

**BEFORE THE NORTH CAROLINA BUILDING CODE COUNCIL  
RALEIGH, NORTH CAROLINA**

**Docket No. 2024-1**

<b>BBUDC, INC.,</b>	)	
	)	
<b>Petitioner,</b>	)	
<b>v.</b>	)	<b>ORDER AND FINAL DECISION</b>
	)	
<b>DURHAM CITY/COUNTY INSPECTIONS DEPARTMENT,</b>	)	
	)	
<b>Respondent.</b>	)	
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**THIS MATTER** came on before the North Carolina Building Code Council on 30 October 2024 in Raleigh, North Carolina pursuant to the Council’s 30 July 2024 *Second Amended Scheduling Order and Order Denying Respondent’s Motion to Dismiss as Moot* and the Council’s 25 October 2024 *Order*.

The Council’s 30 July 2024 *Second Amended Scheduling Order and Order Denying Respondent’s Motion to Dismiss as Moot* continued the hearing of this appeal to the Council’s next scheduled hearing date, 30 October 2024. In its 25 October 2024 *Order*, the Council notified the parties that it would consider Respondent Durham City/County Inspections Department’s 16 August 2024 *Second Motion to Dismiss* and, if necessary, Petitioner’s 10 September 2024 *Motion for Summary Judgment* at the scheduled 30 October 2024 hearing. Because these motions are potentially dispositive of the appeal, the Council’s rules require that they be considered and ruled upon by a majority of the entire Council. 2018 N.C. Bldg. Code, Admin. Code and Policies, § 103.3 (2024).

The hearing on the parties' dispositive motions was held in Room G-13 of the North Carolina Department of Justice. A majority of the nine-member Building Code Committee of the Council (hereinafter, the "Commercial Super-Committee") and a majority of the seven-member Residential Code for One- and Two-Family Dwellings Committee of the Council (the "Residential Super-Committee") were present, and a quorum of the Council was also present.

As allowed by the Supreme Court's holding in *In re Twin County Motorsports, Inc.*, 367 N.C. 613, 766 S.E.2d 832 (2014), corporate Petitioner, BBUDC, Inc. ("BBUDC"), appeared and was represented at the hearing through its President, Mr. Isaac Woods. Respondent Durham City/County Inspections Department (the "City") was represented by Durham Deputy City Attorney Sofia Hernandez and City of Durham Associate Attorney Sarah Laws.

Both dispositive motions have been fully briefed. The City filed and served its *Second Motion to Dismiss* on 16 August 2024. BBUDC filed and served its *Response to the Motion* on 28 October 2024. BBUDC filed and served its *Motion for Summary Judgment* and Mr. Woods' supporting affidavit on 10 September 2024. The City filed and served its *Brief in Opposition to Petitioner's Motion for Summary Judgment* and the affidavits of Alexis John, Eric Halstead, and Wyatt Blalock on 28 October 2024.

In support of its *Second Motion to Dismiss*, the City's Exhibits marked 1-11, 13-16, and Exhibits B and E were admitted into evidence at the hearing. Except for marked Exhibits B and E, the City withdrew its larger exhibit that was pre-marked as Exhibit 12, and the remainder of the larger exhibit was not admitted into evidence

or considered. In opposition to the City's motion, BBUDC's Exhibits marked 1-3 were also admitted into evidence at the hearing.

Because the Council **GRANTS** the City's *Second Motion to Dismiss*, which contests the Council's subject matter jurisdiction, and **DISMISSES** this appeal, BBUDC's *Motion for Summary Judgment* is **DENIED** as moot and was not reached at the 30 October 2024 hearing.

### RESPONDENT'S SECOND MOTION TO DISMISS

In its 16 August 2024 *Second Motion to Dismiss*, the City asserts that the Council lacks subject-matter jurisdiction over BBUDC's appeal such that this appeal must be dismissed pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and Section 202.9.2.5 of the Administrative Code and Policies, 2018 N.C. State Building Code. More particularly, the City contends that no provision of the North Carolina State Building Code is at issue in BBUDC's appeal, and instead, BBUDC's appeal improperly asks the Council to interpret the City's local laws and ordinances controlling steep slopes and safe property conditions, which are outside the Council's statutory authority. *Resp't's 2d Mot. Dismiss* at 2-4.

