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NO. COA08-218

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

IN RE REQUEST BY SHARON WALKER, BRAD DUNKER and SHERRY DUNKER, d/b/a FIRST CHOICE CHILD DEVELOPMENT CENTER,

Petitioners,

v. New Hanover County No. 07 CVS 1116

NEW HANOVER COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent.

Court of Appeals

Slip Opinion

Appeal by Petitioners from order entered 12 September 2007 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 28 August 2008.

Eldridge Law Firm, P.C., by James E. Eldridge, for Petitioners-Appellants.

Office of the County Attorney, by Sharon J. Huffman, for Respondent-Appellee.

STEPHENS, Judge.

Petitioners Sharon Walker, Brad Dunker, and Sherry Dunker, doing business as First Choice Child Development Center, applied three times for a special use permit to build and operate a daycare facility at 547 Sanders Road in New Hanover County. Hearings on Petitioners' first two applications were held by Respondent, the

New Hanover County Board of County Commissioners ("Board"), in June and September 2006. At both meetings, the Board denied Petitioners' requests on the basis that the traffic impact on Sanders Road from ongoing residential and commercial development had not been mitigated and, therefore, the true potential impact of a large daycare operation could not yet be evaluated. Petitioners' third application was reviewed by the County Planning Board during its 7 December 2006 meeting. Motions to approve and deny the request were tied at a vote of three to three.

Petitioners' application, which included essentially the same site plan as the previous applications, was heard before the Board at its 8 January 2007 meeting. The application was denied by a vote of four to one.

On 9 March 2007, Petitioners filed a Petition for Writ of Certiorari with the Superior Court of New Hanover County appealing Respondent's third denial of their application. The petition was granted on 13 March 2007. Petitioners' appeal was heard on 5 September 2007. By order entered 12 September 2007, the superior court affirmed Respondent's denial of Petitioners' application. From this order, Petitioners appeal.

Facts

Petitioners applied for a special use permit to build and operate First Choice Child Development Center ("Center"), a child daycare facility, on a 2.98-acre tract of land at 547 Sanders Road in New Hanover County, North Carolina. The area was zoned as residential, or R-15, and under Section 72-20 of New Hanover

County’s Zoning Ordinance (“Ordinance”), child daycare facilities are permitted by special use permit in any residential district, subject to the requirements set forth in the Ordinance.

A site plan prepared for Petitioners by Cindee Wolf, RLA, PLS, a professional landscape architect and surveyor, illustrated that the proposed Center would be located on the north side of Sanders Road heading west from the intersection of Sanders Road and US 421/Carolina Beach Road (“Intersection”). Sanders Road is a two-lane road, less than a mile long. Bellamy Elementary School (“School”) is located about 400 feet to the west of the Center property.

At the 8 January 2007 hearing, Ms. Wolf was tendered by Petitioners as an expert in land use planning issues including the interpretation and application of zoning ordinance standards to various land use projects. Ms. Wolf testified that the proposed use met the specified and general requirements set forth in the Ordinance and was harmonious with the surrounding area. Petitioners submitted into evidence the site plan prepared by Ms. Wolf and a “driveway” exhibit also prepared by Ms. Wolf showing the distance between the proposed Center and the School.

Petitioners also retained Rynal G. Stephenson, P.E., of Ramey Kemp & Associates, Inc. (“RKA”) to prepare a Traffic Impact Analysis (“TIA”) to determine the impact of the estimated Center traffic on the Intersection, the adjacent roadways, and the School. The TIA analyzed the impacts under projected 2008 traffic conditions with the Center fully built out and projected 2008

traffic conditions with the Center and other planned commercial and residential developments fully built out. The TIA also analyzed the impact of the Center's projected traffic upon the traffic conditions existing at the School during the peak morning and afternoon hours when students are being dropped off and picked up.

