



Mandamus to Require Enforcement of Local Ordinances

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A restaurant is located in a residential zone, operating as a nonconforming use. The owner recently began construction of a new wing on the restaurant building, and neighbors have complained to the city, arguing that the new wing would be an improper expansion of a nonconforming use. As far as the neighbors can tell, the city has done nothing; construction has continued on the new wing. Therefore the neighbors bring suit against the city to obtain a writ of mandamus that would require the city to enforce the zoning ordinance against the restaurant.

A city regulates and limits the number of taxicabs allowed in the city, and as a result the fee for obtaining a taxicab permit is significant. Existing permit holders believe the city is more interested in receiving the permit fees than in otherwise enforcing the ordinance and claim that cabs from an adjoining city are operating within the city without a permit. Although they have complained to the city and demanded that it enforce its taxicab ordinance, they still see the foreign cabs operating in the city. Therefore the permit holders bring suit against the city to obtain a writ of mandamus that would require the city to enforce the taxicab ordinance against these out-of-city cabs.

Would or should these mandamus suits succeed, and what sort of relief might these plaintiffs expect? This *Local Government Law Bulletin* reviews North Carolina case law on these questions, which is all from the past twenty-five years and almost exclusively from the state court of appeals. It then goes on to describe some of the vulnerabilities in this existing case law, should a comparable case be argued to and decided by the North Carolina Supreme Court.

The Elements of Mandamus

Mandamus is a so-called extraordinary writ that, when issued, directs a public officer to perform a specific duty. It exists to relieve the frustration of persons who are entitled to have an officer take a specific action but face a persistent refusal by the officer to do so. As an extraordinary writ its issuance is intended to be rare, and a trial court enjoys a high degree of discretion

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in deciding whether issuance of the writ is appropriate. In *In re T.H.T.*, the North Carolina Supreme Court identified five elements necessary to a successful mandamus suit:¹

1. The party seeking relief must demonstrate a clear legal right to the act requested.
2. The defendant must have a legal duty to perform the act requested, and the duty must be clear and not reasonably debatable.
3. Performance of the duty-bound act must be ministerial in nature and not involve the exercise of discretion.
4. The defendant must have neglected or refused to perform the act requested, and the time for performance must have expired.
5. There must be no alternative, legally adequate remedy available (the court may only issue a writ of mandamus in the absence of such a remedy).

Midgette v. Pate

In 1989, a panel of the North Carolina Court of Appeals first applied the rules of mandamus to the question of whether a city might be ordered to enforce a local ordinance, holding that a person suffering special damages because of an alleged violation of a local zoning ordinance could bring an action in mandamus against the local government or its zoning administrator to require enforcement of the ordinance. The case was *Midgette v. Pate*.²

Doris Midgette lived next door to the Pates in a subdivision within the zoning jurisdiction of the town of Snow Hill. The town had issued building and special use permits to the Pates to allow them to construct a swimming pool and bathhouse on their two lots. In her suit Midgette alleged a number of problems, some of which were violations of the zoning ordinance and some of which were violations of the restrictive covenants applicable to both homeowners. These included allegations that the Pates

- had sold memberships in the pool and thus were operating a commercial enterprise;
- had constructed buildings not included in the building or special use permits;
- were causing parking issues that violated the zoning ordinance; and
- had constructed a fence that was either too high, too close to the road, or both.

Midgette complained to the town about the zoning violations and, in her eventual lawsuit, alleged that the town had ignored her complaints. She brought the suit seeking, inter alia, a mandamus order against the town (or against its zoning administrator—the opinion is not clear) directing that the zoning ordinance be enforced. (She also sought to attack the validity of the permits that were issued to the Pates and to obtain an injunction against the couple to cease violating the restrictive covenants.³) The trial court granted motions by all defendants—the Pates, the town, and various town officials—to dismiss for failure to state a claim.

1. 362 N.C. 446, 453–54, 665 S.E.2d 54, 59 (2008).

2. 94 N.C. App. 498, 380 S.E.2d 572 (1989).

3. The state court of appeals held that the plaintiff had stated a cause of action regarding the covenants, and for that reason reversed an order granting the Pates' motion to dismiss. The court also held that the appropriate method of challenging the permits would have been an appeal to the board of adjustment or from the board of adjustment to superior court. Because the plaintiff did not follow that course, the court affirmed the dismissal of those counts in the complaint.

In deciding the mandamus count the appellate court considered four issues, each quite briefly (and not in the order listed here). It began with the standard point that in order for mandamus to be available, the official against whom the writ is sought must have a “purely ministerial duty” that he or she has not performed, the third element in the state supreme court’s list of five, set out above. The court of appeals found that duty, imposed upon the zoning administrator, in Section 160A-412 of the North Carolina General Statutes (hereinafter G.S.), especially in the concluding paragraph, which the court characterized as G.S. 160A-412(4).⁴ The statute sets out the “duties and responsibilities” of an inspection department, stating that these “shall be to enforce” various laws—apparently including a zoning ordinance, although the statute doesn’t specifically say that and is codified in the building inspection Part of G.S. Article 19, Chapter 160A. The appeals court noted particularly that the “legislature has prescribed the duties of local zoning inspectors including: ‘the issuance of orders to correct violations, the bringing of judicial actions against actual or threatened violations.’”⁵

As to the second mandamus-related issue, the court held that the plaintiff had a sufficiently special interest to bring an action for mandamus, setting herself apart from the public generally. (This holding reaches the first of the North Carolina Supreme Court’s five elements, listed above.) She was an adjacent owner and thus might well have suffered special damages from the alleged zoning and covenant violations. In addition, she had sought the town’s help and had been ignored. (Apparently, both the special damages and the fruitless appeal to the town were necessary to establish the requisite special interest.)

Third, the court held that the plaintiff was not required to follow the procedures of G.S. 160A-388 (covering challenges to zoning ordinance decisions) before bringing suit, inasmuch as there had been no decision by an administrative officer that could be appealed to the board of adjustment. There had been nothing but inaction.

Finally, the appellate court addressed the content of any mandamus order: “Though the zoning administrator may exercise discretion in assessing the alleged violations, this does not lessen the duty to investigate the charges of a plaintiff who has legal right to have the duty enforced[.]”⁶

4. The statute reads as follows:

§ 160A-412. Duties and responsibilities.

