NO. COA11-202
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

BOJANGLES' RESTAURANTS, INC.,
Plaintiff

v. Mecklenburg County
No. 10 CVS 5566

THE TOWN OF PINEVILLE,
Defendant

Appeal by Plaintiff from Order entered 22 November 2010 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 August 2011.

K&L Gates LLP, by John H. Carmichael, for Plaintiff-appellant.

Currin & Currin, Attorneys at Law, by Robin T. Currin, for Defendant-appellee.

HUNTER, JR., Robert N., Judge.

Bojangles' Restaurants, Inc. ("Plaintiff") ("Bojangles") appeals the trial court's Order affirming the decision of the Town of Pineville ("Pineville") Board of Adjustment (the "Board"), which cited Plaintiff for violations of the Pineville Zoning Ordinance (the "Ordinance"). Plaintiff contends the trial court erred in determining that the Board's decision was

not based upon errors of law. Plaintiff further argues the trial court erred in determining that the Board's decision was supported by competent, material, and substantial evidence. We disagree and therefore affirm the trial court's order.

I. Factual and Procedural History

This dispute arises out of the issuance of a notice of violation to Bojangles, requiring Bojangles to remove a nonconforming sign abutting an awning in violation of the Ordinance. Bojangles leases approximately .86 acres of property located at 8720 Pineville-Matthews Road in Pineville (the "Property"). The Property is zoned in the B-4 district and contains a single building from which Bojangles operates a fast food restaurant (the "Restaurant") with a drive-through window.

Signage in the B-4 zoning district is regulated by Section 5.4.4 of the Ordinance. Under that provision, a business may have a wall sign on the front of the building that totals two square feet for each linear foot of the building's wall frontage. Section 5.4.4 also allows one ground or monument sign that cannot exceed fifty square feet, cannot be over seven feet tall, and cannot exceed fifty percent of the business's total allowable signage. The combined square footage of all signs on

a single business in the B-4 zoning district cannot exceed the allowable wall signage or 300 feet, whichever is smaller.

The width of the Bojangles Restaurant building façade is 35.1 square feet. Therefore, under Section 5.4.4 of the Ordinance, Bojangles is entitled to seventy square feet of signage for the front of the Restaurant. Bojangles has a pole sign, measuring 8 feet 6 inches by 11 feet and containing a total of 93.5 square feet of signage (the "Pole Sign"). Bojangles also has a wall sign, measuring 4 feet 9 inches by 14 feet 7 inches and containing a total of 70 square feet of signage. Thus, Bojangles currently has 163.5 square feet of combined signage, exceeding the maximum allotment of signage by 93.5 square feet.

The wall sign is at issue in this case. It is undisputed by the parties that the wall sign does not comply with the sign regulations in the Ordinance. However, the Ordinance allows a sign which existed before the Ordinance's effective date[1] to remain as a legally permitted nonconforming sign, so long as the sign complies with Section 2.8 of the Ordinance, which is entitled "Nonconformities." Both Pineville and Bojangles

[1] We were unable to locate the effective date of the Ordinance either in the record or within the Ordinance, however, we do not address this issue because the parties did not raise it as a concern.

considered the attached wall sign to be a legal nonconforming sign under the Ordinance.

The wall sign was initially installed on the Restaurant in 1993 and was attached to the building by two metal poles that extended through a fabric awning and connected to the sign. In October 2009, Bojangles decided to replace the fabric awning. To do so, Bojangles removed the wall sign from the two poles, removed the fabric awning, and installed a metal awning.[2] Once the metal awning was in place, Bojangles re-attached the wall sign in November 2009. The two metal poles were not removed or altered in connection with this entire process. Furthermore, the wall sign itself was not altered, converted, or changed in any manner during this process. The wall sign that was re-attached in November 2009 is the same sign that was originally installed in 1993.

Prior to the removal of the wall sign, Pineville zoning officials informed Bojangles' local management several times that if the wall sign was removed, it could not be put back up under the terms of the Ordinance. Despite the warnings, Bojangles removed the wall sign in October 2009, stored it off-

[2] Bojangles did not make clear in its brief or during oral argument whether this was the only method to remove the fabric awning.

site, and returned it unchanged to its original spot in November 2009.

On 1 December 2009, Town Planner Travis Morgan issued a notice of violation to Bojangles for replacing the wall sign in violation of the Ordinance. The notice provides in pertinent part that Bojangles

> re-installed a non-conforming sign on the front awning despite being advised numerous times not to do so through both a corporate representative and the sign contractor Mr. David Stevens. Our zoning ordinance does not permit non-conforming signage to be replaced once it has been enlarged, altered, or removed in any way.

