NO. COA09-1353

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

THOMAS J.P. MARSH,

Petitioner,

v. Union County
No. 09 CVS 30

UNION COUNTY BOARD
OF ADJUSTMENT,

Respondent.

Appeal by petitioner from an order entered 18 June 2009 by Judge Gary Evan Trawick of Union County Superior Court. Heard in the Court of Appeals 11 March 2010.

Calvin C. Craig, III, for petitioner-appellant.

Shumaker, Loop & Kendrick, LLP, by Frederick M. Thurman, Jr. and William H. Sturges, for respondent-appellee.

JACKSON, Judge.

Thomas J. P. Marsh ("petitioner") appeals the 18 June 2009 order affirming the Union County Board of Adjustment's ("the Board") decision to uphold the Land Use Administrator's notice of violation of petitioner's special use permit. For the reasons stated herein, we affirm.

Petitioner owns and operates a 300-acre farm in Marshville, North Carolina. In the fall of 2006, petitioner approached the

land use administrator for Union County ("administrator") and inquired into the regulations and requirements that would govern his holding rodeo-type events on his farmland. The administrator reviewed the applicable Union County ordinances and informed petitioner that he needed to apply for a special use permit ("permit"). Petitioner applied for a permit, the Board reviewed his application, and on 7 May 2007, the Board orally approved the grant of petitioner's permit. The Board placed nine conditions upon its grant of the permit, including: "Limit number of rodeos to 4 per year" and "Conform to [North Carolina Department of Transportation] regulations and specific recommendations, including two road accesses to the special event rodeo area."

In September 2007, the administrator determined that petitioner had violated two of the conditions of his permit — he had held more than four events and had not constructed a second road access — and sent him a notice of the violations on 12 October 2007. On 25 October 2007, the Board reviewed the administrator's recommendation to revoke petitioner's permit based upon the violations. The Board voted to revoke the permit. On 30 November 2007, petitioner appealed the revocation to superior court, arguing that the administrator's original determination that petitioner's rodeo-type events necessitated a special use permit was legally incorrect; rather, petitioner's rodeo-type activities fell within the zoning exemption provided for *bona fide* farm activities. On 16 April 2008, the trial court affirmed the Board's revocation of the permit ("the 16 April order"), concluding "that there has been

no error in law, deference being accorded . . . to the Board's interpretation of its authority to regulate the proposed use at issue[.]" Petitioner did not appeal the 16 April order.

Petitioner held additional rodeo-type events on his property on 3 June 2007, 1 July 2007, 5 August 2007, 19 August 2007, 16 September 2007, 21 October 2007, 20 July 2008, and 7 September 2008. The administrator issued a notice of violations to petitioner for the latter four events, because they were held either in violation of the number-of-events condition of his permit or after the permit had been revoked. Petitioner appealed the administrator's notice of violations, and on 11 December 2008, the Board upheld the administrator's notice. Petitioner appealed the Board's decision to superior court. On 18 June 2009, the trial court upheld the Board's decision ("the 18 June order"), concluding that three alternative bases for its decision existed: (1) the rodeo-type events taking place on petitioner's farmland were non-farm activities, and therefore, were subject to regulation by the Board; (2) petitioner was estopped from challenging the Board's authority because he had applied for and received a special use permit; and (3) petitioner was estopped from challenging the Board's authority because he had failed to appeal three prior decisions — (a) the administrator's initial determination in the fall of 2006 that he needed a special use permit, (b) the Board's issuance of the permit with conditions in 2007, and (c) the trial court's 16 April order that determined that the Board had the authority to regulate the rodeo-type activities — each of which

would bar his current appeal. Petitioner appeals the 18 June 2009 order.

Petitioner's second argument, which we address first, is that the trial court erred as a matter of law in finding that principles of estoppel prohibited him from challenging the Board's legal authority to regulate rodeo and rodeo-type events held on petitioner's farm. We disagree.

"Traditionally, under collateral estoppel 'a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.'" *Mays v. Clanton*, 169 N.C. App. 239, 241, 609 S.E.2d 453, 455 (2005) (quoting *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986)). When a party does not appeal the adverse determination, the judgment becomes final. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986).

In the case *sub judice*, petitioner appealed the Board's revocation of his special use permit, arguing, in part, that the trial court "should rule that [the Board] has no legal authority to place land use restrictions on the [p]etitioner's family farm because said farm is exempt from their [sic] regulatory authority." Petitioner, in his brief to the trial court, used all five pages of his argument section to support this contention with case law and argument. On 16 April 2008, the trial court affirmed the Board's revocation of petitioner's permit, concluding, in part, that

> having considered the arguments and contentions of counsel, . . . upon *de novo* review of the record for errors in law, the court concludes that there has been no error in law, deference being accorded . . . to the Board's interpretation of its authority to regulate the proposed use at issue [citations omitted][.]

Petitioner did not appeal this order. Therefore, petitioner cannot use his current appeal to mount a collateral attack upon the 16 April order.

When petitioner appealed his subsequent notice of violations, the trial court held:

> The Board also contends that the [16 April order] has already determined that the Board had authority to regulate these types of activities when it affirmed the [d]ecision of the Board revoking [petitioner's] [s]pecial [u]se [p]ermit. The [trial c]ourt agrees with the Board's position. As another alternative basis for upholding the Board's [d]ecision, the [trial c]ourt concludes that [petitioner] is collaterally estopped . . . by the prior [16 April order].

Accordingly, petitioner is estopped from asserting the Board's lack of regulatory authority in this instance, and the trial court did not err in so finding.

Because petitioner is estopped from challenging the Board's authority to regulate his rodeo-type activities, we do not address his first argument — that the trial court erred as a matter of law in finding that certain events that took place on his farm were non-farm activities and thus subject to land use regulation by the Board.

Affirmed.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).