IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-615

Filed: 18 December 2018

Cleveland County, No. 17 CVS 212

BRINKLEY PROPERTIES OF KINGS MOUNTAIN, LLC, JERRY MOORE, CAROLYN MOORE, DON BABER, GAIL BABER, BARRY RIKARD, JENNY RIKARD, STEPHANIE SHORT, SHANE SHORT, ALICE WHITE, MABEL MOORE, MIKE WHITEHEAD, ELIZABETH WHITEHEAD, LEONARD WHITE, GEORGE GREER AND MARY GREER, Plaintiffs,

v.

CITY OF KINGS MOUNTAIN, NORTH CAROLINA, ORCHARD TRACE OF KINGS MOUNTAIN, LLC, Defendants.

Appeal by plaintiffs from order entered 14 March 2018 by Judge Lisa C. Bell in Cleveland County Superior Court. Heard in the Court of Appeals 15 November 2018.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Nicolas E. Tosco, for plaintiff-appellants.

Corry Law Firm, by Clayward C. Corry, Jr., and Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Jason White, for defendant-appellant City of Kings Mountain.

Moore & Van Allen PLLC, by David E. Fox and Benjamin F. Leighton, for defendant-appellant Orchard Trace of Kings Mountain, LLC.

ARROWOOD, Judge.

Brinkley Properties of Kings Mountain, LLC, Jerry Moore, Carolyn Moore, Don Baber, Gail Baber, Barry Rikard, Jenny Rikard, Stephanie Short, Shane Short, Alice White, Mabel Moore, Mike Whitehead, Elizabeth Whitehead, Leonard White, George Greer, and Mary Greer ("plaintiffs") appeal from an order granting City of Kings Mountain ("Kings Mountain") and Orchard Trace of Kings Mountain, LLC ("Orchard Trace") (collectively, "defendants")'s motion for summary judgment, denying plaintiffs' motion for summary judgment, and dismissing plaintiffs' complaint with prejudice. For the reasons stated herein, we affirm the order of the trial court.

I. Background

On 7 November 2016, Orchard Trace submitted a rezoning application to the Kings Mountain Planning and Economic Development Department ("Planning and Economic Development Department"). The application requested that 120-acres of land owned by Orchard Trace be rezoned from residential to conditional use property, enabling Orchard Trace to proceed with plans to develop multi-family market rate apartments, active living housing, neighborhood offices and retail space, and single-family, detached homes on the property. The director of the Planning and Economic Development Department, Steve Killian ("Mr. Killian"), determined the application was complete and complied with the requirements of Kings Mountain's zoning ordinances.

Mr. Killian presented the rezoning application to the Kings Mountain Planning and Zoning Board (the "Planning and Zoning Board") at a public meeting on 13 December 2016. The Planning and Zoning Board voted to recommend that the Kings Mountain City Council ("City Council") approve the application. The City Council considered and approved the rezoning application on 20 December 2016.

On 8 February 2017, plaintiff Brinkley Properties of Kings Mountain, LLC ("Brinkley Properties") initiated an action for declaratory judgment in Cleveland County Superior Court. The action requested a declaration that the rezoning amendment authorized by the City Council was invalid and an injunction to bar defendants from proceeding with the development because: (1) the rezoning was submitted by a non-existent entity; (2) the properties did not qualify to be a planned unit development; (3) the rezoning application was incomplete; (4) the Planning and Zoning Board did not hold a public hearing; (5) the public hearing before the City Council was not sufficiently noticed; (6) the project's site plan was improperly changed just before the public hearing; (7) the City Council failed to properly identify the properties that it purported to rezone; (8) the City Council gave contradictory instructions regarding the project and failed to make key findings; and (9) Brinkley Properties is entitled to a preliminary injunction, a declaratory judgment, and a permanent injunction.

On 17 February 2017, plaintiff filed an amended complaint, adding all other named plaintiffs as parties. Both defendants answered and filed motions to dismiss claims (1) through (7) in April 2017. Plaintiffs moved for preliminary injunction on 5 May 2017. Plaintiffs' motion for injunctive relief came on for hearing on 15 May 2017, before the Honorable J. Thomas Davis. The trial court denied the motion on 21 June 2017.

