NO. COA09-1610
NO. COA09-1611
NO. COA09-1621

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

LANVALE PROPERTIES, LLC
and CABARRUS COUNTY
BUILDING INDUSTRY
ASSOCIATION,
Plaintiffs,

v. Cabarrus County
No. 08 CVS 1244

COUNTY OF CABARRUS
and CITY OF LOCUST,
Defendants.

MARDAN IV,
Plaintiff,

v. No. 08 CVS 1950

COUNTY OF CABARRUS,
Defendant.

CRAFT DEVELOPMENT, LLC,
Plaintiff,

v. No. 08 CVS 1951

COUNTY OF CABARRUS,
Defendant.

Appeal by defendant from order entered 19 August 2008 by Judge Mark E. Klass and order entered 17 August 2009 by Judge W. David Lee in Cabarrus County Superior Court. Heard in the Court of Appeals 8 June 2010.

Ferguson, Scarborough, Hayes, Hawkins & DeMay, P.A., by James E. Scarborough and James R. DeMay, for plaintiffs-appellees.

The Brough Law Firm, by G. Nicholas Herman and Michael B. Brough; and Richard M. Koch, for defendant-appellant County of Cabarrus.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Fletcher Hartsell, for defendant-appellee City of Locust.

HUNTER, Robert C., Judge.

This appeal arises out of plaintiffs' — Lanvale Properties, LLC, Cabarrus County Building Industry Association ("CCBIA"), Mardan IV, LLC, and Craft Development, LLC — actions challenging the validity of defendant Cabarrus County's adequate public facilities ordinance ("APFO"). As the issues presented in these separate appeals involve common questions of law, we consolidate the appeals for purposes of decision under Rule 40 of the Rules of Appellate Procedure.

The County assigns error to the trial court's granting summary judgment in favor of plaintiffs, arguing that the trial court erred in concluding that (1) plaintiffs' claims were not barred by the statute of limitations and (2) the County's APFO is not authorized by the County's general zoning and subdivision powers. As each of these contentions has been rejected by a prior panel of this Court, we affirm.

Facts

In recent years, North Carolina has experienced significant population growth, necessitating the building of additional public schools by local governments. In response to the burgeoning

student population, the Cabarrus County Board of Commissioners ("BOC") adopted an APFO in January 1998 as part of its subdivision regulations. The purpose of the APFO is to assist the County in determining whether to issue or deny development permits. The APFO provides county planners with a methodology for "review[ing] each subdivision, multi-family development, and mobile home park to determine if public facilities[, including public schools,] are adequate to serve that development." According to Section 15-7(1) of the APFO, if the BOC determines that existing public schools are adequate to support the proposed development, the proposal is approved without the imposition of any conditions. If, however, the BOC determines that school facilities are inadequate to accommodate the project, the BOC may deny the application or, alternatively, approve the application subject to conditions designed to mitigate the impact on school capacity. Section 15-7(3) specifies the conditions the County may impose: (1) deferring the proposed development until adequate school facilities are available; (2) phasing the development "so that future increments of development are not constructed until future capacity becomes available"; (3) reducing the scope of the development to a level consistent with available school capacity; (4) constructing school facilities by the developer; (5) allowing the development to proceed if the developer consents to "mitigation measures," such as the payment of a fee per residential unit, known as a "voluntary mitigation payment" ("VMP"); or (6) imposing any other "reasonable

condition[]" to ensure adequate school capacity given the forecasted impact of the development.

On 25 August 2003, the BOC adopted a "Resolution to Create a Policy for the Advancement of School Adequacy," which stated that although "new development continues to be approved within the unincorporated areas of Cabarrus County[,] after a review of the adequacy of services," the BOC "would like for all new residential development in both incorporated and unincorporated areas of Cabarrus County to be reviewed for school adequacy." On 30 June 2004, the General Assembly enacted House Bill 224, which provides:

> Notwithstanding the provisions of Article 19 of Chapter 160A of the General Statutes, the County of Cabarrus or any municipality therein may enforce, within its jurisdiction, any provision of the school adequacy review performed under the Cabarrus County Subdivision Regulations, including approval of a method to address any inadequacy that may be identified as part of that review.

H.B. 224, ch. 39, sec. 5, 2004 N.C. Sess. Laws ("House Bill 224"). In response to House Bill 224, the BOC adopted a resolution that expanded application of the APFO to all proposed developments within the incorporated areas of the County as well as the unincorporated areas. On 20 August 2007, the BOC adopted a resolution moving the County's APFO from its subdivision ordinance into its zoning ordinance and subsequently amended the subdivision ordinance to incorporate the APFO by reference.

