plain language of UDO § 15.2.1 is unambiguous. "When a violation is discovered, *and is not remedied through informal means, written notice of the violation shall be given.*" UDO § 15.2.1.A (emphasis supplied). "The City must follow the requirements of the statute and charter, and the ordinances and procedures it established." *State ex rel. City of Albemarle v. Nance*, 266 N.C. App. 353, 361, 831 S.E.2d 605, 611 (2019).

Based upon the plain language and mandate of the ordinance, written notice of specific violation(s) must be issued *after* a violation was not remedied through informal means. *See* UDO § 15.2.1.C. The City immediately issued the purported NOV to DGFM without attempting to resolve the dispute informally or by allowing DGFM an opportunity to abate or cure any purported violation. *See MR Ent., LLC v. City of Asheville*, __ N.C. App. __, __, 905 S.E.2d 246, 251 (2024). The City failed to issue a lawful NOV according to the unambiguous language of the ordinance and

governing statutes. UDO § 15.2.1.C.

Additional language within the ordinance further supports this conclusion. The NOV must also include "a description of the violation and its location, the measures necessary to correct it, the possibility of civil penalties and judicial enforcement action, and notice of the right to appeal." UDO § 15.2.1.C.

As the dissenting member of the board correctly noted, the notice fails to allege which elements of the approved site plan were non-compliant or "the measures necessary to correct" them. UDO § 15.2.1.C. The City carries the burden of proving the existence of a violation of a local zoning ordinance. *City of Winston-Salem v. Hoots Concrete Co.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980). Because the City further failed to provide DGFM the informal means to cure or abate and failed to describe the specific measures required to correct the property's unstated inconsistencies with or deviations from the site plan, the NOV fails to satisfy the plain language requirements of the ordinance. *See id.*; UDO § 15.2.1.C.

IV. Judicial Notice and Due Process

"To receive adequate notice, the bases for the sanctions must be alleged. . . . In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him." *Dunn v. Canoy*, 180 N.C. App. 30, 40, 636 S.E.2d 243, 250 (2006) (brackets, citation, and quotations omitted). The mandates of Due Process and adequate notice is to inform a party of alleged failure to comply with the law and an opportunity to cure before depriving

the owner of their property rights. *McMillan v. Robeson Cnty.*, 262 N.C. 413, 417, 137 S.E.2d 105, 108 (1964).

The UDO mandates the purported non-confirming party must have the opportunity to cure and rectify the violation and the opportunity to be heard. *See* UDO § 15.2.1.C; *City of Randleman v. Hinshaw*, 267 N.C. 136, 139-40, 147 S.E.2d 902, 904-05 (1966). "[T]he opportunity to be heard must be 'at a meaningful time and in a meaningful manner.'" *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 309, 750 S.E.2d 46, 49 (2013) (quoting *Peace v. Employment Sec. Com'n of North Carolina*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998)).

In *Lipinski*, this Court held the petitioner's procedural Due Process rights were not violated because a meaningful opportunity to be heard was provided. *Id.* The petitioner was sent and received notice of a city ordinance violation, was able to meet with the town attorney to clarify the specific violation, and the parties agreed upon the scope and issues of the hearing beforehand. *Id.* At the hearing, the petitioner testified and was able to present evidence and ask questions. *Id.*

Unlike the petitioner in *Lipinski*, DGFM was unaware of the specific nature of the purported violations, and it was not given the opportunity before the hearing to informally meet with the site compliance officer to clarify, cure, or abate the specific violation(s). DGFM was not afforded a meaningful opportunity to be heard at the hearing. DGFM was barred from presenting evidence at the hearing of the alleged discriminatory and selective enforcement of the ordinance compared to similarly-

situated businesses in the area.

According to *Lipinski*, Due Process mandates a party purportedly violating a city ordinance must be notified of and given an opportunity to abate and cure the specific violations, afforded a pre-hearing conference to determine the scope of the hearing, and given the opportunity to be meaningfully heard. *Id.* The City has the burden and cannot reasonably show DGFM was afforded adequate notice and Due Process under the law. *Id.*; *City of Winston-Salem,* 47 N.C. App. at 414, 267 S.E.2d at 575.

A property owner must be sufficiently informed, not only of the proceedings against him, but also provided a "description of the violation and its location" and the "measures necessary to correct it." UDO § 15.2.1.C. A property owner in violation of a non-specific "failure to comply" cannot be characterized as being "on notice" of the violation itself or of the measures necessary to abate, correct, or cure the violation. Providing the "measures necessary to correct" any purported violation as an inverse statement of the violation itself is insufficient notice of the City's expectations or means to comply. *See id.* Without this specific information, correction of the violation requires the property owner to guess or infer what issue, or possibly several issues, the City is referring to or the "measures necessary" to abate or cure them.

