

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

NO. COA01-1043

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

NORTHFIELD DEVELOPMENT CO.,
INC.,

Plaintiff,

v.

Alamance County
No. 97 CVS 2122

THE CITY OF BURLINGTON, a
Political Subdivision of the
State of North Carolina,

Defendant.

Appeal by plaintiff and defendant from order and judgment entered 19 April 2001, and appeal by plaintiff from order entered 17 May 2001, by Judge W. Osmond Smith, III, in Superior Court, Alamance County. Heard in the Court of Appeals 15 May 2002.

Smith, James, Rowlett & Cohen, L.L.P., by J. David James, for the plaintiff-appellant-cross-appellee.

Faison & Gillespie, by Reginald B. Gillespie, Jr., for the defendant-appellee-cross-appellant.

WYNN, Judge.

This appeal presents the question of whether the Burlington City Council's action in deciding to approve or deny an application for a Manufactured Housing Overlay District (MHOD) designation constitutes a legislative or a quasi-judicial function. In two earlier decisions, this Court answered this precise question,

concluding that the City Council's action in ruling on MHOD applications is quasi-judicial, rather than legislative, in nature. See *Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272, 523 S.E.2d 743, *aff'd*, 352 N.C. 671, 535 S.E.2d 32 (2000) ("*Northfield I*"); see also *Devaney v. City of Burlington*, 143 N.C. App. 334, 545 S.E.2d 763, *disc. review denied*, 353 N.C. 724, 550 S.E.2d 772 (2001). Accordingly, we vacate the summary judgment order in this case and remand for further proceedings.

Many of the underlying facts relevant to this matter are set forth in *Northfield I*. Northfield Development Co. brought forth claims in 1997 relating to two separate properties, the Blackwell property and the Isley/Oliver property, arising from the City Council's denial of its requests for MHOD designations for the two properties. Northfield asserted that the City Council's denial of its MHOD petitions violated its due process rights under N.C. Const. art. I, § 19, and violated N.C. Gen. Stat. § 160A-383.1 (2001). The trial court in *Northfield I* granted the City of Burlington's motion to dismiss Northfield's Isley/Oliver property claims based on mootness and lack of standing; the trial court further dismissed all of Northfield's claims under G.S. § 160A-383.1.

On appeal, this Court in *Northfield I* reversed the trial court's dismissal of Northfield's Isley/Oliver property claims on grounds of mootness and lack of standing; however, we affirmed the trial court's dismissal of all of Northfield's G.S. § 160A-383.1 claims. In considering Northfield's G.S. § 160A-383.1 claims, this

Court also clarified that, under the Burlington City Code, the City Council "is not *obligated* to approve a MHOD [but rather] retains the *discretion* to make the designation." *Northfield I*, 136 N.C. App. at 281, 523 S.E.2d at 749 (emphasis added). This Court also stated:

[T]he initial decision by the Council to amend its zoning ordinance in 1989 to include MHODs was a legislative decision, because it established a general policy affecting the entire community of [the] City [of Burlington]. *The decision of the Council to approve or deny Plaintiff's petition for MHODs for the Isley/Oliver and Blackwell properties was a quasi-judicial decision because it required application of the MHOD standards set out in [the] City's zoning ordinance to individual situations.* The decision to approve or reject MHOD petitions is most analogous to the decision to grant or deny variances or special use permits, which are quasi-judicial in nature.

Id. at 282, 523 S.E.2d at 750 (emphasis added).

In *Devaney*, this Court again considered the City Council's procedure for evaluating MHOD petitions, stating:

In *Northfield [I]*, we determined that *the City Council's action in deciding whether to approve an MHOD is quasi-judicial*, in that it involves the application of set policies to an individual situation.

Devaney, 143 N.C. App. at 336-37, 545 S.E.2d at 765 (emphasis added). This Court in *Devaney* concluded that the procedure employed by the City Council in evaluating *Northfield's* MHOD application was inconsistent with *Northfield I*. As the City Council utilized the wrong standard, this Court vacated the trial court's order and remanded to the Superior Court, for further remand to the City of Burlington "for the determination in a quasi-

judicial hearing of the propriety of granting [Northfield's] application." *Devaney*, 143 N.C. App. at 338, 545 S.E.2d at 766.

