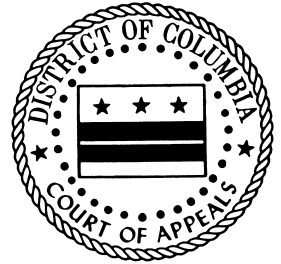


No. 22-CV-299



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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ROMEO MORGAN,
APPELLANT,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF
CONSUMER AND REGULATORY AFFAIRS, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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STATEMENT OF THE ISSUES

Romeo Morgan sued in the Superior Court to challenge the D.C. Department of Consumer and Regulatory Affairs' ("DCRA's") designation of his commercial property as vacant. As a result of that designation, Mr. Morgan was subject to higher real property taxes and, when he failed to pay those taxes, the Office of Tax and Revenue ("OTR") sold his property at a tax sale. Mr. Morgan sought a declaration that DCRA's vacant property designation was erroneous; a refund of a portion of the taxes he paid; and an order setting aside the tax sale. The Superior Court dismissed Mr. Morgan's suit for lack of subject matter jurisdiction because Mr. Morgan did not exhaust his administrative remedies and failed to show that an equitable exception to the exhaustion requirement applied. The issue on appeal is:

Whether the Superior Court lacked subject matter jurisdiction over Mr. Morgan's tax case where he failed to exhaust his administrative remedies and pay his outstanding taxes before suing, both of which are jurisdictional prerequisites to judicial review.

STATEMENT OF THE CASE

On October 12, 2021, the day before his commercial property was to be sold at a tax sale, Mr. Morgan filed a pro se complaint and motion for temporary restraining order ("TRO") in the Superior Court. Civil Division Clerk's Index,

Record Document (“RD”) 1, 7. He asked the Superior Court to enjoin the sale of his property. RD 1, 7.

The District was not served with the TRO motion until November 2021, after Mr. Morgan’s property was sold on October 13. RD 17, 23. Thus, the District moved to dismiss the TRO motion and complaint as moot, as well as barred by the Anti-Injunction Act, D.C. Code § 47-3307, because they only sought to enjoin the tax sale. RD 21, 23. Before the Superior Court ruled on the District’s motion to dismiss, Mr. Morgan secured counsel and filed an amended complaint. Supplemental Appendix (“SA”) 1-11. As a result, the Superior Court denied the District’s motion. RD 30.

Mr. Morgan filed his amended complaint on December 6, 2021. SA 1. The District moved to dismiss the amended complaint for lack of subject matter jurisdiction on January 7, 2022. SA 12-23. Mr. Morgan opposed that motion, and the District replied. SA 28-36, 39-42. The Superior Court granted the District’s motion on February 8. SA 45-48. On March 7, Mr. Morgan filed a timely Superior Court Civil Rule 59(e) motion to alter or amend the Superior Court’s judgment. SA 49-56. The District opposed that motion. SA 57-62. The Superior Court denied Mr. Morgan Rule 59(e) relief on March 22. SA 66-67. Mr. Morgan filed a timely notice of appeal on April 20. RD 51.

STATEMENT OF FACTS

1. Statutory Framework.

Owners of vacant buildings in the District are required to register those buildings with DCRA¹ within 30 days of them becoming vacant, pay a \$250 registration fee, and maintain the building in compliance with certain statutory standards. D.C. Code § 42-3131.06(a); *see id.* §§ 42-3131.09; 42-3131.12.² A “vacant building” is “real property improved by a building which, on or after April 27, 2001, has not been occupied continuously.” *Id.* § 42-3131.05(5). In contrast, a commercial building is considered “occupied” when it is in use “consistent with zoning regulations, for which there is a current valid certificate of occupancy, and (i) paid utility receipts for the specified period, executed lease agreements, or sales tax return, or (ii) other evidence of use of the building that the Mayor may require by rule.” *Id.* § 42-3131.05(3).

In addition to registering vacant buildings, DCRA is responsible for identifying vacant buildings that have not been registered by their owners. *Id.*

¹ Until October 2022, DCRA was responsible for the oversight of vacant buildings. The Department of Buildings (“DOB”) is now responsible for this function. *See* D.C. Code §§ 10-561.02(a), 10-561.07(a)(4)(A). The caption should be amended to reflect this reorganization. *Cf.* D.C. App. R. 43(c). Because the events in this case predate the reorganization, this brief refers to DCRA as the relevant actor.

² All citations to the D.C. Code are to the current version of the code, which was in effect during the relevant times here, unless otherwise specified.

§ 42-3131.11(a). Upon identifying such a building, DCRA must notify the owner that the building has been designated vacant by mailing a notice to the owner of record “at the owner’s mailing address as updated in the real property tax records of [OTR].” *Id.* §§ 42-3131.11(a), 42-3131.05a(a).³ Together with providing the notice by mail, DCRA is also required to post the notice on the vacant building. *Id.* § 42-3131.05a(b). The notice must advise the property owner of his right to appeal the vacant-property designation. *Id.* § 42.3131.11(a). “After the initial designation of a property as vacant . . . , [DCRA] shall not be required to perform additional inspections or surveys to sustain that classification.” *Id.* § 42-3131.06(a-1)(1).