Lanvale Properties owns a 54 acre tract of land in the City of Locust that it intends to develop into a single-family residential subdivision. Mardan IV similarly owns a 11.23 acre tract in the

City of Concord, which it plans to develop into a 168-unit apartment project. Craft Development likewise owns a 15.56 acre tract in the Town of Midland, intending to develop the property into a multi-family project. Between 4 April 2008 and 22 May 2008, each plaintiff filed a complaint against the County,[1] alleging that the County "will not allow development of plaintiff's land and will withhold approvals unless plaintiff complies with the county's APFO and enters into a 'consent agreement' with the county." Plaintiffs requested, among other forms of relief, a declaratory judgment declaring that the County lacked the authority to adopt its APFO and that the ordinance was invalid. The County filed an answer generally denying plaintiffs' claims and moving to dismiss the complaints for failure to state a claim for relief, lack of personal and subject-matter jurisdiction, and being barred by the statute of limitations. Lanvale Properties subsequently filed a motion to consolidate all three cases and CCBIA, a "trade organization consisting of members who are directly or indirectly involved in the building industry in Cabarrus County," filed a motion to intervene in the lawsuit as a plaintiff.

After conducting a hearing on 21 July 2008 regarding the parties' motions, the trial court entered three separate orders on 19 August 2008 (1) consolidating the three cases; (2) allowing CCBIA to intervene; and (3) denying the County's motion to dismiss. In May 2009, the parties filed cross-motions for summary judgment,

---

[1]Lanvale Properties also included the City of Locust as a defendant in its complaint.

and, after conducting a hearing on the parties' motions on 1 June 2009, the trial court entered an order on 17 August 2009 denying the County's motion for summary judgment and granting plaintiffs' motion. The County timely appealed to this Court.

Standard of Review

An appellate court "review[s] a trial court's order for summary judgment de novo to determine whether there is a 'genuine issue of material fact' and whether either party is 'entitled to judgment as a matter of law.'" *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)); N.C. R. Civ. P. 56(c). Where, as here, there is no dispute as to any material fact, the dispositive issue on appeal is whether the trial court properly concluded that plaintiffs are entitled to judgment as a matter of law. *See Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte*, __ N.C. App. __, __, 688 S.E.2d 538, 542 (2010) ("[G]iven that no party has claimed that the record reveals the presence of any disputed issue of material fact, the ultimate issue that we must decide in order to address the issues raised by Plaintiffs' appeal is whether the trial court correctly concluded that Defendants were entitled to judgment as a matter of law.").

Validity of APFO

The County contends that the trial court erroneously concluded that "there is no statutory authority for the enactment of the APFO under the general zoning and general subdivision powers delegated to the Defendant County . . . ." The County acknowledges in its

brief, however, that this Court recently "rejected" these arguments in *Union Land Owners Ass'n v. County of Union*, __ N.C. App. __, __, 689 S.E.2d 504, 507-08 (2009) (holding that county's APFO, which included imposition of a school impact fee as a condition of approving new developments, was not authorized by county's general zoning or subdivision powers). The County nonetheless presents its arguments in its appellant's brief "for purposes of preserving further appellate review . . . ." Here, Cabarrus County's arguments asserted in support of upholding its APFO are identical to Union County's contentions that this Court rejected in *Union Land Owners Ass'n*. As we are bound by *Union Land Owners Ass'n*, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we conclude that Cabarrus County lacks the authority to adopt its APFO pursuant to its general zoning or subdivision powers. *See also Amward Homes, Inc. V. Town of Cary*, __ N.C. App. __, __, __ S.E.2d __, __, 2010 N.C. App. LEXIS 1440, *27, 2010 WL 3001393, *10 (COA09-923) (Aug. 3, 2010) (concluding, based on *Union Land Owners Ass'n*, that municipality's collection of school impact fee under "Adequate Public School Facilities" ordinance "illegally shifted the burden of paying for public education to the subdivision builder-plaintiffs in this case"); *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 636-38, 630 S.E.2d 200, 205-06 (2006) (holding that county could not shift financial responsibility for funding school construction to new developments by using school impact fee).

One distinction between this case and *Union Land Owners Ass'n* is that while Union County sought, but did not receive, "authority from the North Carolina General Assembly to impose school impact fees upon developers in Union County[,]" __ N.C. App. at __, 689 S.E.2d at 505, the General Assembly enacted House Bill 224 in response to Cabarrus County's "desire[] to extend its review of school adequacy to developments located in all of the incorporated areas of the County." As plaintiffs point out, however, the County does not argue on appeal that House Bill 224 provides the express grant of authority to adopt its APFO absent from the general zoning and subdivision statutes. Instead, during oral arguments, the County contended that it would be "absurd" to read House Bill 224 as enabling the County to "enforce" its APFO if the ordinance were not "otherwise authorized." As we have already concluded, however, *Union Land Owners Ass'n* foreclosed the argument that an APFO, such as the one at issue here, is "otherwise authorized" under the counties' general zoning and subdivision powers.

The County nonetheless points to the fact that its APFO has been in existence since 1998, that it requested special legislation in 2003 to enforce the APFO county-wide, and that the General Assembly enacted House Bill 224 in 2004. The County argues that, in light of this historical backdrop, implicit in the General Assembly's enactment of House Bill 224 is the Legislature's belief that the County has the authority to adopt the APFO at issue in this case.