At the hearing, Mr. Stephenson was tendered by Petitioners as an expert in the field of traffic engineering and traffic impact analysis. Petitioners submitted into evidence the TIA prepared by Mr. Stephenson.

Additionally, Petitioners submitted into evidence nine photographs dated 19 December 2006 showing the traffic conditions along Sanders Road near the School between 7:48 and 7:52 a.m. and 2:35 and 2:39 p.m.; documentation of the School's forecasted reduced student population for Fall 2007; and Petitioners' Exhibit Notebook containing the aforementioned exhibits.

Sid Bowman and Cecile Montminy testified in opposition to Petitioners' request at the hearing. Mr. Bowman, a resident of Beau Rivage, a subdivision with a gated entry east of the Center property, submitted a petition with 300 signatures of persons opposing the Center. He also submitted pictures of traffic on Sanders Road near the School taken in September 2006. Both the petition and the photographs had been submitted to the Commission at the September 2006 hearing.

After the presentation of all the evidence, the Commission voted to deny Petitioners' request for a special use permit by a vote of four to one.

Discussion

On appeal, Petitioners contend that (1) Respondent's decision to deny the special use permit is not supported by competent, material, and substantial evidence and is arbitrary and capricious; (2) Respondent's arbitrary hearing time limits violated Petitioners' due process rights; and (3) Petitioners are entitled to the special use permit.

The Board is the finder of fact in its consideration of Petitioners' application for a special use permit. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 565 S.E.2d 9 (2002). As the finder of fact, the Board is required to

> follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. If *a prima facie* case is established, a denial of the permit then should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.
>
> . . . .
>
> Any decision of the [Board] has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Id. at 12, 565 S.E.2d at 16-17 (quotation marks and citations omitted).

Upon appeal from the Board to the superior court, the superior court acts as a court of appellate review. *Id.*, 356 N.C. 1, 565 S.E.2d 9. The superior court's scope of review includes:

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

Id. at 13, 565 S.E.2d at 17 (citation omitted). The standard of review applied by the superior court depends upon the type of error assigned. *De novo* review is appropriate if a petitioner contends the board's decision was based on an error of law. *Id.* If the error assigned is that a board's decision is not supported by the evidence or is arbitrary or capricious, the superior court must apply the whole record test. *Id.*

When applying *de novo* review,

> the superior court consider[s] the matter anew [] and freely substitut[es] its own judgment for the [Board's] judgment. When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the "whole record") in order to determine whether the [Board's] decision is supported by "substantial evidence." 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*.

Id. at 13-14, 565 S.E.2d at 17-18 (quotation marks and citations omitted). Additionally, the superior court "must set forth

sufficient information in its order to reveal the scope of review utilized and the application of that review." *Id.* at 13, 565 S.E.2d at 17 (quotation marks and citations omitted).

When this Court reviews a superior court's order affirming or reversing the zoning decision of a board of commissioners, we examine the order to "(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly." *Id.* at 14, 565 S.E.2d at 18 (quotation marks and citations omitted).

I.

Petitioners first contend that Respondent's decision to deny the special use permit is not supported by competent, material, and substantial evidence and that the decision is arbitrary and capricious. As the trial court's order specifically states that the court used the "whole record" test, our role is thus to determine if the superior court properly applied the "whole record" test in concluding that the Board's decision to deny Petitioners' application was based on competent, material, and substantial evidence. *Id.* at 13, 565 S.E.2d at 17.

Pursuant to N.C. Gen. Stat. § 153A-340 (2007), New Hanover County enacted a Zoning Ordinance which divided the county into various zoning districts. For each district the Ordinance includes a list of permitted uses and a list of special uses which are permitted only upon receipt of a special use permit. The owner of the property requesting the special use permit must submit an application to the New Hanover County Planning Department. New

Hanover County Zoning Ordinance § 71-1(2) (2006). The Planning Board must review the petition and may make recommendations to the Board of County Commissioners. New Hanover County Zoning Ordinance § 71-1(1) (2006). Upon receiving the recommendations of the Planning Board and holding a public hearing, the Board of County Commissioners may grant or deny the special use permit requested. New Hanover County Zoning Ordinance § 71-1(3) (2006). In granting a special use permit the Board shall find:

> (A) that the use will not materially endanger the public health or safety if located where proposed and approved;
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> (B) that the use meets all required conditions and specifications;
>
> (C) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and
>
> (D) that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the plan of development for New Hanover County.

