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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-414

Filed: 7 January 2020

Cumberland County, No. 18CVS4649

BRIAN CLEMENT and BEATRICE CLEMENT, Petitioners,

v.

CUMBERLAND COUNTY, a North Carolina County; MCCORMICK FARMS, L.P., a North Carolina Limited Partnership, and DEEP CREEK ATV PARK, LLC, a North Carolina Limited Liability Company, Respondents.

Appeal by respondents from order entered 19 December 2018 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 29 October 2019.

The Brough Law Firm, PLLC, by Kevin R. Hornik and T.C. Morphis, Jr., for petitioner-appellees.

County Attorney Rickey L. Moorefield, for respondent-appellant Cumberland County.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough, for respondent-appellants McCormick Farms, L.P. and Deep Creek ATV Park, LLC.

BERGER, Judge.

Cumberland County, McCormick Farms, L.P. (“McCormick Farms”), and Deep Creek ATV Park, LLC (“Deep Creek”) (collectively, “Respondents”), appeal the trial

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court's December 19, 2018 order which granted a petition for writ of mandamus sought by Brian and Beatrice Clement (collectively, "Petitioners"). Pursuant to the writ of mandamus, Cumberland County was compelled to provide Petitioners with a written zoning determination. On appeal, Respondents argue the trial court erred by (1) denying their motions to dismiss brought under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, and (2) issuing the writ of mandamus sought by Petitioners. Because the trial court lacked subject matter jurisdiction to rule on the petition for writ of mandamus, we reverse.

Factual and Procedural Background

McCormick Farms owns real property in Cumberland County, North Carolina. Petitioners own real property adjacent to McCormick Farms. Deep Creek leases certain portions of the McCormick Farms property for use as a recreational all-terrain vehicle park ("ATV Park"). On April 16, 2018, Petitioners, by and through counsel, contacted Thomas Lloyd ("Lloyd"), the Cumberland County Planning and Inspections Director, requesting administrative guidance as to whether the ATV Park qualified as an agritourism activity under the *bona fide* farm purposes exemption from county zoning authority pursuant to N.C. Gen. Stat. § 153A-340. The email request was titled "ATV Park Zoning Question."

That same day, Lloyd responded to the inquiry, in pertinent part,

This land has been, and still is, in the present use program, is actively engaged in Silviculture and has a farm

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number. It is a Bona Fide Farm operation. As the person tasked with making the determination, and in light of the vagueness of the statute, I have determined that it does fall into the category of Agritourism. The County Attorney agrees and has advised me on the matter. In the future, I would request that you contact County Attorney Rick Morefield [*sic*] . . . with further questions.

From the record, it appears that Petitioners had no further questions and sought no clarifications from the County Attorney.

On June 12, 2018, Petitioners again contacted Lloyd requesting administrative guidance as to whether the ATV Park qualified as an agritourism activity under the exemption, this time in light of our Court's holding in *Jeffries v. Cty. Of Harnett*, ___ N.C. App. ___, 817 S.E.2d 36 (2018). On June 13, 2018, Rickey L. Moorefield, the Cumberland County Attorney, responded to Petitioners' inquiry. The response stated that Lloyd would not provide an official determination.

On July 29, 2018, Petitioners filed a petition for writ of mandamus seeking to compel Cumberland County to provide a written determination as to whether the ATV Park qualified as an agritourism activity under the *bona fide* farm purposes exemption from county zoning authority pursuant to Section 153A-340. On August 13, 2018, Cumberland County filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On September 12, 2018, McCormick Farms and Deep Creek also filed motions to dismiss under Rules 12(b)(1) and 12(b)(6).

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On December 17, 2018, the trial court held a hearing on Respondents' motions to dismiss and on the substantive issues regarding the writ of mandamus sought by Petitioners. The trial court denied Respondents' motions to dismiss and issued a writ of mandamus compelling Cumberland County to provide a written zoning determination on December 19, 2018. On December 21, 2018, Respondents filed a joint notice of appeal and a joint verified motion to stay pending appeal. The trial court granted the stay on February 4, 2019.

On appeal, Respondents argue the trial court erred when it (1) denied their motions to dismiss, and (2) granted the writ of mandamus sought by Petitioners. Because the trial court lacked subject matter jurisdiction to rule on Petitioners' request for a writ of mandamus, we reverse the trial court's order denying Respondents' motions to dismiss pursuant to Rule 12(b)(1).

