

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 8, 2023 Session

**KATRINA GREER ET AL. v. FAYETTE COUNTY, TENNESSEE BOARD
OF ZONING APPEALS ET AL.**

**Appeal from the Chancery Court for Fayette County
No. 18301 William C. Cole, Chancellor**

No. W2022-00783-COA-R3-CV

Appellants filed a petition for common law writ of certiorari, seeking judicial review of Appellee Fayette County Board of Zoning Appeals' grant of a special exception to other Appellees for the construction of a solar farm. The trial court denied the writ of certiorari. Discerning no error, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed and Remanded**

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Richard L. Winchester, Germantown, Tennessee, for the appellants, Katrina Greer, Gary Bullwinkel, Joseph Tapp, Theophilus Middlebrook, and Willie Porter.

James I. Pentecost and Haynes T. Russell, Jackson, Tennessee, for the appellee, Fayette County, Tennessee Board of Zoning Appeals.

William S. Rhea, Somerville, Tennessee, and Michael S. Blazer, Chicago, Illinois, for the appellees, Yum Yum Solar, LLC, Invenergy, LLC, Invenergy Solar Project Development, LLC, Invenergy Solar Development North America, LLC, and Invenergy Solar Development, LLC.¹

¹ Appellees filed a joint brief. Although Fayette County was not specifically sued in this lawsuit, Fayette County's attorney, Richard G. Rosser, is also listed on the brief.

OPINION

I. Background

This is the second appeal concerning the construction of a solar farm in Fayette County, Tennessee. In our previous opinion, *Tapp v. Fayette County, Tennessee et al.*, No. W2021-00856-COA-R3-CV, 2022 WL 2658872 (Tenn. Ct. App. July 11, 2022) *perm. app. denied* (Tenn. Nov. 17, 2022),² we explained that,

Invenergy, LLC, Invenergy Solar Project Development, LLC, and Yum Yum Solar, LLC [] petitioned the Fayette County Board of Zoning Appeals (the “Zoning Board”) to approve their request to construct a solar farm in an area designated as “rural” under the Fayette County Growth Plan (the “Growth Plan”). Such request was premised on Section 13 of the Fayette County Zoning Resolution (“Section 13 [of the Zoning Resolution]”), which authorizes the Zoning Board to issue a special exception permit for construction of “solar photovoltaic facilities” in an area designated as “rural.” The Zoning Board granted the . . . request, issued a special exception, and approved construction of the solar farm.

Id. at *1. On January 14, 2021, the *Tapp* plaintiffs/appellants filed a declaratory judgment action in the Chancery Court for Fayette County (“trial court”) alleging that Tennessee Code Annotated sections 6-58-106(c) and 6-58-107 prohibited Fayette County from “approving an industrial activity [such as solar farms] in an area designated as ‘Rural’ in the Fayette County Growth Plan.” The *Tapp* plaintiffs/appellants asked the trial court to “enter an order declaring Section 13 of the Fayette County Zoning Resolution null and void as violative of State Law.” On July 1, 2021, the trial court dismissed the declaratory judgment action, which the plaintiffs/appellants timely appealed.

While the *Tapp* appeal was pending in this Court, on July 20, 2021, the Zoning Board conducted a hearing concerning the site design for the solar farm. A representative for Yum Yum Solar explained that the solar farm met all applicable design criteria, including criteria for grading, drainage, minimum setbacks, and noise level. The representative also confirmed that the solar farm would comply with all 26 design conditions that the Zoning Board placed on the solar farm’s construction. At this hearing, the Zoning Board also heard from members of the public concerning the solar farm. Thereafter, the Zoning Board voted to approve the solar farm’s design plan.

On September 16, 2021, Katrina Greer, Gary Bullwinkel, Joseph Tapp, Theophilus

² We note that the *Tapp* opinion is a memorandum opinion, which generally should not be cited in subsequent opinions. However, we cite to *Tapp* in this opinion because the cases are related. *See* Tenn. R. Ct. App. 10.

