IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-763

Filed: 7 April 2015

From the North Carolina Property Tax Commission, No. 07 PTC 375

IN THE MATTER OF APPEAL OF: Parkdale Mills and Parkdale America from the decisions of the Davidson County Board of Equalization and Review concerning the valuation of certain real property for the tax year 2007.

Appeal by respondent Davidson County from final decision on second remand entered 8 April 2014 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 19 November 2014.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Jamie S. Schwedler, for respondent.

Bell, Davis & Pitt, PA, by John A. Cocklereece, Jr., and Justin M. Hardy, for taxpayer.

North Carolina Association of County Commissioners, by Amy Bason and Casandra Skinner, for amicus curiae.

BRYANT, Judge.

Where a directive of this Court instructs a lower tribunal that the lower tribunal "shall conduct hearings *as necessary*," the plain language of such a directive indicates that the lower tribunal may, but is not required to, conduct additional hearings. Where the Property Tax Commission's decision was supported by

substantial evidence, the decision will be affirmed upon appeal, despite the presence of contrary evidence in the record.

Parkdale Mills and Parkdale America ("taxpayer") own two textile manufacturing plants in Davidson County ("the County"). In January 2007, the County assessed the value of taxpayer's Lexington plant at $6,776,160.00 and the value of the Thomasville Plant at $3,620,080.00. In contrast, taxpayer's expert appraiser valued the properties at $905,000.00 and $625,000.00, respectively. Upon appeal by taxpayer to the County's Board of Equalization and Review ("the Review Board"), the appraised values were reduced to $5,040,429.00 and $3,287,150.00, respectively. Taxpayer then appealed to the North Carolina Property Tax Commission ("the Commission") which, after a hearing, affirmed the Review Board's assessments of taxpayer's buildings on 3 November 2009.

Taxpayer appealed to this Court, which found that taxpayer had demonstrated that the County's appraisal values were arbitrary, capricious, or illegal, and that the burden of showing that these values were still proper had shifted to the County. This Court then found that the Commission had failed to properly apply the burden-shifting framework as required by not making findings of fact and conclusions of law showing how the County's valuations were still proper despite evidence that these values were arbitrary, capricious, or illegal. We therefore vacated and remanded this case to the Commission with instructions that it "*may* conduct additional hearings on

this matter if it deems them necessary." *In re Appeal of Parkdale Am.*, 212 N.C. App. 192, 198, 710 S.E.2d 449, 453 (2011) ("*Parkdale I*") (emphasis added). The Commission was further instructed that, upon remand, it "*shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence to reach its conclusions using the burden-shifting framework" as articulated in the opinion. *Id*.

Upon remand, no additional hearings were conducted, but a new final decision was entered. By final decision upon remand, entered 23 May 2012, the Commission re-affirmed the appraisal values of taxpayer's plants at $5,040,429.00 and $3,287,150.00, respectively. Taxpayer again appealed the Commission's decision to this Court, which agreed with taxpayer that the Commission had again failed "to alleviate this Court's lack of confidence that the County has, in fact, carried its burden." *In re Parkdale Mills & Parkdale Am.*, ___ N.C. App. ___, ___, 741 S.E.2d 416, 421 (2013) ("*Parkdale II*"). This Court went on to note in *Parkdale II* that

> [a]lthough we make no finding on appeal here regarding the true value of the property, this Court is troubled by the substantial discrepancy between [taxpayer's] assessed value and the County's assessed value. *On remand, the Commission shall conduct additional hearings as necessary and make further findings of fact and conclusions of law in order to reconcile this discrepancy*. If the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer's] valuation of the property as, unlike the

County's valuation, it has not been held to be "arbitrary."

Id. at ___, 741 S.E.2d at 422 (citation omitted) (emphasis added).

On second remand to the Commission, taxpayer filed a motion to limit the scope of the hearing to the record created during the initial hearing and as presented to this Court in *Parkdale I*. By order entered 16 October, the Commission granted taxpayer's motion.