Analysis

A trial court must have subject matter jurisdiction in order to exercise authority over a case or controversy. *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). If a court lacks subject matter jurisdiction, then the action must be dismissed. N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2017). On appeal, "[w]e review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

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Under Section 106 of the Cumberland County Zoning Ordinance (the “Ordinance”), the Cumberland County Planning and Inspections Director (“Director”) is empowered to administer and enforce the Ordinance. Cumberland County, N.C., Zoning Ordinance, art. I, § 106 (July 3, 1972). When a party seeks an official decision, the Director must provide that party with written notice of his final decision. Zoning Ordinance, art. XVI, § 1604(B). This written notice may be delivered by personal delivery, first-class mail, or electronic mail. Zoning Ordinance, art. XVI, § 1604(B).

Under Section 160A-388 of the North Carolina General Statutes, counties may establish a board of adjustment to “hear and decide appeals from decisions of administrative officials charged with enforcement of the zoning . . . ordinance.” N.C. Gen. Stat. § 160A-388(b1) (2017). Cumberland County adopted this scheme in Article XVI of the Ordinance. Zoning Ordinance, art. XVI, § 1604. Under Section 1604, any party with standing may appeal a decision of the Director to the quasi-judicial Cumberland County Board of Adjustment. Zoning Ordinance, art. II, § 203; art. XVI, § 1604. Such appeal must be filed with the Board of Adjustment within thirty days of receiving written notice of the Director’s official decision. Zoning Ordinance, art. XVI, § 1604(C). A party may appeal the final decision of the Board of Adjustment to the Superior Court. Zoning Ordinance, art. XVI, § 1610.

In North Carolina, “[a]s a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief

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must be exhausted before recourse may be had to the courts.” *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). By requiring the exhaustion of administrative remedies, our courts promote certainty in the marketplace and prevent economic waste by giving effect to the speedy, binding determinations of those officials and quasi-judicial bodies best equipped to carry out the administrative functions of the State.

However, a writ of mandamus may properly be issued where a petitioning party has no other legal remedy available—such an occasion may arise where an administrative official fails to issue an official decision in response to a zoning inquiry. *See Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 889, 599 S.E.2d 921, 925 (2004). Where no official decision has been issued, a mandamus proceeding may be necessary because the party seeking the determination has no right to appeal to the Board of Adjustment. *See Meier v. City of Charlotte*, 206 N.C. App. 471, 478-79, 698 S.E.2d 704, 709-10 (2010).

In *Meier*, we held that a response to a zoning inquiry constitutes an appealable, official decision when: (1) the response provides a determination made by an official with the authority to issue definitive interpretations of the zoning ordinance; (2) the response concerns the manner in which a provision of the zoning ordinance should be applied; (3) the response concerns a specific set of facts; and (4) the response is provided to a party with a clear interest in the outcome of a specific dispute. *Id.* at

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479, 698 S.E.2d at 710. Therefore, where a response to a zoning inquiry meets these requirements, a party must exhaust their administrative remedies by appealing to the Board of Adjustment prior to seeking review in the Superior Court. Zoning Ordinance, art. XVI, §§ 1604, 1610; *Meier*, 206 N.C. App. at 479, 698 S.E.2d at 710; *Northfield Dev. Co.*, 165 N.C. App. at 889, 599 S.E.2d at 925.

Here, on April 16, 2018, Petitioners, by and through counsel, contacted Lloyd, the Cumberland County Planning and Inspections Director, requesting administrative guidance as to whether the ATV Park qualified as an agritourism activity under the *bona fide* farm purposes exemption from county zoning authority pursuant to Section 153A-340. The email request was titled “ATV Park Zoning Question.”

Under Section 153A-340(b)(1), a property used for *bona fide* farm purposes is exempted from county zoning regulations. N.C. Gen. Stat. § 153A-340(b)(1) (2017). Included within the definition of “*bona fide* farm purposes” is any building or structure used for agritourism, provided that the building or structure is located on property that is either (1) owned by a person holding a qualifying farmers sales tax exemption certificate or (2) “is enrolled in the present-use value program pursuant to [Section] 105-277.3.” N.C. Gen. Stat. § 153A-340(b)(2a). “Agritourism” is defined as “any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural

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activities.” N.C. Gen. Stat. § 153A-340(b)(2a). Additionally, a “building or structure used for agritourism” broadly includes “any building or structure used for public or private events.” N.C. Gen. Stat. § 153A-340(b)(2a).

