NO. COA02-1505

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

CARL RICKER, JR., and JANIS RICKER, husband and wife,
Petitioners,

v. Buncombe County
No. 01 CVS 3808

THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF ASHEVILLE,
Respondent,

THE CITY OF ASHEVILLE,
Intervenor-Respondent.

Appeal by intervenor from judgment entered 7 August 2002 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 8 September 2003.

Van Winkle, Buck, Wall, Starnes & Davis, PA, by Craig D. Justus, for petitioner-appellees.

Curtis W. Euler, Assistant City Attorney, for intervenor-appellant.

STEELMAN, Judge.

Intervenor, the city of Asheville, appeals the judgment of the trial court reversing a decision of respondent, the Zoning Board of Adjustment of the City of Asheville (Board). The Board had upheld a zoning officer's determination that a billboard located on petitioners' property was in violation of municipal ordinances. For the reasons discussed herein, we affirm.

Petitioners, Carl and Janis Ricker, are the owners of real estate in the city of Asheville upon which a billboard was erected in 1988 pursuant to a permit issued by the city of Asheville. On 15 May 1997, petitioners were sent a notice of violation from the sign administrator for the city of Asheville stating that the billboard located on their property exceeded the maximum height allowed, in violation of the 1995 version of section 30-9-10 of the city's ordinances. Petitioners' billboard exceeded the forty-foot maximum height allowed by less than four feet. The sign administrator issued a citation to petitioners on 29 September 1997 for petitioners' failure to remedy the violation. Petitioners appealed the citation to respondent, the zoning board, on 29 October 1997. The city of Asheville moved to dismiss the appeal for lack of subject matter jurisdiction. The Board denied that motion on 16 June 1999. This ruling was affirmed by the Buncombe County Superior Court in case 99 CVS 3709 on 9 June 2000.

An evidentiary hearing was held by the Board on 23 April 2003. The Board found, *inter alia*, that: (1) a sign ordinance adopted in 1977 provided that the maximum height for a sign was 40 feet but any existing sign would be considered conforming if it exceeded the height maximum by 10% or less; (2) in 1990, the ordinance was amended to require that nonconforming signs shall be made conforming or be removed within 5 years; (3) in 1997, the sign ordinance was amended twice to provide for procedures to bring a nonconforming sign into compliance; and (4) the instant sign was erected in 1988 and exceeded the 40-foot maximum. The Board

concluded that: (a) the sign never conformed with the 1977 ordinance; (b) the sign was not an existing sign at the time the 1977 ordinance was adopted and therefore not subject to the 10% allowance; and (c) pursuant to the 1990 ordinance, the sign was a nonconforming sign.

Petitioners filed a petition for a writ of *certiorari* requesting that the trial court review the Board's decision. By consent of the parties, a writ of *certiorari* was issued to the Board for the record to be submitted to the trial court. This same consent order allowed the city of Asheville to intervene as a party-respondent to this action.

In a judgment dated 7 August 2002, the trial court reversed the Board's decision, concluding that: (1) under the 1990 ordinance, the billboard was a nonconforming sign; (2) the 1990 ordinance incorporated the sign regulations of the 1977 ordinance; (3) 28 August 1990 was the date upon which to measure a sign's conformity with the 1977 ordinance; (4) as of 28 August 1990, the billboard complied with the 1977 provisions by being less than 44 feet in height; (5) because the billboard conformed to the 1977 provisions, section 7-13-8(d)(1) of the 1997 ordinance did not apply; (6) the billboard fell within the classification set forth in section 7-13-8(d)(2) of the 1997 ordinance; (7) the amortization provisions in section 7-13-8(d)(2) were struck down by our Supreme Court; and (8) the Board's decision was reversed and petitioners did not have to remove the billboard. Intervenor, the city of Asheville, appeals.

Upon reviewing a writ of *certiorari* to review a decision of a board of adjustment, the trial court sits as an appellate court and not as a trier of the facts. *Overton v. Camden County*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 159 (2002); *Sun Suites Holdings, L.L.C. v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. rev. denied*, 353 N.C. 280, 546 S.E.2d 397 (2000). The trial court's review is limited to determining whether: (1) the board committed any errors in law; (2) the board followed lawful procedure; (3) the petitioner was afforded appropriate due process; (4) the board's decision was supported by competent evidence in the whole record; and (5) the board's decision was arbitrary and capricious. *Overton*, 155 N.C. App. At 393, 574 S.E.2d at 159.

Where a petitioner claims that the board of adjustment erred as a matter of law, the trial court must review the board's decision *de novo*. *Employment Sec. Comm'n v. Peace*, 122 N.C. App. 313, 317, 470 S.E.2d 63, 67 (1996). Where the petitioner claims that the board's decision was unsupported by the evidence and/or arbitrary and capricious, the court must examine all competent evidence within the "whole record." *Hedgepeth v. North Carolina Div. of Servs. for the Blind*, 142 N.C. App. 338, 346-47, 543 S.E.2d 169, 174 (2001).