Id. The Board must find that all of the above exist or the application must be denied.

In denying Petitioners' application for a special use permit, the Board found that the proposed Center did not satisfy subsections (A) and (D) of the above Ordinance. In finding that, inapposite to subsection (A), the Center "would materially endanger the public health or safety if [l]ocated where proposed and developed according to the plan as submitted and approved[,]" the Board stated the following reasons:

> A. Road improvements, which the Department of Transportation and County Planning Staff have determined are needed, at the intersection of Sanders Road, on which the proposed project would be located, and Carolina Beach Road, have not yet been installed.
>
> B. In the month of November 2006, between the hours of 7:30 and 8:30 AM, and 2:00 and 3:00 PM, a total of thirty-eight (38) traffic tickets were issued on Sanders Road, twenty-two (22) of which were for speeding in the Bellamy School zone. Bellamy School is a short distance from the subject site (this testimony was not rebutted).
>
> C. Petitioner's [sic] expert estimated that 1,016 trips per day would be added to Sanders Road if the use as proposed were to come to fruition.
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> D. Unsafe traffic patterns currently occur very near the subject site, as shown by [p]ictures provided by those in opposition to the project, which would be made worse by the subject property under current conditions.

Petitioners contend that "none of these findings are supported by competent, material[,] and substantial evidence." We disagree.

Petitioners' TIA analyzed the impact of the estimated Center traffic on the Intersection, the adjacent roadways, and the School during the morning hours of 7:00 to 9:00 and the afternoon hours of 4:30 to 6:30. Existing 2006 traffic conditions were analyzed to determine the current traffic volume and levels of service, and 2008 traffic conditions were also projected without the Center. The TIA then "estimated that the . . . [Center] will generate approximately 1,016 total new site trips (508 entering and 508 exiting) during an average 24-hour weekday period" based on an

enrollment of 204 day students and 90 after-school students.[1] As both the entrance to and the exit from the Center would be located on Sanders Road, Sanders Road would absorb every site trip generated by the Center. Accordingly, Petitioners' own TIA supported the Board's finding that "Petitioner's [sic] expert estimated that 1,016 trips per day would be added to Sanders Road if the use as proposed were to come to fruition."

Additionally, there are four developments which have been approved for construction adjacent to the proposed Center. Such developments will increase traffic on Sanders Road and at the Intersection. As part of the approval process for the developments, an exclusive left turn lane on the eastbound approach of Sanders Road at US 421 is required to be constructed. The addition of a second northbound exclusive left turn lane has been requested by the North Carolina Department of Transportation. Furthermore, according to Mr. Stephenson's testimony, the Department of Transportation is working on options for improving the School traffic situation. When projected 2008 traffic volumes are added to the estimated traffic generated by the Center and the adjacent developments, the TIA concluded that

> [t]he traffic generated by the [Center] is a relatively small proportion of the total traffic passing through the . . . [I]ntersection and will not degrade the level of service at this intersection to unacceptable conditions. The eastbound left

[1] The TIA estimated that only 45 of the 90 after-school students would generate additional trips because the other 45 after-school students would have siblings already at the daycare who needed to be picked up.

> turn lane required to be provided by the four adjacent developments included in this analysis will allow the . . . [I]ntersection to maintain an acceptable level of service under projected (2008) + site + adjacent development conditions.