Lloyd responded to Petitioners’ inquiry regarding the applicability of Section 153A-340 to the ATV Park on April 16, 2018 via electronic mail. In his response, Lloyd first addressed the applicability of the *bona fide* farm purposes exemption to the property. According to the decision, the property upon which the ATV Park is located is enrolled in the present-use value program. The response next addresses whether the ATV Park qualifies under the exemption. The decision states, in pertinent part, “It is a Bona Fide Farm operation. As the person tasked with making the determination, . . . I have determined that it does fall into the category of Agritourism.” The response also directed Petitioners to contact the County Attorney with any further questions.

Lloyd’s response to Petitioners’ April 16, 2018 zoning inquiry constituted an appealable, official decision. As the Cumberland County Planning and Inspections Director, Lloyd had the authority to issue a definitive interpretation of the Ordinance. In fact, Lloyd’s response even acknowledges that he is tasked with making the determination. Second, Lloyd’s response concerns the specific application of county zoning regulations in light of the *bona fide* farm purposes exemption, found in Section 153A-340. Third, the response concerns a specific set of facts—the application of

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Section 153A-340 to an ATV park located on a property entitled to the *bona fide* farm purposes exemption. Finally, the response was provided to Petitioners, who, as owners of property adjacent to the ATV Park, had a clear interest in the outcome of the dispute. *Meier*, 206 N.C. App. at 478-79, 698 S.E.2d 704, 709-10 (finding an adjacent property owner to have a “definite interest in the outcome” of a zoning dispute).

On appeal, Petitioners contend that Lloyd’s response to their April 16, 2018 request was “vague and ambiguous” and “did not state, with any degree of certainty, whether or not the ATV park use proposed for the site was or was not agritourism.” We are not persuaded. In an email inquiry, titled “ATV Park Zoning Question,” Petitioners requested administrative guidance as to whether the ATV Park qualified as an agritourism activity under the *bona fide* farm purposes exemption. Lloyd responded to that inquiry as follows: “*It is a Bona Fide Farm operation. As the person tasked with making the determination, . . . I have determined that it does fall into the category of Agritourism.*” (Emphasis added). Lloyd’s response plainly addressed Petitioners’ inquiry concerning the zoning question about the ATV Park.

Petitioners’ argument that Lloyd’s response was too vague and ambiguous to qualify as an appealable decision is further undermined by the lack of any indication in the record that Petitioners sought clarification of this initial decision. Rather, Petitioners made no attempt to revisit the matter until June 12, 2018, after this Court

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issued an opinion that Petitioners viewed as favorable to their argument that the ATV Park should not qualify for the *bona fide* farm purposes exemption.

Because Lloyd's response to Petitioners' April 16, 2018 zoning inquiry constituted an appealable, official decision, Petitioners were required by Section 1604 of the Ordinance to file their appeal with the Board of Adjustment within thirty days of receiving written notice of that decision. By failing to file an appeal with the Board of Adjustment, Petitioners did not exhaust their administrative remedies. Accordingly, Petitioners cannot subsequently create jurisdiction with the Superior Court "by couching [their] claim in the guise of a mandamus proceeding." *Northfield Dev. Co.*, 165 N.C. App. at 889, 599 S.E.2d at 925. To hold otherwise would undermine the quasi-judicial scheme intended by the General Assembly in Section 160A-388 and could lead to market uncertainty and costly economic waste by forcing Cumberland County to revisit a prior, official determination regarding a project which has presumably moved toward completion.

Therefore, the trial court erred by denying Respondents' motions to dismiss pursuant to Rule 12(b)(1) because the court lacked subject matter jurisdiction over Petitioners' mandamus proceeding.

Conclusion

For the reasons stated herein, we reverse the trial court's denial of Respondents' motions to dismiss for lack of subject matter jurisdiction.

CLEMENT V. CUMBERLAND CNTY.

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REVERSED.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).