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NO. COA03-1323

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

BEAU RIVAGE HOMEOWNERS
ASSOCIATION, a North Carolina
non-profit corporation, BRIAN
HODSHON and wife, CARY
HODSHON, SHELBY COVINGTON,
THOMAS RICE, GEORGE MILLER
and wife, EILEEN MILLER,
HUGH VAN ZELM and wife,
SHEILA VAN ZELM, and ANN
BOSEMAN,

Petitioners,

v.

New Hanover County
No. 02 CVS 2482 and
No. 02 CVS 2483

NEW HANOVER COUNTY, NORTH
CAROLINA, and THEODORE DAVIS,
ROBERT GREER, WILLIAM
CASTER, NANCY PRITCHETT, and
JULIA BOSEMAN, New Hanover
County Commissioners,

Respondents,

and

BILLY EARL, LLC, a North
Carolina limited liability
company, CAROLINA GREEN
ESTATES, LLC, a North
Carolina limited liability
company, and BEAU RIVAGE
PLANTATION, INC., a North
Carolina corporation,

Intervenor-
Respondents.

Appeal by petitioners from judgment entered 31 March 2003 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 26 August 2004.

Susan McDaniel Keelin and Stevens, McGhee, Morgan, Lennon, & Toll, L.L.P., by Richard M. Morgan, Mark F. Carter, for petitioner-appellants.

David C. Barefoot and The Law Office of Kenneth A. Shanklin, by Kenneth A. Shanklin and Matthew A. Nichols, for intervenor-respondents Billy Earl, LLC and Carolina Green Estates, LLC.

Wessell & Raney, by John C. Wessell for intervenor-respondent Beau Rivage Plantation, Inc.

E. Holt Moore, III, Assistant County Attorney, for all respondent-appellees.

ELMORE, Judge.

This appeal concerns the interpretation of New Hanover County Subdivision Regulations addressing who may appeal a decision of the New Hanover County Planning Board Technical Review Committee (TRC) to the Board of County Commissioners. The Beau Rivage Homeowners Association and the named individual homeowners (petitioners) contend that the regulations permit aggrieved parties, such as adjacent property owners, to appeal the approval of a subdivision plan. Billy Earl, LLC, and Carolina Green Estates, LLC (intervenor-respondents) argue that the plain language of the regulations allow appeal only by the applicant-subdivider. This Court recently addressed the very same issue, the proper construction of New Hanover County Subdivision Regulations Section 32-3(2), in *Sanco of Wilmington Service Corporation v. New Hanover*

County, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2004). In *Sanco*, we agreed with the reasoning of the trial court that the plain language of the ordinance did not provide for an appeal process by third parties. We recognized that under the ordinance at issue in *Sanco*, the local government had only a ministerial role in plat approval. It followed from this conclusion that the Board of Commissioners lacked the authority to consider an "appeal" by a third party challenging the approval of the applicant's plat. We affirm in the instant case on the reasoning that supported our decision in *Sanco*.

We briefly recite the relevant background of petitioners' appeal. The TRC approved the Carolina Green Preliminary Site Plan and the Updated Beau Rivage Plantation Preliminary Site Plan on 13 March 2002 and 10 April 2002, respectively. On 19 April 2002, petitioner Beau Rivage Homeowners Association (Homeowner's Association) appealed the TRC's decisions to the Board of Commissioners. The Board held hearings on these appeals in May of 2002 and voted to affirm the TRC's decisions approving both plans. Petitioners appealed the Board's decision to the superior court for review by *writ of certiorari*. After reviewing the file and hearing oral argument, the court issued its order on 31 March 2003. In the findings of fact, the court referenced its recent decision in the *Sanco* case reviewing the very same subdivision regulations:

11. On September 5, 2002, during the same term of Court, in *Sanco of Wilmington Service v. New Hanover County and New Hanover County Board of Commissioners* (File No. 01 CVS 4667, New Hanover County Superior Court), this Court interpreted these same County ordinances and

subdivision regulations in dismissing the appeal of third parties from a TRC decision to the Board of County Commissioners in a proceeding involving a County performance residential development.

In accord with its previous ruling, the court concluded that petitioners had no right under the regulations to appeal TRC decisions to the Board of Commissioners. The court declared the actions of the Board in hearing the appeal of petitioner Homeowner's Association null and void; dismissed petitioners' *certiorari* appeal for lack of standing; reinstated the TRC approval; and remanded to the TRC to continue with the subdivision process as previously approved by the TRC on 10 April 2002. From this order dismissing for lack of subject matter jurisdiction, petitioners appeal.

The proper construction of an ordinance is a question of law requiring a *de novo* standard of review. *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 137, 431 S.E.2d 183, 187 (1993). Thus, as petitioners' assignments of error challenge the proper interpretation of the Subdivision Regulations of the New Hanover County Zoning Ordinance, we review the decision of the trial court *de novo*. Petitioners contend that the trial court erred in concluding that Section 32-3(2) did not allow anyone other than the applicant-subdivider to appeal a decision of the TRC. The applicable version of this section reads as follows:

(2) Upon completion of the preliminary plat review, the Planning Board shall approve or disapprove the plat.

(a) If the preliminary plat is approved, the approval shall be noted on the sepia.

One print of the plat shall be transmitted to the subdivider and the sepia shall be retained by the Planning Department.

(b) When a preliminary plat is disapproved, the Planning Department shall specify the reasons for such action in writing. One copy of such reasons and the sepia shall be retained by the Planning Department and a print of the plat with the reasons for disapproval shall be given to the subdivider. If the preliminary plat is disapproved, the subdivider may make the recommended changes and submit a revised preliminary plat.

(c) Decisions of the Planning Board Chairperson may be appealed to the Board of County Commissioners at which time they may affirm, modify, supplement, or remand the decision of the Planning Board Chairperson.

A careful reading of the language of the ordinance and regulations compels the conclusion that adjacent property owners are not permitted to participate in the process of appealing to the Board of Commissioners. As in *Sanco*, we agree with the trial court that the ordinance does not grant a right to third parties to participate in the subdivision approval process. The New Hanover County subdivision approval process is a ministerial, rather than a quasi-judicial, process. See *Sanco*, ___ N.C. App. at ___, ___ S.E.2d at ___; see also *Nazziola v. Landcraft Props., Inc.*, 143 N.C. App. 564, 566-67, 545 S.E.2d 801, 803 (2001) (a subdivision approval process which does not grant discretion to the governmental board to hear an appeal from a party other than the applicant is ministerial). Because the subdivision approval process under the ordinance in the instant case is ministerial, the

Board of Commissioners was without the authority to consider an appeal by a party other than the applicants. *Sanco*, ___ N.C. App. at ___, ___ S.E.2d at ___.

Absent an express provision granting an aggrieved party the right to appeal a decision approving an applicant's subdivision plan, a ministerial scheme such as the one here simply does not allow for a third party appeal to the governmental board. As this Court observed in *Sanco*, "[t]o read the right to appeal mentioned in 32 § 3(2)(c) as applying to other parties . . . would require us to read into the ordinance rights of and involvement by individuals, classes, and other third parties about whom the ordinance is otherwise silent." *Id.* at ___, ___ S.E.2d at ___. We agree with the trial court that petitioner Homeowner's Association lacked standing to appeal the TRC decisions. As such, we affirm the order of the trial court.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).