The duties and responsibilities of an inspection department and of the inspectors therein shall be to enforce within their territorial jurisdiction State and local laws relating to

- (1) The construction of buildings and other structures;
- (2) The installation of such facilities as plumbing systems, electrical systems, heating systems, refrigeration systems, and air-conditioning systems;
- (3) The maintenance of buildings and other structures in a safe, sanitary, and healthful condition;
- (4) Other matters that may be specified by the city council.

These duties shall include the receipt of applications for permits and the issuance or denial of permits, the making of any necessary inspections, the issuance or denial of certificates of compliance, the issuance of orders to correct violations, the bringing of judicial actions against actual or threatened violations, the keeping of adequate records, and any other actions that may be required in order adequately to enforce those laws. The city council shall have the authority to enact reasonable and appropriate provisions governing the enforcement of those laws.

5. *Midgett*, 94 N.C. App. at 503, 380 S.E.2d at 576 (quoting G.S. 160A-412(4)).

6. *Id.* at 503–04, 380 S.E.2d at 576. In support of the quoted phrase, the court cited and quoted from A. RATHKOPF, 3 THE LAW OF ZONING AND PLANNING § 44.03[2] (1975): “Where a duty to make a decision is imposed upon a body or officer, even though discretion is involved in the determination,

Four Subsequent Cases

The North Carolina Court of Appeals has decided four cases that cite, elaborate, or build on *Midgette*. All four were decided in 2007 or later; *Midgette* was not mentioned in appellate case reports before then. Two of the cases limit somewhat the availability of the mandamus remedy. None of them extend *Midgette* to other sorts of ordinances, although one implies the possibility of its extension to building code enforcement. The four cases are discussed below, in order of decision.

***McDowell v. Randolph County* (2007)**⁷

The plaintiffs owned residential property next to a saw mill. The mill was a nonconforming use, and the plaintiffs alleged that the mill owners had illegally expanded their operation over the years. Eventually, the county rezoned the mill property to allow the various structures that had been added. At that point the plaintiffs sued, listing these three counts:

1. The rezoning was illegal spot zoning.
2. The mill owners should be enjoined from using their illegal buildings.
3. The county should be mandamus-ed to enforce the pre-amendment ordinance.

At the trial the plaintiffs voluntarily dismissed the mill owners and, therefore, the second count. The trial court held that the rezoning was illegal spot zoning (which the North Carolina Court of Appeals affirmed), but it denied the plaintiffs' motion for a writ of mandamus against the county.

The court of appeals affirmed on the mandamus issue. It held that the mill owners were necessary parties, inasmuch as they would be injured by issuance of the writ of mandamus. Their dismissal sank the plaintiffs' mandamus case.

***Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, LLC* (2008)**⁸

In this case the plaintiffs were seeking to stop construction of an airport on a ridge overlooking a mountain valley in Madison county. They did not seek any sort of mandamus order against the county. Rather, their argument against the county was that a zoning ordinance amendment that clearly allowed the airport had not been successfully adopted. (There had been a mistake in drafting the minutes of the commissioners' meeting.) The trial court dealt with this issue in short order, ruling for the county, and the North Carolina Court of Appeals quickly agreed.

That left the plaintiffs with a case against only the owners of the airport site, in which the plaintiffs were seeking to enjoin an alleged violation of the zoning ordinance. The trial court held a jury trial on this issue, which resulted in a verdict and judgment for the defendants. The court of appeals vacated that outcome and held that the trial court should not have reached this issue at all. The appellate court held that the trial court was without subject matter jurisdiction on the issue because the plaintiffs had failed to exhaust their administrative remedies. The

mandamus will lie to compel the body or officer to make the decision, since there is no discretion involved in whether action is to be taken." This language is found in § 64.7 of the current edition of the Rathkopf treatise (by Edward Ziegler, 4th ed. 2011), where the context makes plain that the authors were discussing mandamus to force issuance of some sort of development permit rather than mandamus to force enforcement of the ordinance against an alleged violator.

7. 186 N.C. App. 17, 649 S.E.2d 920 (2007).

8. 192 N.C. App. 391, 665 S.E.2d 561 (2008).

plaintiffs should have caused the county to make a decision on whether the landowners were in violation of the zoning ordinance; if the decision supported the landowners, the plaintiffs could then have appealed to the board of adjustment.

In reaching this decision, the panel in a sense turned *Midgette* on its head. In *Midgette* the court had allowed the plaintiff—a neighboring property owner—to seek a mandamus order because the town officials had allegedly ignored her complaints and never made a decision that could be appealed to the board of adjustment. Administrative remedies were not available, and therefore there were none to exhaust. In *Laurel Valley*, though, the court required a neighboring property owner to first seek action by the local government to correct any alleged violation of the zoning ordinance. Should the government make a formal decision that there has been no violation, the neighbor could then use administrative remedies—first go to the board of adjustment and then to superior court. But should the local government simply ignore the neighbor's complaints, as was the allegation in *Midgette*, the *Laurel Valley* court seemed to require the neighbor to then seek a mandamus order. The issuance of the writ would force the appropriate local official to actually make a decision, which the neighbor could then appeal to the board of adjustment and so on.

***Worthy v. Ivy Community Center, Inc.* (2009)⁹**

This was a personal injury case brought against the owners and managers of a Durham apartment complex, with an additional count against the city for negligent inspection. Some wires that hung down above a stove in an apartment in the complex appeared to have caused a fire that caused the injuries leading to the suit. The city does not appear to have actually undertaken a fire inspection; rather, when the tenants complained to the city about the wires, a telephone operator at the fire department told the tenants to take certain band-aid steps to deal with them, and the problem continued to recur.

The trial court granted summary judgment to all defendants, and the North Carolina Court of Appeals reversed. The city's argument on appeal was that the issue of whether it should enforce the fire code was a "non-justiciable political question" inasmuch as the city council had extended full discretion to the city's inspector as to whether to undertake an inspection in these sorts of circumstances; it was not a court's place to second-guess the council's directions regarding the use of city resources, and therefore negligence liability should not be available. The appellate court appeared nonplused by this argument, which it rejected out of hand, pointing out that there have been many cases brought against local governments for negligent inspections. But the city's point was that there was no inspection—what had been argued was that the city was negligent in not undertaking an inspection at all, a different issue and one the court did not really address.

