REGARDING MUNICIPAL, QUASI-JUDICIAL PROCEEDINGS – EXHAUSTION OF ADMINISTRATIVE REMEDIES, AND APPLYING COLLATERAL ESTOPPEL TO DEFEAT COLLATERAL ATTACKS

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By: Keith H. Johnson
Poyner Spruill LLP
kjohnson@poyners.com

Ryan Fairchild
UNC School of Law
rfairchi@live.unc.edu

Poyner Spruill LLP

ATTORNEYS AT LAW

I. THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES APPLIES TO MUNICIPAL, QUASI-JUDICIAL PROCEEDINGS.

Under the doctrine of exhaustion of administrative remedies, if the legislature has created an effective statutory administrative remedy, that remedy is exclusive. *See Presnell v. Pell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979). As such, a party must first exhaust its administrative remedies before seeking relief from the courts. *Id.* Furthermore, failure to exhaust deprives a court of subject matter jurisdiction. *See Hentz v. Asheville City Bd. of Educ.*, 189 N.C. App. 520, 522, 658 S.E.2d 520, 522 (2008). By requiring exhaustion, the legislature protects administrative proceedings from "untimely and premature intervention by the courts," which would "completely destroy the efficiency, effectiveness, and purpose of the administrative agencies." *Presnell*, 298 N.C. at 722, 260 S.E.2d at 615 (quoting *Elmore v. Lanier*, 270 N.C. 674, 678, 155 S.E.2d 114, 116 (1967)) (internal quotation marks omitted). Thus, exhaustion is also a doctrine of judicial restraint. *See id.*

Exhaustion generally requires that a party satisfy five conditions before turning to the courts: "(1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute." *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992) (citing *Dyer v. Bradshaw*, 54 N.C. App. 136, 138, 282 S.E.2d 548, 550 (1981); *Presnell*, 298 N.C. at 721, 260 S.E.2d at 615). Typically, if a party has not "checked the boxes" required for exhaustion, the party cannot bring a claim before the courts. However, North Carolina courts have noted two primary exceptions to the doctrine of exhaustion.[1]

First, a party need not exhaust administrative proceedings where the administrative remedy would be inadequate. *See Huang*, 107 N.C. App. at 715, 421 S.E.2d at 815. A remedy is inadequate "unless it is 'calculated to give relief more or less commensurate with the claim.'" *Id.* (citing Louis L. Jaffe, Judicial Control of Administrative Action 426 (1965)). An example of inadequacy includes where "a party seeks monetary damages and the agency is powerless to grant such relief . . . ." *Id.* (citing Jacob A. Stein et al., Administrative Law § 49.02[1] (1992)); *see also Philips v. Pitt Cnty. Mem'l Hosp.*, 731 S.E.2d 462, 470 (N.C. Ct. App. 2012) (holding that, where the plaintiff sought monetary damages, but the hospital's bylaws governing administrative proceedings did not provide for monetary damages, the doctrine of exhaustion was inapplicable). However, mere inclusion of a claim for monetary damages does not necessarily circumvent the need to exhaust. *See, e.g.*, *Jackson v. N.C. Dep't of Human Res.*, 131 N.C. App. 179, 189, 505 S.E.2d 899, 905 (1998).

Second, exhaustion is not required where administrative proceedings would prove futile. *Id.* Futility and inadequacy are often treated as equivalent, but futility can also refer to the inadequacy of the administrative proceeding itself, as opposed to the inadequacy of the remedy.

[1] Two other exceptions exist beyond the two discussed here. However, these exceptions do not appear to be discussed in North Carolina cases: (1) where the agency action would cause irreparable injury, and (2) where the agency acts in excess of its statutory authority. *See* Stein et al., *supra*, § 49.02[2] and [3].

See Stein et al., *supra*, § 49.02[4]. For example, futility refers to situations where an agency "has deliberately placed an impediment in the path of a party" or where agency policies "are so entrenched that it is unlikely that parties will obtain a fair hearing." *Id.* The party claiming futility or inadequacy (1) must include such allegations in the complaint and (2) ultimately bears the burden of proving futility or inadequacy. *Huang*, 107 N.C. App. at 715, 421 S.E.2d at 815.

