An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-183

No. COA21-282

Filed 15 March 2022

Durham County, No. 18 CVS 3010

BRYAN SARVIS, ANGELA SARVIS, JAMES VENTRILLA, JAMES WOLAK, DARLEENA WOLAK, TIMOTHY ELLIS, and KENNETH PRICE, 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 6 December 2018 by Judge Keith O. Gregory and 30 November 2020 by 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) 6 December 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 Bryan and Angela Sarvis, James Ventrilla, James and Darleena Wolak, Timothy Ellis, and Kenneth Price (Petitioners) attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.7.

¶ 2 This case—along with the companion case *Coates v. Durham County*[1] COA21-281—requires us to review proceedings on an application for a Special Use Permit and subsequent appeal by certiorari to the Superior Court occurring in 2018 under statutes which were then in effect and which have since been amended or repealed and superseded.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 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—applied the prior version of the statute, which was still in place when this 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 of the effective

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

date of the 2019 amendment 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. That application is at issue in *Coates v. Durham Cnty*. COA21-281. The Board of Adjustment granted that application and the *Coates* petitioners sought judicial review of that application by Writ of Certiorari in Durham County Superior Court. Ultimately, in August 2018, the Superior Court in *Coates* entered an Order reversing the issuance of the mSUP and remanded the matter to the Board of Adjustment to conduct a new hearing. Hubrich appealed from that Order and in a 2019 Opinion, we dismissed the appeal as interlocutory. *Coates v. Durham Cnty.*, 266 N.C. App. 271, 272, 831 S.E.2d 392, 393 (2019) (*Coates I*).

¶ 5 While the *Coates* matter was still pending in Durham Superior Court, Hubrich filed a second application for an mSUP on 12 December 2017, which is the subject of

this case. This second application sought approval of the same school project but added an additional parcel of land to the application not included in the first application. The Board of Adjustment issued an order approving this second application and granting the mSUP on 22 May 2018. On 20 June 2018, Petitioners petitioned the Superior Court for review by way of a Writ of Certiorari.

¶ 6 The Petition for Writ of Certiorari reviewing the Board of Adjustment's approval of the second application came on for hearing on 10 and 20 September 2018, and after the hearing concluded, the presiding judge—consistent with the earlier ruling in *Coates*—ruled that the permit be revoked and the matter remanded back to the Board of Adjustment with instructions to reopen the public hearing while correcting errors the Superior Court would enumerate in its written Order. On 6 December 2018, the Superior Court entered the 2018 Remand Order captioned "Final Order and Judgment" as to Hubrich's second application. In its 2018 Remand Order, the trial court reversed the Board of Adjustment's decision to grant 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. The 2018 Remand Order also concluded: "In that the Court has found that Respondent County through its [Board of Adjustment] has acted outside the scope of its legal authority, the Court determines to award reasonable attorneys' fees and costs to Petitioners . . . who have successfully challenged the County's . . . action." The 2018 Remand Order decreed it

was granting Petitioners attorneys' fees and costs pursuant to N.C. Gen. Stat. § 6-21.7, with the amount of fees to be determined later. Hubrich and the County appealed the 2018 Remand Order to this Court, and we dismissed that appeal as interlocutory by a 26 February 2020 Order.

¶ 7 On the Record before us, it appears that following our dismissal of the appeal in this case, no further action was taken on the second application for the mSUP.[2] There is no indication that any hearing occurred before the Board of Adjustment; that any action was taken to allow, deny, or withdraw the application; or that any Superior Court review of any such action was requested or undertaken. Instead, the Record 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 6 December 2018 Order granting Petitioners attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.7. On 30 November 2020, the Superior Court entered an Order Awarding Attorneys' Fees to Petitioners in the amount of $87,108.25, including costs. Respondent filed written Notice of Appeal from the 2018 Remand Order and the 2020 Fee Order on 23 December 2020.

Issues

[2] 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.

