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NO. COA11-210
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

TOWN OF LELAND, NC,
Plaintiff,

v.

Brunswick County
No. 07 CVS 2440

HWW, LLC and WESTPORT HOMEOWNERS'
ASSOCIATION, INC.,
Defendants.

Appeal by Defendant-appellant from order entered 26 October 2010 by Judge Thomas H. Lock in Brunswick County Superior Court. Heard in the Court of Appeals 16 November 2011.

Wessell & Raney, L.L.P., by John C. Wessell, III, for Plaintiff-appellee.

Marshall, Williams & Gorham, L.L.P., by Charles D. Meier, for Defendant-appellee Westport Homeowners' Association, Inc.

Hogue Hill Jones Nash & Lynch, LLP, by David A. Nash and Anna J. Averitt, for Defendant-appellant HWW, LLC.

HUNTER, JR., Robert N., Judge.

HWW, LLC ("HWW") appeals from an order entered 26 October 2010 denying in part and granting in part HWW's Rule 60(b) motion. We also review the trial court's order entered 10 June

2008 granting summary judgment in favor of the Town of Leland (the "Town"). For the following reasons, we affirm.

I. Factual & Procedural Background

HWW is the developer of the Westport subdivision in Leland. Westport Homeowners' Association, Inc. ("WHOA") is the current owner of the real property, the Westport subdivision, which is the subject of this action.¹ On 16 December 2004, HWW submitted a land use plan to the Town Council for approval of phase 2 of the Westport subdivision. The Town Council approved the project. On 15 September 2005, HWW submitted another site specific plan for approval by the Town Council for phase 2 section 2 of the Westport subdivision plan. The Town Council approved the site specific plan for phase 2 section 2.

The site specific plan for phase 2 section 2 provided for an area of open space described as a recreation area, including a parking lot, pool, softball field, and soccer field. The site specific plan notes elevations of various areas within the recreation area, but the plan does not indicate whether those elevations constitute pre-construction or post-construction elevations. After remedial work was completed on the recreation area, a topographic survey showed the area ultimately consisted

¹ WHOA did not appeal the trial court's judgment.

of three levels. The lowest level is approximately 24 feet in height and includes a parking lot and the pool house. The second level is approximately 29 feet in height and includes a basketball court, a softball field, and a soccer field. The third level varies in height between 30 and 37 feet and contains no improved recreation facilities (the "berm area"). The berm area is bounded on the north by the southern boundaries of the softball and soccer fields, on the east by the western lines of lots 434-436, on the south by the northern line of the dirt road, and on the west by the dividing line between the berm area and Mallory Creek. The berm area is a man-made area containing roots, clumps of gravel or asphalt, portions of silt fences, and similar debris and is "completely inadequate and inappropriate for use as a recreation area." HWW claims the berm area consists of soils excavated from other areas of the subdivision. As the recreation area is laid out in the site specific plan, it does not explicitly include such a berm area or state whether the elevation is changed at all from its pre-construction state.

In June of 2006, the Town adopted a new zoning ordinance, section 30-313, which required:

(5) Ensured recreation/open space

- a. In any [planned unit development] district, a minimum of five percent of the

total land area shall be reserved as open space. Any area or segment of land less than eight feet in width may not be included in calculating the minimum open space reservation unless such land is clearly a part of an open space system, such as a pedestrian walkway.

b. A minimum of 25 percent of the required open space shall be developed for active recreational purposes, such as tennis courts, ballfields or playgrounds Such recreation area shall be conveniently and centrally located to the housing units. Building areas for recreational facilities may be computed as open space.

c. Provisions for continuous maintenance of open space, specifically including that developed for active recreational purposes, shall be made by the developer either through proposed dedication to the town, if acceptable, or through the establishment of a private homeowners' association.

