An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-545

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

WILLIAM F. CANADY, JUDY M. CANADY, and WILLIAM F. CANADY and JUDY M. CANADY, TRUSTEES OF THE CANADY REVOCABLE LIVING TRUST DATED NOVEMBER 17, 2006,
Petitioner-Appellants,

v.

New Hanover County
No. 07 CVS 4295

NORTH CAROLINA COASTAL RESOURCES COMMISSION,
State Respondent-Appellee,

and

ROBERT DON FOSTER and ANDREW PRICE,
Respondent-Appellees.

Appeal by petitioners from order entered 16 October 2008 by Judge Russell J. Lanier, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 16 November 2009.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for petitioners.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan and Assistant Attorney General Ward Zimmerman, for the State.

Wessell & Raney, L.L.P., by W.A. Raney, Jr., for respondents.

ELMORE, Judge.

William F. Canady and Judy M. Canady, as individuals and in their capacities as trustees of the Canady Revocable Living Trust

Dated November 17, 2006 (petitioners), appeal the New Hanover Superior Court judgment affirming the Final Agency Decision of the Coastal Resources Commission (Commission).

Petitioners own real property in New Hanover County adjacent to the waters of Middle Sound and the Atlantic Intracoastal Waterway. Under the Coastal Area Management Act (CAMA), developing land within areas of environmental concern in certain coastal counties requires a permit. *See* N.C. Gen. Stat. § 113A-100 *et seq.* (2009). Because the land at issue here is within the Coastal Shorelines Area of Environmental Concern, development of the land is controlled by 15A N.C. Admin. Code 7H.0209(d)(10), commonly called the Buffer Rule, which states: "[N]ew development shall be located a distance of 30 feet landward of the normal water level or normal high water level[.]" 15A N.C. Admin. Code 7H.0209(d)(10) (2010). An exception to this rule, termed the small house exception, states: "Where application of the buffer requirement would preclude placement of a residential structure with a footprint of 1,200 square feet or less on lots, parcels and tracts *platted prior to June 1, 1999*, development may be permitted within the buffer as required in Subparagraph (d)(10) of this Rule[.]" 15A N.C. Admin. Code 7H.0209(d)(10)(I) (2010) (emphasis added).

After petitioners applied for and were issued a Minor Development Permit pursuant to these regulations, adjacent property owners filed hearing requests to challenge its issuance. The Administrative Law Judge (ALJ) reversed the issuance of the permit. Petitioners appealed that decision to the Commission, which issued

a Final Agency Decision upholding the Judge's ruling. Petitioners appealed that decision to the Superior Court of New Hanover County, which affirmed the Final Agency Decision. Petitioners now appeal that decision to this Court.

The issue in this case concerns the phrase "platted prior to June 1, 1999," from 15A N.C. Admin. Code 7H.0209(d)(10)(I). The ALJ came to the conclusion that the lot was not platted prior to June 1, 1999, and thus the structure petitioners proposed to build on the land "[was] not entitled to the small house exception." That decision was adopted wholesale by the Commission in its Final Agency Decision. That conclusion was the basis of the revocation of petitioners' permit, and, as such, it is the focus of their appeal.

The permit was originally issued by Jim Gregson of the Division of Coastal Management (DCM), a component of the Department of Environment and Natural Resources that provides staff support to the Commission. N.C. Gen. Stat. § 113A-124(b) (2009); 15A N.C. Admin. Code 7A.0101(a) (2010). During questioning at the hearing by the assistant attorney general appearing on behalf of the State, he testified as to his own interpretation of "platted":

> Q. . . . So the next issue that brings us to is whether or not it would be on a lot, parcel – lots, parcels, and tracts plotted prior to June 1, 1999. Did you also consider that issue?
> A. I didn't consider that, I don't think, as much as the County did. They had already been doing some research of the deeds. My only question in my earlier discussions with Ms. Wilson was – just in a nutshell – when was this lot created? Was it created prior to June 1, 1999? Have the boundaries changed

> since then? Have they divided it or have they combined it with another lot?
>
> And it's my understanding it hasn't been, so in terms of the way we applied that buffer exception that it was created prior to June 1, '99, and they therefore could take advantage of that exception.
>
> Q. So it's fair to say you didn't go into a lot of depth with that review at that time?
>
> A. No. And we certainly didn't go into great depth on what the definition of platted was.
>
> Q. How do you routinely apply it in the field - in this particular rule?
>
> A. Basically like I just said. The question we ask is, when was the lot created? We don't look to see if there is an actually recorded plat map. We look primarily at the deed to see when that - when that lot or tract with the specific boundaries that it had - when was that recorded and has it changed since June 1 of 1999.

