NO. COA05-1068

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

SUMMIT AT CULLOWHEE, LLC,
Petitioner,

v. Jackson County
No. 05 CVS 87

VILLAGE OF FOREST HILLS
BOARD OF ADJUSTMENT,
Respondent.

Appeal by respondent from an order entered 30 March 2005 by Judge Ronald K. Payne in Jackson County Superior Court. Heard in the Court of Appeals 22 February 2006.

Clement Law Office, by Charles E. Clement, for petitioner-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for respondent-appellant.

JACKSON, Judge.

The Village of Forest Hills Board of Adjustment ("Village of Forest Hills") appeals from the superior court's order that allowed construction to continue on Summit at Cullowhee's ("Summit") 14.701-acre tract in Jackson County. O'Briant & Stayton, L.L.C. is Summit's predecessor in interest ("O'Briant").

In July 1997, O'Briant paid $5,000.00 for an option to purchase a 14.701-acre tract ("the Property"). On 4 August 1997, O'Briant executed its option contract and purchased the 14.701-acre

Property for $169,000.00. O'Briant purchased the 14.701-acre Property as a student housing project to include eighteen multi-unit apartment buildings, a club house, a pool, and tennis and volleyball courts. The Property is located immediately across from the campus of Western Carolina University.

O'Briant began development on the Property and completed the environmental site assessment for the 14.701-acre Property, received a permit for wastewater collection for forty-eight four-bedroom apartments on the Property, and prepared utilities and parking lots for the initial four buildings. O'Briant also received building permits from Jackson County for the first three buildings.

On 16 February 1998, O'Briant executed a deed of trust in favor of Clyde Savings Bank for $66,670.00 secured by 10.2 acres of the 14.701-acre Property ("Parcel B"). That same day, O'Briant executed a purchase money deed of trust in favor of Van Allen Stayton, IRA for $80,000.00 secured by 4.5 acres of the 14.701-acre Property ("Parcel A"). When O'Briant executed the contract to purchase the 14.701-acre Property and the two deeds of trust, the Property remained outside any municipal or county zoning jurisdiction.

On 11 May 1998, O'Briant executed a deed of trust in favor of Wachovia Bank, N.A. pursuant to a construction agreement for 4.5 acres of the 14.701-acre Property for $2,200,000.00. O'Briant secured the deed of trust with the 14.701-acre Property. On 27 February 2002, O'Briant executed a general warranty deed to Summit

for the entire 14.701-acre Property. The same day, Summit executed its final deed of trust for $3,400,000.00 secured by prior construction obligations and the 14.701-acre Property in favor of Branch Banking and Trust Company.

On 2 March 1998, the Village of Forest Hills Council adopted its zoning ordinance which provided that property within the Village's extraterritorial jurisdiction "may hereafter be brought within the purview . . . of the [Village's zoning] [o]rdinance." Thereafter, on 3 December 2001, the Village of Forest Hills adopted an "Ordinance Establishing an Extraterritorial Jurisdiction for the Village of Forest Hills," which extended the extraterritorial jurisdiction to include the Property. The ordinance was effective retroactive to 22 October 2001 and was recorded on 10 December 2001.

On 14 January 2002, the Village of Forest Hills Council established a six-month building permit moratorium that applied to the extraterritorial jurisdiction, including the Property. Two days later, Jackson County, unaware of the moratorium, reinstated a building permit for the construction of the third building on Parcel A of the Property. That same day, after being notified of the moratorium, Jackson County denied O'Briant's application for a building permit for the fourth building on Parcel A. On 29 February 2002, Summit applied for another building permit to further develop the Property which also was denied.

On 17 June 2002, the Village of Forest Hills Council enacted a zoning ordinance that adopted "R-4 Rural Residential" zoning for

the Property. Pursuant to the adopted zoning, Summit was only allowed to build one more unit of no more than eight bedrooms, although they had planned to build an additional 528 bedrooms on Parcels A and B.

On 15 March 2004, Summit filed an application for a zoning certificate, which is the subject of this dispute. In the application, Summit applied to build the third of four buildings on Parcel A, and to build the remaining fourteen buildings on Parcel B. The Zoning Administrator denied Summit's application.