In February 2007, residents of the Westport subdivision complained to the Mayor of Leland regarding HWW's use of the berm area to dump dirt and debris, claiming it did not comply with the "open space" requirement under the ordinance. On 9 February 2007, Town Manager and Acting Code Enforcement Officer of the Town, William Farris, sent a memorandum, copied to HWW, stating, "the condition and appearance of the [berm area] was less than desired." The memorandum indicated HWW had discussed the berm area with Mr. Farris and agreed to improve the area by,

inter alia, installing a small foot bridge, grading the site to enable the residents to access the berm area more easily, and cleaning the area of trash materials. In addition, HWW agreed to create a passive recreation area with landscaping and to install irrigation to help new plants survive. The memorandum also stated, "a registered land surveyor has made calculations that show the development's open space and recreation areas meet the Town's requirements without considering [the berm area]." Mr. Farris also noted, however, "Storage of poor soils appears to be an issue in many of our developments. It is probably wise for us to consider ordinance changes to address this issue directly." On 1 March 2007, Sandy Wood, president of Hearthside Builders & Developers, LLC and a member of HWW, sent a letter to Mr. Farris indicating HWW had completed all the requirements in the Town's 9 February 2007 memorandum except for seeding and planting trees due to inclement weather.

On 20 March 2007, Mr. Farris notified HWW that the condition of the berm area did not meet the previously approved site specific plan and was in violation of section 30-313 of the Town code. This letter notified HWW that it

must begin removal of the existing mound of dirt on the recreational site adjacent to Merestone Drive as described hereinabove and bring that area into compliance with the

site specific plan approved by the Town of Leland. Action to remove this violation must begin within fourteen (14) days of the date of this letter and must be completed within seventy-four (74) days of the date of this letter.

On 25 April 2007, HWW's attorney, Bill Lynch, sent a letter to the Town's attorney contesting the Town's decision and its authority to require developers to construct additional facilities. Mr. Lynch's letter requested that the Town "[p]lease provide me with any official form for an appeal to the Board of Adjustment if this letter does not suffice." On 4 May 2007, Mr. Lynch sent another notice of appeal stating the Town had conceded that HWW's site specific plan met all requirements in September 2005. HWW's appeal to the Town's Board of Adjustment (the "Board") was scheduled for hearing on 25 June 2007 and later continued until 23 July 2007.

On 23 July 2007, HWW's counsel sent another letter to the Town, notifying the Town it was withdrawing its appeal. Additionally, HWW agreed to move the soil to make it match the natural grade of the area and allow construction of a ball field. The letter also stated, "[r]emoval or relocation of earth for commencement of construction of the ball field cannot begin until an amended erosion control permit has been obtained." On the same day, the Town's attorney sent a letter

to HWW's counsel acknowledging HWW's 23 July 2007 letter stating, "[s]ince [HWW] has withdrawn its appeal from the decision of the Code Enforcement Officer, that decision now stands as the ruling in this matter." The letter also notified HWW of a thirty day deadline in order to comply with the Town's decision. If HWW did not comply by the deadline, the Town planned to commence enforcement proceedings. In addition, the letter stated, "[HWW] must still satisfy the Town that what it is proposing to do is consistent with the Town ordinances."

On 30 July 2007, HWW's counsel responded to the Town's 23 July 2007 letter, stating it had no other written plans for improving the condition of the berm area besides what it detailed it would do in its 23 July 2007 letter. On 13 August 2007, counsel for HWW sent a letter to the Town's counsel stating HWW had submitted a plan to the Division of Water Quality regarding the removal of soil. After learning it would take 15 days for approval, HWW asked the Town to extend the thirty day deadline to begin work. On 28 August 2007, HWW sent a letter to Mr. Farris stating it received approval for modification of an erosion control permit and would begin removing the dirt in September. HWW never removed the dirt from the recreation area.

On 2 November 2007, the Town filed a complaint seeking a court order requiring the developer to remove the dirt from the recreation area. The Town alleged HWW made certain improvements to phase 2 section 2, which included:

- (a) Grading a portion of the previously existing mound of dirt to a level approximately the same as that of the parking lot and swimming pool;
- (b) Constructing within the newly graded area a youth soccer field and youth softball field;
- (c) Moving the dirt and debris from the graded area to another location within the same recreation area;
- (d) Installing a fence around the newly constructed soccer field and softball field; and
- (e) Placing additional fill and grassing certain portions of the remaining mound.