Although the required left turn lane was included in the above analysis and necessary to the determination that the Intersection would maintain an acceptable level of service, as of the time of the Commission's denial of Petitioners' application, it had not yet been constructed. While Petitioners maintain that the road improvements "are what Respondent deemed necessary when it previously approved, conditioned upon such improvements, certain future commercial and residential developments" and that "[t]hose proceedings are not relevant to Petitioners' application[,]" the traffic created by the construction and operation of the Center and the approved adjacent developments would, according to the TIA, degrade the levels of service at the Intersection to unacceptable levels before and until the completion of the necessary left turn lane. While "[i]t is true that future improvements could eliminate the traffic congestion in the area . . . the [Board] is not bound to approve a proposed development because the present traffic problems may be solved at some point in the future." *Ghidorzi Constr., Inc. v. Chapel Hill*, 80 N.C. App. 438, 444, 342 S.E.2d 545, 549, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). Thus, Petitioners' TIA and testimony supports the Board's finding that "[r]oad improvements, which the Department of Transportation and County Planning Staff have determined are needed, at the

intersection of Sanders Road, on which the proposed project would be located, and Carolina Beach Road, have not yet been installed."

Finally, in analyzing "Bellamy School Traffic Issues," the TIA states:

> RKA observed the traffic patterns at the school during the AM peak period (7:00 – 8:00 AM) on Friday, December 1, 2006 and during the school PM peak period (2:00 – 3:00 PM) on Wednesday, November 29, 2006.
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> During the school AM peak period, off-site queuing did not occur at the school site. Vehicles traveling from US 421 to the school site had to turn left into the school and wait for a gap in opposing eastbound Sanders Road traffic. As a result, through vehicles temporarily queued on westbound Sanders Road waiting on the left turning vehicle. At the longest point, the queuing traffic was eleven vehicles long (approximately 225 feet). Those queuing vehicles are not expected to significantly impact the traffic operations at the proposed daycare site.
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> During the school PM peak period, off-site queuing was observed to the west of the Bellamy Elementary School . . . . Off-site queuing traffic formed a queue on the right shoulder (unpaved) of eastbound Sanders Road that included sixteen cars (approximately 400 feet) at its worst point queuing to the west of the school entrance. Vehicles traveling from US 421 and desiring to enter the waiting queue were observed to proceed west on Sanders Road and execute a U-turn maneuver after passing the end of the queue. These queuing vehicles are not expected to significantly impact the traffic operations at the proposed daycare site.

Furthermore, Mr. Bowman showed photographs of a pick-up truck making a U-turn on Sanders Road, cars queued up on Sanders Road waiting to turn left into the School, and cars queued up on the right unpaved shoulder of Sanders Road waiting to turn right into

the School, as corroborated by the findings of the TIA. Mr. Bowman testified that these photos, which were also introduced at the September 2006 hearing, were taken on 19 September 2006 when school was in session, and that the traffic conditions had not changed since they were taken.

While the TIA concludes that the queuing vehicles observed at both the morning and afternoon peak school hours "are not expected to significantly impact the traffic operations at the proposed daycare site[,]" the TIA does not conclude that the traffic estimated to be generated by the Center will not significantly impact the traffic operation at the School, which is the main concern of those in opposition to the Center. Thus, Petitioners' TIA, along with Mr. Bowman's testimony and photographs, supports the Board's finding that "[u]nsafe traffic patterns currently occur very near the subject site, as shown by [p]ictures provided by those in opposition to the project, which would be made worse by the subject property under current conditions."

Accordingly, we conclude that the trial court correctly determined that the Board's denial of Petitioners' special use permit on the basis that the Center "would materially endanger the public health or safety if [l]ocated where proposed and developed according to the plan as submitted and approved[,]" was based on findings which are supported by competent, material, and substantial evidence appearing in the record. Having so concluded, we need not consider whether the Board's finding that, inapposite to subsection (D), "the location and character of the [Center] if

developed according to the plan as submitted and approved will not be in harmony with the area in which it is to be located and in general conformity with the plan of development for New Hanover County" was supported by sufficient evidence. Furthermore, based on this conclusion, we reject Petitioners' argument that they were entitled to the special use permit. The decision of the superior court affirming the Commission's denial of Petitioners' application for a special use permit is affirmed.