The Commission, in adopting the decision of the ALJ, defined "platted" this way in conclusion of law 6:

> . . . Black's Law Dictionary, Special Deluxe, 5th Edition, 1979 defines plat or plot as "a map of a subdivision showing the location and boundaries of individual parcels of land subdivided into lots, with streets, alleys, easements, etc., usually drawn to a scale". Plat map is defined as: "A plat map is generally drawn after the property has been described by some other means---Once a plat map is set, legal descriptions are defined by referring to the given map---."

Petitioners argue to this Court that we should hold in their favor both because Mr. Gregson's definition is the more logical, and because his definition was entitled to a deference not shown it by the ALJ. We disagree.

We review the definition of "platted" *de novo*.

> If the petitioner argues that the agency's decision was based on an error of law, "*de novo*" review is required. "*De novo*" review requires a court to consider a question anew,

> as if not considered or decided by the agency. The court may freely substitute its own judgment for that of the agency. Since incorrect statutory interpretation by an agency constitutes an error of law under N.C. Gen. Stat. § 150B-51(b)(4), when the issue on appeal is whether the state agency erred in interpreting a statutory term, an appellate court may substitute its own judgment [for that of the agency] and employ *de novo* review.

Friends of Hatteras Island v. Coastal Resources Comm., 117 N.C. App. 556, 567, 452 S.E.2d 337, 344 (1995) (quotations and citations omitted; alteration in original).

The ALJ (and, thus, the Commission) looked to Black's Law Dictionary to determine the meaning of the term "platted," a method of defining terms this Court has explicitly approved. *See Hylton v. Koontz*, 138 N.C. App. 511, 515, 530 S.E.2d 108, 110-11 (2000) ("The plain meaning of words in a statute can be ascertained from dictionaries.") (citation omitted). We agree that the Black's definition of "platted" is the appropriate definition to use in construing 15A N.C. Admin. Code 7H.0209(d)(10)(I).

Petitioners do not argue that the land at issue meets the above definition of "platted" set out by the agency. We note that they do not take issue with the finding of fact by the ALJ that "[t]here is no recorded subdivision map in New Hanover County which shows the [land] as a lot, parcel or tract." Petitioners argue instead that, "all things considered, DCM's (through Jim Gregson) historical and reasonable application of these words: 'on lots, parcels and tracts platted prior to June 1, 1999,' complies with 7H.0209(d)(10)(I)." That is, they argue that another definition

should be preferred by this Court – a definition under which the land at issue would qualify for the small house exception.

While petitioners are correct that, even in light of our own *de novo* review of this issue, deference is to be accorded an agency's decisions in interpreting its own regulations, they are mistaken as to the identity of that agency in this case. It is not, as petitioners assert, DCM (as represented here by Mr. Gregson) that merits such deference, but rather the Coastal Resources Commission, which is empowered by statute to implement rules and administer CAMA. N.C. Gen. Stat. § 113A-107 (2009). Petitioners point this Court to the South Carolina Court of Appeals case of *Neal v. Brown*, 649 S.E.2d 164 (S.C. Ct. App. 2007), which considered a very similar point and came down on the side of the land owners. Unfortunately for petitioners, in the interim between their brief being filed and their appeal being heard, the South Carolina Supreme Court reversed the Court of Appeals, 682 S.E.2d 268 (S.C. 2009), specifically stating that "an agency's Appellate Panel, not its staff, is typically entitled to deference in interpreting agency regulations." *Id.* at 270. We agree with petitioners that this case is informative and agree with the reasoning of the South Carolina Supreme Court.

Affirmed.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).