Within 15 days of the designation of a building as vacant, an owner can petition DCRA for reconsideration. *Id.* § 42-3131.15(a). Within 30 days of receiving a petition for reconsideration, DCRA must issue a notice of final determination. *Id.* Then, within 45 days after DCRA issues its notice of final determination, a property owner can file an appeal with the Real Property Tax Appeals Commission (“Commission”). *Id.* § 42-3131.15(b); *see id.* § 47-825.01a(e)(1)(B)(i). DCRA’s notice of final determination is a statutory

³ Property owners must keep OTR apprised of their address. D.C. Code § 42-405(a). “If the name or address of an owner of a vacant building changes for any reason other than by transfer or conveyance, the change shall be reported to the Mayor in writing within 30 days in the manner provided in § 42-405(b-1).” *Id.* § 42-3131.06(e).

prerequisite to filing an appeal with the Commission. *Id.* § 42-3131.15(b) (“[A]n owner may file an appeal with the [Commission]; provided, that the notice of final determination under subsection (a) of this section shall be a prerequisite to filing an appeal with the [Commission].”).

The Commission in turn must decide its appeal within 120 days. *Id.* § 47-825.01a(e)(1)(B)(i). Once the Commission has ruled, “[a]n owner aggrieved by a decision of the Commission, with respect to an appeal filed pursuant to . . . a [vacant property] notice issued pursuant to § 42-3131.15, may appeal the decision of the Commission to the Superior Court of the District of Columbia in the same manner and to the same extent as provided in §§ 47-3303 and 47-3304.” *Id.* § 47-825.01a(g)(2). The time for seeking judicial review is measured from the Commission’s decision—the appeal must be filed “by September 30 of the tax year in which the decision of the Commission is issued or within 6 months after the date of the decision of the Commission, whichever is later.” D.C. Code § 47-825.01a(g)(2). Section 47-3303 requires a taxpayer appealing a Commission decision to the Superior Court to first pay the assessed tax together with any penalties and interest due to the D.C. Treasurer. D.C. Code § 47-3303.

Semiannually, DCRA must transmit to OTR a list of buildings that are registered as vacant, or for which a notice of final determination has been issued under D.C. Code §§ 42-3131.05 through 42-3131.16 and for which administrative

appeals have been exhausted or expired. *Id.* § 42-3131.16(a). Upon receiving DCRA’s list of vacant buildings, OTR “shall re-classify the real property without limitation for each tax year or half tax year after receipt of the list under § 42-3131.16.” *Id.* § 47-813(d-1)(5)(A-i)(ii). OTR classifies property with vacant buildings as Class 3 property, which has a higher tax rate than property classified as Class 1 or Class 2 property. *Id.* § 47-813(c-8)(4)(A); Office of Tax and Revenue, Real Property Tax Rates, Current Classes and Rates, <https://otr.cfo.dc.gov/node/389122>. When classifying property, OTR “may request the Mayor to inspect the improved real property to determine whether the property is correctly included on the list compiled under § 42-3131.16.” D.C. Code § 47-813(c-8)(4)(B).

Buildings are maintained on DCRA’s vacant-property list until a change in classification is approved under Section 47-813(d-1)(5)(A-i)(i)(II). *Id.* § 42-3131.16(c). Section 47-813(d-1)(5)(A-i)(ii) requires a property owner to notify DCRA when property appearing on the vacant-property list is no longer properly classified as Class 3 property and seek a change in designation. *See id.* § 42-3131.06(a-1)(2) (“After [DCRA] has made a final determination that a building is a vacant building . . . , that final designation shall remain in effect until the property owner submits information to the Mayor sufficient to warrant a change to that classification.”).

If the request for a change in designation is approved by DCRA, the change in property classification is retroactive to the half tax year when DCRA was notified. *Id.* § 47-813(d-1)(5)(A-i)(ii). If the request is denied, the owner has the right to administrative review as provided under Section 42-3131.15, which, as discussed, authorizes a property owner to seek reconsideration before DCRA and then appeal DCRA’s final determination to the Commission within 45 days. *Id.* And once again, if aggrieved by the Commission’s decision, the owner may then appeal to the Superior Court as provided in Section 47-825.01a(g)(2).

DCRA also has the same authority as provided to OTR in Section 47-825.01a(f) to make redeterminations of vacancy and any reclassifications that may be necessary. *Id.* § 47-825.01a(e)(1)(B)(iv). This affords DCRA the power to “change . . . a real property classification which is the result of a substantial error that would cause an injustice to the owner for the immediately succeeding, current, or preceding 3 tax years.” *Id.* § 47-825.01a(f)(2).

In certain circumstances, vacant buildings are not to be included on DCRA’s list compiled under § 42-3131.16 and transmitted to OTR for tax reclassification. *Id.* § 42-3131.06(b). There are three such exemptions relevant to this appeal. *First*, a vacant building that is “[u]nder active construction or undergoing active rehabilitation, renovation, or repair, and there is a building permit to make the building fit for occupancy that was issued, renewed, or extended within 12 months

of the required registration date” should not be included on the vacant-property list. *Id.* § 42-3131.06(b)(3). This exemption may only last two years for a commercial property. *Id.* § 42-3131.06(b)(3)(B).

Second, DCRA may issue an exemption “in extraordinary circumstances and upon a showing of substantial undue economic hardship.” *Id.* § 42-3131.06(b)(5)(A). This exemption may be granted for a period of no more than 12 months from the required vacant property registration date but is subject to renewal based on continuing extraordinary circumstances and substantial undue economic hardship. *Id.* § 42-3131.06(b)(5)(B). DCRA can withdraw the exemption at any time, and the exemption must be published in the District of Columbia Register. *Id.*

Third, in response to the COVID-19 pandemic, the Council added an exemption in 2020, that it has since repealed, for “commercial property that houses a business that has closed during a period of time for which the Mayor has declared a public health emergency pursuant to § 7-2304.01, as a result of the circumstances giving rise to or resulting from the public health emergency, and for 60 days thereafter.” *Id.* § 42-3131.06(b)(10) (2020).