Defendants' motions to dismiss came on for hearing before the Honorable Jesse B. Caldwell on 24 July 2017. Judge Caldwell dismissed counts (1), (5), and (7), and denied the motions to dismiss as to counts (3), (4), and (6) on 14 August 2017.[1]

On 26 September 2017, defendant Kings Mountain moved for summary judgment as to plaintiffs' remaining claims. Plaintiffs moved to amend their amended complaint and requested a preliminary injunction on 29 November 2017. Defendants consented to the second amendment of the complaint. On 15 December 2017, plaintiffs moved for summary judgment.

On 2 January 2018, both defendants answered plaintiffs' second amended complaint, and defendant Orchard Trace moved for summary judgment. The summary judgment motions came on for hearing on 9 January 2018, the Honorable Lisa C. Bell presiding. On 14 March 2018, the trial court denied plaintiffs' motion for

[1] The court's order did not address count (2).

summary judgment, granted defendants' motions for summary judgment, and dismissed plaintiffs' complaint with prejudice.

Plaintiffs appeal.

II. Discussion

Plaintiffs present two issues on appeal. First, plaintiffs argue the rezoning at issue is invalid because Kings Mountain violated various procedural requirements of its own zoning ordinance. Second, plaintiffs argue Kings Mountain violated North Carolina law by allowing substantial changes to defendant Orchard Trace's rezoning application on the same day it was approved by the City Council. However, we do not reach either of these issues because plaintiffs do not have standing to maintain this action.

Only a person with proper standing may challenge the validity of a municipal zoning ordinance under our Declaratory Judgment Act. *Ring v. Moore Cty.*, __ N.C. App. __, __, 809 S.E.2d 11, 12-13 (2017) (citation omitted), *review dismissed, cert. denied*, __ N.C. __, 818 S.E.2d 285 (2018). Standing to challenge a zoning ordinance in an action for declaratory judgment exists when a party "has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby." *Taylor v. City of Raleigh,* 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976) (citations omitted).

We utilize a *de novo* review to determine whether a party has standing, viewing "the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment,* 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008) (citation omitted). "Whether a party has standing to maintain an action implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal." *Fort v. Cty. of Cumberland*, 218 N.C. App. 401, 404, 721 S.E.2d 350, 353 (2012) (citation and internal quotation marks omitted).

In *Ring*, our Court held that plaintiffs did not have standing to challenge a county ordinance rezoning a tract of land that was adjacent to their property because the plaintiffs failed to allege an actual or imminent injury resulting from the rezoning. *Ring*, __ N.C. App. at __, 809 S.E.2d at 13-14. *Ring* based this holding on the requirements of *Taylor* and *Morgan v. Nash Cty.*, 224 N.C. App. 60, 735 S.E.2d 615 (2012), which "impose upon Plaintiffs the burden of establishing that the challenged rezoning directly and adversely affects them, *Taylor*, 290 N.C. at 621, 227 S.E.2d at 584, or results in an actual or imminent, concrete and particularized injury, *Morgan*, 224 N.C. App. at 65, 735 S.E.2d at 619." *Ring*, __ N.C. App. at __, 809 S.E.2d at 13.

The plaintiffs in *Ring* did not meet the burden described by *Taylor* or *Morgan* where their complaint alleged the following injuries: "increase in traffic, noise and light pollution[,] making trespassing . . . more difficult to control[,] and the virtual

certainty of complaints about odors, dust, feathers and allergic reactions thereto, arising from the Ring Family's poultry operation[.]" *Id.* at __, 809 S.E.2d at 13-14 (internal quotation marks omitted). These allegations were insufficient because they did not constitute a "concrete injury or direct consequence beyond conjecture of possible interference with their enjoyment of their property." *Id.* at __, 809 S.E.2d at 14 (citation omitted).

Furthermore, *Ring* distinguished itself from *Thrash Ltd. P'ship v. Cty. of Buncombe*, 195 N.C. App. 727, 673 S.E.2d 689 (2009), a case that held "that a party challenging the validity of a rezoning action under the Declaratory Judgment Act need not allege a direct injury to establish standing." *Ring*, __ N.C. App. at __, 809 S.E.2d at 14. *Thrash* was inapposite to *Ring* because in *Thrash* the "plaintiff's use of its land was limited by the zoning regulations" it challenged, *Thrash*, 195 N.C. App. at 731, 673 S.E.2d at 692, whereas the plaintiffs in *Ring* did not allege "that the zoning ordinance directly limits the use of their land." *Ring*, __ N.C. App. at __, 809 S.E.2d at 14.