¶ 8 The dispositive issues in this case are whether: (I) appellate review of the interlocutory 2018 Remand Order is proper in light of the facts we previously dismissed that appeal as interlocutory and there is no indication further proceedings on remand to the Board of Adjustment were ever undertaken; and (II) the Superior Court erred in finding the County acted outside the scope of its legal authority 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 review and reverse the 2018 Remand Order reversing the Board of Adjustment's decision to grant the mSUP and remanding for a new hearing. In *Coates I*, we determined we did not have appellate jurisdiction to review an Order reversing the Board of Adjustment's grant of Hubrich's first application and remanding the matter for a new hearing and dismissed that appeal. 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.* at 272, 831 S.E.2d at 393-94 (quoting *Akers v. City of Mount Airy*, 175 N.C. App. 777, 779-80, 625 S.E.2d 145, 146-47 (appeal of superior court's remand to a board of commissioners for further proceedings dismissed as interlocutory)). We subsequently dismissed the prior appeal in this case because it was a substantially similar interlocutory appeal from an order remanding the matter to the Board of Adjustment for a new hearing.[3]

¶ 10 Here, the County asks us to review the 2018 Remand Order. However, functionally, that Order remains in the same interlocutory posture it occupied in the first appeal. On the Record before us, there is no indication there has been: a new public hearing; a new decision on the first application by the Board of Adjustment; any dismissal or withdrawal of that application; or any additional review of this matter by the Superior Court 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

---

[3] At the time, the 2018 Remand Order in this case had an additional interlocutory aspect to it in that it awarded attorneys' fees but made no final determination as to the amount of those fees. *See Triad Women's Ctr., P.A. v. Rogers*, 207 N.C. App. 353, 356, 699 S.E.2d 657, 659 (2010).

[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 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.

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*. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Consequently, we dismiss the portion of the County's appeal from the 2018 Remand Order seeking review of the Superior Court's ruling remanding this matter to the Board of Adjustment for a new hearing.

II. The 2020 Fee Order

¶ 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 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 in its discretion under the version of N.C. Gen. Stat. § 6-21.7 effective in 2018, 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] Here, the trial court made no finding the County abused its discretion in granting the mSUP, so the award of fees was discretionary and not mandatory.

---

[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).

¶ 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]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 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 discretionary award of attorneys' fees required: (1) a successful challenge to the County's action; and (2) a finding the County acted outside the scope of its legal authority in taking the action.

¶ 15 First, the Superior Court in this case made a determination in the 2018 Remand Order that Petitioners had successfully challenged the County's action in issuing the mSUP. However, at that stage in 2018, there was 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 requiring further action by the Board of Adjustment and/or the Superior Court. Moreover, on the Record before us there is no indication in the 2020 Fee Order as to whether or not Petitioners were subsequently successful in their challenge to the mSUP. Indeed, the 2020 Fee Order itself makes no independent finding as to whether the Petitioners successfully challenged the issuance of the mSUP. As such, the Superior Court's award of attorneys' fees was at least premature without a final determination as to whether the mSUP itself could properly issue in this case and whether Petitioners, in fact, successfully challenged the issuance of the mSUP.[6]

¶ 16 Second, while the Superior Court in its 2018 Remand Order concluded it had "found that . . . [the] County through its [Board of Adjustment] has acted outside the scope of its legal authority," the 2018 Remand Order contains no such express finding, and on this Record, without further explanation, it is unclear what "action" the Superior Court found outside the scope of the County's legal authority. Indeed, it appears that in the 2018 Remand Order, the Superior Court was not making a determination as to whether the Board of Adjustment had the legal authority to issue

[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 issued allowing the school project to move forward.

the mSUP, but rather, the Superior Court determined the Board of Adjustment made a series of procedural errors which required a new hearing before such a 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 final 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

[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.

¶ 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 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).

---

[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 might be deemed to have brought a successful challenge to the mSUP.