Middlebrook, Willie Porter (together, “Appellants”), William Hendry, and Dave Rhea filed a verified petition for writ of certiorari in the trial court asking the trial court to nullify the Zoning Board’s grant of Yum Yum Solar’s request for a special exception permit for a solar farm.³ In this lawsuit, Appellants sued the Zoning Board as well as Yum Yum Solar, LLC, Invenergy, LLC, Invenergy Solar Project Development, LLC, Invenergy Solar Project North America, LLC, and Invenergy Solar Development, LLC (the “Invenergy Defendants”). In the petition, Appellants alleged, *inter alia*, that: (1) the Zoning Board’s authorization of a solar farm in an area designated as “rural” violated state law; (2) the Zoning Board was not authorized to impose certain conditions when it granted the special exception, and, in doing so, the Zoning Board exceeded its scope and jurisdiction; and (3) the Zoning Board’s decision “to allow the construction of the [solar farm] in th[e] Rural community was illegal, arbitrary and capricious.” On December 20, 2021, the Zoning Board filed a motion to dismiss and an answer. On December 22, 2021, the Invenergy Defendants filed an answer and a motion to dismiss portions of the petition for writ of certiorari.

On March 24, 2022, the trial court heard the petition for writ of certiorari. At the conclusion of the hearing, the trial court announced its findings of facts and conclusions of law and denied the petition for writ of certiorari. The trial court found that the question of whether there was “a reasonable basis, a rational basis, a fairly debatable reason” for the Zoning Board’s actions was not at issue, as conceded by Appellants. Accordingly, the trial court found that

[t]he only issues being raised . . . are that the conduct of the [Zoning Board] constitutes rezoning and that the [Zoning Board] acted illegally by exercising jurisdiction granted it in accordance with a previously-enacted zoning reg[ulation] in which solar farms as a use was allowable in areas designated rural in the county.

On May 12, 2022, the trial court entered its final order, wherein it found that: (1) the certified record contained numerous relevant facts, evidence, and documents to materially support the findings and decision of the Zoning Board to grant the special exception; and (2) Fayette County acted appropriately in its legislative powers and in the powers delegated to the Zoning Board by Article III, Section 13 of the zoning resolution and the Zoning Board acted legally in granting the application for a special exception. The trial court’s March 24, 2022 oral ruling was incorporated and made part of the trial court’s final order. Appellants filed a timely appeal.⁴

³ Messrs. Tapp, Porter, Hendry, and Bullwinkel were the plaintiffs/appellants in *Tapp* and were also represented by Attorney Winchester. We note that, although Messrs. Hendry and Rhea were named plaintiffs in the trial court, they are not parties to this appeal.

⁴ On July 11, 2022, this Court dismissed the *Tapp* appeal due to deficiencies in the plaintiffs’/appellants’ brief. *See generally Tapp*, 2022 WL 2658872.

II. Issues

Although Appellants raise four issues for review, for the reasons discussed, *infra*, we conclude that the dispositive issue is whether the trial court erred in upholding the Zoning Board’s decision to grant a special exception for a solar farm in an area designated as “rural.” Appellees raise the additional issue of “[w]hether Appellants’ arguments amount to a declaratory judgment action that should not be considered by this Court.”

III. Discussion

A court’s review of a common law writ of certiorari is extremely limited. “[R]ather than address the issue *de novo* as the initial decision maker,” the trial court applies “a limited standard of review to decisions already made by administrative officials.” *State ex rel. Moore & Assocs., Inc. v. West*, 246 S.W.3d 569, 574 (Tenn. Ct. App. 2005). “The scope of review of the appellate courts ‘is no broader or more comprehensive than that of the trial court with respect to evidence presented before the [administrative agency].’” *Griffin v. Bd. of Zoning Appeals for Rutherford Cnty.*, No. M2019-02043-COA-R3-CV, 2020 WL 5666711, at *4 (Tenn. Ct. App. Sept. 23, 2020) (quoting *Whitson v. City of La Vergne Bd. of Zoning Appeals*, No. M2019-00384-COA-R3-CV, 2020 WL 2745420, at *2 (Tenn. Ct. App. May 27, 2020) (quoting *Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980))). The only issue to be reviewed in a common law writ of certiorari is whether an administrative agency “exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently.” *Hoover, Inc. v. Metro. Bd. of Zoning Appeals*, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996); *see also* Tenn. Code Ann. § 27-8-101 (“The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.”) In their appellate brief, Appellants state that

[f]or purposes of this [a]ppeal, Appellants do NOT contend that the action of the [Zoning Board] was arbitrary, fraudulent, or without evidence. Rather, Appellants contend that the action of the [Zoning Board] exceeded its jurisdiction and resulted in an unlawful outcome.