According to section 2.8.8(A) of the Ordinance, "[w]henever any nonconforming sign or part thereof (including the copy) is altered, *replaced*[], converted or changed, the entire sign must immediately comply with the provisions of this Chapter." Pineville Zoning Ordinance § 2.8.8(A) (emphasis added).[3] Pineville instructed Bojangles to remove the wall sign pursuant to Section 2.8.8(A) of the Ordinance.

On 11 December 2009, Bojangles timely appealed the notice of violation to the Board, claiming that its actions did not

[3] Section 2.8.8(A) permits ordinary maintenance and repairs to a nonconforming sign, and Section 2.8.8(B) permits rebuilding up to forty-nine percent of a nonconforming sign that has been damaged or destroyed. However, neither exception applies in this case.

violate the Ordinance because it did not alter, replace, convert, or change the wall sign within the meaning of the Ordinance. Following a hearing on the matter on 11 February 2010, the Board found that Bojangles had replaced the wall sign within the meaning of Section 2.8.8(A) of the Ordinance.

On 12 March 2010, Petitioner filed for *writ of certiorari* to the Mecklenburg County Superior Court pursuant to N.C. Gen. Stat. § 160A-388. In its petition, Bojangles alleged the Board's determination that Bojangles replaced the wall sign within the meaning of the Ordinance was an error of law subject to *de novo* review and was not supported by substantial, competent evidence. Bojangles further alleged that the Board's determination that Bojangles, as a result of its conduct with respect to the wall sign, is required to bring the wall sign into compliance with the Ordinance is an error of law and arbitrary and capricious. Judge Boner affirmed the Board's determination that Bojangles had replaced the wall sign in violation of the Ordinance in an Order filed 22 November 2010. In its Order, the trial court concluded: the decision was not based upon errors of law; Pineville followed the procedures specified by law; Bojangles' due process rights were protected; the decision was supported by competent, material, and

substantial evidence in the whole record; and the decision was not arbitrary and capricious. Bojangles timely entered notice of appeal from this Order.

II. Jurisdiction and Standard of Review

Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2009) (stating a right of appeal lies with this Court from the final judgment of a superior court "entered upon review of a decision of an administrative agency"). "[T]his Court examines the trial court's order for error[s] of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Turik v. Town of Surf City*, 182 N.C. App. 427, 429, 642 S.E.2d 251, 253 (2007) (second alteration in original) (quoting *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001)). If a petitioner appeals an administrative decision "on the basis of an error of law, the trial court applies *de novo* review; if the petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test." *Blue Ridge Co. v. Town of Pineville*, 188 N.C. App. 466, 469, 655 S.E.2d 843, 845-46, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 742 (2008). "[A]n

appellate court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjustment*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting) (citation omitted), *rev'd for reasons stated in the dissent*, 355 N.C. 269, 559 S.E.2d 547 (2002).

III. Analysis

A. The Board's Interpretation of the Ordinance

Bojangles contends the trial court made an error of law in denying the writ because the wall sign was not "replaced" within the plain meaning of the Ordinance. We disagree.

The dispositive issue in this case is the meaning of "replaced" under the terms of Section 2.8.8(A) of the Ordinance. The Ordinance provides in pertinent part that: "[w]henever any nonconforming sign or part thereof (including the copy) is altered, *replaced*[], converted or changed, the entire sign must immediately comply with the provisions of this Chapter." Pineville Zoning Ordinance § 2.8.8(A) (emphasis added). **[R. 35]** Thus, if Bojangles is deemed to have "replaced" the nonconforming wall sign under the Ordinance, it will have to

remove the wall sign in its entirety. Unfortunately, the Ordinance does not define the term "replaced."

In interpreting a term of an ordinance, "'[t]he basic rule is to ascertain and effectuate the intent of the legislative body.'" *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 138, 431 S.E.2d 183, 187 (1993) (quoting *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)) (alteration in original). "Intent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance." *Id.* at 138, 431 S.E.2d at 188.