“The cumulative time period for exemption from registration and fee requirements for a vacant building under the same, substantially similar, or related ownership shall not exceed 3 real property tax years.” *Id.* § 42-3131.06(f)(1).

2. The Department of Consumer And Regulatory Affairs Designates Mr. Morgan's Property As Vacant In 2019 But Exempts It From The Vacant-Property List For Tax Years 2018 And 2019 Based On Ongoing Construction.

In August 2019, DCRA issued a notice to Mr. Morgan that it had designated as vacant the property he owns at 3200 Georgia Avenue, NW. SA 25. The notice advised him of the requirement that he register his property, and of his appeal rights, including the right to seek reconsideration or an exemption from tax reclassification. SA 25. The notice instructed Mr. Morgan to complete an enclosed Vacant Building Response Form to register his property or seek relief. SA 25, 44.

Over two months later, in November 2019, Mr. Morgan returned the Vacant Building Response Form. SA 44. He did not dispute that his property was vacant or otherwise seek reconsideration of DCRA's determination. SA 44. Instead, he sought a tax-classification exemption for tax years 2018 and 2019 because his property was under construction. SA 44. For support, Mr. Morgan listed the applicable building permit numbers as required. SA 44.

A month later, in December 2019, DCRA approved Mr. Morgan's construction exemption, indicating that he was exempt from the vacant property tax rate for the 2018 and 2019 tax years. SA 27. The determination further advised Mr. Morgan that vacant building owners are required to register their property or seek an exemption annually. SA 27. In a separate email exchange, a DCRA Program Support Specialist explained to Mr. Morgan that the construction exemption could

be used only for two tax years—2018 and 2019—and that Mr. Morgan would have to seek another exemption for tax year 2020, which began on October 1, 2019. SA 64; *see* D.C. Code § 47-802. To that end, the Program Support Specialist provided Mr. Morgan with forms and information about seeking an exemption based on substantial undue economic hardship. SA 64.

3. Mr. Morgan Fails To Seek An Exemption For Tax Year 2020 Or 2021, His Property Is Included On The Vacant Property List, And When He Fails To Pay His Taxes, OTR Sells His Property At A Tax Sale.

As a result of the construction exemption, Mr. Morgan’s property was taxed as a Class 2 property in tax years 2018 and 2019. *See* SA 38. But Mr. Morgan did not, as instructed, seek an exemption for tax year 2020 on any basis. Thus, although his property was taxed as a Class 2 property for the first half of the 2020 tax year, it was classified as a Class 3 property in the second half of the tax year (beginning April 2020), as well as for tax year 2021. SA 38.

Mr. Morgan did not pay his 2020 and 2021 property taxes. SA 38. By August 2021, Mr. Morgan owed the District \$94,919.70 in unpaid taxes, penalties, and interest. SA 38. As a result of this outstanding tax liability, OTR offered his property for purchase at a tax sale in October 2021.

4. Mr. Morgan Sues In The Superior Court, Filing An Amended Complaint To Challenge DCRA's Vacant-Building Designation, Seek A Partial Refund Of Taxes, And Set Aside The Tax Sale.

Mr. Morgan unsuccessfully sued in Superior Court to enjoin the tax sale of his property. After his property was sold, Mr. Morgan filed an amended complaint. In it, he sought a declaration that DCRA's designation of his building as vacant was improper, resulting in OTR assessing erroneous taxes, penalties, and interest, for which he sought a partial refund of taxes he paid as well as an order setting aside the tax sale. SA 1-2.

For support, Mr. Morgan alleged that he owns the property at 3200 Georgia Avenue, NW, which his family has operated as Morgan's Seafood, a restaurant and bar, for over 85 years. SA 2-3. After receiving a construction grant in 2018 to improve the exterior of the building, construction began in the Spring or Summer of 2018 pursuant to a building permit that was to expire in March 2019. SA 3. Mr. Morgan maintained that after construction began in 2018, "Morgan's Seafood offered catering and limited take out services because the dining area was not presentable enough for sit-down dining." SA 3. He explained that while the exterior construction was completed in 2019, interior construction was ongoing, and he secured another building permit in 2019 that was set to expire in March 2020. SA 4. Mr. Morgan continued to run his catering and takeout business as the interior construction progressed. SA 4.

When the Mayor declared a public health emergency in March 2020 in response to the COVID-19 pandemic, Mr. Morgan said that he determined that it no longer made financial sense to continue operating Moran's and closed its doors. SA 4. According to Mr. Morgan, it was *after* this decision in March 2020 to close in response to the pandemic that DCRA declared his property vacant, effective April 12, 2020. SA 4.

Relying on the 2020 pandemic exemption to DCRA's reporting requirement—for "commercial property that houses a business that has closed . . . as a result of the circumstances giving rise to or resulting from the [Mayor's declared] public health emergency, and for 60 days thereafter"—Mr. Morgan maintained that DCRA wrongly designated his property as vacant in 2020. D.C. Code § 42-3131.06(b)(10) (2020); SA 5. Mr. Morgan asserted that the taxes owed would have totaled about \$19,000 had his property been classified as a Class 2 property in the second half of 2020 and in 2021. SA 5-6.

