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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-171

No. COA21-281

Filed 15 March 2022

Durham County, No. 17 CVS 2906

RHONDA COATES, TIMOTHY ELLIS, PATRICK and MARIE MAHONEY, KENNETH PRICE, BRYAN and ANGELA SARVIS, JAMES VENTRILLA, and JAMES WOLAK, Petitioners,

v.

DURHAM COUNTY, a North Carolina County, and HUBRICH CONTRACTING, INC., a North Carolina Corporation, Respondents.

Appeal by Respondent Durham County from Orders entered 28 August 2018 by Judge G. Bryan Collins and 30 November 2020 by Judge Michael J. O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 21 September 2021.

Brown & Bunch, PLLC, by LeAnn Nease Brown, for petitioners-appellees.

Bryan E. Wardell, Senior Assistant County Attorney, for respondent-appellant.

HAMPSON, Judge.

¶ 1 Durham County (the County) appeals from (1) the Durham County Superior Court's (Superior Court) 28 August 2018 Order (2018 Remand Order) reversing and remanding the Durham City-County Board of Adjustment's (Board of Adjustment)

approval of Hubrich Contracting, Inc.'s (Hubrich) application for a Minor Special Use Permit (mSUP) and (2) the Superior Court's 30 November 2020 Order (2020 Fee Order) awarding Rhonda Coates, Timothy Ellis, Patrick and Marie Mahoney, Kenneth Price, Bryan and Angela Sarvis, James Ventrilla, and James Wolak (Petitioners) attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.7 (2018).

¶ 2 This case—along with the companion case *Sarvis v. Durham Cnty.*[1] COA21-282—requires us to review proceedings on an application for a Special Use Permit and subsequent appeal by certiorari to the Superior Court occurring in 2017 and 2018 under statutes which were then in effect and which have since been amended or repealed and superseded. In particular, this includes review of the Superior Court's 2020 Fee Order awarding attorneys' fees under N.C. Gen. Stat. § 6-21.7 as it existed prior to the 2019 amendment. *See* 2019 N.C. Sess. Law 111, § 1.11 (N.C. 2019). It bears mentioning that in our own review of 2019 N.C. Sess. Law 111, we observe that the Session Law reflects the General Assembly provided the amendment to Section 6-21.7 to "clarify and restate the intent of existing law and apply to ordinances adopted before, on, and after the effective date." 2019 N.C. Sess. Law 111, § 3.1. The Superior Court, in its 2020 Fee Order—with the apparent assent of the parties—however, applied the prior version of the statute which was still in place when this

[1] The two cases were consolidated for hearing pursuant to N.C.R. App. P. 41 by Order dated 21 June 2021.

matter was first heard by the Superior Court in 2018. Indeed, on appeal the parties continue to agree the prior version of Section 6-21.7 controls, and no party has briefed the impact the effective date of the 2019 amendment has on this case. Consequently, whether the 2019 amendment to Section 6-21.7 operates retroactively to the case at bar—and if so, what impact it might otherwise have—is not before this Court, and we do not decide it. We further express no opinion on the impact, if any, of subsequent legislative amendments to the statutes involved in this case and limit our analysis solely to the arguments in this case.

¶ 3 Having said that, the Record in this case tends to reflect the following:

Factual and Procedural Background

¶ 4 On 7 November 2016, Hubrich submitted an application for the mSUP with the Durham City-County Planning Department in order to allow construction of a school. The Board of Adjustment held a quasi-judicial hearing on 28 February 2017. On 28 March 2017, the Board of Adjustment issued an order granting the mSUP. On 25 April 2017, Petitioners petitioned the Durham County Superior Court for review by way of a Writ of Certiorari.[2] On 28 August 2018, the Superior Court entered the 2018 Remand Order captioned "Final Order and Judgment". In the 2018 Remand

[2] While this matter was pending in Superior Court, Hubrich submitted a second mSUP application for the same project, seeking to include an additional parcel of land omitted from the first application. This second application gave rise to the companion case *Sarvis v. Durham Cnty.* COA21-282.

Order, the Superior Court reversed the Board of Adjustment's issuance of the mSUP to Hubrich and remanded the matter to the Board of Adjustment with instructions to, *inter alia*, reopen the public hearing on Hubrich's application for the mSUP. The Superior Court further indicated it was retaining "jurisdiction to consider Petitioners' prayer for costs and attorneys' fees pursuant to the provisions of N.C.G.S. §6-21.7."

