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NO. COA02-173

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2002

IN RE: ZONING OF RICHARD D.
BATCHELOR and DEBORAH J.
BATCHELOR PROPERTY ON SKYUKA
ROAD, POLK COUNTY, NORTH CAROLINA

Polk County
No. 01-CVS-70

Appeal by respondents from judgment entered 19 October 2001 and filed 29 October 2001 by Judge James U. Downs in Polk County Superior Court. Heard in the Court of Appeals 3 September 2002. Petition for rehearing granted 27 September 2002, and order affirmed 30 September 2002.

Adams Hendon Carson Crow & Saenger, P.A., by George Ward Hendon and Cynthia Marie Roelle, for petitioner-appellees.

Powell & Deutsch, by Robert J. Deutsch for respondent-appellants.

Wynn, Judge.

In an opinion filed 3 September 2002, this Court dismissed the appeal of the residents of Skyuka Hills Subdivision and the Skyuka Hills homeowners association (respondents) for failure to give timely notice of appeal. The record on appeal filed by respondents contained a judgment dated 19 October 2001 which lacked a file stamp by the clerk of court. See N.C.R. App. P. 9(b)(3). Respondents' notice of appeal and their appeal information statement filed with this Court also stated that the judgment was

entered on 19 October 2001. On the basis of respondents' record on appeal, and nothing appearing to the contrary, this Court concluded respondents' notice of appeal filed on 30 November 2001 was untimely and dismissed the appeal for lack of jurisdiction.

Respondents filed a petition for rehearing on 17 September 2002 and attached a copy of the judgment which bears a file-stamped date of 29 October 2001. Although this file-stamped judgment is not properly part of the original record on appeal, see N.C.R. App. P. 9(b)(5), this Court granted respondents' petition for rehearing on 27 September 2002 in order to treat the purported appeal as a petition for writ of certiorari and reach the merits of the case.

In their appeal, respondents contend the trial court erred in ruling that five of the Zoning Board of Adjustment's conclusions were not supported by its findings of fact and were arbitrary and capricious. We disagree.

Initially we note the trial court properly used the "whole record test" in reviewing the Zoning Board of Adjustment's decision. *Ball v. Randolph County Board of Adjustment*, 129 N.C. App. 300, 302, 498 S.E.2d 833, 834, *disc. review improvidently allowed*, 349 N.C. 348, 507 S.E.2d 272 (1998). The trial court found, and we agree upon review of the record, that the Zoning Board of Adjustment's findings of fact do not support its conclusions that: the activities of Richard D. and Deborah J. Batchelor (petitioners) "on the premises is a business" and "constitute or closely resemble 'retail trade, commercial services, sales and rental of merchandise and equipment'"; the proposed

building is not an "Accessory building"; the petitioners' "intended use of the premises would not be consistent with the statement of district intent"; and "the proposed building is not a structure permitted in the RE-1 district" We therefore affirm the trial court's judgment which reversed the order of the Zoning Board of Adjustment and reinstated the determination of the Zoning Administrator.¹

Affirmed.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).

¹ The Zoning Administrator approved the building permit application; determined the training of petitioner's dogs was a hobby and that any business aspect of the sale of ten puppies was incidental to the hobby; and, cautioned the petitioners that "if the facility [was] used for purposes other than those permitted in the RE-1 district, [they] would be in violation of the Polk County Zoning Ordinance and subject to the remedies necessary for corrective action."