Alternatively, the City contends that dismissal of this appeal is an appropriate sanction due to BBUDC's continued failure to comply with the Council's commands that BBUDC exchange certain information regarding its anticipated testifying witnesses with the City. These orders are contained in the Council's 20 May 2024 *Amended Scheduling Order*, and its 30 July 2024 *Second Amended Scheduling Order and Order Denying Respondent's Motion to Dismiss as Moot*.

## FINDINGS OF FACT

Based on the parties' pleadings, the arguments of the parties in their papers and those made at the hearing, and the exhibits and other competent evidence introduced at the hearing, and the record as a whole, the Council makes the following findings of fact pertinent to Respondent's *Second Motion to Dismiss*:

A. *The Building Code Council's Subject Matter Jurisdiction*

1. The Council received BBUDC's 15-page notice of appeal on 3 November 2023. On the face of BBUDC's notice, Petitioner indicated that the appeal related to "DENIAL OF Certificate of Compliance (CO) for 905 Ardmore Drive DURHAM 27713 BuildingPermit# 21105964." *Pet'r's Notice of Appeal at 2.*

2. BBUDC's notice of appeal acknowledges that the City's decision to deny a certificate of compliance for the dwelling at 905 Ardmore Drive was due to "outstanding PWE [Public Works Engineering] conditions[,]" specifically an "excessively steep slope that cannot be stabilized." BBUDC attached a copy of a 13 July 2023 email from Thomas Hosey, the City's Director of Inspections (Building & Safety), to Mr. Woods explaining that BBUDC would need to address the "outstanding conditions" with the Engineering Division of Durham's Public Works Department "as they are an independent department not within my span of control and not subject to the same adopted state codes that we are. You need to work with PWE directly to address any and all conditions they have in order to allow them to approve your project..." *Pet'r's Notice of Appeal at 3 and 14.*

3. Section 141(a) of Article 9 of Chapter 143 of our General Statutes confers the Building Code Council with limited jurisdiction to hear appeals from decisions of State enforcement agencies so long as they are “relating to any matter under this Article or under the North Carolina State Building Code[.]” N.C. Gen. Stat. § 141(a).

4. Pursuant to the authority granted by N.C. Gen. Stat. § 160D-1201, the City of Durham has adopted a minimum housing code setting out certain minimum safety and sanitation requirements applicable to dwellings located within its jurisdiction. Durham, N.C., Municipal Code Ch. 10, art. VI, §§ 10-230 – 10-241; *see also Resp’t’s Exs. 1, 11, B, and E.*

5. N.C. Gen. Stat. § 160D-1201 generally authorizes local governments “to exercise [their] police powers” to adopt a minimum housing code requiring the “repair, closing, or demolition” of dwellings located within the local government’s “planning and development regulation jurisdiction” that have “conditions rendering the dwellings unsafe or unsanitary, or dangerous or detrimental to the health, safety, morals, or otherwise inimical to the welfare of the residents of the local government.” N.C. Gen. Stat. § 160D-1201(a); *see also Resp’t’s Ex. 11.*

6. Consistent with Section 160D-1208 of the General Statutes, Durham’s municipal code also provides that violations of Durham’s minimum housing code may be appealed to Durham’s Housing Appeals Board, which is established for the purpose of hearing such appeals. Durham, N.C., Municipal Code Ch. 10, art. VI, § 10-238.

