NO. COA05-841

NORTH CAROLINA COURT OF APPEALS

Filed: 01 August 2006

B. WILSON TAYLOR and
JOAN KOZAK NOEL,

Petitioners,

v. Craven County
No. 04 CVS 2193

TOWN OF RIVER BEND,

Respondent.

Appeal by petitioners from order entered 11 March 2005 by Judge Kenneth F. Crow in Craven County Superior Court. Heard in the Court of Appeals 7 February 2006.

Jordan, Price, Wall, Gray, Jones & Carlton, by R. Frank Gray, for petitioners-appellants.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Jimmie B. Hicks, Jr. for respondent-appellee.

ELMORE, Judge.

According to the Town of River Bend (the Town), a home with a chassis, whether it be manufactured or modular, will be prohibited from areas outside the Town's Manufactured Home Overlay District. This appeal arises from the Town's decision that the home purchased by petitioners is not a modular home, as they thought, but rather a manufactured home, which is not permitted on the lot they purchased.

On 21 June 2004 petitioners applied for a zoning permit to place a residential building in the Norberry Estates subdivision of the Town. After reviewing the application, plans, and necessary materials, the Town's Zoning Administrator issued the necessary zoning permit on 28 June 2004. Petitioners then sought and obtained a building permit from Craven County. Once these permits were issued, petitioners purchased lot 49 in Norberry Estates. They also purchased a modular home from Horton Homes.[1] According to the Zoning Administrator, modular homes are permitted in Norberry Estates, an area of the Town zoned R-15.

However, on 23 August 2004, when petitioners' home was delivered to lot 49, the neighbors complained to the zoning office that a mobile home, or manufactured home, was being delivered. The Zoning Administrator went out that day and visually inspected the home being delivered. He declared it to be a manufactured home, and accordingly issued a stop work order that day. The next day he revoked petitioners' zoning permit.

Petitioners appealed to the Town's Board of Adjustments (the Board), and a hearing was conducted on 28 October 2004. The Board determined the home was a manufactured home and was not permitted

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[1] From the record evidence, apparently Horton Homes offers modular homes—those constructed to state building codes instead of federal HUD guidelines—with or without a steel undercarriage frame attached. "On frame modulars" use the steel chassis for transportation and are attached to columns or piers as a foundation. "Off frame modulars" are transported by flat bed truck or removable chassis and require a crane to set them in place on a more traditional foundation. The option is ostensibly designed to give modular home buyers a choice that reduces delivery costs and set-up expenses while still providing them a home built to state and local codes.

in Norberry Estates, since Norberry Estates is not part of the Town's Manufactured Home Overlay District.

Petitioners then filed a writ of certiorari with the superior court. That writ was granted, and a hearing was held on 10 February 2005. The superior court, in an appellate capacity, concluded the Board made no errors of law in revoking petitioners' permit and there was substantial evidence to support its decision.

Petitioners now appeal to this Court arguing that since the Board's order is not supported by sufficient findings of fact and its conclusions are erroneous, the superior court erred in affirming the Board's decision.

The decision of the Town's Board must be based on competent, material, and substantial evidence. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002). If so, the Board's "findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Id.* (quoting *Humble Oil & Ref. Co. v. Board of Aldermen of Chapel Hill*, 284 N.C. 458, 469, 202 S.E.2d 129, 137 (1974)). Accordingly then, "a reviewing superior court 'sits in the posture of an appellate court' and 'does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.'" *Id.* (quoting *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs of Nags Head*, 299 N.C. 620,

626-27, 265 S.E.2d 379, 383 (1980)). In so doing, the superior court must:

> (1) Review[] the record for errors in law,
> (2) Insur[e] that procedures specified by law in both statute and ordinance are followed,
> (3) Insur[e] that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
> (4) Insur[e] that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
> (5) Insur[e] that decisions are not arbitrary and capricious.

Mann Media, 356 N.C. at 12-13, 565 S.E.2d at 17. The first three inquiries involve questions of law to which the superior court applies a *de novo* standard, while the fourth and fifth inquiries are questions of fact requiring review under the whole record test. *See Ward v. Inscoe*, 166 N.C. App. 586, 593, 603 S.E.2d 393, 398 (2004).