Without evidence of the specific violations and ameliorative measures, DGFM could not rectify the violations it believes the City complains of without possibly being in violation of other unidentified problems. The proposed remedy for DGFM's

unspecified "failure to comply with [the] site plan" cannot merely be another unspecified "word salad" of "compliance with the site plan." *Id.*

This lack of specificity allows the City of Durham to "make it up" at the hearing or as the process proceeds and transforms the unlawful Notice of Violation into a prohibited "General Warrant", proscribed by the Due Process clause of the Fifth Amendment and prohibited by the Fourteenth Amendment. *See Andresen v. Maryland*, 427 U.S. 463, 491-92, 49 L. Ed. 2d 627, 649 (1976); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950) ("An elementary and fundamental requirement of Due Process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); U.S. Const., amends. V, XIV, § 1; N.C. Const. art. I, § 19.

The mandates of Due Process and notice is to specifically inform a party of its failure to comply with the law before depriving him of rights to the property. *McMillan,* 262 N.C. at 417, 137 S.E.2d at 108; *Innovative 55, LLC.*, 253 N.C. App. at 720, 801 S.E.2d at 676.

The City failed to provide adequate advance notice of the specified site plan violations and, as such, DGFM did not have the necessary information to abate, cure, or be adequately heard or present evidence at a fair and impartial hearing, in violation of DGFM's Due Process rights. *Id.*

V. Abuse of Discretion

The superior court is empowered by N.C. Gen. Stat. § 160D-1402(k) to "affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." N.C. Gen. Stat. § 160D-1402(k) (2023).

The trial court affirmed the Board of Adjustment's denial of appeal and *sua sponte* ordered DGFM to "bring the property . . . into full compliance with a site plan, *approved by the Durham City-County Planning Department*." (emphasis supplied). The order instructed DGFM to comply with filing a new site plan, rather than specifying the requirements for DFGM to achieve full conformity with the existing, approved site plan. The order merely reiterated the directions the court had made to counsel "for petitioner to submit for review and approval a site plan which is compliant with the law, for which the Durham City County Board has authority, or to come into compliance with the current site plan."

The statute does not authorize the superior court under *certiorari* and appellate review to both affirm the Board and further enlarge the burdens on Petitioner in its order. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11-12, 387 S.E.2d 655, 662 (1990) ("In its capacity as an appellate court reviewing the town's quasi-judicial subdivision permit hearing, the superior court could not properly grant summary judgment. . . . The superior court judge may not make additional findings." (citations omitted)). The trial court committed an error of law and abused its discretion by creating and modifying the instructions for how DGFM may come into

unspecified compliance with the site plan, including by requiring DGFM to submit a new site plan, when DFGM was provided defective and unspecified notice and no fair opportunity to be heard. N.C. Gen. Stat. § 160D-1402(k).

VI. Conclusion

The trial court failed to correctly interpret and apply the plain meaning of the UDO's mandates. UDO § 15.2.1.C. The City of Durham failed to provide an informal means to correct, cure, or abate, or to issue a specific notice of violation, or to provide a fair hearing. *See id.*; N.C. Gen. Stat. § 160D-1402(k); *Lipinski*, 230 N.C. App. at 309, 750 S.E.2d at 49; *McMillan,* 262 N.C. at 417, 137 S.E.2d at 108; *Innovative 55, LLC.*, 253 N.C. App. at 720, 801 S.E.2d at 676; *Mullane,* 339 U.S. at 314, 94 L. Ed. at 873.

The trial court also failed to protect DGFM's Due Process rights under the ordinance and statute. *Id.* In doing so, the trial court and the City denied DGFM of specific notice and an opportunity to abate or cure and its statutory and Due Process rights to present evidence, testimony, or be impartially heard. *See Lipinski*, 230 N.C. App. at 309, 750 S.E.2d at 49; *Mullane,* 339 U.S. at 314, 94 L. Ed. at 873. The order is affected by prejudicial errors mandating reversal and remand for entry of dismissal of the purported violations. *See MR Ent.*, __ N.C. App. at __, 905 S.E.2d at 251. I respectfully dissent.

No. 24-246

North Carolina Court of Appeals

Docket Sheet

Durham Green Flea Mkt. v. City of Durham

Case Number: 24-246

As of: 01/17/2025

Case Closed: Yes **Close Date:** 12-23-2024 **Case Type:** Civil (Tort, Contract, Real Property) **Mediation:** No

DURHAM GREEN FLEA MARKET,
Petitioner,

v.

CITY OF DURHAM,
Respondent.

