NO. COA03-1270

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2004

HANSON AGGREGATES SOUTHEAST, INC.,
Plaintiff,

v. Wake County
No. 02 CVS 12536

CITY OF RALEIGH and RALEIGH BOARD OF ADJUSTMENT,
Defendants.

Appeal by plaintiff from order entered 26 June 2003 by Judge A. Leon Stanback, Jr., in Wake County Superior Court. Heard in the Court of Appeals 15 June 2004.

Kennedy Covington Lobdell & Hickman, L.L.P., by A. Lee Hogewood, III, Amie Flowers Carmack and Jason L. Barron; Michael B. Brough & Associates, by Michael B. Brough; and Phears & Moldovan, by H. Wayne Phears, for plaintiff.

Taylor Penry Rash & Riemann, PLLC, by J. Anthony Penry and Cynthia A. O'Neal, for defendants.

Bailey & Dixon, L.L.P., by Gary S. Parson, for defendants.

LEVINSON, Judge.

The present appeal arises from the dismissal of a complaint filed by plaintiff Hanson Aggregates Southeast, Inc., (Hanson) seeking, *inter alia*, declaratory and injunctive relief to prevent the City of Raleigh (the City) and the City's Zoning Board of Adjustment from applying the City's zoning ordinances against the company. Hanson challenges the superior court's dismissal of its

action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of subject matter jurisdiction. We affirm.

Hanson owns property in Raleigh, North Carolina, hereinafter referred to as the "Crabtree Quarry Property," upon which it operates a quarry and conducts mining operations. The property at the center of the present case, hereinafter referred to as the "Southside Property," is located on the Crabtree Quarry Property. In August 1973, the City of Raleigh extended its zoning jurisdiction to include the Southside Property, and at some point zoned the district in which the Southside Property is located for residential use. On 23 April 2002, a City zoning inspector issued a written "Order for Compliance" stating that the inspector had observed Hanson engaging in mining activity on the Southside property and ordering Hanson to immediately cease this activity. Though the company has consistently insisted that it did not have to appeal from the inspector's order, Hanson appealed from the Order for Compliance to the City's Zoning Board of Adjustment.

Prior to completion of the entire process set forth in N.C.G.S. § 160A-388 for appeals from determinations made by zoning officials, Hanson filed the suit at issue in the present appeal in Wake County Superior Court. Hanson's complaint alleged that it had the right to mine the Southside Property pursuant to common law, constitutional vested rights and the Raleigh Zoning Ordinance's provisions concerning legally existing nonconforming uses. The complaint further alleged that the City resorted to improper

measures and procedures to deny these rights. Hanson's complaint prayed for a declaration as to the company's rights and the City's limitations, injunctive relief, and damages against the City for alleged violations of the company's constitutional rights.

According to Hanson's complaint, its rights under the applicable zoning ordinance and its alleged vested rights are derived from the following facts and circumstances: Since 1972, Hanson or one of its predecessors has held a permit from the North Carolina Department of Environmental and Natural Resources to mine the entire Crabtree Quarry Property, including the Southside Property. Prior to the City's acquisition of zoning authority, a predecessor of Hanson's constructed on the Southside Property several settling ponds, alleged to be an "integral part of the overall mining operations" at the quarry. This construction required clearing, grubbing, and excavating areas that were previously wooded, and moving and stockpiling soil and other materials. The City is alleged to have determined "sometime in the 1970's" that the use of the Southside Property for settling ponds constituted a legally existing non-conforming use. Between 1973 and 1976, Hanson's predecessor added an additional settling pond to the Southside property with the City's knowledge. In 1985, 1991-92, 1994, and 1998 Hanson or its immediate predecessor engaged in further clearing and grading operations, excavation, earthmoving, stockpiling, removal, and/or construction activities on the Southside property, and, according to Hanson, "through the end of calendar year 2001, all of the activities conducted on the

Southside Property by Hanson or its predecessors were found by the City of Raleigh to be part of a legal nonconforming use and not a violation of the . . . Raleigh Zoning Ordinance."

In an order entered 26 June 2003, the superior court dismissed Hanson's action without prejudice pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of subject matter jurisdiction because Hanson had not yet exhausted its administrative zoning remedies and its claims were not, therefore, ripe. The superior court ordered Hanson to complete its appeal before the Raleigh Zoning Board of Adjustment prior to filing suit on any of the matters raised in its complaint. Hanson now appeals from the superior court's order, contending that it is not required to exhaust administrative remedies before filing its suit to establish vested rights in superior court.

"When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings." *Dep't of Transp. v. Blue*, 147 N.C. App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428-29 (2002) (citation omitted). "However, if the trial court confines its evaluation to the pleadings, the court must accept as true the plaintiff's allegations and construe them in the light most favorable to the plaintiff." *Id.* (citation omitted). "[T]his Court's review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*, except to the extent the trial court resolves issues of fact [in which case] those findings are binding on the appellate court if

supported by competent evidence in the record." *Id.* (citation and internal quotation marks omitted).