In rejecting the city's argument, the court cited *Midgette*, stating that "this Court has specifically held that a municipality may be compelled through a writ of mandamus to comply with [G.S. 160A-412], the statute at issue here."¹⁰ The court's point seems to have been that the city council was not free to allow its inspector to choose to not undertake an inspection. Although this statement is dicta, the court clearly appears to have been willing to extend the *Midgette* holding from zoning ordinance enforcement to enforcement of the State Building Code.

9. 198 N.C. App. 513, 679 S.E.2d 885 (2009).

10. *Id.* at 523, 679 S.E.2d at 892.

***Sanford v. Williams* (2012)¹¹**

This case was basically a dispute between neighbors in Hickory. Mr. and Mrs. Williams, the defendants, had constructed a carport pursuant to a zoning permit from the city and a building permit from the county, and Sanford, the plaintiff, believed that the carport was in violation of the side-yard setback requirement of the city's zoning ordinance. He first asked the city to investigate the matter, and the city issued an oral stop-work order pending the investigation. The carport was almost complete, however, and the county's building inspector issued a compliance certificate within two weeks of the stop-work order. About two months later, the city wrote a letter to the Williamses, suggesting that their carport violated the side-yard setback requirement and delaying any further enforcement action for thirty days so that the city could obtain a survey. The survey was procured,¹² and the city took no further action.

About three months later, Sanford brought suit, eventually including as defendants the Williamses and the city. The trial court ultimately granted summary judgment to the private defendants on issues involving their subdivision covenants¹³ and summary judgment to the plaintiff on his effort to obtain a mandamus order requiring the city to enforce the ordinance. The trial court's mandamus order directed the city to "make a decision as to the zoning matters in this case within thirty (30) days of the entry of this Order and . . . notify each party in writing of its decision."¹⁴

The North Carolina Court of Appeals never reached the issues of the appropriateness of the mandamus order and its detailed requirement. Rather, it characterized the plaintiff's argument as a disagreement with the city's understanding and application of the zoning ordinance and held that he should have followed the standard administrative procedures for appealing the grant of a zoning permit. Because he did not, the court held that the trial court was without subject matter jurisdiction. In contrast to *Midgette*, in *Sanford* there was an administrative decision by the city that could have been administratively appealed.

Summary

One lesson of the post-*Midgette* cases is the clear statement that mandamus is not a substitute for following the administrative procedures set out in the statutes for challenging zoning administration decisions of a city or county. Rather, mandamus is available only if the local government makes no formal decision at all (as in *Midgette*). And perhaps it can only be used to force a local government to make and communicate a formal decision which can then be appealed through those appropriate administrative procedures if that decision is not satisfactory to the mandamus plaintiff.

A second lesson from the case law following *Midgette* is the requirement, easily met, that any action brought to obtain a mandamus order against a local government to enforce its zoning ordinance must include as parties the owner or owners of the property alleged to be in violation of the ordinance.

11. 727 S.E.2d 362 (N.C. Ct. App. 2012).

12. The chronology is somewhat unclear. The opinion recites that the city's letter to the Williamses was dated October 10, 2008, but that the survey, which seems to have been in reaction to the letter, was obtained in September of the same year.

13. The state court of appeals affirmed this portion of the trial court's decision.

14. *Sanford*, 727 S.E.2d at 364.

Finally, it is worth pointing out that at least one panel of the state court of appeals seems to have been open to the idea that mandamus is also available to require a local government to enforce the fire protection code and other portions of the State Building Code.

The Content of a Mandamus Order

Even if a plaintiff wins the battle by obtaining a mandamus order against a local government, he or she may not win the war and obtain the final relief desired. Accepting for the moment that the North Carolina Court of Appeals was correct in holding in *Midgette* that G.S. 160A-412 imposed a ministerial duty upon a local zoning administrator to enforce the local zoning ordinance, just what sort of mandamus order may a trial court issue in a zoning enforcement case?

It's clear that what the typical mandamus plaintiff wants is some action by the local government that entirely abates the ordinance violation alleged. In *Midgette*, the plaintiff wanted cessation of the commercial operation of the swimming pool, cessation of any vehicle parking in violation of the ordinance, and removal and rebuilding of any fences constructed in violation of the ordinance. In *McDowell*, the plaintiffs wanted the mill to be stopped from using buildings constructed in violation of the ordinance. In *Laurel Valley*, the plaintiffs wanted the proposed airport's construction blocked. In *Sanford*, the plaintiff wanted the carport demolished and constructed farther away from the property line. It is highly unlikely, though, that a mandamus action can guarantee any plaintiff that sort of outcome.

In *Midgette*, the court of appeals recognized that although the city or its zoning administrator might be under a duty to enforce the zoning ordinance, there were a variety of methods by which that could be done. The choice of what method to use clearly rests with the local government and its zoning administrator.

Cities have a statutory menu of remedies that might be attached to various ordinances. G.S. 160A-175 provides a default remedy—violation of an ordinance constitutes a misdemeanor or, in the case of traffic or parking violations, an infraction—and then permits a city to impose up to three other remedies in addition to or in lieu of the default remedy: civil penalties, injunctive action, and injunctive action coupled with abatement. G.S. 160A-365 explicitly provides that this menu of remedies applies to any ordinance adopted pursuant to G.S. Chapter 160A, Article 19, including a zoning ordinance. In addition, other sections in Article 19 establish remedial provisions that are statutorily available even if a city does not accept the invitation to include them in a local ordinance pursuant to G.S. 160A-175. For example:

- G.S. 160A-389 permits a city to seek injunctive relief for any violation of a zoning ordinance regardless of whether the zoning ordinance (or unified development ordinance) specifies that remedy.¹⁵

15. "If a building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this Part or of any ordinance or other regulation made under authority conferred thereby, the city, in addition to other remedies, may institute any appropriate action or proceedings to prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate the violation, to prevent occupancy of the building, structure or land, or to prevent any illegal act, conduct, business or use in or about the premises." G.S. 160A-389.

- G.S. 160A-421 permits a city inspection department to issue stop orders if construction is proceeding in violation of a zoning ordinance.¹⁶
- G.S. 160A-422 permits a city inspection department to revoke development permits if unauthorized construction is proceeding under the permits.¹⁷

Significantly, none of these enforcement methods is mandatory, and one of them—the misdemeanor default—is ultimately under the control of the district attorney rather than the city or its zoning administrator. Each of the three statutes referenced immediately above and quoted in the notes states that the city or its local official *may* take the authorized action; none of them can be read to *require* the city or its official to do so.