7. BBUDC's appeal form asserts that "[t]he City OF Durham Public Works Right of Way (CO) has **no jurisdiction** on private property[ ]" and identifies two statutes that the appeal relates to: "General Statutes 153A-363 and 160A-423." These statutes are not codified in Article 9 of Chapter 143 of the General Statutes or the North Carolina State Building Code. *Pet'r's Notice of Appeal at 2.*

8. BBUDC's appeal form does not assert that the grounds for the City's denial of the certificate of compliance at issue relate to any matter under Article 9 of Chapter 143 of the General Statutes or under the North Carolina State Building Code. *Pet'r's Notice of Appeal at 2.*

9. Whether the Engineering Division of the City of Durham's Public Works Department has the right to enter private property to inspect for violations of Durham's Housing Code is not addressed or codified in Article 9 of Chapter 143 of the General Statutes or in the North Carolina State Building Code. Instead, such inspections are addressed in Article 12 of Chapter 160D. *See N.C. Gen. Stat. § 160D-1207* (authorizing periodic inspections for minimum housing code violations where, among other things, "violations of the local ordinances or codes are visible from the outside of the property.")

10. The parties agree that the certificate of compliance in controversy was withheld by the City due to the "outstanding PWE conditions" involving the purportedly "excessively steep slope that cannot be stabilized." *See Pet'r's Notice of Appeal, Pet'r's Prehearing Statement, and Resp't's Prehearing Statement.*

11. Neither party contends that the certificate of compliance for the dwelling at 905 Ardmore Drive was not issued due to an existing violation of the North Carolina State Building Code or due to an issue under Article 9 of Chapter 143. *See Pet'r's Resp. Deny Resp't's Mot. Dismiss, and Resp't's Second Mot. Dismiss.*

12. The drawings and photographs attached to BBUDC's notice of appeal and the documents and photographs introduced into evidence at the hearing show that it was indeed solely "outstanding PWE conditions" – and not Building Code violations – that underpinned the City's withholding of the certificate of compliance at issue here. From a neighboring historic cemetery, the slope at issue drops down adjacent to the exterior wall of the dwelling at 905 Ardmore Drive, running approximately along the property line separating the lots containing the dwelling and the cemetery. *Pet'r's Notice of Appeal at 5, 7-10.*

13. A 21 July 2023 email from Marvin G. Williams, Director of the City of Durham Department of Public Works, to Mr. Woods explains:

*The City Manager's Office has requested that the Dept. of Public Works (DPW) follow up with you on your request for our reasons for withholding the Certificate of Occupancy (CO) for 905 Ardmore Dr.*

*DPW has reviewed the site on several occasions (site conditions reflected in the photographs below), and we will continue to withhold the CO for this property based on North Carolina General Statute § 160D-1116.*

*This statute states that a CO should only be issued for a property when the inspectors have found that the improvements comply with all state and local laws. The City staff that inspected this site have previously informed you that the issuance of the CO for this property will be withheld due to the near vertical unreinforced soil slope*

*that is in close proximity to the dwelling unit. This slope poses a potential threat to this structure and potentially to any occupants of the structure, and is in violation of City Code § 10-234 (which requires that yards be free of physical hazards).*

*This slope presents a physical hazard to the structure, as well as to its future occupants. In addition, the grading between the slope and the dwelling unit appears to be allowing the ponding of water onsite.*

*Prior to sign-off on the CO for this property, you will need to address the condition of this slope.*

*Resp't's Ex. E.*

14. In pertinent part, a subsequent 21 July 2023 email from Eric Halstead, P.E., Engineering Inspections Group Supervisor for the City of Durham's Department of Public Works, to Mr. Woods further clarifies:

*Public works employees cannot determine the boundaries of the cemetery. Your surveyor will need to locate the property lines. Please be aware that the vertical faces of your excavation exceed the City allowed maximum of 2:1. As you get closer to the point where you will look to obtain your certificate of compliance the slope of this cut will need to be brought into compliance, either by additional grading or the installation of a retaining wall. If the 2:1 slope is established from the bottom of where your cut currently is located, it appears that you will impact the tombstones and anything buried in the area within the graveyard.*

*Cemeteries have a protected status and cannot be disturbed without necessary approvals. As this is not Public Works jurisdiction we reached out to several other departments to make them aware of this issue.*

*Resp't's Ex. B.*

15. At the hearing and in its brief, the City contends that North Carolina law specifically authorizes building code officials to withhold issuing a certificate of



compliance where the building does not comply with “other applicable laws and ordinances,” such as local government minimum housing codes. 2018 N.C. Bldg. Code, Admin Code and Policies, § 204.8.1; N.C. Gen. Stat. § 160D-1116(a); *see Pet’r’s Mot. Dismiss* and *Pet’r’s Ex. 8*.