Mr. Morgan said he learned of the tax sale for his property in late September or early October 2021. SA 6. On October 12, 2021, the day before suing, Mr. Morgan paid \$50,000 toward the almost \$99,000 in taxes, penalties and interest owed by that date. SA 6, 38. This partial payment was insufficient to prevent the tax sale. D.C. Code § 47-1341(a) (requiring full payment to avoid the tax sale); *see id.* § 47-1366(b)(1). Mr. Morgan's property was sold on October 13, subject to his

right of redemption. RD 23; *see* D.C. Code § 47-1360 (granting the owner of property, or other person who has an interest in the real property, a right of redemption, which continues until the foreclosure of the right of redemption is final).

In Count I of his complaint, Mr. Morgan sought a declaration that DCRA's purported 2020 designation of his property as vacant was erroneous because the property was exempt from inclusion on the vacant property list under the exemption for businesses that closed during the pandemic. SA 7-8. In Count II, he sought a partial refund of the \$50,000 in taxes he paid based on DCRA's allegedly erroneous designation of his property as vacant. SA 8-9. In Count III, he asked the court to set aside the tax sale because the taxes due were based on DCRA's erroneous inclusion of his property on the vacant property list. SA 9-10. He maintained that if Class 2 property taxes had been assessed, his property would not have been subjected to a tax sale—presumably because he would have paid those taxes. SA 9.⁴

Notably, Mr. Morgan did not acknowledge DCRA's 2019 vacant property determination in his amended complaint. Nor did he allege:

⁴ In the Superior Court, Mr. Morgan did not explain his failure to timely pay his 2020 and 2021 taxes, even in the amount he believed he owed. On appeal and for the first time, he maintains that he could not pay his taxes because OTR's offices were closed during the pandemic. Br. 9. But he could have mailed his tax payment to OTR. *See* SA 38 (instructing Mr. Morgan to pay his taxes by mail by sending a check and the payment coupon to OTR in the envelope provided).

- that the purported notice of designation he received in 2020 failed to advise him of his appeal rights or was otherwise deficient;
 - that he sought reconsideration of DCRA's designation of his property as vacant (in 2019 or 2020) and obtained a final determination from DCRA that was needed to appeal to the Commission;
 - that he appealed to the Commission to challenge DCRA's final determination (in 2019 or 2020);
 - that his post-construction catering and take-out operations satisfied the requirements for the property to be considered occupied in 2018, 2019, and 2020, including that he possessed a valid certificate of occupancy for these operations and other required indicia of use;
 - that he requested DCRA to remove the 2019 vacant property designation;
 - that he asked DCRA to apply the COVID-19 pandemic exemption to exclude his property from the vacant property list provided to OTR for tax year 2020;
- or
- that he tried but failed to contact DCRA during the pandemic.

SA 1-11.

5. The District's Motion To Dismiss For Lack Of Subject Matter Jurisdiction.

The District moved to dismiss Mr. Morgan's amended complaint under Superior Court Civil Rule 12(b)(1) for lack of subject matter jurisdiction based on

his failure to exhaust his administrative remedies. SA 12. The District argued that the Superior Court lacked jurisdiction because Mr. Morgan had not appealed to the Commission before suing, which was a jurisdictional prerequisite to judicial review. SA 12. For support, the District mainly relied on D.C. Code § 47-825.01a(g)(1). SA 16-18. This statute provides:

Except as provided in § 47-830 *or paragraph (2) of this subsection*, an owner aggrieved by a proposed assessed value or *classification* may appeal the proposed assessed value or classification to the Superior Court of the District of Columbia in the same manner and to the same extent as provided in §§ 47-3303 and 47-3304 by September 30 of the tax year; provided, that the owner shall have in good faith first appealed the assessed value or classification to the Commission immediately preceding the appeal to the Superior Court of the District of Columbia.

D.C. Code § 47-825.01a(g)(1) (emphasis added).

This provision addresses the exhaustion requirement for classification appeals through OTR's administrative review process under Section 47-825.01a(d). But here, Mr. Morgan is challenging DCRA's vacant property designation and the inclusion of his property on the vacant property list. SA 1 (asking the Superior Court to "declare that the classification of his building as vacant by [DCRA] was improper"), 8-9. In that situation, "[t]he determination that real property belongs on a list compiled under § 42-3131.16 or § 42-3131.17 (and, indirectly, its Class 3 or 4 Property classification) shall only be appealed as prescribed under § 42-3131.15, notwithstanding any other provision of law." D.C. Code § 47-813(d-1)(4A). As explained, D.C. Code § 42-3131.15 permits appeals from vacant property

designations to DCRA and then the Commission. Further appeals are governed by subsection (g)(2), rather than (g)(1), of Section § 47-825.01a:

An owner aggrieved by a decision of the Commission, with respect to . . . a notice issued pursuant to § 42-3131.15, may appeal the decision of the Commission to the Superior Court of the District of Columbia in the same manner and to the same extent as provided in §§ 47-3303 and 47-3304 by September 30 of the tax year in which the decision of the Commission is issued or within 6 months after the date of the decision of the Commission, whichever is later.

Id. § 47-825.01a(g)(2) (emphasis added).

The two provisions in subsection (g), however, are not materially different. Both require a taxpayer to appeal to the Commission from the respective agency, and with reference to Section 47-3303, to pay the outstanding tax liability in full before appealing to the Superior Court.