Determining just what sort of court order the plaintiff in *Midgette* might have expected upon remand is made more difficult by ambiguity in the *Midgette* opinion itself as to exactly how the town had responded to the plaintiff's pre-litigation complaints. At one point in the opinion, the court of appeals states that "plaintiff has alleged that her requests to town officials have been ignored."¹⁸ Perhaps the court was responding to that understanding of the facts when it framed the appropriate mandamus order as enforcing the zoning administrator's "*duty to investigate* the charges of a plaintiff who has legal right to have the duty enforced."¹⁹ Under this formulation, when a citizen lodges a complaint alleging a violation of the zoning ordinance, a town's officials must investigate, that is, look into the allegations of the complaint lodged with the local government claiming an ordinance violation.

A more difficult question to answer might be this: Is more required? The answer may depend on what the mandated investigation reveals. Assume first that the town determines after investigation that no ordinance violation has occurred. Under the *Laurel Valley* analysis, if a local government has received and investigated a complaint and decided that there has been no violation and has then communicated that decision to the complainant, the complainant's appropriate response is to appeal to the board of adjustment and then to superior court. The local government will in this scenario have met its statutory responsibility.

In the alternative, assume that the local government agrees that there has been a violation but either takes no further action or takes some kind of enforcement action that the plaintiff deems insufficient. If a trial court anticipates such an outcome, can it include in its mandamus order more than a directive to investigate? Or can the plaintiff return to court for an additional order?

If the local government finds a violation but does nothing at all, a number of cases from other states suggest that a court might order the government to, at minimum, use one of the enforcement methods available to it. For example, in *Falls Road Community Ass'n, Inc. v. Baltimore*

16. "Whenever any building or structure or part thereof is being demolished, constructed, reconstructed, altered, or repaired in a hazardous manner, or in substantial violation of any State or local building law, or in a manner that endangers life or property, the appropriate inspector may order the specific part of the work that is in violation or presents such a hazard to be immediately stopped . . ." G.S. 160A-421(a). G.S. 160A-421(c) makes clear that this sentence applies to violations of the local zoning ordinance.

17. "The appropriate inspector may revoke and require the return of any permit by notifying the permit holder in writing stating the reason for the revocation. Permits shall be revoked for any substantial departure from the approved application, plans, or specifications; for refusal or failure to comply with the requirements of any applicable State or local laws; or for false statements or misrepresentations made in securing the permit. Any permit mistakenly issued in violation of an applicable State or local law may also be revoked." G.S. 160A-422.

18. *Midgette*, 94 N.C. App. at 503, 380 S.E.2d at 575.

19. *Id.* at 503–04, 380 S.E.2d at 576 (emphasis added).

County, it was clear on appeal that a restaurant had violated the local zoning ordinance and that the county had taken no steps to remedy the violations.²⁰ The appellate court acknowledged that the county code gave administrators a choice of enforcement methods and stated that it was not going to require them to use one rather than another; however, the court was willing to require them to use at least one method.²¹

It may be that the *Midgette* court would have followed this route. As was noted earlier, there is ambiguity in the court's description of the town's response to the plaintiff's complaints. In fact, the record reveals that the plaintiff alleged in her complaint that the town's zoning administrator had written a letter to her neighbors, the Pates, calling their attention to possible violations of the zoning ordinance, and that the Pates had done nothing in response to the letter. In their answer to the plaintiff's complaint, the Pates admitted receiving the letter and not making any changes in the construction of their pool or bathhouse. Obviously this amounts to more than simply ignoring the plaintiff's complaints, but it is less than actually attempting any of the statutory enforcement methods. These alleged and admitted facts suggest that the *Midgette* court might not have been satisfied with investigation by the town and an attempt at an informal resolution of the matter but would instead have directed the town to use one of the statutory enforcement alternatives.

If a local government does attempt one of those statutory methods, however, and if the plaintiff remains dissatisfied, national case law suggests that a trial court should and would go no further. For example, in *Winbco Tank Co., Inc. v. City of Ottumwa, Iowa*, the plaintiff property owner complained to the city that the next-door salvage company was not in compliance with the screening requirements of the local zoning ordinance.²² The city inspected and agreed, and it then issued an order to the company to come into compliance in thirty days. When the company did not do so, the city administrator recommended to the city council that the company's license be revoked, but the council refused to take that step. The plaintiff then brought suit for a writ of mandamus requiring the city to take additional steps. The Iowa Court of Appeals affirmed the trial court's refusal to issue the writ, noting that the statutes gave the city a range of enforcement alternatives, and because the city had used one of them, even though unsuccessfully, it could not be ordered to choose another. The city was under a duty to exercise its discretion, and it had already done so.

Similarly, in *Richardson v. City of Rutland*, a McDonald's restaurant illegally expanded its parking lot into a residential zone.²³ The city's zoning administrator met with the local manager, who placed barricades on the illegal portion of the lot to prevent its use for parking. The petitioners in this suit were not satisfied with that outcome, however, and brought suit to obtain a writ of mandamus against the city requiring it to bring suit to force McDonald's to return the improper parking strip to its original (unpaved) condition. The trial court dismissed the

20. 38 A.3d 493 (Md. Ct. Spec. App. 2012). The restaurant had, for example, paved a parking lot that the zoning ordinance required remain unpaved.

21. See also *Cordill v. City of Estacada*, 678 P.2d 1257 (Or. Ct. App. 1984), in which the defendant city had erroneously issued a permit to a car wash, and the plaintiff property owners sought a mandamus order directing the city to revoke the permit and bring an action to have the building removed. The trial court refused that specific order, issuing instead an order directing the city to bring the property into conformity with the ordinance; the Oregon Court of Appeals affirmed. The appellate court noted that the statutes gave the city discretion in selecting the method of enforcement and that, therefore, the plaintiffs' proposed remedy would have been inappropriately specific.

22. 713 N.W.2d 248 (Iowa Ct. App. 2006) (unpublished).

23. 671 A.2d 1245 (Vt. 1995).

petition, and the Vermont Supreme Court affirmed. The court noted that the statutes gave the city discretion in selecting how to enforce its ordinance and it had done so. The city's actions were therefore sufficient.

Is Mandamus Available for Other Sorts of Ordinances?

A zoning ordinance is the only sort of local ordinance that the North Carolina courts have *held* is susceptible to a mandamus order to enforce. (No North Carolina cases hold that any other sort of ordinance is *not* susceptible to such an order, however.) How easily can the holding in *Midgette* be transferred to other kinds of ordinances?