When this Court reviews a superior court's appellate review order our scope 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.'" *In re Appeal of Willis*, 129 N.C. App. 499, 501-02, 500 S.E.2d 723, 726 (1998) (applying review of agency decisions to that of municipal bodies) (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

As to the first step in our review, the petition for certiorari alleged errors of law and the fact that the Board's decision was arbitrary and capricious. Therefore, the superior court was required to conduct both a *de novo* review and a whole

record test. It's order affirming the Board's decision is congruent with applying these principles. Consequently, we will determine whether the court's application was proper. In so doing, we apply the same principles of review the superior court did: *de novo* for issues of law, procedure, and due process, and application of the whole record test for issues of evidence and arbitrariness. *See Fantasy World, Inc. v. Greensboro Bd. of Adjust.*, 162 N.C. App. 603, 609, 592 S.E.2d 205, 209-10 (2004) (citing *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 627, 265 S.E.2d 379, 383 (1980)). Equally similar to the superior court's review, we must settle whether the evidence before the Town's Board supported its order, not whether there was sufficient evidence before the superior court. *Ward*, 166 N.C. App. at 593, 603 S.E.2d at 398.

For a reviewing court, the "whole record test" consists of examining all competent evidence to assess whether the Board's decision is supported by substantial evidence. *Mann Media*, 356 N.C. at 14 565 S.E.2d at 17-18 (internal quotations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *ACT-UP Triangle*, 345 N.C. at 707, 483 S.E.2d at 393 (internal citation omitted).

> The 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.' . . . Under the whole record test, the Board's decision must stand unless it is arbitrary and capricious.

Harding v. Board of Adjust. of Davie Cty., 170 N.C. App. 392, 396, 612 S.E.2d 431, 435 (2005) (internal citations omitted). But, where errors of law are alleged, a *de novo* review allows the court to consider those issues anew. *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999).

> However, 'one of the functions of a Board of Adjustment is to interpret local zoning ordinances,' and respondent's interpretation of its own ordinance is given deference. . . . Therefore, 'our task on appeal is not to decide whether another interpretation of the ordinance might reasonably have been reached by the board,' but to decide if the board 'acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law' in interpreting the ordinance. . . .

Id.

Here, petitioners and the Town entered into numerous stipulations, including:

> 9. The zoning application and permit is for a modular home.
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> 10. The zoning application and permit does not reference a manufactured home.
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> 11. The real property is not in the Town's Manufactured Home Overlay District.
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> 12. The Zoning Ordinance does not prohibit the construction of a modular home in the zoning class R-15.
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> 13. The structure contains the Department of Insurance seal reflecting a modular home.

While these stipulations are obviously not in dispute, the conclusions arising from them and the evidence presented are contested. An important nuance here is the fact the Board does not

dispute that pursuant to *the state building codes* petitioners' home is a modular home. Petitioners argue that the home they purchased is a modular home pursuant to *the town's zoning ordinances*; however, the Board disagreed, adopting the Town's position that petitioners' home is a manufactured one in light of zoning requirements.

Section 143-145 of our General Statutes defines a manufactured home as:

> A structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width, or 40 body feet or more in length, or, when erected on site, is 320 or more square feet; and which is built on a permanent chassis and designed to be used as a dwelling, with or without permanent foundation when connected to the required utilities, including the plumbing, heating, air conditioning and electrical systems contained therein.

N.C. Gen. Stat. § 143-145(7) (2005). The Town's definition of a manufactured home references section 143-145, but also goes considerably further in scope. The ordinance picks up at section 143-145's "therein" and adds:

> and that satisfies all of the following additional criteria:
>
> (a) the manufactured home is a multi-section home which has a length not exceeding four times its width . . .
>
> (b) Contains a minimum of 1450 square feet of enclosed and heated living area,
>
> (c) the pitch of the roof has a minimum vertical rise of three feet for each twelve feet of horizontal run . . .
>
> (d) . . .
>
> (e) the exterior siding consists of materials comparable in composition,

> appearance and durability to the exterior siding commonly used in standard residential construction,
> (f) the manufactured home . . . [is installed with] a continuous masonry foundation or masonry curtain wall . . .
> (g) . . . and
> (h) the moving hitch, wheels and axles and transporting lights have been removed.
>
> It is the intent of these criteria to insure that a manufactured home, when installed, shall have substantially the appearance of an on-site conventionally built, single family dwelling.

