IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-646

Filed: 30 December 2016

Cabarrus County, No. 14-CVS-2649

In re Appeal by:

TONEY L. HARRELL and T.L. HARRELL'S LAND DEVELOPMENT CO., INC., Petitioners,

v.

THE MIDLAND BOARD OF ADJUSTMENT and THE TOWN OF MIDLAND, Respondents.

Appeal by Petitioners and cross-appeal by Respondent Town of Midland from order entered 1 April 2016 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 28 November 2016.

Scarbrough & Scarbrough, PLLC, by James E. Scarbrough and John F. Scarbrough, for Petitioners.

Parker Poe Adams & Bernstein, LLP, by Anthony Fox and Benjamin R. Sullivan, for Respondent Town of Midland.

McGEE, Chief Judge.

I. *Factual Background*

T.L. Harrell's Land Development Co., Inc., along with Toney L. Harrell, ("Petitioners") were the developers of a subdivision in Cabarrus County called Bethel Glen ("the subdivision"), now located in the Town of Midland ("the Town"), along with

the Midland Board of Adjustment ("the Board"), ("Respondents"). Initial development plans were approved by the Cabarrus County Board of Commissioners on 16 October 2000, because the Town had not yet been incorporated when the initial approval was sought. During the final plat approval process for the subdivision, Petitioners executed the following agreement, which was included on each plat: "I (we) hereby certify that I (we) will maintain the roads to the standards set forth by the North Carolina Department of Transportation until the respective governmental agency takes over this responsibility." In 2004, after the Town had incorporated and had taken responsibility for overseeing and approving issues related to the subdivision, Petitioners completed an application with the North Carolina Department of Transportation ("NCDOT" or "DOT") requesting that DOT assume responsibility for the maintenance of the subdivision roads. By letter dated 28 October 2004, D. Ritchie Hearne ("Hearne"), a District Engineer for DOT, wrote the Town, stating that Petitioners "contacted my office regarding acceptance of the [subdivision roads]. I have informed [Petitioners] that acceptance of these roads would be a Town function under our normal policy. . . . . The review of the street plans, inspection, and ultimate takeover of the roads would be the Town's responsibility."

Hearne again contacted Respondents by letter dated 30 December 2005, to advise Respondents that he had again spoken with Petitioners and had informed them that DOT would not take responsibility for maintenance of the subdivision

roads; that because the roads were within the Town's corporate limits, Petitioners would have to petition the Town for takeover. In response to this letter, the Town wrote Hearne on 19 January 2006 stating that the Town was "willing to take the [subdivision] streets . . . into the Town with some verification from you. [We request] a letter from you stating that the roads . . . are built to NCDOT standards. When we receive this letter, we will proceed with adoption of said streets." There is no record evidence Petitioners requested that the Town take over maintenance of the subdivision roads, nor that the Town sent a copy of the 19 January 2006 letter to Petitioners. There is no record evidence that Respondents ever indicated directly to Petitioners that the Town would take over maintenance of the roads. The Town hired a firm to inspect the subdivision roads, and was alerted by email on 30 January 2006 that certain repairs were needed. This email stated in part:

> As you can see on the map, there were multipl[e] phases recorded over the past few years. According to my inspection, there are a number of items that need to be fixed prior to the Town taking over the streets, i.e. settlement of pavement at utility ditches, manholes, storm drainage lines etc. According to the Town of Midland Subdivision Ordinance, Section 60-40-C-5, either the developer or a Homeowner's Association is responsible for maintenance of the streets until they are accepted by NCDOT or the Town. It appears that T.L. Harr[ell]'s Land Development Co. Inc. is responsible for the maintenance. How do you want to handle this?
>
> I would assume that the Town would want the developer to make a formal request to the Town for acceptance of the streets. However, this step could be omitted since these are

> already platted. Upon receiving the request, the Town would inspect the development and provide the developer with a list of items that need to be corrected. Once these items are fixed to the Town's satisfaction, the Town Board could accept the streets for maintenance.