The *Midgette* court found the ministerial duty to enforce a zoning ordinance in the language of G.S. 160A-412(4). That section is located within Part 5 of G.S. Chapter 160A, Article 19, which concerns building code enforcement, and therefore it is likely that the same duty applies to enforcement of that code. As was noted above, another panel of the North Carolina Court of Appeals seemed to be ready to accept that outcome in *Worthy v. Ivy Community Center, Inc.*²⁴ The logic of that outcome might also extend to other sorts of ordinances authorized in G.S. Article 19, such as subdivision ordinances,²⁵ erosion and sedimentation control ordinances,²⁶ and floodway regulations.²⁷ The same would be true for the comparable county ordinances authorized under G.S. Chapter 153A, Article 18.

Of course, most kinds of city and county ordinances are not authorized, or even cross-referenced, in G.S. Chapter 160A, Article 19, or G.S. Chapter 153A, Article 18. Rather, they are authorized by Article 8 of Chapter 160A, Article 6 of Chapter 153A, and occasionally elsewhere. Neither Article 8 nor Article 6 includes any "duty" language comparable to that found in G.S. 160A-412. Does such language exist elsewhere, such that it might support a finding of a ministerial duty to enforce other sorts of ordinances? Perhaps. The best possibilities are G.S. 160A-148(4), which sets out the powers and duties of city and town managers, G.S. 160A-155, which sets out the duties of department heads in mayor-council cities and towns, and G.S. 153A-82(4), which sets out the powers and duties of county managers. Each of these statutes provides that the official in question "shall see that all laws of the State, the city charter, and the *ordinances*, resolutions, and regulations *of the council* [or board of commissioners] . . . are faithfully executed." If a court wishes to find a ministerial duty to enforce an ordinance, the quoted language may be sufficient.

What about the experience in other states? Most of the cases that permit mandamus involve zoning ordinances, but a handful of cases extend to a few other sorts of ordinances: building codes,²⁸ fire limits,²⁹ beach dune protection,³⁰ swine regulation,³¹ and junk yards.³² Importantly, each of the ordinances in question involves uses of land or the condition of land and buildings.

24. 198 N.C. App. 513, 579 S.E.2d 885 (2009). See the discussion *supra* notes 9 and 10.

25. G.S. 160A-371 through -377 (Article 19, Part 2).

26. G.S. 160A-458 (Article 19, Part 8).

27. G.S. 160A-458.1 (Article 19, Part 8).

28. *Mullen v. Ippolito Corp.*, 50 A.3d 673 (N.J. Super. Ct. App. Div. 2012).

29. *Beem v. Davis*, 175 P. 959 (Idaho 1918).

30. *Mullen*, 50 A.3d 673.

31. *State ex rel. Edwards v. City of Clovis*, 607 P.2d 1154 (N.M. 1980).

32. *Winbco Tank Co., Inc. v. City of Ottumwa, Iowa*, 713 N.W.2d 248 (Iowa Ct. App. 2006) (unpublished).

When plaintiffs have sought to force local governments to enforce other sorts of ordinances—particularly ordinances that regulate behavior not associated with specific real property—courts in other states have refused. The two cases discussed immediately below illustrate this pattern.

In *People ex rel. Jansen v. City of Park Ridge*, the petitioners alleged that for at least twenty years city ordinances had prohibited parking on certain parkways and for twenty years the ordinances had been routinely violated.³³ Therefore the petitioners brought suit seeking an order directing the city to enforce the parking prohibitions in the future. The trial court dismissed the petition, and the Illinois Court of Appeals affirmed. The court's primary concern was that the requested order would have required the trial court to continually monitor and supervise the activities of the municipal defendants to assure that the order was being carried out. The appellate court thought this an inappropriate judicial role.

In *Germantown Business Ass'n v. City of Philadelphia*, the plaintiffs represented merchants in the Germantown area of Philadelphia.³⁴ They alleged that they were subject to competition from street vendors, who were in violation of the city's street vending ordinance, and that they had been unsuccessful in their attempts to have the ordinance enforced. Therefore they brought suit seeking a writ of mandamus ordering the city to enforce the ordinance and going so far as to include a requirement that employees in the appropriate city department visit the area twice a day for ninety days. The trial court denied the writ and the Commonwealth Court affirmed. The appellate court noted that the usual mandamus case involved a court order to do one specific act, not a course of conduct, and that the necessary continuing judicial role in the present case would have been inappropriate.

In sum, based on *Midgette*, we might expect North Carolina courts to be willing to enter mandamus orders to enforce other sorts of ordinances that regulate land use or construction, but we should probably not expect anything beyond that.

Should *Midgette* Be Good Law?

It is not hard to understand how attractive a mandamus order to a local government to enforce a zoning ordinance might be to a court. The typical case involves a clear violation of the ordinance to the obvious detriment of the plaintiff, usually a neighboring property owner, and the apparent unwillingness of the local government to enforce the rules that the government itself has created. Indeed, in some cases the facts are so clear that the courts seem to suspect something more than municipal indifference or negligence. In one New Jersey case, the court noted that mandamus and other prerogative writs had “been used as a comprehensive safeguard against official wrong” and argued that failing to issue the writ “would disable our courts from doing complete justice though the particular circumstances be ever so compelling, and would seriously reflect on our advanced judicial administration.”³⁵ And in a Kentucky case, the court argued that

33. 129 N.E.2d 438 (Ill. App. Ct. 1955).

34. 534 A.2d 553 (Pa. Commw. Ct. 1987).

35. *Garrou v. Teaneck Tryon Co.*, 94 A.2d 332, 336, 337 (N.J. 1953). Teaneck Tryon owned six lots that were part of a single tract; five were zoned commercial but the sixth, which abutted the plaintiff's home, was zoned residential. Despite protestations from the plaintiff and his attorney, the city approved Teaneck's building permit, and the company then built a grocery store on four of the six lots and paved a supporting parking lot on the other two, including the lot zoned residential. When the city would do nothing about the zoning violation, the plaintiff brought the action.

without mandamus, a private citizen would be helpless at the hands of public officials who for one reason or another chose not to enforce the zoning ordinances. Mandamus is needed to meet the requirement of the public and to insure that the courts can dispense full and complete justice.³⁶

Nevertheless, courts in a good number of states refuse to issue writs of mandamus requiring local governments to enforce zoning or other sorts of ordinances—probably at least as many as states in which the courts allow such writs.³⁷ *Midgette* was decided by the North Carolina Court of Appeals, as were the subsequent cases described above, and obviously the state supreme court is not bound by any of those decisions.³⁸ So, what sorts of arguments against mandamus might a local government in North Carolina make to the state supreme court were that court to consider a case in which a citizen or property owner sought the writ?