16. Section 204.8.1 of the Administrative Code and Policies volume of the 2018 State Building Code authorizes building code officials to withhold issuance of a certificate of compliance “until all required service systems have been inspected for compliance with the technical codes and other applicable laws and ordinances and released by the inspection department.” 2018 N.C. Bldg. Code, Admin. Code and Policies, § 204.8.1 (emphasis added). This administrative rule is consistent with the statute authorizing it, N.C. Gen. Stat. § 160D-1116, which provides that a certificate of compliance shall be issued when an inspection demonstrates that “the completed work complies with all applicable State and local laws and with the terms of the permit[.]” N.C. Gen. Stat. § 160D-1116(a) (emphasis added).

17. At the hearing and in its written response to the City’s motion, BBUDC argues that its appeal is “under” the North Carolina State Building Code – and falls within the Council’s subject matter jurisdiction – because the term “certificate of compliance” is a defined term in Section 202 of the North Carolina Building Code volume of the 2018 North Carolina State Building Code. *Pet’r’s Response Deny Rep’t’s Mot. Dismiss at 1-2*.

18. According to Section 202, “certificate of compliance” means “[a] certificate stating that materials and products meet specified standards or that work

was done in compliance with *approved construction documents.*” 2018 N.C. Bldg. Code, N.C. Bldg. Code, § 202.

19. BBUDC also contends that because the violations at 905 Ardmore Drive did not arise out of the State Building Code, Section 204.8.4 of the Administrative Code and Policies volume of the State Building Code obligated the City to issue BBUDC a certificate of compliance. *See Pet’r’s Mot. Summ. J. at 1-2.* Section 204.8.4 provides:

**204.8.4 Issuing certificate of occupancy.** Upon satisfactory completion of a building and after the final inspection, the inspection department may issue a certificate of occupancy. The certificate of occupancy shall state the occupancy may be safely occupied.

2018 N.C. Bldg. Code, Admin Code and Policies, § 204.8.4.

20. Responding to the City’s arguments that Section 204.8.1 of the Administrative Code and Policies and N.C. Gen. Stat. § 160D-141 expressly authorize building code enforcement officials to withhold certificate of compliances until inspection shows compliance with “other applicable laws and ordinances” and “all applicable State and local laws,” respectively, BBUDC argues that those provisions do not apply here because the City “has failed with partiality [sic] to detail where this unspecified local code or ordinance is within the approved construction documents when the permit was issued.” *Pet’r’s Response Deny Rep’t’s Mot. Dismiss at 1.*

21. BBUDC also argues that the City is estopped from denying a certificate of compliance for the dwelling at 905 Ardmore Drive because the permit issued by the

City does not specify that the City could deny issuing a certificate of compliance based on a violation of Durham's minimum housing code. The building permit at issue was not introduced into evidence. *See Pet'r's Exs.* 1-3.

*B. Failure To Comply With Council Orders*

22. On 20 May 2024, the Council served and entered its *Amended Scheduling Order* which, among other things, directed the parties to file and serve a prehearing statement on 8 July 2024 providing "a list of the names and addresses of all proposed witnesses that you intend to call to testify at the hearing and a brief description of each witness's anticipated testimony." *Am. Sched. Order at 3; Resp't's Ex 13.*

23. On 8 July 2024, BBUDC filed and served its *Prehearing Statement*, attaching a list providing the names and home cities of 16 proposed witnesses.<sup>1</sup> Rather than providing a brief description of each witness's anticipated testimony, BBUDC generally represented in its *Prehearing Statement* that "Each proposed Witness will include testimony that 905 Ardmore Drive complies with all the Building Codes for which the building was permitted." *Pet'r's Prehearing Statement at 2, 55; Rep't's Ex. 14.*

24. On 17 July 2024, the City filed and served its *Motion to Dismiss, or in the Alternative, Motion for Continuance*, arguing that BBUDC's failure to provide the