Mr. Morgan filed a verified opposition to the District’s motion to dismiss. SA 28. Mr. Morgan understood that the District was moving to dismiss his complaint “because he failed to exhaust his administrative remedies by bringing his initial challenges related to his tax issues to DC government agencies.” SA 28. Mr. Morgan did not claim to have exhausted his administrative remedies, but relying on *District of Columbia v. Green*, 310 A.2d 848 (D.C. 1973), argued that “special and extraordinary” circumstances warranted the court excusing this failure. SA 30-31. In particular, Mr. Morgan identified DCRA’s purported illegal designation of his property during the pandemic as vacant as the “special and extraordinary

circumstance” that warranted equitable relief. SA 31. He stressed that OTR’s physical offices were closed during the pandemic; claimed he could not reach anyone there by telephone; and maintained he lacked the necessary computer literacy and access to use OTR’s online portal, all to show he had no effective administrative remedy. SA 31-33.⁵ Mr. Morgan also maintained that it would be futile to seek relief from the agencies now, pointing to delays in OTR’s administrative review process, but not addressing the process for reviewing DCRA’s vacant property determination. SA 34.

In reply, the District highlighted the fact that *Green’s* “special and extraordinary circumstances” standard had been questioned by subsequent decisions from this Court. SA 40. In addition, the District presented evidence that in fiscal year 2020, although OTR’s physical offices were closed during the pandemic, it answered 439,442 taxpayer telephone calls, replied to 82,274 written correspondences, processed 1,092,583 tax returns, and issued 314,846 tax refunds. SA 41. And it emphasized that Mr. Morgan could have challenged DCRA’s determination that his property was vacant or sought an exemption from its inclusion

⁵ Mr. Morgan did not specify how or when he received DCRA’s 2020 vacant property designation, nor did he include it among his exhibits. In his opposition, he suggested that, because of the pandemic, the notice he received from DCRA (and from OTR about the tax sale in 2021) was possibly inadequate, but he did not allege facts showing that the notice was actually deficient. SA 33.

on the vacant property list, like he had for 2018 and 2019, but he failed to do so. SA 41.

6. The Superior Court’s Decision And Mr. Morgan’s Motion For Reconsideration.

The Superior Court granted the District’s motion to dismiss for lack of subject matter jurisdiction. SA 45-48. In doing so, it first observed that “[w]hen a statute requires exhaustion of administrative remedies prior to filing suit, ‘[s]ubject matter jurisdiction of the Superior Court does not attach until that [administrative review] prerequisite has been satisfied[.]’” SA 45-46 (quoting *District of Columbia v. Craig*, 930 A.2d 946, 954 (D.C. 2007)). It also determined that it was Mr. Morgan’s burden to show that he complied with the statutory exhaustion requirements because the court could not excuse them. SA 46.

The court found that Mr. Morgan did not dispute that he failed to exhaust his administrative remedies before filing suit but sought an equitable exception to the exhaustion requirement. SA 46. The court declined to find an exception, concluding that the fact that OTR’s physical offices were closed during the pandemic was not enough to warrant relief. SA 46-47. Even accepting that Mr. Morgan could not reach anyone at OTR by telephone and could not access OTR’s online portal, the court found that Mr. Morgan “could have submitted a *written correspondence* to either [OTR or the Commission].” SA 47. The court also found that Mr. Morgan could have filed a request for reconsideration with DCRA after it designated his

property as vacant, but he chose not to do this and provided no reason for his failure. SA 47. Because Mr. Morgan failed to make these efforts, the court declined to find extraordinary circumstances to exercise jurisdiction. SA 47.

Mr. Morgan filed a motion to alter or amend the court's judgment under Superior Court Civil Rule 59(e). He argued that the court erred by failing to view the record in the light most favorable to him and maintained that the pandemic was an exceptional and extraordinary circumstance on which the court should have relied to excuse his failure to exhaust his administrative remedies. SA 49, 51-53. The Superior Court denied this motion, finding that Mr. Morgan's failure to exhaust his administrative remedies warranted dismissal of his suit for lack of subject matter jurisdiction. SA 66-67. In addition, the court found that Mr. Morgan had given it no reason to disturb its prior ruling that extraordinary circumstances did not exist to justify the exercise of equitable jurisdiction. SA 67.

STANDARD OF REVIEW

The Superior Court granted the District's motion to dismiss Mr. Morgan's complaint under Superior Court Civil Rule 12(b)(1) for lack of subject matter jurisdiction. SA 46-47. This Court reviews the Superior Court's ruling de novo because it involves a question of law. *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002).

Mr. Morgan erroneously relies on the standard of review for a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief. Br. 7 (quoting *Oparaugo v. Watts*, 884 A.2d 63, 77 (D.C. 2005), a case that was on appeal from an order granting a Rule 12(b)(6) motion to dismiss), 11-12 (asserting that his allegation should be viewed “[i]n the light most favorable” to himself). To survive a motion to dismiss under Rule 12(b)(1), a plaintiff bears the burden of proving jurisdictional facts, and these facts are not construed in the plaintiff’s favor. *Pardue v. Ctr. City Consortium Schs. of the Archdiocese of Wash., Inc.*, 875 A.2d 669, 674-75 (D.C. 2005). In a “‘factual’ attack” on the court’s subject matter jurisdiction, where the plaintiff’s allegations are not controlling, matters outside the pleadings are properly considered without converting the motion to one for summary judgment. *Heard*, 810 A.2d at 878; *Matthews v. Automated Bus. Sys. & Servs., Inc.*, 558 A.2d 1175, 1179 n.7 (D.C. 1989).