II.

Next, Petitioners contend that arbitrary time limits imposed on the parties by Respondent at the hearing violated Petitioners' due process rights. As Petitioners are contending that the Board's action was based on an error of law, *de novo* review is appropriate. *Mann Media,* 356 N.C. 1, 565 S.E.2d 9.

When conducting a hearing on a special use permit application, the board of county commissioners must follow quasi-judicial procedures. N.C. Gen. Stat. § 153A-340(c1) (2007). Thus, while a board of commissioners is not bound by formal rules of evidence or civil procedure, when a board of county commissioners "conducts a quasi-judicial hearing to determine facts prerequisite to issuance of a permit, [its procedures] can dispense with no essential element of a fair trial." *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582, 594, 649 S.E.2d 458, 468 (2007) (quotation marks and citations omitted). Essential elements of a fair trial include:

> (1) The party whose rights are being determined must be given the opportunity to

> offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and (3) crucial findings of fact which are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" cannot stand.

Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974) (citation omitted). While a party "must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal[,]" *id.*, North Carolina appellate courts have upheld time limitations on a party's right to do so.

In *Freeland v. Orange Cty.*, 273 N.C. 452, 160 S.E.2d 282 (1968), plaintiffs alleged that the county commissioners failed to comply with statutory procedures for conducting a public hearing regarding the adoption of a zoning ordinance where time limitations placed on the presentation of evidence prohibited approximately 200 persons, including some of the plaintiffs, from being heard at the hearing. Pursuant to Chapter 153 of the North Carolina General Statutes in effect at the time, "[o]n receipt of a zoning plan from the county planning board, the board of commissioners shall hold a public hearing thereon, after which it may adopt the zoning ordinance and map as recommended, adopt it with modifications, or reject it." *Id.* at 455, 160 S.E.2d at 285 (quoting N.C. Gen. Stat. § 153-266.15).[2] "Whenever . . . a public hearing is required, all

[2] Chapter 153 became effective 16 June 1959 and was repealed by Session Laws 1973, c. 822, which enacted new Chapter 153A,

parties in interest and other citizens shall be given an opportunity to be heard." *Id.* at 455-56, 160 S.E.2d at 285 (quoting N.C. Gen. Stat. § 153-266.16).[3]

Approximately 500 people attended the public hearing on the proposed zoning ordinance. At the beginning of the hearing, the acting chairman announced that one hour would be allocated to both the proponents and the opponents of the ordinance, and that at the close of said period, an additional 15 minutes would be allocated to each side for rebuttal. At the hearing, 16 proponents spoke in favor of the adoption of the ordinance and 15 opponents spoke in opposition to the adoption of the ordinance, with each side using its allotted time.

Counties. The corresponding sections of Chapter 153A provide in pertinent part,

> [t]he board of commissioners shall not hold the public hearing required by [N.C. Gen. Stat. §] 153A-323 or take action until it has received a recommendation regarding the ordinance from the planning board. Following its required public hearing, the board of commissioners may refer the ordinance back to the planning board for any further recommendations that the board may wish to make prior to final action by the board in adopting, modifying and adopting, or rejecting the ordinance.

N.C. Gen. Stat. § 153A-344(a) (2007). N.C. Gen. Stat. § 153A-323 provides in pertinent part, "[b]efore adopting, amending, or repealing any ordinance authorized by this Article . . . the board of commissioners shall hold a public hearing on the ordinance or amendment." N.C. Gen. Stat. § 153A-323(a) (2007).

[3] Chapter 153 became effective 16 June 1959 and was repealed by Session Laws 1973, c. 822, which enacted new Chapter 153A, *Counties*. No corresponding section allowing that "all parties in interest and other citizens shall be given an opportunity to be heard" was enacted in Chapter 153A.