¶ 5 Hubrich appealed the 2018 Remand Order to this Court, and we dismissed that appeal as interlocutory. *Coates v. Durham Cnty.*, 266 N.C. App. 271, 272, 831 S.E.2d 392, 393 (2019) (*Coates I*). We concluded the appeal was interlocutory because the Superior Court had remanded the matter to the Board of Adjustment for further proceedings including a new hearing on the application and was, thus, not, in fact, a final judgment. *Id.* at 272, 831 S.E.2d at 393-94 (citing *Akers v. City of Mount Airy*, 175 N.C. App. 777, 779-80, 625 S.E.2d 145, 146-47 (2006)).

¶ 6 On the Record before us, it appears that following our dismissal of the appeal in *Coates I*, no further action was taken on the application for the mSUP in this case.[3] There is no indication that: any hearing occurred before the Board of Adjustment; any action was taken to allow, deny, or withdraw the application; or any Superior Court review of any such action was requested or undertaken. Instead, the Record

[3] Instead, it appears from the 2020 Fee Order that Hubrich proceeded under yet a third application for an mSUP, which was allowed by the Board of Adjustment, and it does not appear the issuance of that permit was challenged by any party.

reflects this case sat dormant until on or about 10 August 2020 when Petitioners filed a Motion for Attorneys' Fees in the Superior Court "based on the [Superior] Court's 28 August 2018 ruling" and pursuant to N.C. Gen. Stat. § 6-21.7.

¶ 7 On 30 November 2020, the Superior Court entered its 2020 Fee Order awarding attorneys' fees and expenses to Petitioners pursuant to Section 6-21.7 in the amount of $70,514.55 plus interest. In this 2020 Fee Order, the Superior Court concluded that under the 2018 version of N.C. Gen. Stat. § 6-21.7, an award of attorneys' fees was mandatory because the 2018 Remand Order determined the Board of Adjustment had committed reversible errors, violations of due process, and its actions were arbitrary and capricious, which the Superior Court further concluded in the 2020 Fee Order necessarily meant the Board of Adjustment had committed an "abuse of discretion." On 23 December 2020, the County filed written Notice of Appeal from both the 2020 Fee Order awarding attorneys' fees and the 2018 Remand Order.

Issues

¶ 8 The dispositive issues in this case are whether: (I) appellate review of the interlocutory 2018 Remand Order is proper notwithstanding our prior decision in *Coates I* and in the absence of any indication further proceedings on remand to the Board of Adjustment were ever undertaken; and (II) the Superior Court erred in

entering an award of attorneys' fees to Petitioners under the version of N.C. Gen. Stat. § 6-21.7 effective in 2018 on the basis of the interlocutory 2018 Remand Order.

Analysis

I. The 2018 Remand Order

¶ 9 Although the County's appeal centers primarily around the Superior Court's 2020 Fee Order, the County also asks this Court to vacate the 2018 Remand Order, reversing and remanding the Board of Adjustment's decision to grant the mSUP. In *Coates I*, we determined we did not have appellate jurisdiction to review the 2018 Remand Order. We noted: "In its Order, the trial court instructs the BOA to reopen the public hearing on [Hubrich's] application for the Permit after following certain notice procedures and orders the BOA to conduct a new hearing on [Hubrich's] application." *Coates I*, 266 N.C. App. at 273, 831 S.E.2d at 394. Relying on our precedent, we observed: " '[T]his Court has consistently held that an order by a superior court, sitting in an appellate capacity, that remands to a municipal body for additional proceedings is not immediately appealable.' " *Id.* 272-73, 831 S.E.2d at 393-94 (quoting *Akers*, 175 N.C. App. at 779-80, 625 S.E.2d at 146-47 (appeal of superior court's remand to a board of commissioners for further proceedings dismissed as interlocutory)).

