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NO. COA01-787

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

WILLIAM E. CANTRELL and wife
ELLEN C. CANTRELL, as TRUSTEES
OF THE WILLIAM E. CANTRELL AND
ELLEN C. CANTRELL LIVING TRUST
dated March 18, 1996 and
WILLIAM E. CANTRELL and wife,
ELLEN C. CANTRELL, individually,

Petitioners

v.

Polk County
No. 00 CVS 0260

BOARD OF ADJUSTMENT OF
POLK COUNTY, JASON DECK
and wife, TINA DECK, and
JAMES L. DECK and wife,
BRENDA H. DECK,

Respondents.

Appeal by petitioners from judgment entered 7 March 2001 by Judge Dennis J. Winner in Polk County Superior Court. Heard in the Court of Appeals 18 April 2002.

Roberts & Stevens, P.A., by Sarah Patterson Brison Meldrum and Christopher Z. Campbell, and Callahan Law Offices, by Christopher Callahan, for petitioners-appellants.

Prince, Youngblood & Massagee, by Sharon B. Alexander, and Mullinax and Alexander, by William M. Alexander, Jr., for respondents-appellees.

TYSON, Judge.

William E. Cantrell and Ellen C. Cantrell individually and as trustees of the William E. Cantrell and Ellen C. Cantrell living

trust dated 18 March 1996 (collectively "petitioners") appeal from an order affirming the decision of the Polk County Board of Adjustment ("Board") that granted Jason Deck, Tina Deck, James L. Deck, and Brenda H. Deck (collectively "respondents") a conditional use permit for construction and operation of a concrete plant. We remand to the superior court to set forth and apply the appropriate standard of review of the Board's decision.

I. Facts

Petitioners own the Green River Plantation, a forty-two room house located on 366 acres, that operates as a bed and breakfast inn located in Rutherfordton, North Carolina. Respondents own an adjacent tract of undeveloped property zoned multiple use. On 3 August 2000, respondents appeared before the Board, verbally requested a conditional use permit to build a concrete plant on their property, and submitted preliminary plans for their project. No action was taken at that meeting other than to receive the application and plans and to set a hearing date.

On 24 August 2000, the Board conducted a hearing to consider respondents' request for a conditional use permit. Petitioners received notice of that meeting, appeared, and presented evidence. After the hearing, the Board decided to tour the site of the proposed concrete plant and to remain in open session. On 31 August 2000, the Board conducted another hearing. Petitioners appeared with counsel and requested a continuance because their regular lawyer was unavailable. The Board approved petitioners' request and continued the hearing until 7 September 2000.

At the reconvened hearing, respondents and petitioners presented and cross-examined witnesses under oath, and presented and had the opportunity to examine all exhibits. After the witnesses testified and exhibits were received, motion was made and seconded to approve respondents' application with the following conditions: (1) double rows of leland cypress or white pines around the property, (2) no other operations, and (3) proper signage. The motion was approved on a four to one vote. The Board held another hearing on 5 October 2000 with petitioners' attorney present to review the Board's findings of fact which were approved unanimously. The Board's conclusions of law were approved by a vote of four to one.

Petitioners filed a "Petition For Review And Certiorari" with the superior court in Polk County on 3 November 2000 claiming that the Board's decision "is contrary to law, was not rendered in accordance with the procedures specified by law, is not supported by competent, material and substantial evidence and is arbitrary and capricious." Respondents filed motions to dismiss on 9 November 2000. The Board filed a motion to dismiss on 11 January 2001. Respondents filed an answer on 26 February 2001. The Board did not file an answer.

After a hearing, the superior court filed an order affirming the Board's decision on 7 March 2001. Petitioners appeal.

II. Issues

_____The issues presented are whether: (1) the trial court applied the proper standard of review to an agency decision, (2) the trial

court erred by ruling that a concrete batch plant is a manufacturing use, (3) the trial court erred by failing to conclude that the Board did not follow proper procedure, and (4) petitioners due process rights were violated,

III. Standard of Review

_____Petitioners contend that the superior court erred by not applying the proper standard of review when it reviewed the Board's granting of a conditional use permit, and argue that "[i]t is the responsibility of the trial court, as a reviewing court, to review the entire record to make the determinations required by *Coastal Ready-Mix*." We are unable to determine from the superior court's order whether it applied the appropriate standard of review to the issues raised by petitioners.