This case is similar to *Ring*. Here, it is undisputed that plaintiffs own property adjacent and near the 120-acres that were rezoned. However, as in *Ring*, proximity to land affected by a rezoning decision, without more, is not sufficient to establish that a challenged decision directly and adversely affects plaintiffs or results in an actual or imminent, concrete and particularized injury. *See Ring*, __ N.C. App. at __,

809 S.E.2d at 13. Plaintiffs' complaint alleged the following injuries as a result of the challenged rezoning: (1) the rezoning will cause traffic congestion, noise, overflow parking, and potentially impact water resources, or, if the development fails, the rezoning will lower the value of plaintiffs' properties; and (2) the rezoning involved a change in use of property.

First, we address plaintiffs' allegation that the rezoning will either succeed and cause traffic congestion, noise, overflow parking, and potentially impact water resources, or fail, lowering the value of plaintiffs' properties. Plaintiffs contend this allegation is not speculative because plaintiff Don Baber, an adjacent homeowner, stated by affidavit that he is:

> particularly concerned about the traffic that Orchard Trace could produce. . . . There is already significant traffic on local roads. . . . I would expect Phase I of Orchard Trace by itself to add a lot of traffic to those roads beyond what they already have. And if Phase II is built and occupied, that would bring even more traffic to these roads. . . .

He also stated that he is:

> concerned about Orchard Trace's potential impact on water resources in the area. Orchard Trace would create a huge amount of impervious surface. There is a creek near the Orchard Trace site, as well as a number of natural springs in the area. I haven't seen in the Orchard Trace proposal any study or explanation of how water runoff from the development would be handled, including what steps would be taken to prevent water runoff from damaging these natural resources.

Plaintiffs also cite the affidavit of Elizabeth Whitehead, another plaintiff and adjacent neighbor to the property, as evidence of injuries:

> I know the roads around Orchard Trace well and drive them a lot. Several intersections in that area are already very congested. For example, the intersection of Margrace Road and Battleground Avenue is heavily congested. If Orchard Trace is built, traffic traveling between Orchard Trace and downtown Kings Mountain would use that intersection and would bring a lot more traffic to an already difficult intersection. The roads and intersections between the Orchard Trace site and I-85 are already congested, too. If Orchard Trace is built, traffic traveling between Orchard Trace and the interstate would make the existing congestion in these areas even worse.

Additionally, plaintiffs refer our Court to various affidavits of adjoining landowners alleging the failure of the proposed development would cause their land to lose value. However, these affidavits are unsupported by direct evidence, and merely express neighboring plaintiffs' concern over possible interference with their enjoyment of their property. Therefore, these allegations do not amount to an actionable injury. *See id.* at __, 809 S.E.2d at 13-14 (holding that no concrete injury or direct consequence, beyond conjecture, was alleged where the plaintiff alleged injuries including increase in traffic, noise, and light pollution).

Next, we consider plaintiffs' allegation that the change in use of the property establishes standing for plaintiffs. *See id.* at __, 809 S.E.2d at 14 (citing *Taylor*, 290 N.C. at 621, 227 S.E.2d at 583-84 (explaining that whether the rezoning ordinance involved a change in use of property is a factor to consider in evaluating whether

standing to challenge the ordinance has been established)). Here, although the approval of Orchard Trace's zoning application involved a change in use of the Orchard Trace property, plaintiffs failed to allege that the zoning ordinance directly limits the use of their own land or otherwise results in an actual or imminent, concrete and particularized injury. Therefore, as in *Ring*, the facts in this case are distinct from those in *Thrash*, where additional direct injuries did not need to be alleged to establish standing to bring suit under the Declaratory Judgment Act because the use of the plaintiff's own land was changed by the challenged rezoning ordinance. *See id.* Accordingly, we hold that, under the facts of this case, the change of the property's use from residential to conditional does not constitute an actionable injury.

Thus, plaintiffs failed to allege that the rezoning directly and adversely affects them, or results in an actual or imminent, concrete and particularized injury. As a result, plaintiffs failed to establish standing to maintain this action.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment for defendants, denying plaintiffs' motion for summary judgment, and dismissing plaintiffs' second amended complaint.

AFFIRMED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).