Our review of the trial court's decision is limited to determining whether the trial court applied the correct standard of review and whether that standard was correctly applied. *Souther v. New River Area Mental Health Dev. Disabilities & Substance Abuse*

Program, 142 N.C. App. 1, 3, 541 S.E.2d 750, 752, *aff'd*, 354 N.C. 209, 552 S.E.2d 162 (2001).

In their petition before the trial court, petitioners asserted errors of law by the Board and that the decision of the Board was arbitrary and capricious. The trial court decided the matter solely on errors of law by the Board, and thus correctly applied the *de novo* standard of review. We now consider intervenor's four assignments of error to determine whether the trial court properly applied *de novo* review.

In its first assignment of error, intervenor argues that the trial court erred in concluding that the Board had subject matter jurisdiction to hear petitioners' appeal of the citation because it was not filed timely. We disagree.

The trial court made the following finding of fact with respect to this issue:

> 19. The Petitioners received notice of a City administrative ruling that the Billboard was required to be taken down, and thereafter the Petitioners timely appealed said ruling to the Respondent Board. The issue of the timeliness of that appeal was raised by the City and decided in favor of the Petitioners by a Judgment entered on June 9, 2000 in the case of *In the Matter of Billboard Located at 11 Turtle Creek Drive in the City of Asheville*, Buncombe County Superior Court 99 CVS 3709, which Judgment was not appealed by the City to the North Carolina Court of Appeals.

The record reveals that the issue raised in 99 CVS 3709 is identical to the instant assignment of error. Intervenor did not appeal the trial court's order in 99 CVS 3709, nor did it reference that order in any of its assignments of error in this appeal.

Where there is a prior decision in a matter resolving the issue of jurisdiction that is not appealed, that decision becomes the law of the case and cannot be raised at a later time. *Hedgepeth*, 153 N.C. App. at 656, 571 S.E.2d at 265-66. This assignment of error is without merit.

In its second assignment of error, intervenor argues that the trial court erred by failing to follow general rules governing statutory construction in construing section 30-9-5.C of the 1977 Asheville Code of Ordinances. We disagree.

In interpreting a municipal ordinance, the general rule is to ascertain and effectuate the intent of the legislative body. *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Intent is determined by adhering to the same general rules governing statutory construction, by examining the language, spirit, and goal of the ordinance. *Id.*

Section 30-9-2.A.3 of the 1977 sign ordinance provided that no freestanding sign "shall exceed forty (40) feet in height as measured from either the grade at the sign or the grade of the nearest roadway whichever is higher[.]" Asheville Code of Ordinances § 30-9-2.A.3 (1977). Section 30-9-5.C provided that "[a]ny existing individual sign which exceeds the maximum area or height limitations of this Ordinance by ten (10) percent or less may be considered to be a conforming sign and need not be removed or altered." Asheville Code of Ordinances § 30-9-5(C) (1977). The ordinance further provided that all nonconforming signs as of 21

October 1977 were to be made conforming or removed within five years. Asheville Code of Ordinances § 30-9-10(B) (1977).

In 1989, intervenor enacted Ordinance 1801, which repealed the provisions of the 1977 sign ordinance. This ordinance provided that signs which did not conform with the requirements of the 1977 ordinance as of the effective date were to be made conforming or removed within five years of the effective date of the 1989 ordinance. Asheville Code of Ordinances § 30-9-10 (1989).

On 28 August 1990, intervenor enacted Ordinance 1863, which repealed the provisions of Ordinance 1801 concerning nonconforming signs. This ordinance stated that nonconforming signs as of 28 August 1990 were to be made conforming or removed by 28 August 1995. A new section 30-9-10 provided for a two-tier amortization process for nonconforming signs. Asheville Code of Ordinances § 30-9-10.B (1990). Those signs that did not conform with the requirements of the 1977 sign regulations as of the effective date of the 1990 ordinance were to be made conforming or removed within five years of the effective date of the 1990 ordinance. Those signs that did conform with the 1977 regulations were to be made conforming or removed within seven years of the effective date of the 1990 ordinance.

On 21 February 1995, intervenor adopted Ordinance 2138, which followed the two-tier amortization process set forth in the 1990 ordinance. The first tier requirements remained the same. However, as to the second tier, the signs conforming with the 1977 regulations as of 28 August 1990 were allowed to remain. Asheville

Code of Ordinances § 30-9-10.B (1995). It was this ordinance that the Board found petitioners violated.

On 27 May 1997, intervenor enacted Ordinance 2369, the Unified Development Ordinance, which re-codified its ordinances concerning nonconforming signs. This ordinance established a multi-tier structure for nonconforming signs as follows: (1) nonconforming signs erected prior to 27 May 1997 that did not conform as of 28 August 1990 with the requirements of the 1977 ordinance were subject to Article IX of Appendix A of the city of Asheville's Code of Ordinances; (2) all conforming signs which did not conform as of the effective date of Ordinance 2369 were to be made conforming or removed within five years; and (3) all nonconforming signs which conformed to the requirements of the 1977 ordinance as of the effective date of Ordinance 2369 were allowed to remain. Asheville Code of Ordinances § 7-13-8(b) (May 1997).