Homes, buildings, or structures that meet this definition are limited to a manufactured home overlay district. There is no dispute that this district does not encompass the lot petitioners purchased. On the other hand, the Town's zoning ordinance defines a "modular unit" as "[a] factory-fabricated, transportable building designed to be used by itself or to be incorporated with similar units at a building site into a modular structure." Modular homes may be built in any R-15 district, including petitioners' lot in Norberry Estates.

Evidence before the Board consisted mainly of testimony by the Town's Zoning Administrator Randy Beaman, who granted petitioners' zoning application and then revoked it upon inspection of the home as delivered to the lot. Mr. Beaman testified that the home was a manufactured home; his opinion was based on the fact that the home had a "fixed chassis."

> BEAMAN: I'm relying on the fact that upon inspection of it, there were a fixed chassis . . . . It is a multi-sectional home, but it also is on a fixed chassis . . . . It arrived

> on a fixed frame with chassis with wheels; yes, sir, it did arrive.
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> BOARD MEMBER: (inaudible question)
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> BEAMAN: A fixed frame would be interpreted - - my interpretation of a fixed frame would be something that is permanently affixed to a structure that cannot be removed or if it were to be removed, then it very likely could create difficulties for the structure.

Since the Town's definition of manufactured home is so comprehensive, Mr. Beaman's testimony that petitioners' home arrived on a fixed chassis provides competent and substantial evidence that the home meets the definition of being a manufactured home for zoning purposes. As conceded by the Town, petitioners' home meets the fungible, unrestrictive zoning requirements as a modular home as well, but due to its "fixed chassis" it is a manufactured one. We can discern no arbitrary or capricious reasoning in that decision.

Petitioners next argue that the Board erred in concluding they must comply with the manufactured home zoning requirements since their home is also modular. Their position is that if a structure is both manufactured and modular, for zoning purposes, it should be allowed in either district; however, the Town's position is it must comply with the more restrictive zoning requirements of the two. We see no error in this determination.

First, although section 143-139.1 allows the state to certify by seal or label that a particular factory-built home meets all necessary building codes without further inspection, it does not foreclose inspection for zoning purposes. *See* N.C. Gen. Stat. §

143-139.1(a) (2005) ("All building units, structures or components bearing such labels or seals shall be deemed to meet the requirements of the State Building Code and this Article without further inspection or payment of fees, except as may be required for the enforcement . . . of local ordinances governing zoning[.]"). This is indeed the purpose of the seal on petitioners' home, and the reason that it is a modular home and not a manufactured home according to the building codes.

And, second, the Town's authority to regulate placement of "manufactured" homes according to the most restrictive means is permitted. The Town's general zoning authority arises from section 160A-381, and specifically from section 160A-383.1, which deals with zoning for structures that are "manufactured homes." Section 160A-383.1 restricts a local body from excluding manufactured housing in its zoning jurisdiction. N.C. Gen. Stat. § 160A-383.1(c) (2005). But it does permit that body to establish an overlay district and adopt further "appearance and dimensional criteria." *See* N.C. Gen. Stat. § 160A-383.1(e) (2005) ("In accordance with the city's comprehensive plan and based on local housing needs, a city may designate a manufactured home overlay district within a residential district."); N.C. Gen. Stat. § 160A-383.1(d) (2005) ("A city may adopt and enforce appearance and dimensional criteria for manufactured homes."). Further, section 160A-390 states that if a local ordinance creates more restrictive standards than a statute in Chapter 160A, Article 19, Part III, then the local ordinance controls. *See* N.C. Gen. Stat. § 160A-390

(2005) ("When the provisions of any . . . local ordinance . . . impose other higher standards than are required by the regulations made under authority of this Part, the provisions of that . . . local ordinance . . . shall govern.").

As such, we see no error of law in the Board's determination that since petitioners' home meets the Town's definition of a manufactured home, notwithstanding also meeting other less restrictive definitions, petitioners could be stopped from affixing it to lot 49 in Norberry Estates. And since both state statute and the Town's Zoning Ordinances allow the zoning administrator to inspect work and ensure compliance with permits and zoning regulations, we see no error in the Board's decision that the revocation of petitioners' zoning permit was valid. *See* N.C. Gen. Stat. §§ 160A-420—160A-422 (2005).

After reviewing petitioners' alleged legal and factual errors arising from the Board's order under the appropriate standards of review and determining that review was consistent with the superior court's, we affirm the superior court's order affirming the Board's order.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).