In answering this question, it is useful to recall the five elements necessary for mandamus, set out at the beginning of this bulletin:

1. The party seeking relief must demonstrate a clear legal right to the act requested.
2. The defendant must have a legal duty to perform the act requested, and the duty must be clear and not reasonably debatable.
3. Performance of the duty-bound act must be ministerial in nature and not involve the exercise of discretion.
4. The defendant must have neglected or refused to perform the act requested, and the time for performance must have expired.
5. There must be no alternative, legally adequate remedy available (the court may only issue a writ of mandamus in the absence of such a remedy).

Mandamus to require enforcement of a local ordinance, particularly a zoning ordinance, is vulnerable based on the third, and possibly the fifth, of these listed elements. These two elements are discussed in more detail below.

The Ministerial Duty (Third Mandamus Element)

As has been stated, mandamus is only available to enforce *ministerial duties* of public officials. If a duty or responsibility involves the exercise of discretion by a public official, a court cannot direct the official as to how that discretion should be exercised (although—as we have seen above—courts are willing to direct officials to, at the very least, decide among the discretionary possibilities), and therefore mandamus is not available. The *Midgette* court found the necessary duty in the language of G.S. 160A-412(4), as noted above, although it did not discuss why the

36. *Stratford v. Crossman*, 655 S.W.2d 500, 502 (Ky. 1983). A tavern had been constructed within the perimeters of a new shopping center, and it was clear that its construction and operation would violate the city's zoning ordinance. When the relevant city officials refused to enforce the ordinance, the plaintiff, who owned apartments across the street, brought suit for a mandamus order.

37. Illustrative cases include: *Greenfield v. Reynolds*, 1 A.3d 125 (Conn. App. Ct. 2010) (zoning ordinance); *Clothesline Laundromat, Inc. v. City of New Orleans ex rel. May*, 98 So. 3d 901 (La. Ct. App. 2012) (zoning ordinance); *Randall v. Delta Charter Twp.*, 328 N.W.2d 562 (Mich. Ct. App. 1982) (zoning ordinance); *Fried v. Fox*, 373 N.Y.S.2d 197 (App. Div. 1975) (zoning ordinance); *Vretenar v. Hebron*, 424 N.W.2d 714 (Wis. 1988) (junkyard ordinance).

38. It's not as if the court of appeals had the benefit of extensive arguments on the issue before it reached its conclusion in *Midgette*. The plaintiff's brief devoted three short paragraphs to the mandamus issue, citing two inapposite decisions from the state supreme court; the city's brief did not reach the issue at all.

duty in question was ministerial rather than discretionary. In fact, the notion that local administrative officials have a ministerial duty to enforce various ordinances is contrary to the mandamus case law applicable to other sorts of law enforcement officials and is contrary to at least two doctrines of local government law involving ordinances in other, but related, contexts.

Courts have been unwilling to issue mandamus orders to police departments or sheriff's departments to enforce ordinances or statutes, stating that these law enforcement agencies may have a number of legitimate reasons to choose not to enforce a particular ordinance or statute at all. These reasons include a lack of resources to enforce every law or ordinance, the consequent decision to give priority to enforcement of certain laws or ordinances but not others, and a possible concern over the legality of a particular law or ordinance. (The hesitancy that local law enforcement agencies throughout North Carolina have exhibited over the past several years about enforcing restrictions on video sweepstakes establishments demonstrates the last of these reasons.) A good example of a case reflecting this more deferential approach by courts is *Sensing v. Harris*, decided by the Arizona Court of Appeals in 2007.³⁹ A Phoenix ordinance prohibited persons standing on or adjacent to the street from soliciting occupants of vehicles. Sensing owned a retail establishment and claimed that there were frequent violations of this ordinance in the street outside his store, adversely affecting his business. Alleging that the police chief had refused to enforce the ordinance, he brought an action against the chief seeking a mandamus order directing the chief to begin enforcement. The trial court granted the chief's motion to dismiss, and the court of appeals affirmed.

A separate, city code provision provided that the police chief "shall be responsible for the enforcement . . . of City ordinances." The appellate court first dealt with that language, as follows:

Although the Code uses the term "shall" when entrusting the Chief with the power to enforce Phoenix ordinances, the Code does not impose on the Chief a mandatory duty to act under a clearly defined set of circumstances. The Code gives the Chief a general duty to enforce the Ordinance but leaves him with discretion to choose what, if any, enforcement actions will be taken.⁴⁰

The plaintiff then argued that a police department cannot decide to not enforce an ordinance at all, although he granted that it may decide not to proceed in a particular situation. The court stated his position as follows:

Sensing candidly acknowledged at oral argument that no specific level or degree of enforcement of the Ordinance is mandated by the Code. He recognized that limited resources may lead to other enforcement matters being given higher priority and that this is a valid application of the Chief's discretion. Nevertheless, Sensing argues that there is a difference between not enforcing the Ordinance under specific, limited circumstances and adopting a general policy of non-enforcement because simply declining to enforce the Ordinance is not a valid exercise of discretion. Specifically, he argues that a patrol officer may have the discretion to not enforce the Ordinance against a specific person on a particular day, but the Chief's discretion does not extend to not enforcing the Ordinance at all.⁴¹

39. 172 P.3d 856 (Ariz. Ct. App. 2007).

40. *Id.* at 859.

41. *Id.*

The court disagreed:

Sensing's recognition that there are valid circumstances when the Ordinance may not be enforced is equally a recognition that the Chief is not specifically required to enforce the Ordinance. Whether the Chief's enforcement decision is based on lack of resources, making other tasks higher priorities, or concerns about the legality or wisdom of enforcing the Ordinance, the Chief has the discretion to make that decision. Mandamus is not available to override that discretion.⁴²

It is not immediately obvious why these arguments do not apply equally to a zoning administrator enforcing a zoning ordinance or another non-sworn officer enforcing other kinds of local ordinances.⁴³

Similarly, courts have been unwilling to issue mandamus orders against a district attorney or other prosecuting attorney directing that officer to undertake a specific prosecution.⁴⁴ These cases emphasize the discretion inherent in the office, even when a statute may state that the district (or other) attorney "shall" enforce the criminal laws.⁴⁵ In addition, the courts in cases like this recognize that any law enforcement agency is likely to have fewer resources than it may wish to have—and certainly fewer than would be necessary to prosecute every alleged crime. It is the district attorney's responsibility to set priorities within those limited resources and not the responsibility of a trial judge hearing a petition in a mandamus action.⁴⁶

The Wisconsin Supreme Court is the only court that seems to have drawn the connection between district attorneys and local government enforcement officials. In *Vretenar v. Hebron*, the plaintiffs owned land near a junkyard that was being operated illegally, in violation of

42. *Id.* at 860.