SUMMARY OF ARGUMENT

The Superior Court correctly dismissed Mr. Morgan’s amended complaint for lack of subject matter jurisdiction. Mr. Morgan sought a refund and to enjoin the collection of real property taxes, but he did not satisfy the jurisdictional prerequisites for judicial review. Mr. Morgan had to exhaust his administrative remedies by appealing DCRA’s vacant building determination to the Commission, but he failed to do so. In fact, he never obtained a final determination from DCRA about its

vacant building designation and so was never in a position to satisfy the requirements for Commission review, let alone Superior Court review. Mr. Morgan also failed to pay the assessed taxes, interest, and penalties before suing, which was an independent jurisdictional requirement for Superior Court review.

Mr. Morgan does not dispute that he failed to satisfy these jurisdictional predicates for judicial review. Instead, he maintains that he met the criteria for an equitable exception to the exhaustion requirement that would have allowed the Superior Court to enjoin the payment of taxes. But this is not the case. To do so, Mr. Morgan had to show that he had no adequate legal remedy and that the District could never prevail in this case. He has made neither showing. He had an adequate remedy in DCRA's administrative review process, and the record does not show that DCRA's vacant building designation was "void," as Mr. Morgan asserts. Instead, Mr. Morgan simply failed to use the available review process, and the record shows that DCRA properly designated his building as vacant.

ARGUMENT

I. The Court Should Affirm The Superior Court's Dismissal Of Mr. Morgan's Amended Complaint For Lack Of Subject Matter Jurisdiction.

The Superior Court correctly dismissed Mr. Morgan's amended complaint for lack of subject matter jurisdiction because he failed to satisfy the jurisdictional prerequisites for Superior Court review. The District's Anti-Injunction Act, D.C. Code § 47-3307, provides that "no suit shall be filed to enjoin the assessment or

collection by the District of Columbia or any of its officers, agents, or employees of any tax.” Instead, because the right to appeal a tax assessment is exclusively statutory in nature, a taxpayer must satisfy the specific, statutorily prescribed requirements governing the appeal in question in order to invoke the jurisdiction of the Superior Court. *District of Columbia v. Keyes*, 362 A.2d 729, 732-33 (D.C. 1976); *see Craig*, 930 A.2d at 954 (To challenge a tax assessment, “a taxpayer must follow the specific, statutorily-prescribed procedures governing such suits.”). “[O]nly after a property owner has appealed to the [Commission] and paid h[is] taxes may [he] petition the Superior Court . . . or review and for a tax refund.” *Craig*, 930 A.2d at 954. Subject matter jurisdiction of the Superior Court does not attach until these prerequisites have been met. *Id.* Although “[t]ax statutes are necessarily formalistic and often technical[, i]t is essential that we adhere to their technicalities, even if at times a seeming hardship results to the taxpayer.” *Keyes*, 362 A.2d at 737.

Here, Mr. Morgan is challenging the designation of his property as vacant and the resulting tax liability imposed by OTR. In addition, he seeks a refund of some taxes he paid in response. But he has not satisfied the jurisdictional prerequisites for judicial review. He did not appeal DCRA’s vacant property designation to the Commission, and he did not pay the full amount of taxes, penalties, and interest owed before suing. Moreover, he has provided no basis for the Court to excuse these failures.

A. Mr. Morgan failed to exhaust his administrative remedies.

Property owners who are “aggrieved by a decision of the Commission, with respect to . . . a [vacant property] notice issued [by DCRA] pursuant to § 42-3131.15, may appeal the decision of the Commission to the Superior Court.” D.C. Code § 47-825.01a(g)(2). But here, Mr. Morgan was not “aggrieved” by a decision of the Commission. He never appealed DCRA’s Section 42-3131.15 vacant property designation to the Commission for it to render a decision he could challenge in the Superior Court. Thus, he did not satisfy the statutory requirements for Superior Court review of DCRA’s determination and the resulting tax assessment. D.C. Code § 47-825.01a(g)(2).

Indeed, Mr. Morgan did not even satisfy the statutory prerequisite for Commission review. To do so, he had to obtain a final determination from DCRA by seeking reconsideration of its vacant building determination. D.C. Code §§ 42-3131.15(a), (b) (“[A]n owner may file an appeal with the [Commission]; provided, that the notice of final determination under subsection (a) of this section shall be a prerequisite to filing an appeal with the [Commission].”); 47-813(d-1)(4A) (“A notice of final determination by the Mayor shall be a prerequisite before an appeal to the [Commission] may be taken.”). But he did not seek reconsideration of DCRA’s vacant building designation in 2019 or 2020. Instead, while he sought an exemption for tax years 2018 and 2019, he took no action after DCRA told him he

would need to claim an exemption for tax year 2020. Nor did he act after he purportedly received notice in March 2020 that DCRA designated his property as vacant.