The doctrine of exhaustion also applies to municipal proceedings. Where the legislature has provided a statute governing municipal proceedings, a party seeking relief from the courts from a municipal proceeding must first exhaust administrative remedies.. *See, e.g.*, *Town of Leland v. HWW, LLC*, No. COA11-210, 2012 N.C. App. LEXIS 233, at *15–16 (Feb. 7, 2012) (unpublished table opinion) (discussing (1) how N.C. Gen. Stat. § 160A-388(b) "governs an appeal from a decision of a Town's zoning administrator" and (2) how those proceedings involve "quasi-judicial power" and administrative determinations); *Potter v. City of Hamlet*, 141 N.C. App. 714, 720, 541 S.E.2d 233, 236 (2001) (also evaluating administrative proceedings provided for by N.C. Gen. Stat. §160A-388, and finding that the plaintiff "failed to file an appeal with the City's Board of Adjustment," barring the plaintiff's ability to bring those claims to court); *Midgette v. Pate*, 94 N.C. App. 498, 501–02, 380 S.E.2d 572, 574–75 (1989) (evaluating zoning proceedings and holding that, insofar as the plaintiff's claims related to her failure to pursue those proceedings, those claims were barred); *see also Guilford Cnty. Planning & Dev. Dep't v. Simmons*, 102 N.C. App. 325, 327–28, 401 S.E.2d 659, 661 (1991) (evaluating administrative proceedings under N.C. Gen. Stat. § 153A-345(e), and finding that, because the property owner failed to appeal the board of adjustment's decision, the property owner was barred from appealing that decision). Several cases elaborate this point.

In *Town of Leland*, a developer, HWW, submitted a site plan that included "an area of open space described as a recreation area" to the Town Council. *See* 2012 N.C. App. LEXIS 233, at *1–2. The Town Council approved of the site plan, but later adopted a new zoning ordinance that limited the use of open, recreational space. *Id.* at *2–4. Citizens complained that HWW's was not complying with the new ordinance by using part of the recreation area to dump dirt and debris. *Id.* at *4. In response, the Town Manager began to pressure HWW to come into compliance. *Id.* at *4–5. HWW failed to fully comply, and the Town ordered HWW to begin removing dirt from the recreational area. *Id.* at *5–6.

At first, HWW appealed the Town's order, but then withdrew its appeal and agreed to move the dirt. *Id.* at *6–7. The Town replied that "[s]ince [HWW] has withdrawn its appeal from the decision of the Code Enforcement Officer, the decision *now stands as the ruling* in this matter." *Id.* at *7 (alterations in original) (emphasis added). Later, HWW again failed to comply, and the Town filed a complaint seeking a court order for HWW to remove the dirt. *Id.* at *8. The trial court granted the Town's motion for summary judgment and HWW appealed. *Id.* at *12–13.

In its analysis, the Court of Appeals first cited the doctrine of exhaustion and noted that N.C. Gen. Stat. § 160A-388(b) governed appeals from a decision by a Town's zoning administrator. *Id.* at *15. Furthermore, "[t]he board of adjustment is an administrative body with quasi-judicial power whose function is to review and decide appeals which arise from the

decisions, orders, requirements or determinations of administrative officials, such as building inspectors and zoning administrators." *Id.* at *16 (quoting *Midgette v. Pate*, 94 N.C. App. 498, 502, 380 S.E.2d 572, 575 (1989)) (internal quotation marks omitted). The Court of Appeals held that, if a party was not satisfied with a board of adjustment ruling, the party could *then* appeal to superior court. *Id.* (citing *Grandfather Vill. v. Worsley*, 111 N.C. App. 686, 688, 433 S.E.2d 13, 15 (1993)). However, because "HWW chose to with draw its appeal of the [Town's] decision," HWW was "precluded from raising any defenses." *Id.* at *18 ("We conclude the effect of withdrawing the appeal is indistinguishable from not filing an appeal at all . . . ."). Not only had HWW not exhausted its administrative remedies in its dispute with the Town, but by doing so, it was then precluded from appealing the Town's decision.

In *Grandfather Village*, the Village asked a convenience store owner to remove two signs; the Village notified the owner that he would be assessed a daily penalty if he did not remove the signs within 60 days. *Grandfather Village v. Worsley*, 111 N.C. App. 686, 687, 433 S.E.2d 13, 14 (1993). After sixty days had passed, the Village's zoning administrator told the owner (1) the total penalty amount, and (2) that "[i]f you disagree with my decision . . . you may appeal to the Board of Adjustment." *Id.* at 687–88, 433 S.E.2d at 14. The administrator also gave the owner a thirty day limit to respond. *Id.* More than thirty days passed before the owner "sent a letter to the zoning administrator's office purporting to give notice of appeal of the assessment." *Id.* at 688, 433 S.E.2d at 14.

