IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1107

Filed: 7 August 2018

Watauga County, No. 16 CVS 204

RANDALL L. and CAROLYN M. HENION, Petitioners,

v.

COUNTY OF WATAUGA, NORTH CAROLINA, JOHNNY and JOAN HAMPTON, MAYMEAD MATERIALS, INC., and JW HAMPTON COMPANY, Respondents.

Appeal by Petitioners from order entered 17 March 2017 by Judge John O. Craig III in Watauga County Superior Court. Heard in the Court of Appeals 21 March 2018.

Davis & Whitlock, P.C., by James S. Whitlock, for petitioners-appellants.

Nexsen Pruet, PLLC, by David S. Pokela, for respondent-appellee County of Watauga.

Smith Moore Leatherwood, LLP, by Kip D. Nelson and Thomas E. Terrell, Jr., for respondents-appellees Johnny and Joan Hampton, Maymead Materials, Inc., and JW Hampton Company.

BERGER, Judge.

Randall L. and Carolyn M. Henion ("the Henions") appeal an order affirming the decision of the Watauga County Board of Adjustment (the "Board") to grant a

high-impact land use permit ("the Land Use Permit") to Johnny and Joan Hampton ("the Hamptons") for the construction of an asphalt plant. The Hamptons ask this Court to dismiss the Henions' intervention into the granting of the Land Use Permit because the Henions lack standing for their challenge. The Henions counter that, because they will suffer special damages due to both a reduction in the value of their property and their loss of the use and enjoyment of their property, they have standing to challenge the granting of the Land Use Permit. We agree with the Hamptons that the Henions lack standing to intervene and, therefore, dismiss.

Factual and Procedural Background

On June 20, 2011, Maymead Materials, Inc. and JW Hampton Company, which both provide asphalt for road construction and are controlled by the Hamptons, were issued permits for the construction of an asphalt plant, including the requisite Land Use Permit. The Hamptons' companies then began preparing and grading the site for the construction of the asphalt plant. However, on June 25, 2015, Mr. Hampton received a letter from Watauga County's Director of Planning and Inspections informing him that the Land Use Permit was "expired and therefore revoked." On July 28, 2015, Mr. Hampton appealed the revocation of his Land Use Permit to the Board.

On November 16, 2015, Blue Ridge Environmental Defense League, Inc., requested to intervene on behalf of the Henions. The Henions live approximately

1800 feet from the location of the proposed asphalt plant and contend that the construction of the asphalt plant would reduce the value of their property and cause diminished use and enjoyment of their property.

The Board heard evidence from all parties over the course of ten meetings between late 2015 to early 2016. At the conclusion of these meetings, the Board determined that the revocation of the Land Use Permit was not justified and should be reversed. Following this decision, the Henions filed a petition for a writ of certiorari in Watauga County Superior Court seeking review of the Board's decision. The trial court reviewed the actions of the Board and upheld its decision. The Henions have timely appealed the trial court's order affirming the Board's decision. The Hamptons have challenged the Henions' standing to seek further review.

Standard of Review

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo." *Smith v. Forsyth Cty. Bd. of Adjust.*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007) (*purgandum*[1]). "In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to

[1] Our shortening of the Latin phrase "*Lex purgandum est*." This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

the non-moving party." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). The party invoking jurisdiction has "the burden of proving the elements of standing." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

Analysis

The Henions assert they have standing to appeal this matter because they have demonstrated special damages pursuant to N.C. Gen. Stat. § 160A-393, which governs a trial court's review of county and city decision-making boards. The special damages they allege, argued to be a direct result of the operation of the proposed asphalt plant, include a reduction in the value of their property and their loss of the use and enjoyment of their property. The Henions argue that these special damages could give them standing, and, ultimately, this Court's jurisdiction over the matter. We disagree.