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief 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) (citation omitted).

> This is especially true where a statute establishes . . . a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted. To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies.

Id. at 721-22, 260 S.E.2d at 615 (citations and internal quotation marks omitted). As such, "[a]n action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999).

Our General Statutes afford administrative remedies to parties alleging error in municipal zoning assessment and enforcement. Specifically, N.C.G.S. § 160A-388(b) (2003) provides for an appeal

from a zoning inspector's order of compliance or notice of violation:

> The [municipal zoning] board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part [zoning]. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city.

Likewise, N.C.G.S. § 160A-388(e) (2003) provides for an appeal to the superior court from an adverse decision by the zoning board of adjustment: "Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari." Under G.S. § 160A-388, the superior court sits as an appellate court and its scope of review includes:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of . . . boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Fantasy World, Inc. v. Greensboro Bd. of Adjustment, 128 N.C. App. 703, 706-07, 496 S.E.2d 825, 827 (1998) (citation omitted).

When an aggrieved party is proceeding pursuant to G.S. § 160A-388, neither the zoning board of adjustment hearing an appeal from a zoning official, nor the superior court hearing an appeal from

the board of adjustment on *certiorari*, has authority to address constitutional challenges to a municipal zoning ordinance. *Dobo v. Zoning Bd. of Adjustment*, 149 N.C. App. 701, 706, 562 S.E.2d 108, 112 (2002), *rev'd in part on other grounds*, 356 N.C. 656, 576 S.E.2d 324-25 (2003). Rather, the constitutional challenges to a zoning ordinance may be appropriately adjudicated by means of a separate civil action instituted in superior court. *Id.* However, our Supreme Court has instructed that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (citations omitted).

The issue in the instant case is whether Hanson is required to wait to bring its constitutional claim until after it has exhausted its administrative remedies before the City's Board of Adjustment. In addressing this issue, we observe that part of the relief sought in Hanson's complaint is a declaration that its use of the Southside Property is a legally existing non-conforming use under the Raleigh Zoning Ordinance. Indeed, paragraph fifty-one of Hanson's complaint specifically states that "Hanson enjoys the right to mine the Southside Property as a lawful nonconforming use under the terms of the Zoning Ordinance of the City of Raleigh." This claim for relief is significant because if Hansons's use of the Southside Property is lawful under the City's zoning ordinances, then the company's claim for vested rights need not be reached. Our General Statutes provide that initial determinations

as to zoning compliance be made via an administrative process as opposed to an immediate resort to the courts. *See* G.S. § 160A-388. As Hanson has not fully availed itself of the process prescribed in G.S. § 160A-388, it has not exhausted its administrative remedies.

Hanson contends that to require it to exhaust administrative remedies is inconsistent with previous rulings from our State's appellate courts. We conclude that the cases cited by Hanson do not excuse the requirement that administrative zoning remedies be exhausted where, as here, a claim of vested rights is asserted as an alternative to a claim of conformity with a local zoning ordinance.

In *Town of Hillsborough v. Smith*, 276 N.C. 48, 58-59, 170 S.E.2d 904, 911 (1969), upon which Hanson relies heavily, our Supreme Court held that a municipality was not entitled to summary judgment on its claim against a landowner for failure to procure a building permit where the local zoning board of adjustment had no authority to issue the permit and the landowner had a vested right to build on the property such that no permit was needed. In so holding, the Supreme Court distinguished *Town of Hillsborough* from a case in which a landowner had "initiate[d] [a] proceeding to obtain judicial relief **from an ordinance applicable to [it]**." *Town of Hillsborough*, 276 N.C. at 58-59, 170 S.E.2d at 911 (emphasis added). In the instant case, the process for determining whether the City's zoning ordinance is applicable to Hanson has not been completed. Thus, *Town of Hillsborough* does not require that Hanson

be permitted to sue on its vested rights claim prior to exhausting its administrative zoning remedies.

Likewise, *Michael Weinman Assocs. v Town of Huntersville*, 147 N.C. App. 231, 555 S.E.2d 342 (2001), which discusses vested rights arising in the context of a municipality's re-zoning of a commercial site, does not hold that a suit to establish vested rights must proceed where a landowner also asserts compliance with a local zoning ordinance. Furthermore, *Mays-Ott Co., Inc. v. Town of Nags Head*, 751 F. Supp. 82, 87 (E.D.N.C. 1990), does not support Hanson's argument as the Federal District Court that ruled in that case specifically noted that there was no administrative remedy to exhaust. As such, the cases cited by Hanson do not excuse the exhaustion requirement in the instant case.

After carefully reviewing Hanson's remaining arguments on appeal, we conclude that they are without merit. The trial court properly dismissed the complaint without prejudice.

Affirmed.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).