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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-603

No. COA21-115

Filed 2 November 2021

Madison County, No. 19CVS340

MADISON ASPHALT, LLC, Petitioner,

v.

MADISON COUNTY, a North Carolina county and body politic, EDWARD FELDMANN, LISA LONG FELDMANN, TIMOTHY J. RUEMLER, BILLY JEAN HAYNIE, LINDA PAYNE, RONNIE PAYNE, DOUGLAS J. BRUGGEMAN, EMILY SONTAG, JAMES TIBBETS, VIVIAN R. LONG, CONNIE M. MOLLAND, and EARL ANDREW CARLSON, Respondents.

Appeal by Respondents-Appellants from order entered 15 September 2020 by Judge Gary Gavenus in Madison County Superior Court. Heard in the Court of Appeals 11 August 2021.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, for Petitioner-Appellee.

Allen Stahl & Kilbourne, by James W. Kilbourne, Jr., for Respondents-Appellants.

Roberts & Stevens, PA, by Ann-Patton Hornthal, for Respondent-Appellee.

CARPENTER, Judge.

¶ 1 Individual Respondents-Appellants filed an appeal of Judge Gavenus’ order reversing the Madison County Board of Adjustment’s written decision denying Madison Asphalt’s Conditional Use Permit to build an asphalt plant. Individual Respondents-Appellants have also filed a petition for writ of certiorari. Madison County filed a motion to dismiss the appeal. For the following reasons, we dismiss Individual Respondents-Appellants’ appeal as interlocutory and deny their petition for writ of certiorari.

I. Factual and Procedural Background

¶ 2 This case involves three parties: Petitioner-Appellee Madison Asphalt, LLC (“Petitioner-Appellee” or “Madison Asphalt”); Respondent-Appellee Madison County, (“Respondent-Appellee,” “Madison County,” or “County”); and Individual Respondents-Appellants, a group of named Respondents-Appellants living in proximity to the proposed construction of Madison Asphalt’s asphalt plant in Madison County.

¶ 3 On appeal, this Court must consider both Respondent-Appellee Madison County’s motion to dismiss Individual Respondents-Appellants’ Appeal as well as Individual Respondents-Appellants’ petition for writ of certiorari to this Court.

¶ 4 Madison Asphalt sought to build an asphalt plant in Madison County and submitted an application for a Conditional Use Permit (“CUP”). The planned plant was to employ “baghouse” technology, which would eliminate more than 99.9% of

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particulate emissions. The procedures for obtaining a CUP are laid out in the Madison County Land Use Ordinance (hereinafter, “Zoning Ordinance”). The Zoning Ordinance provides that certain standards shall apply to all conditional use applications. Specifically, a CUP cannot be granted unless the Madison County Board of Adjustment (“BOA”) finds the use: (a) will not adversely affect the health or safety of persons residing or working in the neighborhood of the proposed use; (b) will not be detrimental to the public welfare; and (c) will not be injurious to property or public improvements in the neighborhood. The burden in establishing the satisfaction of such standards lies with the applicant, by his production of competent, material, and substantial evidence. N.C. Gen. Stat. § 160A–388(e2) (repealed 19 June 2020); *see also* § 160D–406(j) (effective 19 June 2020).

¶ 5 Over the course of eight days of hearings in front of the BOA in the spring and summer of 2019, Madison Asphalt and Individual Respondents-Appellants presented evidence. At the conclusion of the hearings, the BOA voted to deny Madison Asphalt’s application, and on 27 September 2019 issued a written opinion with findings of facts and conclusions of law.

¶ 6 After the BOA’s denial of its application, Madison Asphalt appealed to Madison County Superior Court via writ of certiorari and threatened additional litigation against the County unless the County agreed to enter into a settlement agreement whereby the County was precluded from defending the BOA’s Order. In June 2020,

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the Madison County Board of Commissioners voted to enter into a settlement agreement with Madison Asphalt, purporting to resolve Madison Asphalt's petition for writ of certiorari and application for a CUP. The settlement agreement contemplated that Madison Asphalt and Madison County would present the settlement agreement to the Superior Court at the 4 September 2020 final hearing on Madison Asphalt's writ of certiorari, and request the Court enter a consent order reversing and remanding the BOA's 27 September 2019 Order. Madison Asphalt attached the Settlement Agreement to its brief in support of its petition for writ of certiorari and represented to the Superior Court that because "Madison Asphalt and County agreed to the entry of an Order allowing the issuance of the conditional use permit for the asphalt plant," that this "of course, will require this Court to hold that the BOA erred in its decision to deny the CUP for the Asphalt Plant."