In short, Mr. Morgan did not exhaust his administrative remedies before suing in the Superior Court. Indeed, he does not even allege exhaustion in his complaint. Thus, the Superior Court correctly found he had not met this jurisdictional prerequisite for judicial review. *See Craig*, 930 A.2d at 955 (“[M]embers of the purported class who did not utilize the statutorily-prescribed administrative process were without a statutory right to participate in a refund suit.”). And although not the precise statutory grounds relied on by the Superior Court, this Court can affirm the Rule 12(b)(1) dismissal for failure to meet the jurisdictional requirements of Section 47-825.01a(g)(2). Subject-matter jurisdiction cannot be forfeited or waived, and here, the basis for dismissal for lack of jurisdiction is plainly apparent from the record. *See In re Dapolito’s Est.*, 331 A.2d 327, 328 (D.C. 1975) (“Whenever it affirmatively appears that the jurisdiction fails, the objection may be raised by the parties or the court itself.”); *see also Euclid St., LLC v. D.C. Water & Sewer Auth.*, 41 A.3d 453, 457 n.2 (D.C. 2012) (emphasizing that challenges to the court’s subject-matter jurisdiction cannot be waived).

B. Additionally, and independently, Mr. Morgan failed to satisfy the jurisdictional requirement that he pay the outstanding taxes, penalties, and interest owed before seeking review in the Superior Court.

Mr. Morgan also failed to satisfy the second jurisdictional prerequisite to judicial review—that he pay the outstanding taxes, penalties, and interest as required by Section 47-3303 before filing suit. *See Agbaraji v. Aldridge*, 836 A.2d 567, 569 (D.C. 2003) (“Like the anti-injunction statute, . . . [Section 47-3303] deprives the Superior Court of jurisdiction over a taxpayer’s appeal if the tax has not been paid.”). Under Section 47-825.01a(g)(2), “[a]n owner aggrieved by a decision of the Commission, with respect to . . . a notice issued pursuant to § 42-3131.15, may appeal the decision of the Commission to the Superior Court of the District of Columbia in the same manner and to the same extent as provided in [Section] 47-3303.” *See Am. Bus Ass’n, Inc. v. District of Columbia*, 2 A.3d 203, 209 (D.C. 2010) (“Some categories of taxes not specified in section 47-3303 are nonetheless subject to its terms because other provisions of law specifically state that assessments of those taxes may be challenged pursuant to section 47-3303.”). And Section 47-3303 requires that a challenger “shall first pay [the challenged] tax together with penalties and interest due thereon.” D.C. Code § 47-3303.

When he sued, Mr. Morgan owed about \$99,000 in taxes, penalties, and interest. SA 38. But he paid only \$50,000 toward that liability before filing his complaint. This was insufficient to invoke the Superior Court’s jurisdiction, and Mr.

Morgan did not allege otherwise in his complaint. Once again, because this prerequisite implicates the Superior Court’s subject-matter jurisdiction, it can be raised at any time, including for the first time on appeal. *See In re Dapolito’s Est.*, 331 A.2d at 328.

C. Mr. Morgan has not shown that the Superior Court had equitable authority to excuse the exhaustion requirement or otherwise grant injunctive relief.

Mr. Morgan did not argue below and does not claim on appeal that he satisfied the jurisdictional prerequisites for Superior Court review. Thus, any such contention is doubly forfeited. *See Pourbabai v. Bednarek*, 250 A.3d 1090, 1096 (D.C. 2021) (Appellant “forfeited the remaining arguments by failing to raise them before the trial court.”); *Barber v. United States*, 179 A.3d 883, 893 n.19 (D.C. 2018) (“Appellant makes no such arguments in his appellate brief; therefore, any such arguments are forfeited.”). Instead, he argues that equitable considerations warrant an exception to those requirements. Br. 10-11. He maintains that if a complaint shows that the tax is illegal and there are special and extraordinary circumstances, then the court may exercise equitable jurisdiction to enjoin the collection of taxes. Br. 10-11.

In *Williams Packing*, the Supreme Court held that not only must a plaintiff seeking an injunction despite the federal Anti-Injunction Act show the inadequacy of a legal remedy, but he must also show that “under no circumstances could the

Government ultimately prevail.” *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). Thus, “the proper standard for determining whether equitable relief may be obtained against the collection of any tax requires: 1) a finding that ‘under no circumstances could the Government ultimately prevail,’ and 2) that ‘equity jurisdiction otherwise exists,’ that is, proof of irreparable injury and inadequacy of the legal remedy.” *Barry v. Am. Tel. & Tel. Co.*, 563 A.2d 1069, 1075 (D.C. 1989) (quoting *Williams Packing*, 370 U.S. at 6-7); see *Craig*, 930 A.2d at 953 (“Outside the context of a tax refund suit, a plaintiff seeking declaratory or injunctive relief from a tax assessment can avoid the Anti-Injunction Act bar only by showing that two criteria are met: that there is no adequate legal remedy, and that under no circumstances could the Government ultimately prevail.” (internal quotation marks omitted)); *Agbaraji*, 836 A.2d at 569 (same).

Mr. Morgan has not satisfied the standard for equitable relief. *First*, he had an adequate remedy at law. He could have sought reconsideration of DCRA’s designation of his property as vacant in August 2019 (or 2020), and if DCRA had rejected his contention that the property was occupied, he could have appealed to the Commission, and then to the Superior Court. In addition, Mr. Morgan could have sought an exemption from tax reclassification in tax year 2020 as he had successfully done for tax years 2018 and 2019. Either challenge could have afforded him adequate relief.