Applying this principle, we first turn to the language of the Ordinance. "Zoning restrictions should be interpreted according to the language used in the ordinance." *Jirtle v. Bd. of Adjustment for the Town of Biscoe*, 175 N.C. App. 178, 180, 622 S.E.2d 713, 715 (2005). Section 1.6.1 of the Ordinance is entitled "Meaning and Intent" and states, "All provisions, terms, phases [sic] and expressions contained in this Ordinance shall be construed according to this Ordinance's stated purpose and intent." Pineville Zoning Ordinance § 1.6.1. Section 1.6.7 of the Ordinance applies to the interpretation of Ordinance

terms and states, "Words and phases [sic] not otherwise defined in this Ordinance shall be construed according to the common and approved usage of the language." Pineville Zoning Ordinance § 1.6.7. *See also Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach*, __ N.C. App. __, __, 695 S.E.2d 456, 463 (2010) (An undefined term in an ordinance should be given "'its plain and ordinary meaning.'") (citation omitted). To determine the plain and ordinary meaning of a term in a zoning ordinance, courts often refer to definitions from well-known dictionaries. *MMR Holdings, LLC v. City of Charlotte*, 174 N.C. App. 540, 543 n.2, 621 S.E.2d 210, 212 n.2 (2005).

The term "replaced" is not defined in the Ordinance. Thus, in determining its plain and ordinary meaning, both parties refer the Court to Merriam-Webster dictionary definitions that support *each* of their positions with respect to the meaning of "replaced" in the context of Section 2.8.8(A) of the Ordinance. Bojangles contends that the proper definition of "replaced" is "to put something new in the place of," such as replacing a sign with a new sign, or "to take the place of." Meanwhile, Pineville contends that the proper definition of "replaced" is "to restore to a former place or position," such as replacing cards back to their original file. Because "replaced" has

alternative definitions supporting both Bojangles and Pineville, we must determine which specific meaning applies in the context of Section 2.8.8(A) of the Ordinance.[4]

Bojangles correctly argues that this Court may examine how "replaced" is used in other portions of the Ordinance to determine its meaning. A court "'does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision.'" *MMR Holdings*, 174 N.C. App. at 545, 621 S.E.2d at 213 (quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004)). However, the difficulty lies in the fact that "replaced" is used in the Ordinance under both Bojangles' and Pineville's definitions of the term. Thus, this analysis does not provide much clarity.

The meaning of a word may also be derived by "'reference to the meaning of words with which it is associated.'" *H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Education*, 122 N.C. App. 49, 54, 468 S.E.2d 517, 521 (1996) (quoting *Morecock v. Hood*, 202 N.C. 321, 323, 162 S.E. 730, 731 (1932)). "'A word of a statute may not be interpreted out of context but must be

[4] Neither party submits that "replaced" could mean both definitions in the context of the Ordinance, and, thus, we do not address this possibility.

[read] as . . . part of the composite whole . . . .'" *Id.* (quoting *Myrtle Desk Co. v. Clayton, Comm'r of Revenue*, 8 N.C. App. 452, 456, 174 S.E.2d 619, 622 (1970)).

Section 2.8.8(A) of the Ordinance groups "replaced" with three other words.[5] Bojangles argues that these words, "altered," "converted," and "changed," mean substantially the same thing and so its interpretation of "replaced" is consistent with the other terms in Section 2.8.8(A) of the Ordinance because its interpretation also involves an alteration, conversion, or change to the Restaurant's signage. Bojangles argues it did not violate the Ordinance because Bojangles removed the wall sign without changing or altering it in any way.

However, Pineville correctly asserts that "[t]he presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms." *Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974). As Pineville points out, Section 2.8.8(A) says, "altered,

[5] Section 2.8.8(A) again provides: "[w]henever any nonconforming sign or part thereof (including the copy) is altered, *replaced*[], converted or changed, the entire sign must immediately comply with the provisions of this Chapter." Pineville Zoning Ordinance § 2.8.8(A) (emphasis added).

replaced[], converted *or* changed." (Emphasis added). The word "or" makes clear that "replaced" is independent and separate from "altered," "converted," and "changed." Thus, the term "replaced" must be construed as meaning something different than "altered," "converted," or "changed." Under Pineville's definition of "replaced," the word "adds something which would not otherwise be included in its terms." Pineville submits, and we agree, that a sign can be removed and "replaced" with no change, conversion, or alteration whatsoever. Thus, under the presumption that no part of a statute is mere surplusage, Pineville's interpretation of "replaced" is proper.