"Zoning decisions regarding conditional use permits are quasi-judicial in nature." *Howard v. City of Kinston*, ___ N.C. App. ___, ___, 558 S.E.2d 221, 225 (2002) (citing *Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980)). "Our task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review." *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjustment*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999) (citations omitted). "Such determination might well require remand of the case to the trial court for its application of the proper standard of review." *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*,

139 N.C. App. 269, 274, 533 S.E.2d 525, 528 (2000) (citing *Sutton v. N.C. Dep't. of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 ("order vacated and case remanded where order failed to specify standards of review and trial court's application thereof"))).

A court reviewing a board's decision on an application for a conditional use permit issued must: (1) review the record for errors in law; (2) insure that procedures specified by law in both statute and ordinance are followed; (3) insure that appropriate due process rights of petitioner are protected, including the right to offer evidence, cross-examine witnesses and inspect documents; (4) insure that the decisions of boards of adjustment are supported by competent, material and substantial evidence in the whole record; and (5) insure that decisions are not arbitrary and capricious. *Coastal Ready-Mix Concrete Co. Inc. v. Board of Comm'rs. of the Town of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). The superior court is not the trier of fact and it sits in the posture of an appellate court when reviewing decisions of quasi-judicial bodies. *Id.* "[T]he scope of review is limited to errors alleged to have occurred before the local board." *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 848-49 (1997) (citing *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986)).

Here, petitioners alleged that the Board's decision was "contrary to law, was not rendered in accordance with the procedures specified by law, is not supported by competent, material and substantial evidence and is arbitrary and capricious."

_____ "When it is alleged that the action of a quasi-judicial body was not supported by substantial evidence or was arbitrary and capricious, the reviewing court must apply the 'whole record' test." *Tate*, 127 N.C. App. at 218, 488 S.E.2d at 849 (citing *Ballas v. Town of Weaverville*, 121 N.C. App. 346, 349, 465 S.E.2d 324, 326 (1996)). "The 'whole record' test requires the reviewing court to examine all the competent evidence and pleadings which comprises the 'whole record' to determine if there is substantial evidence in the record to support the [Board's] findings and conclusions." *Ellis v. N.C. Crime Victims Compensation Comm.*, 111 N.C. App. 157, 162, 432 S.E.2d 160, 164 (1993) (citation omitted).

"The reviewing court may not substitute its own judgment for that of the body when the record contains competent and substantial evidence supporting the findings indicated by the quasi-judicial body, even though conflicting evidence in the record would have allowed the court to reach a contrary finding if proceeding de novo." *Tate*, 127 N.C. App. at 218, 488 S.E.2d at 849 (citing *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992)). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Id.*

"If a petitioner contends the Board's decision was based on an error of law, de novo review is proper." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000) (citing *JWL Invs., Inc. v. Guilford County Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715,

717, *disc. review denied*, 351 N.C. 357, 540 S.E.2d 349 (1999)). "The role of appellate courts is to review the trial court's order for errors of law. *Westminster Homes, Inc.*, 140 N.C. App. at 102-03, 535 S.E.2d at 417 (citing *In re Appeal of Willis*, 129 N.C. App. 499, 502, 500 S.E.2d 723, 726 (1998)).

Some issues presented for review to the trial court relate to the proper interpretation of an ordinance, which presents a question of law. *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994) (citing *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 431 S.E.2d 183 (1993)). Whether the Board erred in allowing the construction of a concrete plant in a multiple use district raises an issue of law and is subject to *de novo* review.

Some issues presented for review to the trial court require the whole record test to be applied. The order reflects that the trial court only "reviewed the record." While this language suggests that the court applied a "whole record test," the order did not expressly state what type of review it applied. We are unable to conclude from the order whether the superior court exercised the proper scope of review on all issues before it.

The order of the superior court is vacated. We remand to the superior court to set forth and apply the appropriate standard of review based on the alleged errors raised in petitioners' petition. In light of our holding, we do not reach petitioners' other assignments of error.

_____ Vacated and remanded.

_____ Judges MARTIN and THOMAS concur.

Report per Rule 30(e).