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<sup>1</sup> Among the proposed witnesses identified by BBUDC were Durham Mayor Leonardo Williams, Durham Mayor Pro Tempore Mark-Anthony Middleton, Durham City Councilwoman DeDreana Freeman, Durham City Councilwoman Chelsea Cook, Durham City Manager Wanda Paige and Durham Deputy City Attorney Donald O'Toole.

full addresses of each witness and a description of *each* witness’s anticipated testimony, as required by the *Amended Scheduling Order*, prejudiced the City’s ability to adequately prepare for the hearing. *Resp’ts Mot. Dismiss, Continuance* at 2-3. Other than generically providing that all proposed witnesses would also testify that “There are no hazards present on the property at 905 Ardmore Drive,” BBUDC failed to amend or supplement its *Prehearing Statement* to provide any particularized information regarding each proposed witness’s anticipated testimony despite repeated prodding to do so.

25. On 30 July 2024, the Council entered and served its *Second Amended Scheduling Order and Order Denying Respondent’s Motion to Dismiss as Moot*. The order continued the appeal hearing from 31 July 2024 to 30 October 2024 because a quorum of the 9-member Building Code Committee was not available to participate on 31 July 2024, as required by N.C. Gen. Stat. § 143-136(d). The order also found that BBUDC failed to comply with the Council’s command that the parties provide a brief description of “each” witness’s testimony in their *Prehearing Statements*, and that BBUDC’s “repeated failures to do so worked to prejudice Respondent’s ability to prepare for the noticed July 31, 2024 hearing.” *Second. Am. Scheduling Order and Order Denying Respondent’s Mot. Dismiss at 2*.

26. Because the appeal hearing was continued to October and the City would have additional time to prepare, the Council declined to impose sanctions on BBUDC in the Council’s 30 July 2024 order. Instead, the Council ordered BBUDC “to file and serve an amended and supplemented identification of expected testifying

witnesses in its Prehearing Statement by 5:00 p.m. on Friday, August 9, 2024, setting out a brief, but particularized, description of each witness’s anticipated testimony.” *Id.* at 3 (emphasis in original). The order also expressly warned BBUDC that “failure to comply with this requirement may subject Petitioner to sanctions, including the dismissal of this action.” *Id.*

27. On 5 August 2024, BBUDC filed and served its *Supplement to Petitioner Witnesses and Witnesses Anticipated Testimony*, stating, in pertinent part, that “petitioner cannot stipulate additional details of the Petitioner’s witness’s anticipated testimony and cannot provide any other details of any Witness’s anticipated testimony due to the Respondent’s lack of partiality [*sic*] in this Appeal (matter) before the Building Code Council.” *Pet’s Supp. Pet’s Witnesses and Witnesses Anticipated Testimony* at 2.

28. Despite being expressly warned by the Council that continued non-compliance could subject BBUDC to sanctions – up to and including dismissal of its appeal – BBUDC failed to provide any particularized information regarding any of the proposed witness’s anticipated testimony in violation of the Council’s 30 July 2024 order.

### **CONCLUSIONS OF LAW**

Based on the foregoing findings of fact, the Council hereby makes the following conclusions of law:

1. Appeal hearings before the Council are governed by the North Carolina Rules of Civil Procedure, Article 3A of Chapter 150B of the North Carolina General

Statutes, Sections 143-140 and 143-141 of the North Carolina General Statutes, and the Administrative Code and Policies volume of the 2018 North Carolina State Building Code.

2. Pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, a claim for relief may be dismissed for lack of jurisdiction over the subject matter. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). Rule 12(h)(3) further provides that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” *Id.* at Rule 12(h)(3).

3. Likewise, Section 202.9.2.5 of the Administrative Code and Policies volume of the 2018 N.C. State Building Code directs that “[t]he Building Code Council shall, upon a motion of the State enforcement agency or on its own motion, dismiss appeals for the following reasons: ... 3. Lack of jurisdiction.” 2018 N.C. Bldg. Code, Admin. Code and Policies, § 202.9.2.5.

4. Unlike a motion to dismiss for failure to state a claim, the Council may properly consider matters outside the pleadings when its subject matter jurisdiction has been questioned. *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978).

