NO. COA06-700

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

PHILLIP C. CLEGG and
BENSON NURSERY,
Petitioners-Appellants,

v. Durham County
No. 05 CVS 1931

THE CITY OF DURHAM,
and the DURHAM CITY/COUNTY
BOARD OF ADJUSTMENT,
Respondents-Appellees.

Appeal by Petitioners from decision and order entered 24 January 2006 by Judge Orlando F. Hudson in Superior Court, Durham County. Heard in the Court of Appeals 24 January 2007.

Hutson Hughes & Powell, P.A., by James H. Hughes, for Petitioners-Appellants.

Office of the Durham City Attorney, by Assistant City Attorney Karen A. Sindelar, for Respondents-Appellees.

McGEE, Judge.

Phillip C. Clegg (Mr. Clegg) owns real property at 3666 Guess Road in Durham (the Guess Road lot). Mr. Clegg also owns an adjoining parcel of real property located behind the Guess Road lot that fronts on Hermine Street (the Hermine Street lot). The Guess Road lot and the Hermine Street lot (collectively the properties) are each located in single-family residential zoning districts.

Mr. Clegg began operating an exterminating business, Clegg's

Termite and Pest Control, on the Guess Road lot in 1974. Mr. Clegg received a letter dated 1 October 1985 from the City of Durham's Planning and Community Development Department stating that in 1974 the Durham Inspections Department had "approved the use of an existing nonconforming use of [the properties] for Clegg['s] Termite and Pest Control and Glenn Darst Realty." The letter stated that these two businesses were the only ones that the properties could legally accommodate, but that five businesses were operating on the properties. The letter stated this constituted a zoning violation. Mr. Clegg agreed to reduce the number of businesses operating on the properties to two.

In 1988, Mr. Clegg ceased using the Guess Road lot for the operation of Clegg's Termite and Pest Control and began leasing the Guess Road lot to commercial tenants. Thereafter, Mr. Clegg continued to use a portion of the Hermine Street lot for storage related to Clegg's Termite and Pest Control.

The Durham City/County Zoning Ordinance (the Zoning Ordinance) was modified in 1994 to prohibit a change from one nonconforming use to another nonconforming use. At that time, Mr. Clegg was leasing the Guess Road lot to an auto repair shop. Mr. Clegg began leasing the Guess Road lot to Benson Nursery, a plant nursery, in 2000. Benson Nursery has continued to operate on the Guess Road lot since that time.

The Durham City/County Zoning Enforcement staff received complaints in 2004 concerning a tractor-trailer that was parked on the Hermine Street lot, and general complaints about the operation

of a business on the Guess Road lot. Upon investigation, it was determined that Benson Nursery was operating on both the Guess Road lot and the Hermine Street lot. The Durham City/County Zoning Enforcement Officer issued a notice of violation to Mr. Clegg on 15 July 2004. The notice stated that the Guess Road lot was zoned as an R-8 residential district and the Hermine Street lot was zoned as an R-10 residential district. The notice further stated that a commercial retail nursery was not a permitted use in an R-8 or R-10 residential zoning district. A notice of violation was also issued to Benson Nursery on 16 September 2004. Mr. Clegg and Benson Nursery (Petitioners) appealed to the Durham City/County Board of Adjustment (the Board).

In a letter to the Board, the director of the Durham City/County Planning Department concluded that "Benson Nursery represents a change of use of [the properties] that is not allowed under the Zoning Ordinance." The Board conducted a hearing regarding Petitioners' appeal on 14 December 2004.

The Board found that the properties were located in single-family residential zoning districts. The Board also found that a portion of the properties was being used as a plant nursery, which was not a permitted use in single-family residential zoning districts. The Board found that section 19.6(2) of the Zoning Ordinance, which became effective 1 January 1994, did not allow a nonconforming use to be converted to another nonconforming use. As of 1 January 1994, an auto repair business was being operated on the Guess Road lot. Sometime in 2000, the Benson Nursery opened

and began operating on the Guess Road lot.

The Board concluded "[t]hat the term 'Use' referenced in Section 19 of the Zoning Ordinance [meant] those particular categories of uses found in Section 4 of the Zoning Ordinance or the 'Table of Permitted Uses' found in Section 6." The Board further concluded "[t]hat 'Leasing' [was] not defined and considered as a separate category of property use in the Zoning Ordinance. In other words, the Zoning Ordinance defin[ed] what activities [could] occur on property regardless of whether the property [was] leased or owned." Therefore, "the opening of the plant nursery was a violation of Section 19.6(2) of the . . . Zoning Ordinance in that an existing nonconforming use [auto repair] was changed to another nonconforming use [a plant nursery]." The Board voted to uphold the determination of the Planning Director that Petitioners were operating, or allowing the operation of, Benson Nursery in violation of the Zoning Ordinance.

