

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-851

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

JUNIUS H. TERRELL, RUDY ALVEY,
RACHEL ALVEY, BILL CAMPBELL,
HARRIET CARTER, WINSLOW CARTER,
TONY CIOCHETTI, DEBRA EAGLE,
JAMES FOSTER, ELAINE FOSTER,
JOSEPH FROEBER, TANYA FROEBER,
FULSTON HARTZOG, JACK IMPERIALE,
SR., DAVID KEESEE, SUSAN KEESEE,
DOMINIQUE LAHAUSSOIS, DAVID LOW,
JANE MCCAULEY, ROBERT MURDOCK,
BEVERLY MURDOCK, KIM OGLESBY,
ERIC OLDHAM, MARGIE OLDHAM,
PHIL PARTIN, MARTHA PARTIN,
ED PELLIZZARI, BARBARA PELLIZZARI,
ZONA POLLARD, ED RALSTON,
PATSY REINBERG, ROBERT ROACH,
FREDA ROACH, DOUGLAS SHACKLEFORD,
KNOX TATE, DON TYNDALL, KATHY
TYNDALL, TRUDY THOMSON, STELLA
WAUGH, MARGARET B. WHITE, DANIELLE
WINSLOW, MICHAEL WINSLOW, DAVID
ZOFFER, LINDA ZOFFER, and
ARBOR LEA LANDOWNERS ASSOCIATION,
INC.,

Chatham County
No. 04 CVS 705

Petitioners,

v.

CHATHAM COUNTY and the
CHATHAM COUNTY BOARD
OF COMMISSIONERS,
Respondents.

Appeal by petitioners from a judgment entered 29 March 2005 by Judge J.B. Allen, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 11 January 2006.

The Brough Law Firm, by Robert E. Hornick, Jr., for petitioner-appellants.

Gunn & Messick, L.L.P., by Robert L. Gunn and Paul S. Messick, Jr., for respondent-appellees.

BRYANT, Judge.

Junius Terrell (petitioner-appellant) appeals from a judgment entered 29 March 2005 which affirmed the Chatham County Board of Commissioner's (respondent-appellee's) decision to grant a conditional use permit to David Moser - Pipeline Utilities for the creation of a construction/plant storage and staging area on Lovelia Edwards' 11.5-acre parcel of land (Edwards Property) pursuant to the Chatham County Zoning Ordinance.

The Edwards Property is situated in the RA-40 Residential-Agricultural zoning district pursuant to the Chatham County Zoning Ordinance. Junius Terrell owns approximately 30 acres of land abutting the Edwards Property immediately to the east. Petitioners Robert and Beverly Murdock own and reside on property lying adjacent to the northwest corner of the Edwards Property. Petitioners David and Susan Keesee own property adjacent to the northwest corner of the Edwards Property. The Murdocks and the Keesees are also the fee title owners of Luna Lane which intersects with Old Lystra Road. Most of the other petitioners are residents of the Arbor Lea development which is adjacent to the Edwards Property.

On 23 August 2004, David Moser - Pipeline Utilities filed an application (Application) with the Chatham County Planning Department seeking a conditional use permit (CUP). The proposed use is described on the Application as follows:

Construction/earthwork storage and staging area. Site will be used as a storage/fill site for dirt and shod rock from various job sites. There will be no construction debris (concrete, pavement, etc.) stored on this site. There will be one or two pieces of equipment stored on site to aid in the spreading of deposited earth and shod rock.

The Application indicated the site would be used for up to five (5) years.

The Chatham County Planning Department gave notice to nearby property owners of the Chatham County Board of Commissioners public hearing to consider the Application at its 20 September 2004 meeting. At the public hearing, David Moser presented the Application to the Commissioners. Mr. Moser told the Commissioners that "his construction company has a lot of excess rock and dirt" which he plans to deposit and spread on the Edwards Property. Petitioner-Appellant Junius Terrell appeared at the public hearing and spoke in opposition to the Application. Mr. Terrell asked questions regarding the impact of the truck traffic expected to be generated if the CUP were granted, the accuracy of Mr. Moser's comment that, according to the North Carolina Department of Transportation, Old Lystra Road had sufficient capacity to accommodate about 12,000 vehicles per day, and, whether the use described by the Applicant was consistent with any of the uses permitted in the RA-40 district. Linda Zoffer, also a petitioner and a resident of the Arbor Lea Subdivision, questioned whether allowing a use which would generate heavy truck traffic on Old Lystra Road was suitable. All those who spoke against the Application expressed concerns regarding the impact of the proposed

use and its associated noise, dust and fumes on the environment, on the rural residential character of the area, and on the value of nearby property. At the same public hearing, Stepney Edwards, the son of Lovelia Edwards, indicated that because of the Property's condition, "it cannot be used for anything else; . . . that this is an opportunity to provide an income for [his] mother. . . ."

The Application was reviewed by respondent-appellee's Planning Staff and Planning Board after the public hearing. The Planning Staff informed the Planning Board that "the use category 'contractors' plant, storage yard and storage area' was added to the zoning districts as a conditional use, except where already permitted, in 1998 to allow contractors to pursue obtaining said permit in the area(s) in which they were working." The Planning Staff also indicated that dirt and shod rock to be delivered to the Edwards Property "will be used as beneficial fill in the depression area" where soil was removed from the site "in the 1990's during the construction of various North Carolina Department of Transportation projects, on I-40 and Highway 54." The Planning Staff advocated for approval of the Application, with thirteen conditions, and indicated its opinion that "the five findings [required by Chatham County Zoning Ordinance § 15.1 for granting a conditional use permit] can be made."