On 8 June 2004, Summit appealed to the Village of Forest Hills Board of Adjustment, and the Village of Forest Hills affirmed the Zoning Administrator's decision. Summit appealed to the Jackson County Superior Court, and the Honorable Ronald K. Payne reversed Village of Forest Hills' decision and held that Summit possessed vested rights to proceed with development of Parcel A and Parcel B. The Village of Forest Hills appealed to this Court, contending that the Superior Court erred in finding that Summit acquired a common law vested right because there is no evidence to support a finding that Summit relied upon valid governmental approval in developing Parcel B of the Property.

On appeal from a superior court's review of a municipal zoning board of adjustment, this Court's "standard of review is limited to '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.'" *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 162 N.C. App. 603, 609, 592 S.E.2d 205, 209 (quoting

Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment, 140 N.C. App. 99, 102–03, 535 S.E.2d 415, 417 (2000), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001)), *appeal dismissed and disc. rev. denied*, 358 N.C. 543, 599 S.E.2d 43 (2004). In evaluating whether the findings of fact by the Board of Adjustment are supported by the evidence or are abritrary and capricious, the trial court is charged with applying the "whole record test." *See Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849, *appeal dismissed and disc. rev. denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). Under this standard of review, "[t]he [superior] court must examine all competent evidence to determine if the record supports the board's findings and conclusions.'" *Harding v. Bd. of Adjustment*, 170 N.C. App. 392, 396, 612 S.E.2d 431, 435 (2005) (quoting *William Brewster Co., Inc. v. Town of Huntersville*, 161 N.C. App. 132, 134, 588 S.E.2d 16, 19 (2003)). This is a deferential standard of review, and as our Supreme Court has noted, "[t]he 'whole record test' does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted). Findings of fact supported by competence evidence are binding on the superior court, *see Tate Terrace Realty Investors, Inc.*, 127 N.C. App. at 218, 488 S.E.2d at 849, and the superior court shall apply a *de novo* standard of review to the Board's conclusions of law. *See*

Overton v. Camden County, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002). Using the whole record test, the Village of Forest Hills' "decision must stand unless it is arbitrary and capricious." *Harding*, 170 N.C. App. at 396, 612 S.E.2d at 435 (citation omitted).

In the case *sub judice*, the trial court recited the correct standard of review, but a careful examination of the record indicates that the trial court, in fact, did not apply the whole record test. Here, the trial court's findings of fact differ not only in number — twenty-two compared to thirty-four — but also in substance from the Village of Forest Hills Board of Adjustment's findings. For example, the trial court made a different finding than the Board of Adjustment with regard to Summit's intentions for the Property. Specifically, the Board found that Summit intended to build fourteen to sixteen buildings containing units of four bedrooms and four baths each. Summit did not object to this finding, and "findings contained in the final agency decision which are not objected to . . . are binding on the trial court." *Town of Wallace v. N.C. Dep't of Env't & Natural Res.*, 160 N.C. App. 49, 54, 584 S.E.2d 809, 814 (2003).[1] Nevertheless, even if Summit had

[1]The Court in *Town of Wallace* noted that, although the standard of review of an agency decision had been changed to *de novo* by North Carolina General Statutes, section 150B-51(c), the petition in that case had been filed prior to 1 January 2001, the effective date of the amendment. *See Town of Wallace*, 160 N.C. App. at 54 n.1, 584 S.E.2d at 813–14; *see also* Brad Miller, *What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C. L. Rev. 1657, 1664–66 (2001). This amendment to the Administrative Procedure Act, however, does not affect judicial review of decisions by Boards of Adjustment, as decisions of municipalities are exempted from the

assigned error to that finding of fact, it would have been binding on the trial court if there was substantial competence evidence in the record to support the Board's finding. *See Tate Terrace Realty Investors, Inc.*, 127 N.C. App. at 218, 488 S.E.2d at 849. The trial court, however, found that Summit intended to build eighteen buildings, along with a club house, pool, and other community amenities. By making such an independent finding of fact, the superior court failed to accurately apply the whole record test to the decision of the Village of Forest Hills Board of Adjustment.

Accordingly, because the superior court failed to apply the standard of review correctly on appeal from the Board's decision, we remand this case to the superior court for proper application of the whole record test to the Board of Adjustment's decision.

Remanded.

Judges ELMORE and STEELMAN concur.

Report per Rule 30(e).

Administrative Procedure Act. *See* N.C. Gen. Stat. § 150B-2(1a) (noting that "[a] local unit of government is not an agency."); *see also Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs*, 299 N.C. 620, 624, 265 S.E.2d 379, 382, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Accordingly, the Board of Adjustment's findings to which plaintiff did not object remained binding on the superior court.