The Town responded to this email by stating, *inter alia*, that the Town's "concern (and it[']s obvious) is that with the continuing construction with both phases, there are heavy work vehicles in/out of the development daily adding wear and tear to the roads, etc." The only record evidence of the issue of taking over maintenance of the subdivision roads having been discussed by the Midland Town Council is from the minutes of a 14 February 2006 meeting. Following are the relevant minutes:

> Mayor Pro Tem Page said our engineer inspected the roads and found discrepancies. He added that the Town is still waiting on a letter from NCDOT verifying that the roads have been built to DOT standards.
>
> Mayor Pro Tem Page said that the Town needs to talk with the developer on the discrepancies and future phase plans. He noted for Council that, even if the Town takes over the streets, there is a clause stating the developer is still responsible for the streets for 1 year after takeover. He ended by saying the Town should take the streets in after it gets a formal request from the developer to do so.
>
> Engineer Jeff Moody said upon his inspection of the streets he found 15-18 places where ditches had settled including around manholes. Also there are places in roads that had been patched and were now in need of repair.
>
> Engineer Moody and Council discussed build out of the development.
>
> Mayor Crump suggested not taking in any of the

> [subdivision] streets until build out is finished.
>
> Mayor Pro Tem Page said he'll bring the issue back before Council when action needs to be taken.

Hearne responded to the Town's 19 January 2006 letter by letter dated 25 April 2006, in which he stated that "[t]o this point, the roads within [the] subdivision have been designed, built, and inspected according to NCDOT standards." Hearne then went on to state that generally DOT will *not* take over maintenance of any subdivision roads until the majority of homes in the subdivision are built "and the developer must perform any needed repairs to the road infrastructure." Hearne stated he had inspected the subdivision streets and there were parts of the streets, along with some possible curb and gutter sections, that needed repair. Hearne explained that "[i]t is often damaged and broken by the construction traffic when the homes are being built. There appears to be at least one more phase of construction to complete the subdivision." Hearne's 25 April 2006 letter indicated that a copy of the letter was sent to Petitioners. However, there is no indication Petitioners followed up with Respondents in order to petition the Town to take over maintenance of the subdivision roads, or to check on the status of any process of taking over the subdivision roads that Respondents might have initiated themselves.

The record is silent concerning any activity taken by either Respondents or Petitioners concerning the subdivision roads until the Town sent Petitioners a letter dated 23 August 2012. In that letter the Town informed Petitioners:

> The Town of Midland has received several complaints from homeowners in the Bethel Glen subdivision regarding the deteriorating condition of the streets. The Town of Midland is currently in a position where it cannot legally move forward with any action steps to improve the condition of the streets in Bethel Glen as the streets were never petitioned to be added to the Town's street maintenance system. Thus, the streets are currently considered private and there is no safeguard in place to improve or maintain the streets.
>
> We are in need of your [Petitioners'] help. We are asking that you come in to meet with us so that we may determine what needs to be done for the Town to take on maintenance responsibilities for the streets.

The Town then sent a letter dated 12 October 2012 to the firm the Town used to inspect roadways, requesting "any and all inspection reports" for the subdivision streets. The Town again contacted Petitioners by letter dated 8 January 2013, in which it stated:

> As the subdivision . . . is located in the city limits of the Town of Midland, many [subdivision] residents are looking to the Town to arrange for the repair of the deteriorating street infrastructure that poses a risk to the public. As the original owner and developer of [the subdivision], each final plat was signed, under the Certificate of Road Maintenance, that you would maintain responsibility of the streets until taken over for public maintenance. . . . [N]either [DOT] nor the Town accepted the streets for public maintenance.
>
> As part of our research, [the Town's] Public Works Administrator and Town Engineer . . . has conducted inspections of several streets in [the subdivision] and has identified areas of the streets that need repair. . . . . Once the streets are brought up to standard and a satisfactory

> inspection is made by [the Town Engineer], you may petition the Town to take over the responsibility of maintaining the streets.