In order to "have standing to seek review [of the granting of a conditional use permit,] a party must claim special damages, distinct from the rest of the community." *Casper v. Chatham Cty.*, 186 N.C. App. 456, 458, 651 S.E.2d 299, 301 (2007). "Special damages are defined as a reduction in the value of his own property." *Sarda v. City/Cty. of Durham Bd. of Adjust.*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (*purgandum*). Furthermore,

> [t]o have standing to seek review of the granting of a conditional use permit, a petitioner must first allege the manner in which the value or enjoyment of petitioner's land has been or will be adversely affected. We have held that examples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level. However, the mere averment that petitioners own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of special damages in their Petition, is insufficient to confer standing upon them.

Casper, 186 N.C. App. at 459, 651 S.E.2d at 302 (*purgandum*). "Vague, general allegations that a property use will impair property values in the general area also will not confer standing." *Cherry v. Wiesner*, 245 N.C. App. 339, 349, 781 S.E.2d 871, 878, *disc. review denied*, 369 N.C. 33, 792 S.E.2d 779 (2016).

As discussed by this Court before, our Supreme Court held in *Mangum v. Raleigh Board of Adjustment* that

> the petitioners in [*Mangum*] had standing to maintain their suit where the petitioners: (1) challenged a land use that would be unlawful without a special use permit; (2) alleged they would suffer special damages if the use is permitted; and (3) provided evidence of increased traffic, increased water runoff, parking, and safety concerns, as well as the secondary adverse effects that would result from the challenged use.

Id. at 348, 781 S.E.2d at 878 (citing *Mangum*, 362 N.C. at 643-44, 669 S.E.2d at 282-83). For example, in *Mangum*, evidence of potential "vandalism, safety concerns, littering, trespass, and parking overflow" were presented and determined sufficient

to grant standing. *Mangum*, 362 N.C. at 645, 669 S.E.2d at 283–84. Conversely, there is no standing when the record does not contain sufficient evidence to sustain a finding that the petitioner would suffer a diminution in property value "distinct from the rest of the community." *See Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 350-51, 489 S.E.2d 898, 900-01 (1997).

Here, the evidence tended to show that the Henions have only alleged that special damages will result due to the proximity of their property to the asphalt plant. The Henions testified at the hearing before the Board that "their property would suffer a diminution of property value if the asphalt plant was allowed to operate." The Henions further relied on the testimony of Louis Anthony Zeller ("Zeller"), executive director of the Blue Ridge Environmental Defense League. Zeller presented a study that generally showed that property values were negatively affected by nearby asphalt plants. However, this evidence was inadmissible. Section 160A-393(k)(3) allows certain competent evidence, which would otherwise not be admissible under the rules of evidence as applied in the trial courts of this State, but such evidence shall not include the opinion testimony of lay witnesses as to how "[t]he use of property in a particular way would affect the value of other property." N.C. Gen. Stat. § 160A-393(k)(3) (2017). Zeller was therefore unable to provide opinion testimony as to how "the use of property in a particular way would affect the value of

other property" as Zeller was a lay witness and was not qualified as an expert. *See id.*

Conversely, Timothy J. Ragan ("Ragan"), a licensed and certified real estate appraiser, testified before the Board that he "[did] not think their property value would be affected by the asphalt plant in a negative way." Furthermore, Ragan testified that Zeller's study "did not" conform to the Uniform Standards of Professional Appraisal Practice because it was "strictly based on tax assessments that were done" and appraisers must base their "opinions related to property values on actual sales that have occurred in the marketplace and the market's reaction to a certain situation." Therefore, the Henions have failed to sufficiently establish with credible evidence that "their property value would suffer a diminution of property value if the asphalt plant was allowed to operate." This bald assertion alone confers neither standing on the Henions to challenge the granting of the Land Use Permit, nor jurisdiction on this Court to review their challenge.

Conclusion

As standing of a party seeking review is required for this Court to have jurisdiction to review, we must dismiss this appeal. The Henions have not established the special damages necessary for this Court to have jurisdiction to review the granting of the Land Use Permit to the Hamptons.

DISMISSED.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).