¶ 7

Individual Respondents-Appellants, upon learning of the settlement agreement, filed a declaratory judgment action in Madison County Superior Court, ("Superior Court"), *Edward Feldmann et al. v. Madison County et al.*, No. 20-CVS-141 (hereinafter, "Declaratory Judgment Action"), seeking to have the court declare null and void, and set aside, the purported settlement agreement entered into by Madison County with Madison Asphalt. Individual Respondents-Appellants also filed a motion to join this case with the Declaratory Judgment Action pursuant to N.C. Gen. Stat. § 160D-1402, a motion for preliminary injunction to prevent Madison

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County and Madison Asphalt from presenting the settlement agreement to the Superior Court, and a motion to continue the 4 September 2020 hearing on the petition for writ of certiorari pending the outcome of the Declaratory Judgment Action. Individual Respondents-Appellants also moved to join the Madison County BOA as a necessary party to the action and realign the parties to reflect that Madison County was, as Individual Respondents-Appellants contend, acting as the petitioner in the Superior Court proceedings. These motions were denied in open court on 2 September 2020 and 4 September 2020, but the Superior Court did not reduce its decisions to writing.

¶ 8 On 15 September 2020, Judge Gavenus entered an order (1) reversing the BOA’s decision to deny the permit for the asphalt plant; and (2) remanding the matter to the BOA to “issue to the Petitioner the conditional use permit for the asphalt plant,” subject to conditions as set forth in the Order. On 28 September 2020, the BOA reconvened and issued the permit. That decision has not been appealed.

¶ 9 In March of 2021, Individual Respondents-Appellants filed an appeal of Judge Gavenus’ order reversing the Madison County BOA’s written decision denying Madison Asphalt’s CUP to build an asphalt plant in an industrial district (“I-D”) zone. In May of 2021, Appellee Madison County filed a motion to dismiss the appeal.

II. Jurisdiction

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¶ 10 Individual Respondents-Appellants contend Judge Gavenus' order reversing the Madison County BOA's written decision on 15 September 2020 is a final judgment, and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen Stat. § 7A-27(b). However, this case contains both Petitioner-Appellee Madison County's motion to dismiss Individual Respondents-Appellants' appeal as well as Individual Respondents-Appellants' petition for writ of certiorari to this Court.

¶ 11 Respondent-Appellee Madison County and Petitioner-Appellee Madison Asphalt contend this Court should dismiss Individual Respondents-Appellants' appeal because (1) it is interlocutory: the lack of written orders denying Individual Respondents-Appellants' motion for preliminary injunction, motion for joinder of the cases, motion for continuance, and motion to join a necessary party and realign the parties deprives this Court of jurisdiction of authority to hear Individual Respondents-Appellants' appeals related to those matters; and (2) the appeal is moot due to the BOA's 28 September 2020 decision granting Madison Asphalt's permit, which was commanded by the Superior Court's order.

¶ 12 Under Appellate Rule 21, it is within this Court's discretion to hear the merits of Individual Respondents-Appellants' appeals via writ of certiorari. *See* N.C. R. App. 21 (2019). Individual Respondents-Appellants contend the issuance of their writ would add to the jurisprudence of the State regarding zoning and planning actions conducted by quasi-judicial entities, as well as the interpretation and application of

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Council v. Town of Boone Bd. of Adjustment, 146 N.C. App. 103, 108-09, 551 S.E.2d 907, 911 (2001).

¶ 13 For the reasons stated below, we dismiss this appeal and deny Individual Respondents-Appellants' petition for writ of certiorari.

A. Review of Superior Court Decisions Not Entered into Record

¶ 14 Rule 3 of the North Carolina Rules of Appellate Procedure provides this Court with jurisdiction to consider any “appeal from a judgment or order of a superior or district court.” N.C. R. App. P. 3(a) (2019). N.C. Gen. Stat. § 1A-1, Rule 58 applies to judgments and orders, and sets the criteria for how such rulings are entered.