The Town sent Petitioners a notice of violation on 18 March 2014 because "corrective action has not occurred despite a previous meeting and a written notice to you of these issues. Please also refer to [the Town's] letter dated January 8, 2013 and our subsequent meetings, the first occurring on January 22, 2013 and our second meeting on February 12, 2013." The Town further informed Petitioners in its notice of violation that "[s]ince the January 8th letter, [the Town] has revisited the site and has determined that no action has been taken to remedy the problem and the streets remain in a state of continuous deterioration. Now the streets are substandard and may pose a potential threat to public safety."

In response to this notice of violation, Petitioners' attorney sent a letter dated 9 April 2014 to Respondents seeking review of the notice of violation by the Board. The Board held hearings on 27 May, 17 June, 24 June, and 22 July 2014. By order dated 12 August 2014, the Board upheld the "decision of the Planning, Zoning and Subdivision Administrator" to issue the notice of violation by a vote of six to zero. Petitioners filed a petition for writ of certiorari on 10 September 2014 to Superior Court, Cabarrus County, for review of the Board's decision. This matter was heard in superior court on 21 September 2015, and the Board's decision was affirmed by order entered 1 April 2016. Petitioners appeal; Respondents cross-appeal.

II. *Analysis*

A. *Respondents' Cross-Appeal*

Respondents argue in their cross-appeal that the trial court was correct to affirm the decision of the Board because the trial court was sitting as an appellate court, and could not consider for the first time arguments that Petitioners had failed to make to the Board. We note that the need for a cross-appeal in this case is unclear. The superior court's order noted that various issues were not properly before it, but then "in its discretion, consider[ed] Petitioners' argument[s.]" Because it is not clear whether the trial court intended to reject Petitioners' arguments on the alternative bases of lack of preservation and on the merits, or if its intention was to ignore the failure to preserve arguments and just decide the issues on the merits, this Court will address Respondents' cross-appeal.

1. *Standard of Review*

N.C. Gen. Stat. § 160A-393 controls appeals from quasi-judicial decisions made by decision-making boards such as the decision of the Board in the present case. N.C. Gen. Stat. § 160A-393(a)-(b)(1) (2015). Because Petitioners disagreed with the decision of the Board in this matter, Petitioners' appeal was "in the nature of certiorari [and was] initiated by filing with the superior court a petition for writ of certiorari." N.C. Gen. Stat. § 160A-393(c). For purposes of review by the superior court, "[t]he record shall consist of all documents and exhibits submitted to the

decision-making board whose decision is being appealed, together with the minutes of the meeting or meetings at which the decision being appealed was considered." N.C. Gen. Stat. § 160A-393(i). The scope of the superior court review is limited as follows:

> (k) **Scope of Review**. –
>
> (1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
>
> a. In violation of constitutional provisions, including those protecting procedural due process rights.
>
> b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
>
> c. Inconsistent with applicable procedures specified by statute or ordinance.
>
> d. Affected by other error of law.
>
> e. Unsupported by substantial competent evidence in view of the entire record.
>
> f. Arbitrary or capricious.
>
> (2) When the issue before the court is whether the decision-making board erred in interpreting an ordinance, the court shall review that issue de novo. The court shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate.

> . . . .
>
> (l) **Decision of the Court.** – Following its review of the decision-making board in accordance with subsection (k) of this section, the court may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings.

N.C. Gen. Stat. § 160A-393.

When reviewing a decision of the Board, the superior court acts in the "posture of an appellate court[.]" *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 224, 488 S.E.2d 845, 852 (1997) (citation and quotation marks omitted). Because of the appellate court posture of the superior court in this instance, the superior court could only consider arguments and issues brought before and decided by the Board in the first instance. This Court is similarly limited. *Id*. ("The superior court in its 'posture of an appellate court,' on review by writ of certiorari, may not consider a matter not addressed by the Board. Nor may this Court through our derivative appellate jurisdiction consider matters not raised below.") (citations omitted).