The Town claimed, however, that these improvements resulted in "no dirt or debris being removed from the recreation site in question." The reduction of the grade in one portion of the site was accomplished by moving debris from one location to another on the same site. In January 2008, HWW filed a timely answer. On 23 April 2008, the Town moved for summary judgment and filed an Affidavit of William Farris in support of its motion. On 30 April 2008, HWW moved to amend its answer to

plead laches and estoppel. The same day, the Town moved to amend the complaint to add WHOA as a Defendant. On 12 May 2008, HWW responded to the Town's motion for summary judgment and submitted the affidavits of Sandy Wood and Gregory Buzzerd. On the same day, HWW moved to amend its answer to plead unclean hands. The trial court entered an order allowing the Town's amendment to the complaint to add WHOA as a party on 12 May 2008. On 10 June 2008, the trial court granted the motion for summary judgment in the Town's favor and ordered HWW to bring the recreation and open space area into compliance with the site specific plan by removing the dirt and debris on the recreation and open space area so it would be the same grade as the parking lot, basketball court, soccer field, and softball field.

On 23 June 2008, HWW moved to stay the order pending appeal. On 3 July 2008, the parties consented to amend the answer to plead unclean hands. On 7 July 2008, the parties entered into a consent order staying mandatory injunctive relief pending appeal. On the same day, HWW moved for relief from judgment under Rules 60(b)(1) and (6). HWW argued it was impossible to comply with the trial court's 10 June 2008 order to bring the recreation and open space area into compliance with the site specific plan by removing the dirt and debris from the

area so it would be the same grade as the parking lot, basketball court, soccer field, and softball field. HWW contended it was impossible to comply with the order because the grade of the parking lot and basketball court is four to five feet below the soccer and softball fields and the mound of dirt is seven to eight feet higher than the soccer and softball fields. No hearing or ruling was held on the Rule 60(b) motion. On 9 July 2008, HWW appealed the court's grant of summary judgment in favor of the Town. This Court issued an opinion on 16 June 2009, affirming the trial court's grant of summary judgment for the Town but remanding to the trial court to remove the portion of its order granting relief that exceeded the scope of relief prayed for in the Town's complaint and motion. A petition for rehearing was allowed on 14 August 2009. On 6 April 2010, this Court issued an opinion rescinding its prior opinion. *Town of Leland, N.C. v. HWW, LLC*, No. COA08-987, 2010 WL 1528825, at *1 (N.C. Ct. App. 2010). This Court remanded the case, instructing the trial court to rule on HWW's Rule 60(b) motion because, before the merits of an appeal could be considered, a ruling on a pending Rule 60(b) motion is favored as it allows the appellate court to dispose completely of all issues in a case. *Id.* at *4. This Court did not address in its

opinion HWW's appeal of the trial court's summary judgment order in favor of the Town.

In August 2010, HWW filed an Amended Amendment to Motion of HWW, LLC for Relief From Order and Judgment, and the Town and WHOA filed a Joint Response to the Amended Rule 60(b) Motion on 20 August 2010. After a hearing before Judge Lock on 10 September 2010, the trial court entered an order 26 October 2010 and granted in part and denied in part HWW's Rule 60(b) motion filed 7 July 2008, HWW's Amendment to Motion of HWW, LLC for Relief from Order and Judgment dated 6 August 2010, and HWW's Amended Amendment to Motion of HWW, LLC for Relief from Order and Judgment dated 23 August 2010. The trial court modified its 10 June 2008 order and required HWW within sixty days of the order to "take all necessary steps to remove dirt and debris from the 'berm area' as shown on the topographic survey . . . so that following such removal, the berm area shall have an elevation equal to that of the softball field and soccer field (which elevation is approximately 29 feet)[.]" The order was served on HWW on 17 November 2010.