After conducting a hearing on 19 November, the Commission issued its final decision on second remand on 8 April 2014. In its decision, the Commission found that the previous decisions of the Review Board were erroneous and that the true value of taxpayer's plants were $905,000.00 and $625,000.00, respectively. The County appeals.

On appeal, the County raises three issues as to whether the Commission erred in (I) not conducting additional hearings on second remand; (II) in accepting taxpayer's argument that the County had already lost its case; and (III) in adopting findings that are contrary to the record.

I.

The County argues that the Commission erred in not conducting additional hearings on second remand. We disagree.

Pursuant to North Carolina General Statutes, section 105-345.2,

> [w]hen reviewing decisions of the Commission, this Court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional provisions; or
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> (2) In excess of statutory authority or jurisdiction of the Commission; or
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> (3) Made upon unlawful proceedings; or
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> (4) Affected by other errors of law; or
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> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
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> (6) Arbitrary or capricious.

Parkdale II, ___ N.C. App. at ___, 741 S.E.2d at 418—19 (citing N.C. Gen. Stat. § 105-345.2(b) (201[3])).

"An act is arbitrary when it is done without adequate determining principle[.]" *In re Hous. Auth. of City of Salisbury*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952) (citations omitted). "Determination of whether conduct is arbitrary and capricious or an abuse of discretion is a conclusion of law." *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 244, 511 S.E.2d 671, 677 (1999) (citation omitted).

This Court reviews decisions of the Commission under the whole record test to "determine whether an administrative decision has a rational basis in the evidence." *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981) (citation omitted).

> The "whole record" test does not allow the reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn.

Id. at 87—88, 283 S.E.2d at 127 (citations and quotations omitted). However, this Court cannot reweigh the evidence presented and substitute its evaluation for that of the Commission's. *In re AMP*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975) (citation omitted). "If the Commission's decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned." *In re Philip Morris U.S.A.*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998) (citations omitted).

The County contends the Commission erred in accepting taxpayer's argument that it could not hear evidence because the Commission was bound by this Court's directive to conduct additional hearings. The County's argument lacks merit though, as this Court clearly stated in *Parkdale II* that "[o]n remand, the Commission shall

conduct additional hearings *as necessary* and make further findings of fact and conclusions of law[.]" *Parkdale II*, ___ N.C. App. at ___, 741 S.E.2d at 422 (emphasis added). "A mandate of an appellate court is binding upon [the trial court] and must be strictly followed without variation or departure." *McKinney v. McKinney*, ___ N.C. App. ___, ___, 745 S.E.2d 356, 358 (2013) (citation and quotation omitted), *review denied*, 2014 N.C. LEXIS 46, *review dismissed as moot*, 2014 N.C. LEXIS 50 (Jan. 23, 2014). Moreover, it is well-established that in discerning a mandate's intent, the plain language of the mandate controls. *See, e.g., First Bank v. S & R Grandview, L.L.C.*, ___ N.C. App. ___, ___, 755 S.E.2d 393, 394—95 (2014) (discussing how, in construing the intent of a statute, this Court is guided by the statute's plain language).

Here, this Court indicated that the Commission was to conduct further hearings *as necessary*. We disagree with the County's contention that the language of this directive, that the Commission "shall conduct additional hearings as necessary," meant that the Commission was required to conduct additional hearings because the word "shall" was used. Rather, this directive, taken as a whole, indicates that additional hearings were to be conducted if the Commission found such an action necessary in order to make further findings of fact and conclusions of law regarding the appraisal values of taxpayer's property. At no point did the Court in *Parkdale II* direct the Commission to take new evidence. *See* N.C. Gen. Stat. §105-345.1 (2013)