This Court determined that the purpose of the public hearing requirement is to allow those in favor of and in opposition to the adoption of an ordinance to have a fair opportunity to present their respective views. However, "it is permissible for the county commissioners to prescribe an orderly procedure" for such hearing. *Id.* at 456-57, 160 S.E.2d at 286. In concluding that the hearing was conducted in substantial compliance with the statutory mandate, this Court explained:

> The orderly procedure adopted afforded equal time to opponents and proponents. Fifteen persons spoke in opposition to the ordinance and sixteen persons spoke in favor of it. . . . Nothing in the record suggests the opponents failed to present every fact and argument then and now constituting the basis for their opposition.
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> The contention that the county commissioners were required to hear all persons in attendance without limitation as to number and time is untenable. The opponents as well as the proponents were at liberty to select those whom they regarded as their best advocates to speak for them.

Id. at 457, 160 S.E.2d at 286.

In *Cook*, this Court upheld the act of placing time limits on testimony at a public hearing, but determined that the limits imposed in that case did not afford petitioners due process. Section 101(b) of the Union County zoning ordinance provided that all persons interested in an application for a special use permit "shall be given an opportunity to present evidence and arguments and ask questions of persons who testify." *Cook*, 185 N.C. App. at 594, 649 S.E.2d at 468 (quotation marks omitted). However, Section 101(c) provided that the Board of Adjustment ("BOA") "may place

reasonable and equitable limitations on the presentation of evidence and arguments and the cross-examination of witnesses so that the matter at issue may be heard and decided without undue delay." *Id.* (quotation marks omitted). This Court concluded that "[o]n their face, these procedures comport with [North Carolina statute] and our case law." *Id.*

At several public hearing sessions, petitioners presented evidence in opposition to respondent's special use permit application based on respondent's site plan. At a subsequent hearing on 4 October 2004, the chairman disallowed any further evidence from petitioners but allowed respondent to present a substantially revised site plan. At yet another subsequent hearing, respondent presented a further revised site plan and the BOA allowed respondent's counsel to explain the revised site plan and answer questions regarding the revised plans. This Court concluded that "[t]erminating the rights of the petitioners to present evidence and cross-examine on 4 October 2004 was not justified under Section 101(c) as a 'reasonable and equitable' limitation on the presentation of evidence" as "[t]he evidence which petitioners would have sought to present based on the revised site plan would not have been cumulative or redundant, as it would be based on a substantively different revised site plan." *Id.* at 596, 649 S.E.2d at 469.

In this case, Petitioners and Respondent were each allocated 15 minutes to present their cases-in-chief and five minutes for

rebuttal.[4] As in both *Freeland* and *Cook*, the Commission was permitted to prescribe an orderly procedure for conducting the hearing by placing reasonable and equitable time limitations on the presentation of evidence and arguments and the cross-examination of witnesses. As in *Freeland*, the procedure adopted in this case afforded equal time to Petitioners and Respondent. Moreover, unlike in *Cook* where petitioners sought to present evidence in response to respondent's revised site plan, here Petitioners and Respondent had been granted the full hearing time on three separate occasions to present evidence and examine witnesses on essentially the same site plan. As in *Freeland*, "[n]othing in the record suggests [Petitioners] failed to present every fact and argument then and now constituting the basis for their [application]." *Freeland,* 273 N.C. at 457, 160 S.E.2d at 286. Accordingly, we agree with the superior court's conclusion that the "[d]ue process rights of the Petitioners were protected" and thus overrule Petitioners' argument.

For the reasons stated above, the order of the superior court is

AFFIRMED.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).

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[4] The record reveals that the parties were aware of the time limitations prior to the start of the January 2007 hearing. Respondent asserts that the time limits could not have caught Petitioners by surprise as they "had been through the exact same process . . . twice before."