On 14 December 2010, HWW filed a second Rule 60(b) motion as well as a motion to stay the 26 October 2010 order pending appeal. On 17 December 2010, HWW filed a Notice of Appeal to

this Court regarding the denial of its first Rule 60(b) motion. After the record on appeal was settled and filed, HWW moved to extend the time within which appellees' brief was due in order to allow the trial court to hear the second Rule 60(b) motion. The motion was heard before Judge Lock on 17 June 2011, and on 29 June 2011, Judge Lock certified to this Court that he would deny HWW's Rule 60(b) motion if he had jurisdiction to do so.

II. Jurisdiction

As HWW appeals from the final 26 October 2010 Rule 60(b) order of the superior court, an appeal lies of right with this court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

HWW also filed a petition for writ of certiorari with this court on 17 November 2011 after oral argument requesting this Court to review the summary judgment order entered 10 June 2008 in favor of the Town in addition to the Rule 60(b) order although it had not specifically requested this in its notice of appeal as required under Rule 3 of the Rules of Appellate Procedure. See N.C. R. App. P. 3. We choose to grant certiorari. We note HWW appealed the summary judgment order in its first notice of appeal dated 9 July 2008, and this Court in its first opinion (later rescinded) ruled on the issue of summary judgment. However, in its second opinion, this Court

refrained from ruling on the summary judgment issue, remanding the matter back to the trial court to rule on HWW's pending 60(b) motion. Subsequently, there has been no review of the summary judgment order in favor of the Town that HWW initially appealed. Therefore, we grant certiorari to resolve both HWW's challenge to the summary judgment order from the first appeal as well as the Rule 60(b) motion in the current appeal. We take judicial notice of our own records from the prior appeal and thereby have the record evidence to resolve both issues. In deciding the issues, we refer to the briefs, exhibits, and record from the first appeal as well as those submitted in the current appeal.

III. Analysis

HWW argues the trial court erred in granting summary judgment in favor of the Town because there are genuine issues of material fact as to several issues in the case. HWW also argues the trial court's order denying HWW's Rule 60(b) motion improperly granted relief that was inconsistent with the Town's prayer for relief. For the following reasons, we affirm.

A. Summary Judgment

HWW argues the trial court erred in granting summary judgment in favor of the Town because there are genuine issues

of material fact as to (1) whether HWW's improvements brought the property into compliance with the site specific plan, (2) whether the Town can assert collateral estoppel offensively, (3) the issue of laches, and (4) the defense of equitable estoppel. The standard of review on summary judgment in the trial court is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980). "The record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences reasonably arising therefrom." *Ausley v. Bishop*, 133 N.C. App. 210, 214, 515 S.E.2d 72, 75 (1999), *rev'd on other grounds*, 356 N.C. 422, 572 S.E.2d 153. This Court's standard of review of a trial court's summary judgment ruling is *de novo*. *Gaines v. Cumberland County Hosp. Sys., Inc.*, 195 N.C. App. 442, 444, 672 S.E.2d 713, 715 (2009).

"It is well established that when the legislature has created an effective administrative remedy, it is exclusive and the matter does not become ripe for review until the statutory remedy has been exhausted." *Town of Kenansville v. Summerlin*, 70 N.C. App. 601, 603-04, 320 S.E.2d 428, 430 (1984) (citing *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979)). N.C.

Gen. Stat. § 160A-388(b) governs an appeal from a decision of a Town's zoning administrator and provides in pertinent part:

A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof.