In its analysis, the Court of Appeals noted (1) that N.C. Gen. Stat. § 160A-381 to -394 governed the enactment and enforcement of zoning ordinances; (2) that N.C. Gen. Stat. § 160A-388(b) in particular governed appeals from a decision by the city's zoning administrator; and (3) that the Village had an ordinance prohibiting the owner's sign placement. *Id.* at 688, 433 S.E.2d at 14–15. The Court of Appeals then dismissed the owner's arguments on appeal, finding that "[i]n this case, it is uncontested that defendant failed to file any notice of appeal with the zoning administrator or the board of adjustment within the required 30 days . . . ." *Id.* at 689, 433 S.E.2d at 15. Finally, the court held that "[h]aving failed to exercise his administrative remedies, [the owner] cannot now collaterally attack the determination of the zoning administrator." *Id.* Thus, both failure to *exhaust* and failure to *exercise* one's administrative remedies preclude a party from appealing to the courts.

As previously discussed, a party must meet all the requirements of exhaustion unless there is an exception. *See Huang v. N.C. State Univ.*, 107 N.C. App. 710, 713–15, 421 S.E.2d 812, 814–15 (1992). However, one further case involving municipal proceedings illustrates how a party might still circumvent the exhaustion requirement.

In *Town of Kill Devil Hills*, Dominion North Carolina Power determined that the Town of Kill Devil Hills needed more power—as such, more power lines would need to be built to the area. *See State ex rel. Utils. Comm'n v. Town of Kill Devil Hills*, 194 N.C. App. 561, 563, 670 S.E.2d 341, 343 (2009). Dominion proposed a new power line corridor, but the Town's Board of Commissioners objected and adopted an ordinance limiting all above-ground power lines within Town limits to a single corridor. *See id.* Dominion did not apply to the Town's Board for a

variance, but instead filed a complaint with the North Carolina Utilities Commission "seeking to preempt the ordinances and to allow Dominion to site a second overhead transmission line in a new corridor through the Town." *Id.* at 564, 670 S.E.2d at 343-44. The Commission sided with Dominion and the Town appealed. *Id.* at 564, 670 S.E.2d at 344.

Before the Court of Appeals, the Town argued, among other things, that the "Commission did not have jurisdiction to adjudicate th[e] dispute because Dominion failed to exhaust its administrative remedies before filing its complaint with the Commission . . . ." *Id.* at 568, 670 S.E.2d at 346. Instead, Dominion should have "first [sought] relief from the ordinances via the Town's Board of Adjustment . . . ." *Id.* The Court of Appeals disagreed. *Id.* After citing the general rule of exhaustion from *Presnell*, the Court of Appeals noted that the purpose of the exhaustion doctrine "is to ensure that 'matters of regulation and control are first addressed by commissions or agencies *particularly qualified for the purpose*.' " *Id.* (emphasis in original) (citing *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979)). The court then held that, "[w]hile the siting dispute between Dominion and the Town implicate[d] a local zoning issue, the real issue was . . . a decision which the Commission [was] uniquely qualified to address." *Id.* at 568–69, 670 S.E.2d at 346. Thus, Dominion had no need to exhaust its administrative remedies before the Board of Adjustment because the Commission, not the Board, was the proper body to hear the matter. Similarly, if a property is located outside the jurisdiction of a regulating government entity, an affected party need not appeal any decision by that entity. *See Guilford Cnty. Planning & Dev. Dep't v. Simmons*, 115 N.C. App. 87, 89, 443 S.E.2d 765, 767 (1994).

To summarize, if the legislature has provided an effective administrative remedy, a party must exhaust that administrative remedy before seeking relief from the courts. Furthermore, the doctrine of exhaustion applies to quasi-judicial, municipal proceedings just as to other administrative proceedings. A party seeking to avoid exhaustion must show that its case falls into an exception or that its case does not fall under the statutory administrative remedy provided by the legislature. Otherwise, courts are deprived of subject matter jurisdiction until the party has exhausted administrative remedies. Finally, a party that has failed to exhaust, particularly by failing to appeal claims through administrative proceedings, may be precluded from ever bringing those claims before the courts.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL CAN ALSO APPLY TO MUNICIPAL, QUASI-JUDICIAL PROCEEDINGS, PROVIDING FINALITY AND A SHIELD AGAINST COLLATERAL ATTACKS.

Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial *or administrative* proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (quoting *Thomas M. McInnis and Assocs. v. Hall*, 318 N.C. 421, 433-34, 349 S.E.2d 552, 560 (1986))(emphasis added). Thus, "collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an

entirely different claim." *Id.* (quoting *Hales v. N.C. Ins. Guar. Ass'n.*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994)). The doctrine is premised on a policy of "protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Id.*, 358 N.C. at 16, 591 S.E.2d at 880 (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)).

In *Maines v. City of Greensboro*, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980)(citation omitted), the North Carolina Supreme Court explained that "an essential issue of fact which has been litigated and determined by an administrative decision is conclusive between the parties in a subsequent action."

Following *Maines*, the North Carolina Court of Appeals in *In re Mitchell*, 88 N.C. App. 602, 605, 364 S.E.2d 177, 179 (1988), developed a two-part test for whether an administrative decision is given collateral estoppel effect, based on whether it is "judicial" or "quasi-judicial" in nature, as opposed to "simply 'administrative'" or "legislative." *Id.*; *see also Gray v. Laws*, 915 F. Supp. 747, 759 (E.D.N.C. 1994) ("The general rule in North Carolina is that an agency decision that is judicial or 'quasi-judicial' in nature is a final judgment on the merits for the purpose of collateral estoppel.").

An administrative decision is "quasi-judicial" – and therefore, given collateral estoppel effect – if the administrative body: (1) provides notice and a hearing before rendering its decision; and (2) "provides, under legislative authority for the proceeding's finality and review." *Mitchell*, 88 N.C. App. at 605, 364 S.E.2d at 179; *Catawba Mem'l Hosp. v. N.C. Dep't of Human Res.*, 112 N.C. App. 557, 565, 463 S.E.2d 390, 394 (1993) (applying *Mitchell* and holding that when statutory provisions governing certificate of need appeals "adequately provide[d] . . . for the proceeding's finality and review" of a final agency decision, the administrative order was a final judgment with preclusive effect); *Lancaster v. N.C. Dep't of Env't & Natural Res.*, 187 N.C. App. 105, 111, 652 S.E.2d 329, 362-63 (2007) ("The superior court judge correctly stated at trial that he was bound by the finding in the 2001 final agency decision under the doctrine of collateral estoppel . . . . The 2001 final agency decision stands unreversed and therefore the parties and this Court are bound by that decision's finding that the releases on petitioner's property occurred in 1989 and 1991.").

In applying collateral estoppel, courts must determine whether an issue that is dispositive to a party's claims was adversely decided against that party in a previous proceeding; if so, collateral estoppel requires dismissal. *See Maines*, 300 N.C. at 133, 265 S.E.2d at 160 ("Plaintiff has not sought judicial review of the administrative determination that he moved his residence outside the city limits but rather filed an original action in Guilford County Superior Court . . . . [A]n essential issue of fact which has been litigated and determined by an administrative decision is conclusive between the parties in a subsequent action. We are therefore bound by the determination that plaintiff moved outside the City limits of Greensboro."); *see also, e.g.*, *Whiteheart v. Waller*, 199 N.C. App. 281, 284, 681 S.E.2d 419, 421-22 (2009) (quoting *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973)) (explaining that collateral estoppel "precludes relitigation of a fact, question or right in issue: when there has been a final judgment

or decree, necessarily determining [the] fact, question or right in issue . . . and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit").

A recent example of applying collateral estoppel arose from a municipal proceeding to condemn a building due to its deteriorated condition. The Court of Appeals ruled in a unanimous, published decision that a property owner was collaterally estopped from re-litigating in Superior Court the issue of whether its building was unsafe and a hazard, since a municipal code officer had already conducted a hearing and found it was unsafe. *Hillsboro Partners, LLC v. The City of Fayetteville*, 738 S.E.2d 819 (N.C. Ct. App. March 19, 2013)(copy attached). In *Hillsboro Partners*, at issue was an unoccupied church building that had fire and other damage. A City inspector notified the owner that, based upon an inspection, the church building had been declared dangerous to public health and was condemned. *Id.* at 824. The inspector gave notice that he would hold a hearing, at which time the property owner would be entitled to present evidence and arguments regarding the building's condition, and following the hearing, the inspector would issue such orders for repair or demolition of the building as deemed appropriate. This notice also informed the property owner of their right to appeal any such order to the City Board of Appeals by giving notice within 10 days following issuance of any such order. *Id.*

The hearing was held at which evidence concerning the building's condition was presented. The property owner, however, did not attend the hearing or present any evidence. *Id.*