43. See *Galuska v. Kornwolf*, 419 N.W.2d 307 (Wis. Ct. App. 1987), in which the court refused to issue a mandamus order against a sheriff directing him to enforce a statute regulating transient vendors.

44. See, e.g., *Ackerman v. Houston*, 43 P.2d 194 (Ariz. 1935); *People v. District Court*, 632 P.2d 1022 (Colo. 1981); *Brack v. Wells*, 40 A.2d 319 (Md. 1944); *State ex rel. Kurkierewicz v. Cannon*, 166 N.W.2d 255 (Wis. 1969).

45. For example, in *Kurkierewicz*, the Wisconsin Supreme Court wrote:

It is clear that in his functions as a prosecutor [a district attorney] has great discretion in determining whether or not to prosecute. There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals, it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial.

166 N.W.2d at 260.

46. In *Taliaferro v. Locke*, 6 Cal. Rptr. 813, 815–16 (Cal. Ct. App. 1960), the court refused to issue a mandamus order against a district attorney, making this point:

However, both as to investigation and prosecution that effort is subject to the budgetary control of boards of supervisors or other legislative bodies controlling the number of deputies, investigators and other employees. Nothing could be more demoralizing to that effort or to efficient administration of the criminal law in our system of justice than requiring a district attorney's office to dissipate its effort on personal grievance, fanciful charges and idle prosecution.

certain ordinance sections.⁴⁷ The town had taken several steps to enforce the ordinance, but plaintiffs were dissatisfied and therefore sought a writ of mandamus directing the town to enforce the ordinance. The trial court awarded summary judgment to the town, and the state supreme court affirmed, noting that it had, some twenty years earlier, held that mandamus was not available against a district attorney and that it was unwilling to attempt a distinction between that officer and local government officials enforcing local ordinances:

The plaintiffs would have us distinguish between the prosecutorial duties of district attorneys and those of town board members acting through the town attorney. We reject this distinction. While the former involves criminal laws and the latter involves civil forfeiture ordinances, the prosecutorial duties are similar in that each is responsible for pursuing with discretion violations of laws under the office's jurisdiction.

The town board, acting through the town attorney, is not required to prosecute every infraction of the municipal ordinance code. As we stated in *Kurkierewicz*:

“There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals, it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial.”

Similarly, there is no obligation on the part of municipal officials to prosecute all cases in which an individual commits a violation of the municipal ordinance code. . . . This is true notwithstanding, as the plaintiffs claim, that the violation is open and notorious. To hold otherwise would be tantamount to divesting a municipality of the discretion necessary for effective and efficient law enforcement. This we decline to do.⁴⁸

In addition to the mandamus cases involving police agencies and district attorneys, *Midgette's* holding that there is a ministerial duty to enforce the zoning ordinance appears to be inconsistent with the large body of case law concerning alleged selective enforcement of ordinances and statutes. The typical selective enforcement case involves a local government seeking to enforce an ordinance against a clear violator who defends with the argument that the government has failed to enforce the ordinance against others. This is usually an equal protection argument, and the courts have made it a difficult argument to win. It is not enough that a defendant show some apparent discrimination in the enforcement of the ordinance (or statute); the defendant must also show an improper discriminatory purpose.⁴⁹ The selective treatment must be “based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.”⁵⁰ In developing and articulating this doctrine about selective enforcement, the courts have recognized that it is

47. 424 N.W.2d 714 (Wis. 1988).

48. *Id.* at 717–18 (internal citations omitted).

49. *Wayte v. United States*, 470 U.S. 598 (1985).

50. *LeClair v. Saunders*, 627 F.2d 606, 609–10 (2d Cir. 1980) (footnote omitted).

impossible to enforce every statute or ordinance in every instance. In one widely quoted passage, the Seventh Circuit wrote that:

[t]he Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness as the price of being allowed to enforce them at all. . . . Otherwise few speeders would have to pay traffic tickets. Selective, incomplete enforcement of the law is the norm in this country.⁵¹

Furthermore, the courts have emphasized that enforcement officials have and must retain a basic discretion in making enforcement decisions. In a leading case on selective enforcement, the U.S. Supreme Court pointed out the broad discretion about prosecution held by prosecuting attorneys:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.⁵²

The North Carolina appellate courts have accepted this national case law as the standard for selective enforcement cases in this state.⁵³ In accepting the doctrine, presumably these courts also accept the policy that underpins it—that there is an official discretion that is inherent in enforcement of ordinances and statutes. If this discretion is recognized in and is basic to the selective enforcement context, can it be ignored in the mandamus context?

Finally, the *Midgett* court's holding that ordinance enforcement is a ministerial duty appears to be inconsistent with the North Carolina case law concerning tort claims against local governments alleging a failure to enforce local ordinances. It is black-letter law that local governments cannot be held liable in tort for a failure to enforce their ordinances—they enjoy immunity from such suits because ordinance enforcement is a governmental activity. The North Carolina Supreme Court recognized this immunity in *Hull v. Town of Roxboro*, decided in 1906.⁵⁴ The town in this case had adopted an ordinance regulating pig sties, hog pens, and privies, requiring them to be kept clean and not become a nuisance. A neighbor of the plaintiff allegedly kept his pig sties and privies in a filthy condition, and they drained onto the plaintiff's property, sickening his wife and child. The plaintiff notified the town of the ordinance violation and asked that

51. *Hameetman v. City of Chicago*, 776 F.2d 636, 641 (7th Cir. 1985) (citations omitted).

52. *Wayte*, 470 U.S. at 607–08.

53. See, e.g., *Grace Baptist Church of Oxford v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987); *Brown v. City of Greensboro*, 137 N.C. App. 164, 528 S.E.2d 588 (2000); *Prewitt v. Town of Wrightsville Beach*, 161 N.C. App. 481, 595 S.E.2d 442 (2003).