Docket Date: 04-02-2024 **File Date:** 03-22-2024 **File Time:** 12:27 **Acquired Date:** 03-22-2024

Bond Collected: Yes **Docket Fee:** Yes **Pauper:** No Print Deposit: No **State Appeals:** -

History

Venue: Durham (16) **Heard In:** Superior Court

To SC: **From SC:**

Lower Court Number(s)

Location: Durham (16)

Judge: James E. Hardin Jr.

Case #: 22CVS3973

Tracking/Argue

Argue Date: 10-09-2024 (No oral argument by Rule 30(f))

Opinion

Opinion Date: 12-03-2024 Cert Date: 12-23-2024

Author: Honorable Fred Gore

Decision: Affirmed

Opinion Notes: Tyson(d)

Opinion Pages: 17 Opinion Cost: $ 3.40

Cite:

Slip Opinion: https://appellate.nccourts.org/opinions/?c=2&pdf=43979

Documents

Document	Date Recvd	Cert of Service	Rec/Brf Due	Resp. Due	Resp. Recvd	Mailed Out	Ruling	Ruling Date
(1) RECORD	03-22-2024	03-22-2024				04-03-2024		
(2) SUPPLEMENT	03-22-2024							

No. 24-246

(3) M-EXT-BR	04-15-2024	04-15-2024					Allowed	04-15-2024
(4) APPELLANT BRIEF	05-21-2024	05-21-2024				05-28-2024		
(5) M-GEN	06-05-2024	06-05-2024					Allowed	06-06-2024
(6) M-EXT-BR	06-14-2024	06-14-2024					Allowed	06-14-2024
(7) APPELLEE BRIEF	07-22-2024	07-22-2024				07-23-2024		
(8) REPLY	08-05-2024	08-05-2024				08-07-2024		
(9) M-DSSAPP	08-21-2024	08-21-2024		09-03-2024	09-03-2024		Denied	12-03-2024
(10) M-GEN	09-17-2024	09-17-2024					Allowed	09-19-2024
(11) SUPPLEMENT	09-20-2024							
(12) M-GEN	10-14-2024	10-14-2024			10-24-2024		Denied	12-03-2024
(13) NOTICE OF APPEARANCE	01-06-2025	01-06-2025						
(14) NA-DISSNT	01-06-2025	01-06-2025						

1 - RECORD
Filed: 03-22-2024 @ 12:27:11
FOR: Petitioner-Appellant Durham Green Flea Market
BY : Ms. Chelsi C. Edwards
PERRY, PERRY & PERRY, PA

2 - RECORD SUPPLEMENT
Filed: 03-22-2024 @ 12:27:36
FOR: Petitioner-Appellant Durham Green Flea Market
BY : Ms. Chelsi C. Edwards
PERRY, PERRY & PERRY, PA

3 - M-EXT-BR (Allowed) - 04-15-2024
Filed: 04-15-2024 @ 11:18:09
FOR: Petitioner-Appellant Durham Green Flea Market
BY : Ms. Chelsi C. Edwards
PERRY, PERRY & PERRY, PA

The following order was entered:

The motion filed in this cause on the 15th of April 2024 and designated 'Petitioner-Appellant's Motion for Extension of Time to File Petitioner-Appellant Brief' is allowed. Petitioner-Appellant's brief shall be filed on or before 21 May 2024.

By order of the Court this the 15th of April 2024.

4 - APPELLANT BRIEF
Filed: 05-21-2024 @ 17:55:06
FOR: Petitioner-Appellant Durham Green Flea Market
BY : Mr. Robert T. Perry
PERRY, PERRY & PERRY, PA

5 - MOTION NOTICE OF WITHDRAWAL OF COUNSEL OF RECORD (Allowed) - 06-06-2024
Filed: 06-05-2024 @ 14:39:05
FOR: Petitioner-Appellant Durham Green Flea Market
BY : Ms. Chelsi C. Edwards
PERRY, PERRY & PERRY, PA

The following order was entered:

The motion filed in this cause on the 5th of June 2024 and designated 'Notice of Withdrawal of Counsel of Record' is allowed. Chelsi C. Edwards is permitted to withdraw as counsel of record, and Robert T. Perry remains as counsel of record.

By order of the Court this the 6th of June 2024.

No. 24-246

6 - M-EXT-BR (Allowed) - 06-14-2024
Filed: 06-14-2024 @ 12:28:04
FOR: Respondent-Appellee City of Durham
BY : Ms. Aarin K. Miles
DURHAM CITY ATTORNEY'S OFFICE

The following order was entered:

The motion filed in this cause on the 14th of June 2024 and designated 'Respondent-Appellee's Motion for Extension of Time to File Appellee Reply Brief' is allowed. Respondent-Appellee's brief shall be filed on or before 22 July 2024.