("No evidence shall be received at the hearing on appeal to the Court of Appeals but if any party shall satisfy the court that evidence has been discovered since the hearing before the Property Tax Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court *may*, in its discretion, remand the record and proceedings to the Commission with directions to take such subsequently discovered evidence . . . ." (emphasis added)). As such, this Court's directive to the Commission in *Parkdale II* was not a mandate requiring the Commission to conduct additional hearings. *See In re Appeals of S. Ry. Co.*, 313 N.C. 177, 183—84, 328 S.E.2d 235, 240 (1985) (discussing how N.C.G.S. § 105-345.1 does not require the taking of new evidence on remand to the Commission, and noting that where the evidence in the record is sufficient, this Court will not order new proceedings in order to give a party a second opportunity to bolster its case with new evidence); *Bailey v. N.C. Dept. of Mental Health*, 2 N.C. App. 645, 647—48, 163 S.E.2d 652, 654 (1968) (noting that where the order of a state agency was vacated and remanded for further consideration, the directive did not mandate that a new trial or trial *de novo* be conducted, nor did this directive either require or prohibit the state agency from taking new evidence).

The County further argues that because this Court vacated and remanded in *Parkdale II*, the language of "vacate and remand" was a directive ordering the Commission to conduct additional mandatory hearings. We disagree, for it has been

settled by this Court that, for all practical purposes, the term "vacate" is synonymous with "remand," as both terms generally instruct the trial court to set aside and review its prior order. *See In re Appeal of IBM Credit Corp.*, 222 N.C. App. 418, 426—27, 731 S.E.2d 444, 448—49, *review denied*, 366 N.C. 400, 735 S.E.2d 191 (2012). Here, the Commission had discretion to determine whether or not to conduct additional evidentiary hearings. There was no mandate to conduct new hearings; likewise, there was no mandate to enter an order solely on the record. The mandate was to enter proper findings of fact and conclusions of law to reconcile the huge discrepancy in valuation of taxpayer's property. Therefore, in its final decision on second remand, the Commission did not abuse its discretion by not conducting additional hearings while abiding by the mandate.

Additionally, we note that although the County raises this argument concerning the Commission's final decision on second remand, this Court's directive to the Commission in *Parkdale I* was virtually identical to that now contested in *Parkdale II*, yet the County never raised this issue prior to its current appeal. In *Parkdale I*, this Court made it clear that the Commission had discretion to determine whether additional hearings were necessary: "[T]he Commission *may* conduct additional hearings if it deems them necessary . . . [and] *shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence . . . ." *Parkdale I*, 212 N.C. App. at 198, 710 S.E.2d at 453 (emphasis added). However, no additional

hearings were conducted, and the County never raised this issue regarding the meaning of the mandate in its appeal following *Parkdale I*. Accordingly, the County's argument is overruled.

II.

Next, the County contends that the Commission erred in accepting taxpayer's argument that the County had already lost its case. However, while a review of the transcript does support the fact that taxpayer did make such an argument, the County cites no case law or other authority in support of its contention that it was error for the Commission to do so. Therefore, we decline to address this argument. *See* N.C. R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

III.

In its final argument, the County contends the Commission erred in in adopting findings that are contrary to the record. We disagree.

As stated in *Issue I*, this Court reviews decisions of the Commission under the whole record test to "determine whether an administrative decision has a rational basis in the evidence." *In re McElwee*, 304 N.C. at 87, 283 S.E.2d at 127 (citation omitted). However, this Court cannot reweigh the evidence presented and substitute its evaluation for that of the Commission's. *In re AMP*, 287 N.C. at 562, 215 S.E.2d at 761 (citation omitted). "If the Commission's decision . . . is supported by

substantial evidence, it cannot be overturned." *In re Philip Morris U.S.A.*, 130 N.C. App. at 533, 503 S.E.2d at 682 (citations omitted).

The County contends the Commission "erred in adopting a series of argumentative findings that are contrary to the substantial evidence of record." Specifically, the County presents a broad argument, without citing specific findings of fact, that the Commission's final decision on second remand was in error because, in general, the Commission's findings of fact as to the County's application of schedules of values, comparison sales data of properties similar to those of taxpayer's, the operability of taxpayer's properties, and adaptive reuse sales data, can be challenged by contrary evidence within the record.