Petitioners filed a petition for writ of certiorari and for judicial review of the Board's decision. The trial court filed its decision and order on 24 January 2006, upholding the Board's decision. The trial court determined, *inter alia*, that

> [t]he Board's interpretation of the term 'use' to mean particular activities conducted on property, and the Board's conclusion that leasing for a commercial purpose or to commercial tenants is not a 'use' as defined by the Code are both consistent with the . . . Zoning [Ordinance], and are not affected by error of law[.]

Petitioners appeal.

Petitioners argue the trial court and the Board erred by interpreting the term "use" to mean particular activities conducted on property and by concluding that leasing for a commercial purpose was not a "use" defined by the Zoning Ordinance. "On appeal of a trial court judgment considering a decision of a board of adjustment, our Court reviews the trial court's order for errors of law." *Jirtle v. Board of Adjust. for the Town of Biscoe*, 175 N.C. App. 178, 180, 622 S.E.2d 713, 715 (2005). "A question involving the interpretation of a zoning ordinance is a question of law, to which we apply a *de novo* standard of review." *Id.*

"Zoning restrictions should be interpreted according to the language used in the ordinance." *Id.* "In determining the meaning of a zoning ordinance, we attempt to ascertain and effectuate the intent of the legislative body." *Ayers v. Board of Adjust. 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). "In addition, we avoid interpretations that create absurd or illogical results." *Id.*

Petitioners argue the trial court and the Board erred by failing to apply the definition of the term "use" found in the Zoning Ordinance. Under Section 2.2 of the Zoning Ordinance, "use" is defined as "[t]he purpose for which a building, structure, or area of land may be arranged or occupied or the activity conducted or proposed in a building, structure, or on an area of land." Petitioners contend that under this definition, leasing to commercial tenants who operate businesses allowed by the general

commercial district is a "purpose for which a building, structure, or area of land may be arranged or occupied[.]"

Petitioners argue that in 1988 Mr. Clegg changed the purpose of the use of the Guess Road lot "from operating a business under the Commercial District Classification to leasing to tenants who operate a business under the Commercial District Classification." Therefore, in 1994 when the new Zoning Ordinance was adopted, the nonconforming use of the Guess Road lot was leasing to commercial tenants. Thereafter, Petitioners argue, Mr. Clegg could lease to different commercial tenants without changing the nonconforming use of the Guess Road lot, provided that the commercial tenants operated businesses allowed under the commercial district classification.

Section 4D.3.2 of the Zoning Ordinance lists the uses that are permitted in general commercial districts. Section 4D.3.2 lists, *inter alia*, "[g]arden centers" and "[v]ehicle repair shops without outdoor storage or operations[,]" as uses permitted in general commercial districts. However, Section 4D.3.2 makes no distinction on the basis of whether these uses are conducted by the owner of real property or by a tenant of the owner of real property. Moreover, the table of permitted uses in Section 6 of the Zoning Ordinance lists the uses that are permitted in each of the zoning districts. Again, the table makes no distinction based upon whether the listed uses are conducted on real property that is leased or not. Neither Section 4D.3.2 nor the table of permitted uses list leasing as a separate property use.

The permitted uses listed under Sections 4 and 6 of the Zoning Ordinance all focus on what is occurring on real property, not who is conducting that activity on the real property. Therefore, we hold the trial court did not err by upholding the Board's conclusion that the term "use" "[meant] those particular categories of uses found in Section 4 of the Zoning Ordinance or the 'Table of Permitted Uses' found in Section 6." We also conclude that the trial court and the Board properly determined that leasing was not a separate category of property use under the Zoning Ordinance.

However, even assuming *arguendo* that the Board and the trial court erred by failing to apply the definition of "use" found in Section 2.2 of the Zoning Ordinance, the ultimate result would remain the same. Our Court has held that where "a court's ruling [is] based upon a misapprehension of law, '[but] the misapprehension of the law does not affect the result[,] . . . the judgment will not be reversed.'" *Smith v. Beaufort County Hosp. Ass'n.*, 141 N.C. App. 203, 212, 540 S.E.2d 775, 781 (2000) (quoting *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 348, 317 S.E.2d 684, 689 (1984)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 435, *aff'd per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001).

In the present case, Section 2.2 defines the term "use" in part as "[t]he purpose for which a building, structure, or area of land may be arranged or occupied[.]" The term "purpose" is not defined in the Zoning Ordinance. The term "purpose" can be defined as "[a]n objective, goal, or end[.]" Black's Law Dictionary 1271

(8th ed. 2004). When this definition is applied to the definition of "use" found in the Zoning Ordinance, the definition reads as follows: "the [objective, goal, or end] for which a building, structure, or area of land may be arranged or occupied[.]" We interpret the term "purpose" to relate to what occurs on real property, not to the ownership of real property.