The Supreme Court has stressed, however, that "where the language of a statute expresses the legislative intent in clear and unambiguous terms, the words employed must be taken as the final expression of the meaning intended unaffected by its legislative history." *Piedmont Canteen Service, Inc. v. Johnson*, 256 N.C. 155, 161, 123 S.E.2d 582, 586 (1962); *accord Forsyth County v. Barneycastle*, 18 N.C. App. 513, 517, 197 S.E.2d 576, 579 ("We cannot speculate about what the General Assembly may have intended to say when it is clear what they did say."), *cert. denied*, 283 N.C. 752, 198 S.E.2d 722 (1973). The language of House Bill 224 is unambiguous: the County may "enforce" its "school adequacy review" provisions; it does not provide the County with the "authority" to adopt a revenue-generating impact fee. We, therefore, do not look beyond the plain language of House Bill 224 to effectuate the Legislature's intent. *See Wake Cares, Inc. v. Wake County Bd. of Educ.*, 190 N.C. App. 1, 25, 660 S.E.2d 217, 232 (2008) (explaining that where a statute's language is "clear and unambiguous," the "[l]egislative history cannot . . . be relied upon to force a construction on [a] statute inconsistent with [its] plain language"), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009).

In any event, the County's argument ignores the fact that House Bill 224 was enacted prior to this Court's decision in *Union Land Owners Ass'n*. Had the General Assembly enacted the bill after *Union Land Owners Ass'n*, it would not be unreasonable to infer that the Legislature's granting the County the authority to enforce its APFO included by necessary implication the power to adopt the APFO.

See Childers v. Parker's, Inc., 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968) ("In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it."). The sequence of events in this case, however, does not support such an inference as, at the time the Legislature enacted House Bill 224, there had been no legal challenge to counties' authority to adopt school adequacy review ordinances imposing an impact fee on developers. The historical context surrounding the County's APFO and House Bill 224 is, therefore, not dispositive of the Legislature's intent.[2]

Statute of Limitations

The County maintains that plaintiffs' challenge to the validity of its APFO is barred by the two-month limitation period set out in N.C. Gen. Stat. § 153A-348 (2009): "A cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Part or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1." N.C. Gen. Stat. § 1-54.1 (2009), in turn, provides that "an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county under Part 3 of Article 18 of Chapter 153A of the

[2]Nothing, however, prevents the County from requesting from the General Assembly the explicit authority to adopt an APFO with the procedures and conditions contemplated in the County's current ordinance.

General Statutes or other applicable law" must be filed within two months.

The County argues that its APFO is a zoning ordinance, and, therefore, plaintiffs' claims are subject to the two-month limitations period established by N.C. Gen. Stat. § 153-348 and N.C. Gen. Stat. § 1-54.1. This Court rejected a virtually identical argument in *Amward Homes*. In that case, the Town of Cary had collected school impact fees from subdivision builders pursuant to its "Adequate Public School Facilities" ordinance ("APSFO"). *Amward Homes*, 2010 N.C. App. LEXIS 1440 at *3, 2010 WL 3001393 at *2. When the builders challenged the validity of the Town's APSFO and the legality of the collection of the fees, the Town argued that its APSFO was a zoning ordinance and that the builders' lawsuit was barred by the two-month statute of limitations in N.C. Gen. Stat. § 160A-364.1 (2009), which provides: "A cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1." *Amward Homes*, 2010 N.C. App. LEXIS 1440 at *28, 2010 WL 3001393 at *11. This Court held that the Town's APSFO was not a zoning ordinance and thus "the two-month statute of limitations in N.C.G.S. § 160A-364.1 d[id] not apply" to bar the builders' claims. *Amward Homes*, 2010 N.C. App. LEXIS 1440 at *29, 2010 WL 3001393 at *11.

N.C. Gen. Stat. § 153A-348, governing challenges to county zoning ordinances, is virtually identical to N.C. Gen. Stat. §

160A-364.1, which applies to actions attacking municipal zoning ordinances. *See Baucom's Nursery Co. v. Mecklenburg County*, 89 N.C. App. 542, 544, 366 S.E.2d 558, 560 (noting that "G.S. 160A-364.1 . . . is almost identical to G.S. 153A-348"), *disc. review denied*, 322 N.C. 834, 371 S.E.2d 274 (1988). And the County's APFO in this case is materially indistinguishable from the APSFO in *Amward Homes* in that they both use a school impact fee to generate revenue to fund public school facilities. We are thus bound by *Amward Homes* and constrained to hold that the County's APFO is not a zoning ordinance. Consequently, plaintiffs' claims in this case are not barred by the two-month limitations period established in N.C. Gen. Stat. § 153A-348.

Affirmed.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).

Judge WYNN concurred in the result in this opinion prior to 9 August 2010.