¶ 15 Where . . . judgments or orders are not entered in accordance with Rule 58, they are not effective. *Onslow County v. Moore*, 129 N.C. App. 376, 388, 499 S.E.2d 780, 788 (1998) (a ruling related to a preliminary injunction is not effective until reduced to writing, signed by the judge and filed with the Clerk's Office); *see also* N.C. Gen. Stat. §1A-1, Rule 58 (2019). This Court and the North Carolina Supreme Court have made it clear that, where the entry of a judgment or order is lacking, an appellate court is without the jurisdiction to entertain an appeal of that judgment or order. *State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007) (lack of civil judgment in the record ordering defendant to pay attorney's fees deprived this Court of subject matter jurisdiction on the issue).

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¶ 16 In their notice of appeal, Individual Respondents-Appellants purported to appeal several oral rulings of the Superior Court related to various verbal or written motions made by the Individual Respondents-Appellants, including motions for preliminary injunction, to join the current matter with the declaratory judgment action, for a continuance, and to join a necessary party and to realign parties. In their brief, Individual Respondents-Appellants presented arguments as to why the Superior Court erred in denying the request to add the BOA as a party, not realigning the parties, and not granting a preliminary injunction. The Superior Court’s verbal announcements with regard to these motions, however, do not appear in any written order, nor were they ever entered into the court’s record. Because the Superior Court never reduced its oral rulings on these motions to writing or entered them into the record, they are “non-existent and thus cannot support an appeal.” *Griffith v. N.C. Dep’t of Correction*, 210 N.C. App. 544, 550, 709 S.E.2d 412, 417 (2011).

¶ 17 Additionally, Individual Respondents-Appellants failed to present any argument in their brief as to why the Superior Court’s denial of the motion to continue was in error. As such, this issue is dismissed as abandoned under N.C. R. App. P. 28(b)(6) (2019). *K2HN Construction NC, LLC v. Five D Contractors, LLC*, 267 N.C. App. 207, 213-214, 832 S.E.2d 559, 564 (2019) (issue on appeal deemed abandoned where it lacked argument in the appellant’s brief); N.C. R. App. P. 9(j) (2019) (requiring “copies of all other papers and statements of all other proceedings had in

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the trial court which are necessary to an understanding of all issues presented on appeal . . .”). Therefore, Individual Respondents-Appellants’ appeal of these issues is dismissed.

B. Mootness of Appeal

¶ 18 “Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.” *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

¶ 19 Following the Superior Court’s ruling, the BOA reconvened and issued the permit on 28 September 2020. Individual Respondents-Appellants urge this Court to reverse the trial court’s reversal of the BOA decision, but they did not appeal the 28 September 2020 permit. *See* N.C. Gen. Stat. § 160A-388(e) (providing a thirty-day deadline for judicial challenge to quasi-judicial proceedings). The Superior Court has exclusive jurisdiction to review a BOA’s decision in the first instance. N.C. Gen. Stat. § 160A-393 (2019). By failing to appeal the 28 September 2020 order, the arguments raised on appeal regarding that order are moot. We therefore dismiss this portion of Individual Respondents-Appellants’ appeal as well.

C. Respondents-Appellants’ Petition for Writ of Certiorari

¶ 20 “[O]ur courts have frequently observed that a writ of certiorari is an extraordinary remedial writ.” *N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff’d per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997). If this Court “routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals.” *State v. Cozart*, 260 N.C. App. 96, 100, 817 S.E.2d 599, 602 (2018).

¶ 21 Individual Respondents-Appellants contend the issues raised are important, and determination of the issues would aid North Carolina jurisprudence regarding planning and zoning. However, Individual Respondents-Appellants fail to show how the issuance of a writ of certiorari would change the outcome in this case. Therefore, this Court denies Individual Respondents-Appellants’ petition for writ of certiorari.

III. Conclusion

¶ 22 The lack of written orders denying Individual Respondents-Appellants’ motion for preliminary injunction, motion for joinder of the cases, motion for continuance, and motion to join a necessary party and realign the parties deprives this Court of jurisdiction of authority to hear Individual Respondents-Appellants’ appeals related to those matters; therefore, we dismiss Individual Respondents-Appellants’ appeal as interlocutory. Further, Individual Respondents-Appellants fail to show how the issuance of a writ of certiorari would change the outcome in this case in light of the

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Madison County BOA's 28 September 2020 decision granting Madison Asphalt's permit; therefore, we deny their petition for writ of certiorari.

DISMISSED.

Judges DILLON and INMAN concur.

Report per Rule 30(e).