On 25 November 1997, intervenor adopted Ordinance 2427, which provided that signs erected prior to 28 August 1990 that did not conform to the 1977 requirements as of 28 August 1990 were subject to the nonconforming sign provisions set forth in Article IX of Appendix A of the Asheville Code of Ordinances. Other signs that did not conform to the 25 November 1997 regulations and were erected prior to 25 November 1997 were to be removed no later than 25 November 2004. Asheville Code of Ordinances § 7-13-8(b) (November 1997). However, in *Morris Commun's Corp. v. City of Asheville*, 356 N.C. 103, 112, 565 S.E.2d 70, 76 (2002), our Supreme Court held that "any and all portions of Ordinance 2427 [the

November 1997 ordinance] that impose compliance deadlines on existing nonconforming, off-premises signs are invalid[.]"

Intervenor argues that the 1977 sign regulations can only apply to signs in existence at the time of the adoption of that ordinance, 21 October 1977. This is not correct.

The 1989 ordinance repealed the provisions of the 1977 ordinance. However, the 1989 ordinance and subsequent ordinances made reference to the standards of the 1977 ordinance. Beginning with the 1989 ordinance, the language of intervenor's ordinances discusses two distinct aspects of how nonconforming signs are to be evaluated: (1) the substantive regulations to be applied; and (2) the date of the application. Each of the ordinances from 1989 to 1997, inclusive, contained, in substance, the following language used to reference the substantive regulations:

> All nonconforming on-premise or off-premise signs (and their sign structures) which did not conform as of the effective date of this Article with the requirements of the sign regulations adopted in Article 9 of Chapter 30 of the Code of Ordinances of the City of Asheville on October 21, 1977[.]

The standards to be applied were those of the 21 October 1977 ordinance. However, each of these ordinances clearly states the specific date as of which the signs' conformity or nonconformity with these standards was to be determined. For purposes of the instant case, this date is 28 August 1990, the date set forth in the 1990, 1995 and 1997 ordinances.

It was the clear intent of the legislative body to determine the conformity or nonconformity of a sign based upon the 1977

standards as of 28 August 1990. Under the 1977 regulations, a sign was allowed to exceed the height limitation of forty feet by ten percent. Petitioners' sign was within the ten percent variation allowed by the 1977 standards and was erected prior to 28 August 1990. Thus, the sign complied with 1977 regulations as of 28 August 1990, even though it was nonconforming with the provisions of the later ordinances. The trial court was correct in its findings of fact and conclusions of law. This assignment of error is without merit.

In its third assignment of error, intervenor argues that the trial court erred in not giving proper deference to the Board's interpretation of the 1977 regulations. We disagree.

As stated above, the proper standard of review applied by the trial court was *de novo*. *See Peace*, 122 N.C. App. at 317, 470 S.E.2d at 67. Intervenor contends that under *Tucker v. Mecklenburg County Zoning Bd. of Adjustment*, 148 N.C. App. 52, 57, 557 S.E.2d 631, 635 (2001), *aff'd in part, rev. improv. allowed in part*, 356 N.C. 658, 576 S.E.2d 324 (2003), this Court is required to give deference to the Board's interpretation of the ordinance. In *Tucker*, this Court stated that:

> the function of a board of adjustment is to interpret local zoning ordinances. *Some* deference is given to the board's interpretation of its own city code. Therefore, on review we do not determine whether another interpretation might reasonably have been reached by the Board, but whether the Board acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law.

(Emphasis added). (Citations omitted). In this case, even giving

deference to the board's interpretation of the ordinances, we hold that the trial court was correct in determining that the board's decision was a clear error of law. This assignment of error is without merit.

In its fourth assignment of error, intervenor argues that the trial court erred by applying *Morris Communications Corporations v. City of Asheville*, 356 N.C. 103, 565 S.E.2d 70 (2002), to the facts of this case. We disagree.

The trial court held that the billboard located upon petitioners' property was controlled by the provisions of section 7-13-8(d)(2) of the ordinance adopted on 25 November 1997. Since this provision was invalidated by our Supreme Court in *Morris Communications*, *supra*, petitioners' billboard was not subject to amortization or removal.

Intervenor argues that since the billboard did not conform to the 1977 ordinance, its removal was required by 28 August 1995 under the 1990 ordinance. As discussed earlier, the billboard in question did comply with the standards of the 1977 ordinance as of the applicable date of 28 August 1990.

At the time the initial notice of violation on 15 May 1997, Ordinance 2138 (1995) was in effect. At the time of the citation issued on 29 September 1997, Ordinance 2369 (May 1997) was in effect. At the time of the hearing before the Board on 23 April 2001, Ordinance 2427 (November 1997) was in effect.

In *Overton*, *supra*, this Court held that the zoning law or regulation in effect at the time of the board's decision is

controlling. *Overton*, 155 N.C. App. at 395, 574 S.E.2d at 161. At the time of the Board's decision on 23 April 2001, Ordinance 2427 (November 1997) was in effect. The trial court properly applied Ordinance 2427 and *Morris Communications* to this case. This assignment of error is without merit.

AFFIRMED.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).