5. Subject matter jurisdiction refers to the power of the tribunal to deal with the kind of action in question, and it is the necessary predicate to the exercise of any authority by the Council in all quasi-judicial appeals brought before it. *See generally Harris v. Pembaur*, 84 N.C. App. 666, 667-68, 353 S.E.2d 673, 675 (1987). It is well-established in this State that subject matter jurisdiction cannot be conferred

by waiver, estoppel, or consent of the parties or by any action of the tribunal itself. *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967). Rather, subject matter jurisdiction is conferred on the Council by statute. *See Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953) (“Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.”).

6. The legislature has empowered the Building Code Council to prepare, adopt, and amend the North Carolina State Building Code, which applies statewide. N.C. Gen. Stat. § 143-138(a), (d), and (e). The legislature mandated that the State Building Code address, among other things, “rules governing construction and precautions to be taken during construction,” to include “such other reasonable rules pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large.” *Id.* at § 143-138(b).

7. The General Assembly has conferred jurisdiction on the Council to hear appeals from decisions of local enforcement officers or the State Fire Marshal or other State officials with responsibility for enforcing the State Building Code. N.C. Gen. Stat. § 143-141(a).<sup>2</sup>

8. However, the Council has not been granted general subject matter jurisdiction, like the courts of the Court of General Justice, over all such disputes. *See*

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<sup>2</sup> Although not pertinent to this appeal, the General Assembly has also conferred jurisdiction on the Council to hear appeals of “technical interpretations” of the State Building Code issued by State enforcement agencies. N.C. Gen. Stat. § 143-140(a).

N.C. Gen. Stat. § 7A-240 (vesting the superior court division and district court division with “original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice...”). Instead, the General Assembly has limited the Council’s subject-matter jurisdiction in such appeals “to those relating to any matter under this Article or under the North Carolina State Building Code.” N.C. Gen. Stat. § 143-141(a).

9. Thus, in addition to appeals “under” the North Carolina State Building Code, the Council has jurisdiction over appeals “relating to” the requirements of Article 9 of Chapter 143 of the General Statutes, entitled “Building Code Council and North Carolina State Building Code.” *See* N.C. Gen. Stat. §§ 143-136 – 143.143.7.

10. Likewise, Section 202.9.2 of the Administrative Code and Policies volume of the 2018 N.C. State Building Code provides that “[t]he Building Code Council shall hear appeals from the decisions of state enforcement agencies relating to any matter related to the code.” 2018 N.C. Bldg. Code, Admin. Code and Policies, § 202.9.2.

11. The Council is a tribunal of limited jurisdiction, and as such, without a specific statutory grant of authority, the Council cannot independently exercise subject matter jurisdiction over a dispute between a petitioner and a respondent. *See, e.g., Campbell v. N.C. Dep’t of Transp. – Div. of Motor Vehicles*, 155 N.C. App. 652, 658-59, 575 S.E.2d 54, 59 (2003) (holding that “[j]urisdiction for the Office of Administrative Hearings is limited to those bases listed in the statute...”); *Lakemper v. N.C. Dep’t of Pub. Safety*, 290 N.C. App. 365, 891 S.E.2d 496 (2023) (unpub.)



(holding that the N.C. Industrial Commission’s limited statutory jurisdiction over tort claims against State departments, institutions, and agencies does not extend to policy and procedural decisions made by the Department of Public Safety.).

12. Accordingly, the Council’s subject matter jurisdiction over appeals “from the decision of a State enforcement agency relating to any matter under this Article or under the North Carolina State Building Code” does not extend to appeals that solely involve violations of local government minimum housing codes and not violations of the N.C. State Building Code.