2. *Issues Abandoned*

Respondents contend Petitioners failed to argue issues before the Board that it then argued before the trial court. Specifically, Respondents argue Petitioners did not argue to the Board the following: (1) "that the Town is barred by estoppel from citing Petitioners," (2) "that the Town Ordinance is being applied against Petitioners

retroactively," (3) "that Petitioners received insufficient notice of what Ordinance provisions they violated," and (4) "that Toney L. Harrell is not properly a Petitioner."

Because Petitioners fail to argue estoppel in their brief to this Court, any such argument has been abandoned. *Seraph Garrison, LLC v. Garrison*, __ N.C. App. __, __, 787 S.E.2d 398, 403 (2016) ("[S]ince defendant does not challenge the court's conclusion on appeal, he has abandoned the issue. N.C. R. App. P. 28(b)(6) (2015) ('Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.')."). Further, Petitioners do not now argue that they properly preserved their arguments related to notice or to Toney L. Harrell's being a proper Petitioner, and we agree with the trial court that these arguments were not made to the Board and are therefore not before us.

3. *Retroactive Application*

Petitioners argue that they did present to the Board the argument that the town ordinance was being improperly applied retroactively to Petitioners. We disagree.

It is true Petitioners mentioned that the ordinance for which the Town sent them a notice of violation was enacted in 2011. The extent of Petitioners' argument to the Board concerning retroactivity is as follows: "the Ordinance . . . I believe was adopted in 2011[.] We built the subdivision prior to 2006. So I'm a little concerned about how we can violate something that didn't exist at the time." Petitioners elicited

certain answers related to when the current ordinance was enacted, and questioned whether the provisions for which they were cited were contained in earlier versions of the ordinance. However, Petitioners never specifically argued that the 2011 ordinance was being applied to them retroactively. During Petitioners' closing argument to the Board, the only defense argued was laches. We hold that, because Petitioners did not argue to the Board any improper application of the 2011 ordinance, they did not preserve any such argument for review by the superior court or this Court.

In addition, assuming *arguendo* Petitioners had preserved this argument, it would still fail. The ordinance in question states that, until privately owned streets are accepted by the Town for public maintenance, "the developer shall be responsible for maintenance of those areas." Midland Development Ordinance, Article 16, § 16.1-8(A) (adopted 13 September 2011). It is undisputed that, at the time Respondents filed the notice of violation, Respondents had not taken over responsibility for maintenance of the subdivision roads. The superior court ruled:

> The current Town's Zoning Ordinance is not being applied to Petitioners retroactively. Under that Ordinance, Petitioners have a continuing obligation to maintain the [subdivision] streets . . . until and unless ownership of those streets is transferred to someone else or responsibility for maintaining those streets is accepted by someone else, neither of which has occurred. Petitioners' failure to maintain the streets is an ongoing violation, and consequently Petitioners were properly cited under the Town's current Zoning Ordinance.

We hold that this ruling is supported by the facts and is correct under the law. Regardless of what Petitioners' obligations were prior to the 2011 amendments to the town ordinances, subsequent to those amendments Petitioners had an ongoing obligation to maintain the subdivision streets pursuant to the ordinance. Once Respondents received complaints from subdivision residents, investigated the complaints, and failed to reach an agreement with Petitioners for the needed repairs, Respondents correctly sent Petitioners the notice of violation. This argument is without merit.

B. *Petitioners' Appeal*

All Petitioners' arguments except one have been settled in our above analyses. In Petitioners' final argument, they contend the superior court erred in rejecting their laches defense. We disagree.

"The doctrine of laches is 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 88–89, 712 S.E.2d 221, 230 (2011) (citation omitted). "The burden of proof rests with the party pleading laches as a defense." *Id.* at 89, 712 S.E.2d at 231 (citation omitted).

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the

> property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

Farley v. Holler, 185 N.C. App. 130, 132–33, 647 S.E.2d 675, 678 (2007) (citation omitted).

In the present case, it is uncontested that Respondents had not taken responsibility for maintaining the subdivision roads from Petitioners. Therefore, it was Petitioners' continuing responsibility to maintain the subdivision roads. Petitioners may argue that they erroneously *believed* Respondents had taken over responsibility for maintaining the subdivision roads, and that this erroneous belief was why they allowed the roads to fall into disrepair but, even if true, these facts are not particularly pertinent to Petitioners' laches defense.