On 5 October 2004, the Planning Board met, led by Land Use Administrator of the Chatham County Planning Department, Lynn Richardson. Ms. Richardson indicated the "'contractors' plant, storage yard and storage area' category was added to [the list of

conditional uses in a RA-40 zoning district] in 1998 to give contractors areas that could potentially be re-zoned and utilized near job sites." David Moser, on behalf of Pipeline Utilities, indicated that "the majority of the soil would be transferred from southern Orange County and northern Chatham County, that the primary route would be U.S. 15-501, that the facility would be gated and locked when not in use; that the gates would be unlocked at the beginning of the work day and locked at the end of the work day; and that at times there would be a supervisor on site during work hours." Mr. Terrell and other petitioners attended the Planning Board meeting and expressed their continued concerns about traffic, the proposed unstaffed operations at the Edwards Property, and the Planning Staff's interpretation that the Applicants' proposed use of the Edwards Property fell within the scope of the "contractors' plant, storage yard and staging area" use category.

The Chatham County Planning Staff recommended to the Commissioners that the CUP be granted, but with thirteen conditions attached including permit expiration, land use intensity, utility and access easements, permits, equipment storage, improvements, landscaping stipulations, erosion control and silt control.

On 18 October 2004, the Commissioners adopted a Resolution Approving an Application for the Conditional Use Permit for Pipeline Utilities by a four to one (4-1) vote. From this decision, petitioner-appellant Junius Terrell appeals.

On appeal petitioner contends the superior court, in affirming the conditional use permit for Pipeline Utilities, failed to support its findings with substantial, competent evidence and that the Commissioner's decision was arbitrary and capricious, and that such decision is affected by errors of law.

As a practical matter, petitioner failed to include a complete judgment in the record on appeal. In his Notice of Appeal, petitioner stated that he "hereby gives notice of appeal to the Court of Appeals of North Carolina *from each and every part of the Judgment entered on March 29, 2005*" (Emphasis added). It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form. *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 315 S.E.2d 537 (1984). North Carolina Rules of Appellate Procedure, Rule 9(a)(1)(h) states the record on appeal shall contain "a copy of the judgment, order, or other determination from which appeal is taken[.]" In the record before us, the judgment is incomplete, as it is missing an entire page of the judgment (including the first ten findings of fact) from which petitioner appeals. By failing to include the entire judgment appealed from in the record on appeal, petitioner has violated the North Carolina Rules of Appellate Procedure, and his appeal is subject to dismissal. *Beneficial Mortg. Co. v. Peterson*, 163 N.C. App. 73, 79, 592 S.E.2d 724, 728 (2004); *State ex rel. Lee v. Williams*, 55 N.C. App. 80, 81, 284 S.E.2d 572, 573 (1981) (citing *Craven v. Dimmette*, 8 N.C. App. 75, 173 S.E.2d 647 (1970)). While we note the appellee's brief contains a complete judgment,

this is insufficient to comply with our rules. *West v. Reddick, Inc.*, 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980), *rev'd on other grounds*, 302 N.C. 201, 274 S.E.2d 221 (1981) (A party's "brief is not a part of the record on appeal."). "Matters discussed in a brief, or exhibits in an appendix thereto, which are outside the record will not be considered." *Watts v. Cumberland County Hospital System, Inc.*, 75 N.C. App. 1, 22, 330 S.E.2d 242, 256 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986); *see also*, N.C. R. App. P. 9(a) (stating that review is limited to the record and transcript), and N.C. R. App. P. 28(b) (describing proper contents of appellant's brief).

Here, our review would be whether the trial court, in applying the "whole record test," properly determined that the Commissioners made sufficient findings of fact which were supported by the evidence in an effort to prevent decisions from being arbitrary and capricious. *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (citing *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C. App. 420, 421, 458 S.E.2d 510, 511 (1995)). Where petitioners allege that the Commissioners' decision is not supported by substantial, competent evidence in the record, we must apply the "whole record test" as follows:

This Court is to inspect all of the competent evidence which comprises the 'whole record' so as to determine whether there was indeed substantial evidence to support the Board's decision. Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion.

Showcase Realty & Constr. Co. v. City of Fayetteville Bd. of Adjustment, 155 N.C. App. 548, 550-51, 573 S.E.2d 737, 739-40 (2002) (citations omitted). In order to understand the errors petitioner assigns in his appeal, it is necessary for this Court to determine if there is *any* evidence to support the disputed findings and conclusions. Petitioner's violations of our rules effectively preclude such review by this Court. "It is not the function of the reviewing court . . . to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board and whether the Board made sufficient findings of fact." *Deffet Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 364, 219 S.E.2d 223, 226 (1975) (citation omitted). Because petitioner has failed to provide us with the superior court's entire judgment, we are unable to properly review the matter which is before this Court. Accordingly, this appeal is dismissed.

Dismissed.

Judges CALABRIA and SMITH concur.

Report per Rule 30(e).