(Emphasis in original). Accordingly, the issue before this Court is limited to whether the Zoning Board exceeded its jurisdiction when it granted the Invenergy Defendants’ request for a special exception permit for a solar farm.

Appellants argue that the Zoning Board’s issuance of the special exception was, in effect, a rezoning of the land, and that the power to rezone land is reserved exclusively to the Planning Commission and the Board of Commissioners. As such, Appellants argue that the Zoning Board exceeded its jurisdiction and “usurp[ed] the authority of the County

Commission and the Planning Commission[.]” Fatal to Appellants’ argument is the fact that the Fayette County Board of Commissioners enacted Section 13 of the Zoning Resolution, and, in doing so, bestowed, on the Zoning Board, the power to do exactly what it did here. “Boards of zoning appeals generally engage in enforcing, applying, or executing laws already in existence.” *Griffin*, 2020 WL 5666711, at *3 (quoting *Whitson*, 2020 WL 2745420, at *1 (citing *Weaver v. Knox Cnty. Bd. of Zoning Appeals*, 122 S.W.3d 781, 784 (Tenn. Ct. App. 2003); *Wilson Cnty. Youth Emergency Shelter, Inc. v. Wilson Cnty.*, 13 S.W.3d 338, 342 (Tenn. Ct. App. 1999))). The record shows that the Zoning Board acted within its authority as authorized by Tennessee Code Annotated section 13-7-109(2), and Section 13 of the Zoning Resolution. Tennessee Code Annotated section 13-7-109(2) provides that a board of zoning appeals has the power to “[h]ear and decide, *in accordance with the provisions of any such ordinance, requests for special exceptions* . . .” Tenn. Code Ann. § 13-7-109(2) (emphasis added). As discussed in *Tapp*, Section 13 of the Zoning Resolution “authorizes the Zoning Board to issue a special exception permit for construction of ‘solar photovoltaic facilities’ in an area designated as ‘rural.’” *Tapp*, 2022 WL 2658872, at *1. Accordingly, the Zoning Board acted within its jurisdiction when it issued a special exception permit for a solar farm to the Invenergy Defendants.

Appellants also argue that the trial court’s “refusal to nullify Section 13 of the Fayette County Zoning [Resolution,] which directly contradicts and is antithetical to a specific state statute[,] constitutes clear error by the [t]rial [c]ourt.” In this portion of their briefing, Appellants argue that the authorization of a solar farm in an area designated as “rural” conflicts with state statutes and is unenforceable. We note that Appellants’ briefing on this issue is almost identical to the *Tapp* plaintiffs’/appellants’ briefing in the declaratory judgment action. Regardless, Appellants’ argument here is, in essence, a challenge to *the legality of Section 13 of the Zoning Resolution*—a challenge that is wholly unrelated to the gravamen of this appeal, *i.e.*, whether the Zoning Board exceeded its authority. As explained above, the Zoning Board did not enact Section 13 of the Zoning Resolution. At the trial court hearing, Appellants’ counsel acknowledged that the County Commission, *i.e.*, the Board of Commissioners, enacted Section 13. Notably, Appellants did not sue the Board of Commissioners concerning the enactment of Section 13 in this lawsuit. Furthermore, as Appellees discuss in their brief, “challenges to the legality of a zoning ordinance itself are properly brought under declaratory judgment actions.” Indeed, this Court has explained that “[a]n action for declaratory judgment . . . rather than a petition for [writ of] certiorari, ‘is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative action’ of an authority enacting or amending zoning legislation.” *Benson v. Knox Cnty.*, No. E2015-01357-COA-R3-CV, 2016 WL 2866534, at *5 (Tenn. Ct. App. May 12, 2016) (quoting *Fallin v. Knox Cnty. Bd. Of Comm’rs*, 656 S.W.2d 338, 342 (Tenn. 1983)). Having limited the issue in this appeal to whether the Zoning Board exceeded its jurisdiction, to the extent Appellants now attempt to challenge the legality of Section 13, by filing a writ of certiorari, that issue is not before this Court in this appeal.