We need only focus on the fourth element stated in *Farley*: that "the claimant knew of the existence of the grounds for the claim[,]" to affirm the lower court ruling that laches did not serve as a defense in the matter before us. *Id.* at 33, 647 S.E.2d at 678 (citation omitted). In their brief, Petitioners state: "The record before the Board and the trial court showed that the Town was aware for years of the fact that [Petitioners] were not maintaining the roads of [the] Subdivision, but the Town

waited an unreasonable period of time to cite [Petitioners]." "The Town was aware that [Petitioners] were not maintaining the streets, but the Town waited until March 20, 2014 to serve [Petitioners] with the Notice of Violation."

Initially, Petitioners cite to nothing in the record in support of their contention that Respondents were aware that Petitioners were not maintaining the streets "for years." It is not the job of this Court to comb through the record to find support for Petitioners' arguments. The fact Respondents were aware that they themselves were not maintaining the subdivision streets does not equate to an awareness on Respondents' part that Petitioners had ceased doing so. Pursuant to the final subdivision plats, Petitioners had expressly agreed to maintain the subdivision streets until those streets were taken over by some government entity. Petitioners never requested that Respondents take over maintenance of the subdivision roads, and Respondents never indicated to Petitioners that Respondents had done so. In fact, Petitioners state that "[t]he Town did not correspond with [Petitioners] in 2006, 2007, 2008, 2009 or 2010. The Town's letter to [Petitioners] in 2012 was the first time the Town corresponded with [Petitioners]." The 2012 letter referenced by Petitioners stated in relevant part:

> The Town of Midland has received several complaints from homeowners in the Bethel Glen subdivision regarding the deteriorating condition of the streets. The Town of Midland is currently in a position where it cannot legally move forward with any action steps to improve the condition of the streets in Bethel Glen as the streets were

> never petitioned to be added to the Town's street maintenance system. Thus, the streets are currently considered private and there is no safeguard in place to improve or maintain the streets.
>
> We are in need of your [Petitioners'] help. We are asking that you come in to meet with us so that we may determine what needs to be done for the Town to take on maintenance responsibilities for the streets.

Following this 2012 letter, the Town sent Petitioners a notice of violation on 18 March 2014 because "corrective action has not occurred despite a previous meeting and a written notice to you of these issues. Please also refer to my letter dated January 8, 2013 and our subsequent meetings, the first occurring on January 22, 2013 and our second meeting on February 12, 2013." The Town further informed Petitioners in its notice of violation that "[s]ince the January 8th letter, Midland has revisited the site and has determined that no action has been taken to remedy the problem and the streets remain in a state of continuous deterioration. Now, the streets are substandard and may pose a potential threat to public safety."

In short, Petitioners have cited no record evidence in support of any claim that Respondents knew for some unreasonable period of time, between 2006 and when the Town sent a letter to Petitioners on 23 August 2012, that the subdivision roads were in violation of any Town ordinance. Absent such a showing, Petitioners failed in their burden to prove that "the claimant [Respondents] knew of the existence of the

grounds for the claim [roads in such disrepair that they violated a town ordinance]." *Farley*, 185 N.C. App. at 133, 647 S.E.2d at 678 (citation omitted).

The record evidence tends to show that when Respondents' attention was brought to the deteriorating state of the subdivision roads through resident complaints, they contacted Petitioners in an attempt to reach a mutually acceptable solution. Once it appeared no mutually agreeable solution was forthcoming, Respondents sent Petitioners the 18 March 2014 notice of violation that resulted in Petitioners' 9 April 2014 notice of appeal from the notice of violation, and the subsequent appeals to the Board, the superior court, and this Court. As Petitioners have failed to prove a necessary element of their laches defense, the defense of laches fails. The trial court's order is affirmed.

AFFIRMED.

Judges BRYANT and ENOCHS concur.

Report per Rule 30(e).