A review of the record indicates that both the County and taxpayer presented substantial evidence to the Commission, including testimony regarding various methods of appraisal used by each party to determine the actual values of the properties. Although the County is correct that it presented contrary evidence as to the conditions and valuations of taxpayer's properties, the record shows that taxpayer also presented substantial evidence regarding the conditions and valuations of its properties. Further, the Commission, after making numerous findings of fact and conclusions of law, determined that despite the County's evidence, the County had not meet its burden in demonstrating that its method of valuation for taxpayer's properties was proper. While this Court may consider competing or contradictory

evidence in reviewing the Commission's decision, this Court is not permitted "to replace the [Commission's] judgment as between two reasonably conflicting views, even though th[is] [C]ourt could justifiably have reached a different result had the matter been before it *de novo*." *In re McElwee*, 304 N.C. at 87—88, 283 S.E.2d at 127 (citation omitted).

Additionally, we note that the Commission, by making numerous findings of fact and conclusions of law as to the discrepancy between the County's and taxpayer's valuations of the properties, has followed the directive of this Court as stated in *Parkdale II*. *See Parkdale II*, ___ N.C. App. at ___, 741 S.E.2d at 422 ("On remand, the Commission shall conduct additional hearings as necessary and make further findings of fact and conclusions of law in order to reconcile this discrepancy [between taxpayer's and the County's assessed values for the properties].").

As a final point, we note that even had the Commission failed to properly apply the burden-shifting framework, by adopting taxpayer's valuations of the properties the Commission would have met this Court's prerogative warning in *Parkdale II*. *See id*. (warning that "[i]f the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer's] valuation of the property as, unlike the

County's valuation, it has not been held to be 'arbitrary.' "). The County's argument is, therefore, overruled.

AFFIRMED.

Judge DIETZ concurs.

Judge DILLON concurs by separate opinion.

DILLON, Judge, concurring.

I concur with the majority in affirming the Final Decision on Second Remand of the Property Tax Commission. I write separately to address the *dicta* from *Parkdale II* quoted in the last paragraph of the majority's opinion:

> If the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer's] valuation of the property as, unlike the County's valuation, it has not been held to be 'arbitrary.'

I do not believe that the above *dicta* should be read as a rule which *requires* the Commission to accept the taxpayer's valuation simply because the County may fail to meet its burden (when applicable) that its valuation does not represent the true value of the property. *Parkdale I* and *Parkdale II* explain the burden-shifting framework the Commission is required to apply, which I believe is as follows:

> The County's valuation is presumed to be correct.
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> The taxpayer, however, can rebut this presumption by producing competent evidence to show that the County's (1) methodology was either arbitrary or illegal, *and* (2) valuation was substantially higher than the true value of the property.
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> A rebuttal by the taxpayer does not *conclusively* establish that the County's valuation was in fact arbitrary or illegal or that its valuation was substantially higher than the true value of the property. Rather, the burden shifts back to the County to demonstrate that its valuation was correct.
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> The County's failure to meet its burden does not necessarily render the taxpayer's valuation to be correct. Rather, where the County fails to

> meet its burden, it is up to the Commission to weigh the evidence and to make a determination as to the property's true (market) value. It may be that the Commission concludes that *neither* valuation (offered by the County or the taxpayer) accurately reflects the property's true value and determines the true value be some other number. *See*, *e.g.*, *In re Phillip Morris U.S.A.*, 130 N.C. App. 529, 538, 503 S.E.2d 679, 685 (1998) (after County concedes that it employed an arbitrary methodology, the Commission adopts value that is between value advocated by the County's expert and the value advocated by the taxpayer's expert).

In the present case, the Commission did make a finding that the valuations derived by the taxpayer's appraisal constituted "competent, material, and substantial evidence of the values" of the properties that are the subject matter of this appeal. This finding supports the Commission's ultimate determination of value. There was certainly conflicting evidence regarding the value of the subject properties from which the Commission could have determined that the subject properties' true value was somewhere between the value advocated by the County and the value advocated by the taxpayer. However, it is for the Commission – and not this Court – to weigh the evidence. Accordingly, I concur with the majority in affirming the Commission's order.