Next, we turn to the spirit and goal of the Ordinance. The "General Intent" of the "NONCONFORMITIES" Section set forth at Section 2.8.1 states:

> Nonconforming uses, which are uses of buildings or of land existing at the time of the adoption of this Ordinance, or any amendment thereto but which do not comply with the provisions of this Ordinance, are declared by this Ordinance to be incompatible with permitted uses in the various districts. The intent of this Article is to permit the continued use of a structure, or portion thereof, or of the use of land legally existing prior to the effective date of this Ordinance or any amendment subsequent thereto, ***but not to encourage its survival.*** Such nonconformities shall not be expanded or extended or changed in any manner, except as provided for in

this Article.

Pineville Zoning Ordinance § 2.8.1 (emphasis added). **[R. 97]** This intent not to encourage the nonconforming use's survival is consistent with this State's policy that zoning ordinances are to be "construed against indefinite continuation of a non-conforming use" and that nonconforming uses are "not favored." *Jirtle*, 175 N.C. App. at 181, 622 S.E.2d at 715.[6]

Bojangles argues its definition is consistent with the intent of the Ordinance because allowing a new sign to replace an existing nonconforming sign could permit the perpetual existence of a nonconforming sign, but putting the same exact sign back in its place does not extend the life of the sign. Bojangles fails, however, to recognize that even the replacement of the wall sign with the exact same wall sign extends its life because its life ended once it was removed. Therefore, the action of putting the wall sign back in its place effectively gives the sign new life, conflicting with the Board's intent in

[6] Bojangles urges this Court to follow the policy that a zoning ordinance "is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use." *See In re Application of Rea Constr. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968). As discussed, however, there is clear precedent disfavoring nonconforming uses, and, whenever there is general and specific policy applicable to a situation, the more specific policy applies.

drafting the Ordinance as well as with this State's policy disfavoring nonconforming uses.

Bojangles further argues that applying Pineville's interpretation will result in absurd or illogical results with regard to the interpretation of the entire Ordinance. *See Ayers v. Bd. of Adjustment for the Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (It is a principle of statutory construction that a court "avoid interpretations that create absurd or illogical results"). Bojangles asserts Pineville's interpretation is illogical because it allows maintenance, repairs, and rebuilding of nonconforming signs under Sections 2.8.8(A) and (B), yet does not allow the temporary removal of a nonconforming sign for the purpose of performing building maintenance.

However, the "ordinary maintenance and repairs" permitted by the Board include actions like polishing a sign, not replacing an awning that is not even a part of the sign. Additionally, Pineville stated at oral argument that any maintenance that requires removal and replacement of a sign is not permitted under the Ordinance, even under this exception. Pineville also stated at oral argument that the section allowing the rebuilding of nonconforming signs applies only in extreme

cases, such as destruction due to natural events like a hurricane. We agree with Pineville that these exceptions permitting changes to nonconforming signs are few and narrow, and, as a result, there is nothing illogical or absurd about Pineville's interpretation of "replaced" under Section 2.8.8(A) of the Ordinance.

Therefore, based on our analysis of the language, spirit, and goal of the Ordinance, we hold the Board's intent supports Pineville's definition of "replaced" to mean "to restore to a former place or position." Thus, we conclude that Bojangles did replace the wall sign and is therefore in violation of the Ordinance.

B. The Board's Findings of Fact

Bojangles next contends the trial court erred in determining that the Board's decision to affirm the notice of violation was supported by competent, material, and substantial evidence. We disagree.

In making its findings of fact, the Board is required "to state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision." *Deffet Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 365, 219 S.E.2d 223, 226-27

(1975). "Findings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which this Court can review the Board's decision." *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998).

Under whole record review, "the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency." *Bellsouth Carolinas PCS, L.P. v. Henderson Cty. Zoning Bd. of Adjustment*, 174 N.C. App. 574, 576, 621 S.E.2d 270, 272 (2005). The trial court's review is limited to determining "'whether the Board's findings are supported by substantial evidence contained in the whole record.'" *Malloy v. Zoning Bd. of Adjustment of City of Asheville*, 155 N.C. App. 628, 630, 573 S.E.2d 760, 762 (2002) (quoting *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999)).

Upon our review of the whole record in this case, we find substantial evidence to support the Board's findings of fact. The record of the Board's findings of fact is based on minutes to the Board's 11 February 2010 meeting. These minutes at least establish that in October 2009 Bojangles removed the wall sign and placed it in storage while the underlying awning was changed

from fabric to metal. Thereafter, Bojangles put the wall sign back in its place once the metal awning was installed. Thus, we conclude that competent, material, and substantial evidence supported the Superior Court's decision to affirm the Board's decision.

IV. Conclusion

For the foregoing reasons, the trial court Order is Affirmed.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).