¶ 10 Here, the County asks us to review the same 2018 Remand Order. However, functionally, that Order remains in the same interlocutory posture it occupied in

Coates I. On the Record before us, there is no indication there has been a new public hearing; a new decision on this first application by the Board of Adjustment; any dismissal or withdrawal of that application; or an indication the Superior Court took any additional review of this matter following its remand to the Board of Adjustment.[4] Thus, the 2018 Remand Order remains interlocutory, and no party has advanced any substantial right argument supporting immediate review. Therefore, we must again conclude we do not have appellate jurisdiction to review the 2018 Remand Order in this case. This conclusion is compelled, if not for any other reason, by the fact we are bound by our prior ruling on the same issue in *Coates I*. *N. Carolina Nat'l Bank. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983) (one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case). Consequently, we dismiss the County's appeal from the 2018 Remand Order.

II. <u>The 2020 Fee Order</u>

¶ 11 The County contends—and the Petitioners appear to agree—that the 2020 Fee Order constitutes a final order subject to immediate appeal, asserting that the 2018

[4] Instead, it appears the parties simply left this matter dormant and instead proceeded under a third application—which is not before this Court—which was subsequently granted. This also alludes to yet another issue not addressed by the parties: whether the granting of the third application rendered Petitioners' challenges to the first two applications moot. Again, we do not address this issue because it is not before us.

Remand Order and the 2020 Fee Order, together, constitute a final order determining all issues between the parties. As noted above, however, this is not quite so as the 2018 Remand Order remains interlocutory and does not finally resolve the underlying issues between the parties in this case. Nevertheless, it is evident the trial court's 2020 Fee Order was intended to effectively determine this action without further proceedings on the 2018 Remand Order, thus, having the practical—albeit likely unintentional—effect of preventing a judgment from which appeal may be taken. As such, this Court has jurisdiction to review the 2020 Fee Order under N.C. Gen. Stat. § 7A-27(b)(3)(b) because, while it is an interlocutory order, it is one that: "In effect determines the action and prevents a judgment from which an appeal might be taken." N.C. Gen. Stat. § 7A-27(b)(3)(b) (2021).

¶ 12 Here, the Superior Court awarded attorneys' fees and expenses to Petitioners under the 2018 version of N.C. Gen. Stat. § 6-21.7, which provided:

> In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.

N.C. Gen. Stat. § 6-21.7 (2018).[5] Indeed, it deemed its award mandatory finding the County abused its discretion in conducting the first hearing on the mSUP application.

¶ 13 Generally, the "recovery of attorney's fees, even when authorized by statute is within the trial court's discretion and will only be reviewed for an abuse of that discretion." *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002) (citations omitted). However, "[w]e review a trial court's decision whether to award mandatory attorney's fees *de novo*." *Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 578 (2008). Likewise, "[w]hether an award of attorneys' fees is allowable pursuant to statute is reviewable *de novo*." *S. Seeding Serv., Inc. v. W.C. Eng., Inc.*, 224 N.C. App. 90, 98-99, 735 S.E.2d 829, 835 (2012).

¶ 14 This Court summarized the prior version of Section 6-21.7:

> This statute permits a party that successfully challenges an action by a city or county to recover attorney's fees if the trial court makes certain findings of fact. When the court finds *only* that the city or county acted outside the scope of its legal

[5] N.C. Gen. Stat. § 6-21.7 now provides: "In any action in which a city or county is a party, upon a finding by the court that the city or county violated a statute or case law setting forth unambiguous limits on its authority, the court shall award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action. In any action in which a city or county is a party, upon finding by the court that the city or county took action inconsistent with, or in violation of, G.S. 160D-108(b) or G.S. 143-755, the court shall award reasonable attorneys' fees and costs to the party who successfully challenged the local government's failure to comply with any of those provisions. In all other matters, the court may award reasonable attorneys' fees and costs to the prevailing private litigant. For purposes of this section, 'unambiguous' means that the limits of authority are not reasonably susceptible to multiple constructions." N.C. Gen. Stat. § 6-21.7 (2021).

> authority, the award of attorney's fees is discretionary. However, if the court additionally finds that the city's or county's action constituted an abuse of discretion, then the award of attorney's fees is mandatory.

Etheridge v. Cnty. of Currituck, 235 N.C. App. 469, 477, 762 S.E.2d 289, 295-96 (2014) (citations omitted). Thus, under this version of the statute, a mandatory award of attorneys' fees required: (1) a successful challenge to the County's action; (2) a finding the County acted outside the scope of its legal authority in taking the action; and (3) that, in addition, the County abused its discretion in taking the challenged action.