Mr. Morgan generally asserts without any support that the pandemic undermined the adequacy of these remedies. Br. 12 But the pandemic could not account for his failure to challenge DCRA's August 2019 vacant building designation or to seek an exemption for tax year 2020, as he was instructed to do in December 2019. In addition, Mr. Morgan has not shown that, after ostensibly receiving a vacant property notice in 2020, he undertook any effort to contact DCRA about the notice, including submitting a Vacant Building Response Form as he had in 2019, let alone that he could not obtain relief after trying to challenge the vacancy designation or seek a tax reclassification exemption. Instead, Mr. Morgan had adequate remedies that he simply chose not to pursue.

Second, Mr. Morgan also did not carry his burden to show at the outset of the case that under no circumstances could the District ultimately prevail. *See Craig*, 930 A.2d at 958. While Mr. Morgan characterizes DCRA's determination to include his property on the vacant property list for the second half of 2020 as "void," that is simply not the case. Br. 4, 10.

Rather, DCRA properly designated Mr. Morgan's property as vacant in August 2019. Moreover, Mr. Morgan was explicitly told that he would need to seek an exemption for tax year 2020 in December 2019 and failed to act. Even if Mr. Morgan's building had been designated as vacant only in March 2020, as he claims here, he still failed to challenge that designation or seek an exemption from tax

reclassification for the second half of tax year 2020, or for tax year 2021. DCRA's failure to exclude Mr. Morgan's property from the vacant property list sent to OTR in the second half of tax year 2020 and 2021 was no error where no exemption was ever sought.

Nor has Mr. Morgan demonstrated that he was entitled to any pandemic-related exemption from the vacant property list for 2020. The pandemic-related exemption applied to "commercial property that houses a business that ha[d] closed during a period of time for which the Mayor has declared a public health emergency pursuant to § 7-2304.01, as a result of the circumstances giving rise to or resulting from the public health emergency, and for 60 days thereafter." *Id.* § 42-3131.06(b)(10) (2020). While Mr. Morgan averred that he was operating a catering and take-out service in the building while it was under construction since 2018, SA 3-4, he has never claimed that he had a valid certificate of occupancy for the building during 2018, 2019, or 2020 that would have authorized him to operate a catering and take-out service while his building was under construction. Nor did he challenge DCRA's 2019 vacant property designation on the ground that his property was occupied by his catering and takeout business within the meaning of D.C. Code § 42-3131.05(3). SA 44. Instead, he sought an exemption from tax reclassification for tax years 2018 and 2019 based on the ongoing construction. SA 44. When doing so, he was told he would need to seek another exemption for tax year 2020. SA 27,

64.⁶ Alternatively, he had to show that the property was no longer vacant, but validly occupied. Mr. Morgan did neither.

Third, and finally, Mr. Morgan’s reliance on *Green* is unavailing. Br. 10. In *Green*, “the Tax Division reached the merits in a class action suit challenging real property tax assessments even though only three of the petitioners had pursued administrative appeals.” *Craig*, 930 A.2d 958 n.14. In that case, the court excused the exhaustion requirement after finding “that the taxing authorities, deceitfully, did not inform the petitioning taxpayers that the level of their assessments had been changed until after the time by which they could have pursued an administrative remedy, thereby rendering their administrative remedy ‘useless.’” *Tolu Tolu v. District of Columbia*, 906 A.2d 265, 267 (D.C. 2006).

Green, which this Court has characterized as having “limited precedential value,” *Craig*, 930 A.2d 958 n.14, does not control the outcome here. For one, the *Green* decision “failed to take into account the Supreme Court’s decision in *Williams Packing*.” *Id.* Only post-*Green* has “the law in th[is] jurisdiction [been brought]

⁶ Notably, had Mr. Morgan secured an exemption for tax year 2020, under no circumstances would he have been entitled to one in 2021. Considering the exemptions he received in 2018 and 2019, an exemption in 2020 would have put him at the three-year cap. D.C. Code § 42-3131.06(f)(1) (“The cumulative time period for exemption from registration and fee requirements for a vacant building under the same, substantially similar, or related ownership shall not exceed 3 real property tax years.”).

exactly into line with the law established by the Supreme Court.” *Tolu Tolu*, 906 A.2d at 269. Moreover, “unlike here, no party in *Green* vigorously pressed the jurisdictional question.” *Id.*; see *Green*, 310 A.2d at 852. *Green* additionally involved the exceedingly rare circumstance where the taxpayers could not obtain the relief they were seeking through OTR’s administrative review process, which is not the case here.

In sum, Mr. Morgan has not carried his burden to show that he meets the two-part test for an equitable exception to enjoin the collection of taxes. The Superior Court properly dismissed Mr. Morgan’s complaint for lack of subject matter jurisdiction.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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February 2023

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
 - An individual's social-security number
 - Taxpayer-identification number
 - Driver's license or non-driver's' license identification card number
 - Birth date
 - The name of an individual known to be a minor
 - Financial account numbers, except that a party or nonparty making the filing may include the following:
 - (1) the acronym "SS#" where the individual's social-security number would have been included;
 - (2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
 - (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
 - (4) the year of the individual's birth;
 - (5) the minor's initials; and
 - (6) the last four digits of the financial-account number.
2. Any information revealing the identity of an individual receiving mental-health services.
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4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Stacy L. Anderson
Signature

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Email Address

22-CV-288
Case Number

February 6, 2022
Date

CERTIFICATE OF SERVICE

I certify that on February 6, 2023, this brief was served through this Court's electronic filing system to:

Kellee G. Baker

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STACY L. ANDERSON