Our decision is supported by *Graham Court Assoc. v. Town of Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981), where the issue was "whether the power to control the *uses* of property through zoning extends to control of the manner in which the property is owned." *Id.* at 544, 281 S.E.2d at 419. In that case, the petitioner owned an apartment building that did not fully comply with the standards of the applicable zoning ordinance. *Id.* at 544-45, 281 S.E.2d at 419. However, the continued use of the apartment building was permitted as a prior nonconforming use. *Id.* at 545, 281 S.E.2d at 419. The petitioner sought to sell the individual apartments in the building to new owners in accordance with the North Carolina Unit Ownership Act, but the respondent Chapel Hill Town Council asserted that the petitioner needed to obtain a special use permit to do so. *Id.* at 545-46, 281 S.E.2d at 419. However, the respondent denied issuance of the special use permit to the petitioner. *Id.* at 546, 281 S.E.2d at 419.

Our Court relied on several cases from other jurisdictions, and recognized that "[b]asic to the decisions in other jurisdictions is the premise that zoning is the regulation by a municipality of the *use* of land within that municipality, and of

the buildings and structures thereon–not regulation of the *ownership* of the land or structures." *Id.* at 546, 281 S.E.2d at 420. Our Court held that the petitioner was "not required to apply for or receive a special use permit in order to convert its tenant occupied apartments to owner occupied apartments." *Id.* at 551, 281 S.E.2d at 422. In support of its holding, our Court stated:

> Without question [the] petitioner has the right to continue the present use of the Graham Court Apartments as they stand, because they constitute nonconforming uses. The only real difference in the contemplated change is ownership. If the [respondent] should prevail, the apartments would be relegated, now and for the future, to occupancy by tenants. The conversion which [the] petitioner seeks would permit them to be owned by their occupants. There would be absolutely no change in the *use* of the land. If a use is permitted, as here, it is beyond the power of the municipality to regulate the manner of ownership of the legal estate.

Id. at 551, 281 S.E.2d at 422-23.

In the present case, Petitioners argue that leasing to commercial tenants is a use recognized by the Zoning Ordinance. However, as recognized by *Graham Court Assoc.*, zoning is not the regulation of ownership of land or the structures thereon. *Id.* at 546, 281 S.E.2d at 420. Rather, zoning only deals with regulation of what occurs on real property. *Id.*

Our decision in the present case effectuates the intent of the Board in adopting the Zoning Ordinance. The Purpose paragraph of the section of the Zoning Ordinance dealing with nonconforming lots, uses and buildings, states: "It is not the intent of this Section to encourage the continuance of nonconformities which are

out of character with the standards of the zoning district." Furthermore, the Interpretation paragraph of the Zoning Ordinance states: "In the case of interpretations regarding allowable uses, the Director shall apply the closest existing use category to the activity in question. If there are no such categories, the Director may disallow the use." In other words, in determining whether a use is an allowable use, the Planning Director should look to the categories of uses listed in the Zoning Ordinance. Therefore, the Board and the trial court did not err by looking to Sections 4 and 6 of the Zoning Ordinance in determining that leasing was not a use recognized by the Zoning Ordinance. Accordingly, our interpretation of the term "use" effectuates the intent of the Board in adopting the Zoning Ordinance.

Moreover, our interpretation avoids absurd or illogical results. Petitioners' interpretation would lead to an arbitrary and illogical discrimination in favor of leased properties over properties that are not leased. Petitioners' interpretation would allow nonconforming uses to remain on property that is leased. This is illogical because the offending characteristics of a nonconforming use relate to the activity occurring on real property, not to the ownership of the real property. For example, in the present case, the other residents of the residential district were concerned with the fact that Benson Nursery was operating on the Guess Road lot. They were not concerned with whether Benson Nursery was being operated by the owner of the Guess Road lot or by a lessee.

Our decision is also consistent with the public policy of North Carolina. "Nonconforming uses and structures are not favored under the public policy of North Carolina, and '[z]oning ordinances are construed against indefinite continuation of a non-conforming use.'" *Jirtle*, 175 N.C. App. at 181, 622 S.E.2d at 715 (2005) (quoting *Forsyth Co. v. Shelton*, 74 N.C. App. 674, 676, 329 S.E.2d 730, 733, *disc. review denied*, 314 N.C. 328, 333 S.E.2d 484 (1985)). Under Petitioners' interpretation of the term "use" in the present case, nonconforming uses could continue indefinitely if the properties on which they existed were leased. This result would be contrary to the public policy of North Carolina. For the reasons stated above, we overrule Petitioners' assignment of error. We also deem Petitioners' remaining assignments of error abandoned because Petitioners failed to set forth argument pertaining to those assignments of error. *See* N.C.R. App. P. 28(b)(6).

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).