N.C. Gen. Stat. § 160A-388(b) (2011). "The board of adjustment is an administrative body with quasi-judicial power whose function is to review and decide appeals which arise from the decisions, orders, requirements or determinations of administrative officials, such as building inspectors and zoning administrators." *Midgette v. Pate*, 94 N.C. App. 498, 502, 380 S.E.2d 572, 575 (1989). "Any party not satisfied by the ruling of the board may, in turn, appeal to superior court, and such appeal is in the nature of certiorari review." *Grandfather Village v. Worsley*, 111 N.C. App. 686, 688, 433 S.E.2d 13, 15 (1993) (citing N.C. Gen. Stat. § 160A-388(e)). In *Grandfather*

Village, the city brought an action seeking injunctive relief against the defendant to remove signs at its convenience store for violating the city's zoning ordinance. *Id.* at 687, 433 S.E.2d at 14. In a letter, the city notified the defendant of the violation, the penalty, and the thirty day time period to appeal the decision to the board of adjustment. *Id.* at 687-88, 433 S.E.2d at 14. The defendant sent a purported letter of appeal after the thirty day time period had elapsed. *Id.* at 688, 433 S.E.2d at 14. The trial court granted summary judgment in favor of the city, and the defendant appealed. *Id.* at 686, 433 S.E.2d at 14. This Court held that because the defendant failed to exercise his administrative remedies by appealing the decision of the zoning administrator, "he waived any right to raise in superior court defenses he might have had" and affirmed summary judgment for the city. *Id.* at 689, 433 S.E.2d at 15; see also *Midgette*, 94 N.C. App. at 503, 380 S.E.2d at 575 (plaintiff precluded from attacking the town's grant of building permits to the defendant because the plaintiff failed to first appeal to the board of zoning adjustment); *Potter v. City of Hamlet*, 141 N.C. App. 714, 720, 541 S.E.2d 233, 236 (2001) (party precluded from attacking zoning officer's decision where party failed to appeal decision to board of adjustment);

Guilford Co. Planning & Dev. Dept. v. Simmons, 102 N.C. App. 325, 328, 401 S.E.2d 659, 661 (1991) ("Our Courts have consistently required litigants aggrieved by decisions of Boards of Adjustment to seek relief as mandated by statute.").

Here, HWW was notified in the 20 March 2007 letter that "[HWW] must begin removal of the existing mound of dirt on the recreational site adjacent to Merestone Drive as described hereinabove and bring that area into compliance with the site specific plan approved by the Town of Leland." HWW chose to withdraw its appeal of the decision. We conclude the effect of withdrawing the appeal is indistinguishable from not filing an appeal at all, so HWW was precluded from raising any defenses. HWW's opportunity to contest the ruling passed, and having missed this chance, HWW does not get a second bite at the apple. *See Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C.*, 163 N.C. App. 325, 328, 593 S.E.2d 120, 122 (2004) (citing *Swain v. Elfland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535 (2001)). This Court determined in *Swain* that "allow[ing] plaintiff two bites of the apple[] could lead to the possibility that different forums would reach opposite decisions, as well as engender needless litigation in violation of the principles of collateral estoppel." 145 N.C. App. at 389, 550 S.E.2d at 535.

HWW contends the Town had a duty to inform the developer that relocation of the dirt did not bring the berm area into compliance with the ordinance. The Town argues we should not consider this argument because it is being raised for the first time on appeal. It is well-established that "a party in a civil case may not raise an issue on appeal that was not raised at the trial level." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 690, 562 S.E.2d 82, 95 (2002). Because HWW did not raise this argument in the court below, we will not address this issue. *Greene v. Royster*, 187 N.C. App. 71, 77, 652 S.E.2d 277, 281 (2007). Because we determine HWW was collaterally estopped from raising defenses to the Town's enforcement claim, we affirm summary judgment for the Town.

B. 60(b) Motion

HWW argues the trial court erred by granting relief HWW claims is inconsistent with the relief requested in the Town's complaint and concluding as a matter of law that bringing the elevation of the berm area to 29 feet above sea level is required to bring the property into compliance with the site specific plan approved by the town on 15 September 2006. "A motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure is addressed to the sound discretion of the

trial court and its decision is not reviewable on appeal absent a showing of abuse of its discretion." *Vagilo v. Town & Campus Int'l, Inc.*, 71 N.C. App. 250, 256, 322 S.E.2d 3, 7 (1984).