54. 142 N.C. 453, 55 S.E. 351 (1906).

the ordinance be enforced. The town's health officer also reported the matter to the town's board of commissioners. Nevertheless, the plaintiff alleged that the town had not enforced the ordinance and that he had suffered damage as a result. The trial court sustained the town's demurrer, and on appeal the state supreme court held that the adoption and enforcement of ordinances is a governmental—as opposed to a proprietary—activity of a town, and that there can be no liability to a town for damage incidental to the town's failure to enforce one of its ordinances.⁵⁵ In the course of its opinion, the court in *Hull* made a number of points that are relevant to this line of inquiry.

To begin with, in distinguishing between governmental and proprietary functions of local government, the court wrote that a local government “is exempt from liability for any injury resulting from a failure to exercise its governmental powers, or for their improper or negligent exercise, but it is amenable to an action for any injury caused by its neglect to perform its ministerial functions, or by an improper or unskillful performance of them.”⁵⁶ In explaining why there could be no liability for the failure to enforce a municipal ordinance, the court quoted Judge Cooley, who had written that to permit such a tort action against a local government “would transfer to court and jury the discretion which the law vests in the municipality.”⁵⁷

Finally, the *Hull* court again distinguished between governmental powers, “which are necessarily legislative and therefore discretionary in their character,” and proprietary powers, “which are therefore ministerial.”⁵⁸ In sum, in the tort law context, ordinance enforcement is a discretionary matter and is specifically not ministerial.

In conclusion, courts throughout the country have refused to allow mandamus actions against police agency officials and prosecuting attorneys, citing the discretion inherent in these individuals' law enforcement activities. Furthermore, the law of selective enforcement of ordinances is based upon a recognition of the discretion that is inherent in ordinance enforcement, as is the law concerning local government immunity from actions in tort arising from a failure to enforce local ordinances. In each of these contexts, law enforcement is recognized as a discretionary activity, not a ministerial one.

No Adequate Alternative Remedy (Fifth Mandamus Element)

Another element necessary to mandamus is that the court must not issue the writ when there is an alternative, legally adequate remedy. Some of the courts in other states that have refused to allow mandamus actions to require enforcement of zoning ordinances have done so, at least in part, because there was an alternative remedy available to the plaintiff involved—specifically, the ability to bring a private action against the ordinance violator seeking injunctive relief.⁵⁹ The *Midgette* court did not explore whether the plaintiff in that case could have brought an action for injunctive relief against her neighbors due to their alleged violation of the town's zoning ordinance, but the North Carolina Supreme Court has held that such an action is possible.

55. *Accord* Goodwin v. Town of Reidsville, 160 N.C. 411, 76 S.E. 232 (1912).

56. *Hull*, 142 N.C. at 455–56, 55 S.E. at 352 (emphasis added).

57. *Id.* at 459, 55 S.E. at 353 (quoting Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 300 (7th ed. 1903) (emphasis added)).

58. *Id.* at 460, 55 S.E. at 353 (emphasis added).

59. *See, e.g.*, Clothesline Laundromat, Inc. v. City of New Orleans *ex rel.* May, 98 So. 3d 901 (La Ct. App. 2012); Fried v. Fox, 373 N.Y.S.2d 197 (App. Div. 1975).

In *City of Goldsboro v. W.P. Rose Builders Supply Co.*, the city and adjacent property owners brought suit to enjoin the defendants from operating a gasoline filling station or storage station in violation of the city's zoning ordinance.⁶⁰ The trial court overruled the defendants' demurrer to the action, and the North Carolina Supreme Court affirmed that order, specifically holding that because the private plaintiffs "allege[d] threatened injury to their property of an irreparable nature," they were entitled to bring their action for injunctive relief.⁶¹ In dicta in several subsequent cases, the supreme court has repeated the position that persons suffering special injuries have standing to bring private actions to enjoin violations of a local zoning ordinance.⁶² These cases would seem to establish the rule that neighboring property owners who suffer special damages from a zoning violation have standing to bring an action to enjoin the violation, which would in turn seem to be an adequate alternative remedy such that mandamus should not be available.

The North Carolina Court of Appeals has seemed to disagree with these earlier cases, however. In *Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, LLC*, the plaintiffs sought an injunction against construction of an airport that allegedly violated their county's zoning ordinance.⁶³ The court of appeals held that the trial court was without jurisdiction in the case because the plaintiffs had not exhausted their administrative remedies. Rather than bring suit for injunctive relief, the court held that the plaintiffs should have sought action from a county official, and if that was unsuccessful, they should have appealed the official's decision first to the planning board and then to superior court. The court asserted that the "General Assembly did not signify an intent in Chapter 153 [sic] to give private citizens the right to initiate an action in superior court to enforce zoning ordinances."⁶⁴ It might be noted that the zoning enabling statutes in effect when the state supreme court decided its various cases recognizing private standing to enforce zoning ordinances also said nothing about such causes of action. Nevertheless, the court of appeals decision in *Laurel Valley* might cause a later court to hold that injunctive relief was not sufficiently available to constitute an adequate alternative to mandamus.

Conclusion

Returning to the two hypothetical situations that opened this bulletin, based on the foregoing discussion, one can state that existing North Carolina case law would allow the neighbor adjacent to the expanding restaurant to bring an action against the local government for a writ of mandamus. The plaintiff neighbor's relief, however, might be limited to forcing enough action by the local government that the plaintiff could then begin administrative remedies, a round-about outcome that might dissuade many plaintiffs from acting at all. In addition, it is by no means clear that the existing case law would survive review in the state supreme court,

60. 200 N.C. 405, 157 S.E. 58 (1931).

61. *Id.* at 407, 157 S.E. at 59.

62. *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 72 S.E.2d 838 (1952); *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968); *Jackson v. Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969). *Cf.* *City of Shelby v. Lackey*, 236 N.C. 369, 72 S.E.2d 757 (1952); *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960).

63. 192 N.C. App. 391, 665 S.E.2d 561 (2008).

64. *Id.* at 404, 665 S.E.2d at 569.

given the inherently discretionary character of law enforcement, including enforcement of local ordinances. Even if the existing case law survives, however, it is very unlikely to support the plaintiffs in the second hypothetical, who are seeking a much more intrusive role by a trial court (a writ of mandamus directing their city to enforce a taxicab ordinance against cabs from out of town) than courts in other states have been willing to countenance.

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