Following this Court's remand in *Northfield I*, the parties in the instant case underwent further discovery; in March 2001, the City of Burlington moved for summary judgment. On 19 April 2001, the trial court entered an "Order and Judgment" granting the City of Burlington partial summary judgment with respect to Northfield's Blackwell property claims, but denying the City of Burlington summary judgment with respect to Northfield's Isley/Oliver property claims. To the extent the trial court granted the City of Burlington summary judgment as to the Blackwell property, it dismissed those claims with prejudice and certified such judgment as a final judgment subject to immediate appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001).

Following the filing of this Court's opinion in *Devaney* on 1 May 2001, Northfield moved under N.C. Gen. Stat. § 1A-1, Rule 60(b) (2001) to set aside the 19 April 2001 partial summary judgment on the basis of the *Devaney* decision. The trial court denied this motion pursuant to an order filed on 17 May 2001; on 18 May 2001, Northfield gave notice of appeal from the trial court's 19 April 2001 "Order and Judgment," and from the trial court's 17 May 2001 order denying Northfield's Rule 60(b) motion. The City of Burlington cross-appealed on 18 May 2001 from the trial court's 19 April 2001 "Order and Judgment" partially denying its summary judgment motion as to Northfield's Isley/Oliver claims.

We initially note that the City of Burlington's cross-appeal

is interlocutory, and accordingly is dismissed. See, e.g., *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978). As for Northfield's appeal from the trial court's 17 May 2001 order, we note that Northfield did not specify in its motion the subsection of Rule 60(b) under which it sought relief from the trial court's 19 April 2001 "Order and Judgment." Because Northfield did not state in its Rule 60 motion any of the potential grounds for relief under Rules 60(b)(1) through (5), we assume *arguendo* that Northfield's motion for relief was premised on Rule 60(b)(6).

Appellate review of a Rule 60(b) motion is limited to determining whether the trial court abused its discretion. See, e.g., *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975). Northfield essentially argues in its Rule 60(b) motion that the trial court's 19 April 2001 "Order and Judgment" was erroneous insofar as it partially granted summary judgment to the City of Burlington on its Blackwell property claims; however, this cannot be done under Rule 60(b), which may not be used as a substitute for appellate review. See, e.g., *Smith v. Johnson*, 125 N.C. App. 603, 481 S.E.2d 415, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997). Therefore, we conclude that the trial court properly denied Northfield's Rule 60(b) motion.

Nonetheless, Northfield filed a timely notice of appeal from the trial court's 19 April 2001 "Order and Judgment," permitting us to consider whether the trial court erred in granting the City of Burlington partial summary judgment on Northfield's Blackwell property claims. As Northfield argues on appeal, the application

review procedures employed by the City of Burlington in the instant case were virtually identical to the procedures used by the City Council in *Devaney*, which this Court found to be improper. See *Devaney*, 143 N.C. App. at 338, 545 S.E.2d at 765-66 (City Council's treatment of MHOD application review as a legislative decision, and its failure to make findings of fact, was inconsistent with the procedure required pursuant to *Northfield I*). Inexplicably, the City of Burlington continues to argue before this Court that MHOD decisions are legislative in nature, rather than quasi-judicial; the City of Burlington further argues that the City Council's decision as to the Blackwell property MHOD application was a legislative decision, and was therefore entitled to substantial deference. However, *Devaney* makes clear that the City Council's action in deciding whether to approve an MHOD petition is quasi-judicial rather than legislative. See *id.* at 336-37, 545 S.E.2d at 765. Accordingly, we conclude that the trial court erred in granting the City of Burlington partial summary judgment on Northfield's Blackwell property claims.

In summary, the trial court's 17 May 2001 order denying Northfield's Rule 60(b) motion is affirmed; however, the trial court's 19 April 2001 "Order and Judgment" is vacated, and this matter is remanded to the trial court for further remand to the City of Burlington for determination by the City Council in a quasi-judicial hearing of the propriety of granting Northfield's MHOD petitions as to both the Blackwell property and the Isley/Oliver property. See *Devaney*. The City of Burlington's

cross-appeal is dismissed.

Affirmed in part; dismissed in part; and vacated and remanded in part.

Judges HUNTER and THOMAS concur.

Report per Rule 30(e).