13. In this instance, neither party contends that the City withheld issuing the certificate of compliance due to an existing violation of the North Carolina State Building Code or due to an issue under Article 9 of Chapter 143. The 21 July 2023 emails to Mr. Woods from Mr. Williams admitted into evidence at the hearing confirms that the reason that the certificate of compliance was withheld was that the “slope poses a potential threat to this structure and potentially to any occupants of the structure, and is in violation of City Code § 10-234 (which requires that yards be free of physical hazards).” *Resp’t’s Ex. E*

14. Having reviewed the evidence presented at the hearing, the Council agrees that the “outstanding PWE conditions” involving the purportedly “excessively steep slope that cannot be stabilized” arise under the requirements of Durham’s minimum housing code and not the North Carolina Residential Code, North Carolina Building Code, Administrative Code and Policies, or any other volume of the North Carolina State Building Code.

15. BBUDC's argument that the Council's subject matter jurisdiction extends to this appeal because the appeal involves an application for a certificate of compliance – and the term “certificate of compliance” is defined in the State Building Code – is mistaken. In N.C. Gen Stat. §§ 160D-305 and 160D-1208, the General Assembly chose to confer jurisdiction over appeals involving violations of minimum housing codes to local government housing appeals boards or boards of adjustment. Standing alone, the mere involvement of a certificate of compliance in such a dispute cannot confer subject matter jurisdiction on the Council. Holding otherwise would confound the legislature's intention to create a separate and distinct regulatory scheme addressing minimum housing code appeals. *See* N.C. Gen. Stat. §§ 160D-305, 160D-1208.

16. BBUDC's argument that the City is estopped from denying the certificate of compliance because the building permit did not specify that the certificate could be withheld due to violations of the minimum housing code is also misguided. To begin with, BBUDC failed to introduce the building permit into evidence at the hearing, and it is not before the Council. Furthermore, even if the permit is silent as to Durham's minimum housing code, N.C. Gen. Stat. § 160D-141 and Section 204.8.1 of the Administrative Code and Policies and N.C. Gen. Stat. § 160D-141 expressly authorize code enforcement officials to withhold a certificate of compliance until inspection shows compliance with “all applicable State and local laws” and “other applicable laws and ordinances,” respectively. Finally, to the extent that BBUDC contends that the City's actions (or inactions) somehow conferred

subject matter jurisdiction in this proceeding, it is black-letter law in this State that jurisdiction “is never dependent upon the conduct of the parties.” *Feldman*, 236 N.C. at 734, 73 S.E.2d at 867.

17. In development, compliance with Durham’s ordinances is a component of the final approval process for permitting and land development. Having considered the particular “outstanding PWE conditions” at issue here, the Council finds that these conditions located outside the dwelling and its accessory structures are not governed or regulated by the requirements of the North Carolina Residential Code or any other volume of the State Building Code.

18. To be clear, the Council believes that it would have subject matter jurisdiction over appeals from decisions of local enforcement officers or the State Fire Marshal involving the denial of a certificate of compliance that is grounded in alleged violations of a local government minimum housing code and the State Building Code. That is not the case here, where the only underlying violations are not requirements of the State Building Code or Article 9 of Chapter 143.

19. The Council retains inherent authority to enforce its orders through sanctions, particularly after repeated violations. The provisions of the 20 May 2024 *Amended Scheduling Order* and 30 July 2024 *Second Amended Scheduling Order and Order Denying Respondent’s Motion to Dismiss as Moot* requiring that the parties mutually disclose a brief description of each anticipated witness’s testimony were calculated to assist the parties’ preparation for the hearing and assist in their presentation of evidence. Because the pertinent provisions of the orders related to

discovery and discoverable matters, Rule 37 of the North Carolina Rules of Civil Procedure is applicable here.

20. Rule 37(b)(2)c authorizes drastic sanctions for disobedience of a discovery order, including dismissal of the action. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)c. In its 30 July 2024 order, the Council found that BBUDC's failure to comply with the requirement materially prejudiced the City's ability to prepare for hearing, but gave BBUDC another opportunity to comply. Yet again BBUDC chose not to provide any particularized information regarding the expected testimony of its anticipated witnesses. Under the circumstances here, where BBUDC failed to provide particularized information regarding the expected testimony of its hearing witnesses, even after the Council held that its noncompliance had caused prejudice to the opposing party and directly ordered BBUDC to supplement its disclosures, the drastic sanctions of Rule 37(b)(2)c are warranted.