By order of the Court this the 14th of June 2024.

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7 - APPELLEE BRIEF
Filed: 07-22-2024 @ 16:51:15
FOR: Respondent-Appellee City of Durham
BY : Mr. John P. Roseboro
DURHAM CITY ATTORNEY'S OFFICE

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8 - APPELLANT BRIEF REPLY
Filed: 08-05-2024 @ 17:04:52
FOR: Petitioner-Appellant Durham Green Flea Market
BY : Mr. Robert T. Perry
PERRY, PERRY & PERRY, PA

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9 - M-DSSAPP (Denied) - 12-03-2024
Filed: 08-21-2024 @ 11:51:27
FOR: Respondent-Appellee City of Durham
BY : Ms. Aarin K. Miles
DURHAM CITY ATTORNEY'S OFFICE

The following order was entered:

The motion filed in this cause on the 21st of August 2024 and designated 'Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction' is denied per opinion.

By order of the Court, sitting as a three-judge panel, this the 3rd of December 2024.

RESPONSE TO M-DSSAPP
Filed: 09-03-2024
BY : Mr. Robert T. Perry
PERRY, PERRY & PERRY, PA

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10 - MOTION RESPONDENT-APPELLEE'S MOTION TO AMEND THE RECORD ON APPEAL (Allowed) - 09-19-2024
Filed: 09-17-2024 @ 16:32:30
FOR: Respondent-Appellee City of Durham
BY : Ms. Aarin K. Miles
DURHAM CITY ATTORNEY'S OFFICE

The following order was entered:

The motion filed in this cause on the 17th of September 2024 and designated 'Respondent-Appellee's Motion to Amend the Record on Appeal' is allowed. Respondent-Appellee shall upload the attached documents as a supplement to the record on appeal on or before 27 September 2024.

By order of the Court this the 19th of September 2024.

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11 - RECORD SUPPLEMENT
Filed: 09-20-2024 @ 11:21:19
FOR: Respondent-Appellee City of Durham
BY : Ms. Aarin K. Miles
DURHAM CITY ATTORNEY'S OFFICE

No. 24-246

12 - MOTION RESPONDENT'S MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (Denied) - 12-03-2024
Filed: 10-14-2024 @ 12:14:39
FOR: Respondent-Appellee City of Durham
BY : Mr. John P. Roseboro
DURHAM CITY ATTORNEY'S OFFICE

The following order was entered:

The motion filed in this cause on the 14th of October 2024 and designated 'Respondent's Motion for Leave to File Reply Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction' is denied per opinion.

By order of the Court, sitting as a three-judge panel, this the 3rd of December 2024.

RESPONSE TO MOTION RESPONDENT'S MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
Filed: 10-24-2024
BY : Mr. Robert T. Perry
PERRY, PERRY & PERRY, PA

13 - NOTICE OF APPEARANCE
Filed: 01-06-2025 @ 09:48:30
FOR: Petitioner-Appellant Durham Green Flea Market
BY : Mr. Troy D. Shelton
DOWLING PLLC

14 - NA-DISSNT
Filed: 01-06-2025 @ 20:42:50
FOR: Petitioner-Appellant Durham Green Flea Market
BY : Mr. Troy D. Shelton
DOWLING PLLC

Financial Information

Receipts

Date Charged	Charge Type	Amount	Amount Paid	Document	Pages	Receipt #	Date Paid
07-23-2024	Printing	42.00	42.00	APPELLEE BRIEF	24	R082007324	08-08-2024
Invoice : V072047124							
04-02-2024	Docket Fee	10.00	10.00			R042001724	04-02-2024
Invoice : V032040924							
04-02-2024	Bond	250.00	250.00			R042001724	04-02-2024
Invoice : V032040924							
04-03-2024	Printing	463.75	463.75	RECORD	265	R042021724	04-08-2024
Invoice : V042001624							
05-28-2024	Printing	45.50	45.50	APPELLANT BRIEF	26	R052033424	05-31-2024
Invoice : V052045124							
08-07-2024	Printing	19.25	19.25	APPELLANT BRIEF	11	R082014024	08-19-2024
Invoice : V082007424							
	Assessment	51.00	51.00			R122006224	12-09-2024

No. 24-246

Invoice : V122014624

01-07-2025	Certification Fee	10.00	0.00

Invoice : V012015525

Payments

Payment Date	Payment Type	Amount	Check Number

Exhibits

Transcript(s) Electronically Filed

durhamfleamarketcase5-23-23-1711124871.pdf

Parties

Party Name	Role
Durham Green Flea Market	Petitioner-Appellant
City of Durham	Respondent-Appellee

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