¶ 15 First, in this case, the Superior Court made no determination as to whether Petitioners successfully challenged the County's action in issuing the mSUP. Indeed, at this stage, there has been no final determination as to whether the Board of Adjustment should or should not have issued the mSUP in this case because the trial court remanded the matter for a new hearing, which we have repeatedly now held was an interlocutory order requiring further action by the Board of Adjustment and/or the Superior Court to make that determination. As such, the trial court's award of attorneys' fees was at least premature without a determination as to whether the mSUP itself could be properly issued in this case and whether Petitioners, in fact, successfully challenged the issuance of the mSUP.[6]

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[6] Again, the only reference in the Record we have before us is that a third application for the same school project was subsequently approved and a separate mSUP was issued, allowing the school project to move forward.

¶ 16 Second, the Superior Court in this case also made no finding or determination that in issuing the mSUP, the County "acted outside the scope of its legal authority." Rather, the Superior Court in the 2020 Fee Order found only that because the 2018 Remand Order determined the Board of Adjustment's decision referencing (but apparently not relying upon) materials not in evidence was arbitrary and capricious, that this necessarily constituted an abuse of discretion and mandated an award of attorneys' fees. However, as *Etheridge* held, an award of attorneys' fees required both a determination the County acted outside the scope of its legal authority *and* abused its discretion in taking the action. *See id.* at 479, 762 S.E.2d at 297 ("we conclude that under the plain language of the statute, the trial court is always required to separately determine both (1) that a local government acted outside the scope of its legal authority; and (2) that the act in question constituted an abuse of discretion before the court is required to award attorney's fees."). Indeed, it appears that the Superior Court in the 2018 Remand Order was not making a determination that the Board of Adjustment had no authority to issue an mSUP or abused its discretion in this case, but rather that the Board of Adjustment made a series of procedural errors which required a new hearing before that determination could be made. *See* N.C. Gen. Stat. § 160A-393(l)(1) (2017) (repealed) ("If the court concludes that the error committed by the decision-making board is procedural only, the court may remand

the case for further proceedings to correct the procedural error."). [7] Nevertheless, in the absence of any determination the Board of Adjustment acted outside the scope of its authority in issuing the mSUP, at this point, there is no statutory basis for an award of attorneys' fees. *See Etheridge*, 235 N.C. App. at 479, 762 S.E.2d at 297. Thus, where there is no determination Petitioners successfully challenged the County's action in issuing the mSUP or that the Board of Adjustment acted outside of the scope of its legal authority, the Superior Court was not permitted to make an award of fees. Therefore, the Superior Court erred in awarding attorneys' fees and expenses to Petitioners pursuant to N.C. Gen. Stat. § 6-21.7 (2018). Consequently, we vacate the 2020 Fee Order.

Conclusion

¶ 17 Accordingly, for the foregoing reasons, the County's appeal from the 2018 Remand Order is dismissed and the Superior Court's 2020 Fee Order is vacated. The matter is further remanded to the Superior Court to determine whether any further proceedings in this case—including the underlying mSUP application and/or

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[7] Under the then-existing statutes, N.C. Gen. Stat. § 153A-345.1 made N.C. Gen. Stat. § 160A-388—and thus, N.C. Gen. Stat. § 160A-393—applicable to counties. N.C. Gen. Stat. § 160A-388 provided: "Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2017). These statutes were repealed and recodified in 2019 N.C. Sess. Law 111, which was the same legislation amending N.C. Gen. Stat. § 6-21.7.

attorneys' fees—are still warranted and if so, to require those proceedings, or, if not, to dismiss this matter.[8]

DISMISSED IN PART, VACATED IN PART, AND REMANDED.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).

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[8] The County asserts there was a settlement agreement between Petitioners and Hubrich, which while resolving Petitioners' concerns with the mSUP, left open the issue of attorneys' fees. Petitioners have specifically requested we not consider this assertion because there is nothing in the Record showing such a settlement agreement. On remand, the Superior Court might well inquire as to this settlement agreement and its impact on two salient questions: (1) whether this matter is finally resolved; and (2) whether Petitioners have brought a successful challenge to the mSUP.