Following that hearing, the city's code enforcement manager issued an order finding the building constituted a fire, health and safety hazard. Specific defects in the building that were found were itemized in the order (*e.g.*, ceiling and ceiling joists, floor framing and flooring, interior and exterior walls). Pursuant to G.S. 160A-429, the property owner was ordered to repair or demolish the building in 60 days, and failure to do so would result in the city staff seeking an ordinance for demolition of the building. *Id.*

The property owner was also reminded in that order of its right to appeal it to the City appeals board within 10 days, pursuant to G.S. 160A-430. The owner did not exercise their statutory right to appeal that order or the inspector's findings. Consequently, that order became final pursuant to G.S. 160A-430. *Id.* at 825.[2]

The owner at first intended to demolish the building, and applied for a demolition permit. However, it subsequently changed its mind. The owner claimed that in conducting an asbestos survey in preparing to demolish the building, which was done long after the inspector held the hearing and issued his order, it learned the building was more structurally sound than previously thought. The owner then lobbied the City Attorney's Office, and then the mayor and City Council to save its building.

[2] The City Council subsequently adopted an ordinance for the building to be demolished if the owner failed to comply with the inspector's final order.

The property owner subsequently filed two different lawsuits in Superior Court against the City, one before the City demolished the building, and again after the City did so. Based on its "new" information about the building's condition, the owner in its pre-demolition suit sought to enjoin the City from demolishing the building. The owner's motion for a preliminary injunction was denied, and the City's subsequent motion to dismiss was granted. In each of those rulings, the Superior Court found the plaintiff had failed to exhaust its administrative remedies since it had failed to appeal the order finding the building was unsafe and a hazard, and thus, the Court lacked subject matter jurisdiction. The owner did not appeal that decision.

The City proceeded and had the building demolished.

Undeterred, the owner filed a second civil action against the City after the demolition, asserting a takings claim. It was this case that reached the Court of Appeals. The City again moved to dismiss the suit. This time, before a different Superior Court judge than the one who had dismissed the owner's first suit, the City's motion was denied. The City exercised a right of immediate appeal. On the briefs alone, the Court of Appeals unanimously reversed the order denying the City's motion to dismiss, and held the owner was collaterally estopped from relitigating the pre-demolition condition of its building.

As the Court of Appeals noted, no compensation is required if the property that is taken was a nuisance threatening public health or safety, as such action falls within the proper exercise of the State's police powers. *Id.* at 827, *citing Barnes v. North Carolina State Highway Commission*, 257 N.C. 507, 514, 126 S.E.2d 732, 738 (1962). To get around this, the property owner by necessity had to allege that its building was *not* a hazard or otherwise unsafe – the very issue on which the building inspector had previously held a hearing to determine and finding the building *was* a hazard.

After determining the hearing held by the inspector was quasi-judicial in nature, the Court found that all of the requirements for collateral estoppels were met, namely:

- The prior administrative order the inspector issued was final with regard to the issues he addressed;
- The issue of whether the owner's building was a fire, health and safety hazard, raised in this second lawsuit, was identical to the one at issue in that quasi-judicial, administrative hearing; and
- That issue was actually litigated in that hearing.

Id. at 825-826.

In doing so, the Court flatly rejected the owner's argument that it had obtained and presented "new evidence" after the inspector's hearing that in fact the building was sound and not a hazard. The Court stated:

> Plaintiff did not independently inspect or otherwise verify that [the City's] claims were accurate prior to the [administrative] hearing. Even taking plaintiff's claims as true, plaintiff cannot now use its own failure to adequately inspect its own property prior to the [administrative] hearing to avoid the administrative process put in place by the North Carolina legislature and the City . . . .This case is not one where the situation has changed in such a way as to render the facts at issue in the prior determination inapplicable. . . . Plaintiff claims only that it did not know the physical state of the building at the time of the hearing, not that the state of the building had actually changed between the time of the hearing and the demolition order.

Id. at 825.

The Court also noted there was no evidence the plaintiff had begun repairing the structure, which was also an option under the inspector's order. *Id*,. n.2.

Since the owner/plaintiff was collaterally estopped from re-litigating the pre-demolition condition of its building, its takings claim was dismissed on appeal. *Id.* at 826-828. The holding in *Hillsboro Partners* reinforces the finality to municipal, quasi-judicial proceedings.[3]

[3] The plaintiff in *Hillsboro Partners* subsequently petitioned the N.C. Supreme Court to exercise discretionary review. That petition is pending.