From Appellants' remaining arguments, it appears that they challenge certain design conditions that the Zoning Board imposed on the solar farm prior to construction. Appellants do not have standing to raise this issue.⁵ As this Court has discussed before,

[t]he doctrine of standing is used to determine whether a particular plaintiff is entitled to judicial relief. *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976); *Garrison v. Stamps*, 109 S.W.3d 374, 377 (Tenn. Ct. App. 2003). It requires the court to determine whether the plaintiff has alleged a sufficiently personal stake in the outcome of the litigation to warrant a judicial intervention. *SunTrust Bank v. Johnson*, 46 S.W.3d 216, 222 (Tenn. Ct. App. 2000); *Browning-Ferris Indus. of Tennessee, Inc. v. City of Oak Ridge*, 644 S.W.2d 400, 402 (Tenn. Ct. App. 1982). To establish standing, a plaintiff must show: (1) that it has sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is one that can be addressed by a remedy that the court is empowered to give. *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001); *In re Youngblood*, 895 S.W.2d 322, 326 (Tenn. 1995); *Metropolitan Air Research Testing Auth., Inc. v. Metropolitan Gov't*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992).

The primary focus of a standing inquiry is on the party, not on the merits of the party's claim. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982); *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 767 (Tenn. Ct. App. 2002).

Wood v. Metro. Nashville & Davidson Cnty. Gov't, 196 S.W.3d 152, 157-58 (Tenn. Ct. App. 2005). As discussed in *Wood*, to have standing in a common law writ of certiorari, "the party filing the petition must demonstrate that it is 'aggrieved' by the decision sought to be reviewed." *Id.* (citing Tenn. Code Ann. § 27-9-101 ("Anyone who may be aggrieved by any final order or judgment of any board of commission functioning under the laws of this state may have the order or judgment reviewed by the courts[.]")). To be "aggrieved," the party must show: (1) "a special interest in the agency's final decision or that it is subject

⁵ Furthermore, in their appellate brief, Appellants did not raise a specific issue concerning the design conditions. The contents of appellate briefs are governed by Rule 27 of the Tennessee Rules of Appellate Procedure, which requires an appellant's brief to list "[a] statement of the issues presented for review . . ." Tenn. R. App. P. 27(a)(4). The statement of the issues is vitally important to the appeal as it provides this Court with the questions that we are asked to answer on review. The statement is also significant because our "[a]ppellate review is generally limited" to those issues listed in it. *Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012) (citing Tenn. R. App. P. 13(b)). Indeed, "[c]ourts have consistently held that . . . [a]n issue not included [in the statement of the issues] is not properly before the Court of Appeals." *Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001). Although the issue is waived by Appellants' failure to raise it, in the interest of full adjudication, we also address their lack of standing.

to a special injury not common to the public generally”; and (2) “that it was a party to the agency proceedings sought to be reviewed.” *Wood*, 196 S.W.3d at 158 (internal citations omitted). Appellants failed to prove that they are “aggrieved” by the design conditions the Zoning Board imposed on the solar farm. In other words, Appellants did not show that they are subject to a special injury not common to the general public by virtue of the Zoning Board’s decision to impose certain design conditions on the solar farm. Rather, as Appellees discussed in their brief, Appellants and the general public would likely benefit from these conditions.⁶ Accordingly, we conclude that Appellants do not have standing to raise an issue regarding the design conditions the Zoning Board imposed on the solar farm.

IV. Conclusion

For the foregoing reasons, we affirm the trial court’s order. The case is remanded for such further proceedings as are necessary and consistent with this opinion. Costs of the appeal are assessed to the Appellants, Katrina Greer, Gary Bullwinkel, Joseph Tapp, Theophilus Middlebrook, and Willie Porter, for all of which execution may issue if necessary.

s/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE

⁶ Some of the design conditions involved: (1) allowing emergency services unrestricted access to the solar farm; (2) the imposition of certain fire safety conditions; (3) a maximum decibel volume to be emitted from the solar farm; (4) erosion control; (5) compliance with electrical code standards; (6) a prohibition against the disposal of waste locally; (7) hours during which construction of the solar farm could occur; (8) wildlife protection; and (9) the discharge of chemicals. Another condition required the Invenergy Defendants to continue to comply with the foregoing conditions, and, following documentation of nonconformity, allowed the Zoning Board to revoke the special exception for the solar farm and remove the facility after a public hearing and failure to cure any nonconformity.