21. In sum, the Council finds that it lacks subject matter jurisdiction over this appeal and that the City's *Second Motion to Dismiss* should be granted on this ground. Alternatively, even if the Council did have subject matter jurisdiction, which the Council again holds that it does not, the Council finds that this appeal should be dismissed in its entirety as a sanction for BBUDC's repeated violations of Council orders.

22. Out of an abundance of caution, the Council's Commercial Super-Committee and Residential Super-Committee considered the City's *Second Motion to*

Dismiss and made recommendations to the full Council for disposition, per N.C. Gen. Stat. §§ 143-136(c) and (d).

23. In accordance with N.C. Gen. Stat. § 143-136(c) and (d), the Council's Commercial Super-Committee and Residential Super-Committee both unanimously recommended that the Council grant the City's 16 August 2024 *Second Motion to Dismiss* and dismiss this appeal for lack of subject matter jurisdiction or, alternatively, as a sanction for BBUDC's noncompliance with the Council's 20 May 2024 *Amended Scheduling Order* and 30 July 2024 *Second Amended Scheduling Order and Order Denying Respondent's Motion to Dismiss as Moot*.

### **ORDER**

Based on the foregoing findings of fact and conclusions of law, the Council hereby **GRANTS** the City's 16 August 2024 *Second Motion to Dismiss* and **DISMISSES** this contested case because the Council lacks subject matter jurisdiction over this appeal, or, alternatively, as a sanction for BBUDC's noncompliance with the Council's 20 May 2024 *Amended Scheduling Order* and 30 July 2024 *Second Amended Scheduling Order and Order Denying Respondent's Motion to Dismiss as Moot*. Accordingly, BBUDC's 10 September 2024 *Motion for Summary Judgment* is **DENIED** as moot.

SO ORDERED, this the 31 day of December 2024.

North Carolina Building Code Council

By:   
Bridget Herring, Chair

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing **ORDER AND FINAL DECISION** upon the parties via email, in accordance with the April 25, 2024 written stipulation of the parties and Paragraph 6 of the Amended Scheduling Order, that service via email to the parties' respective preferred email addresses (BBUDCINC@gmail.com, rolang@wtbconstructionlaw.com,  
sofia.hernandez@durhamnc.gov, and sarah.laws@durhamnc.gov) shall be treated as valid and sufficient service in this appeal, addressed as follows:

BBUDC, Inc.  
bbudcinc@gmail.com  
rolang@wtbconstructionlaw.com  
*Petitioner*

Durham City/County Inspections Department  
sofia.hernandez@durhamnc.gov  
sarah.laws@durhamnc.gov  
*Respondent*

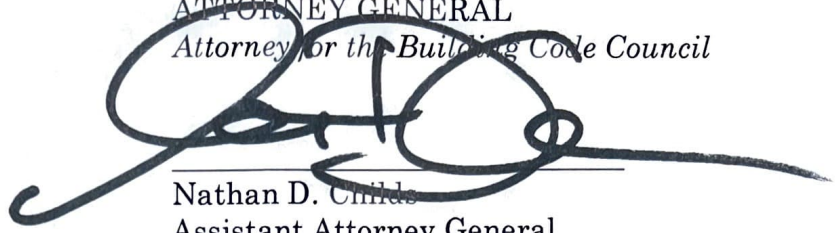
In addition, pursuant to N.C. Gen. Stat. § 150B-42(a), service was also made this day by depositing copies with the United States Postal Service for delivery via U.S. certified mail, return receipt requested, addressed to the following:

BBUDC, Inc.  
P.O. Box 52552  
Durham, NC 27717  
*Petitioner*

Sofia Hernandez  
Deputy City Attorney  
101 City Hall Plaza  
Durham, NC 27701  
*Counsel for Respondent*

This **31** day of December, 2024.

JOSHUA H. STEIN  
ATTORNEY GENERAL  
*Attorney for the Building Code Council*

A large, stylized handwritten signature in black ink, appearing to read 'Nathan D. Childs', is written over the printed name and title of the signatory.

Nathan D. Childs  
Assistant Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629  
Telephone: (919) 716-0010  
nchilds@ncdoj.gov