It is longstanding law that "the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and facts proved, and not the prayer of the party, which determines the measure of relief to be administered; the only restriction being that the relief given must not be inconsistent with the pleadings and proofs.'" *Harriss v. Sneed*, 104 N.C. 369, 375, 10 S.E. 477, 480 (1889) (quoting *Knight v. Houghtalling*, 85 N.C. 17, 33 (1881)). Here, the court's ordered relief is not inconsistent with the pleadings and facts proved. The Town's original complaint filed 1 November 2007 requested the following relief:

A. That consistent with the provisions of N.C.G.S. §160A-175, the Court issue an order of abatement requiring the Defendant to remove the remaining mound of dirt and debris from the area designated on the site specific plan for Phase 2, Section 2, Westport Subdivision as described hereinabove.

The initial order entered by Judge Lock 10 June 2008 granted in part the following relief to the Town:

1. In accordance with the authority granted to this Court by NCGS 160A-175, the defendant HWW, LLC is hereby ordered to

bring the recreation and open space area shown in the lower left hand corner of the site specific plan for Phase 2, Section 2, Westport Subdivision, approved by the Town Council for the Town of Leland on 15 September 2005, into compliance with said site specific plan by removing the mound of dirt and debris that remains on this recreation and open space area *so that the topographical grade and elevation of the area where the mound of dirt and debris is currently located shall be the same as the grade and elevation of the existing parking lot, basketball court, soccer field and softball field.*

(Emphasis added.) On 7 July 2008, HWW filed a Rule 60(b) motion indicating it was impossible to comply with the italicized portion of the order because "the grade and elevation of the existing parking lot and basketball court is four to five feet below the elevation of the soccer field and softball field, while the 'mound of dirt and debris' referred to in the [initial] Order is an additional 7 to 8 feet higher in elevation than the adjacent soccer field and softball field." In its motion, HWW referred to a letter its attorney wrote to the trial court in which he claimed, "'It is our position that based upon the limited one-hour argument on the sole issue of estoppel and the two affidavits submitted, the Court cannot enter such a detailed order with reference to the scope of an injunction without having received any evidence on that issue.'" Once the

Rule 60(b) motion was finally argued before the trial court, the court heard evidence on the very issue of the scope of the injunction. The trial court included findings of fact based on the Affidavit of Gregory R. Thompson, PE, PLS, that the recreation area consists of three levels. The lowest level is about 24 feet high and consists of the parking lot and a pool house; the second level is about 29 feet high and contains the basketball court and softball and soccer fields; and the third level is the berm area varying in height between 30 and 37 feet. Mr. Thompson recommended "that the third level [(the berm) could] be reduced in elevation so that it [would] be at the same elevation [(29 feet high)] as the second level on which the basketball court, softball field and soccer field are currently located." Taking into account the evidence presented at the hearing and recognizing the elevation level differences, the trial court modified its initial order and granted the following relief to address HWW's concerns with the initial order:

HWW, LLC shall take all necessary steps to remove dirt and debris from the 'berm area' as shown on the topographic survey (said berm area being that area bounded on the north by the southern boundaries of the softball field and soccer field, on the east by the western lines of Lots 434-436, on the south by the northern line of the dirt road and on the west by the dividing line between said berm area and Mallory Creek (all as

shown of the topographic survey)) [sic] so that following such removal, the berm area shall have an elevation equal to that of the softball field and soccer field (which elevation is approximately 29 feet).

This 26 October 2010 order was consistent with the Town's prayer for relief requiring removal of the dirt, and the italicized portion of the order detailing how much dirt should be removed was consistent with the evidence presented at the Rule 60(b) hearing through the affidavit of Mr. Thompson. Therefore, we hold that the trial court's 26 October 2010 order granted appropriate relief consistent with the pleadings and the facts proven and was not an abuse of discretion.

IV. Conclusion

For the foregoing reasons, the orders of the trial court are

Affirmed.

Judges GEER and ERVIN concur.

Report per Rule 30(e).