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NO. COA08-390

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

EVERGREEN CONSTRUCTION COMPANY, INC.,

Petitioner,

v. Lenoir County
No. 07 CVS 1023

CITY OF KINSTON, a North Carolina municipality and the CITY OF KINSTON CITY COUNCIL,

Respondents.

Court of Appeals

Slip Opinion

Appeal by petitioner from order entered 11 January 2008 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 23 September 2008.

The Brough Law Firm, by Robert E. Hornik, Jr., for petitioner-appellant, cross-appellee.

Rose Rand Attorneys, P.A., by James P. Cauley, III, for respondent-appellees, cross-appellants.

BRYANT, Judge.

Evergreen Construction Company, Inc. (Evergreen), appeals from an order affirming the decision of the City of Kinston City Council (City) to deny Evergreen's application for a conditional use permit (permit). We reverse and remand.

In March of 2007, Evergreen submitted an application for a permit to subdivide a 19.074 acre tract of land that Evergreen was

under contract to purchase. The property was zoned RA-6 and RA-8 and Evergreen intended to build single family and multi-family homes on the property. On 16 April 2007, the City of Kinston Planning Board (Planning Board) and the City Council held a joint hearing on Evergreen's application. Several residents expressed concern that Evergreen's proposed project would, among other things, increase drainage problems, increase traffic, and decrease property values. On 30 April 2007, the Planning Board conducted another hearing and suggested Evergreen revise its plans to address the expressed concerns. Evergreen agreed with the Planning Board's suggested revisions and made changes to the project accordingly.

On 29 May 2007, the Planning Board voted to recommend to the City that it should grant Evergreen's permit application on condition that Evergreen made the suggested changes. On 18 June 2007, the City held a public hearing to review Evergreen's permit application and voted unanimously to deny Evergreen's application. Evergreen filed a "Petition for Certiorari" with the superior court. On 11 January 2008, the superior court affirmed the City's decision to deny Evergreen's permit application. Evergreen appeals.

On appeal, Evergreen brings forth the following arguments: (I) whether the trial court erred by finding the City's decision to deny the permit was supported by substantial, competent evidence; (II) whether the trial court erred by concluding the City's decision was supported by substantial, competent evidence; and

(III) whether the trial court erred by concluding the City's decision was not affected by errors of law or prejudice.

Standard of Review

This Court reviews an order affirming or denying an application for a conditional use permit to (1) determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review. *Cumulus Broad., LLC v. Hoke County Bd. of Commr's*, 180 N.C. App. 424, 427, 638 S.E.2d 12, 15 (2006). If a party alleges an error of law in the Council's decision, we must examine the record *de novo* and consider the matter anew. *Id.* However, when the party alleges that the decision is arbitrary and capricious or unsupported by substantial competent evidence, the court conducts a whole record review. *Id.*

Under the "whole record" test, the reviewing court must examine all competent evidence which comprises the whole record in order to determine whether there is substantial evidence to support the findings of facts and conclusions of law. *Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528 (2000). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion and is more than a scintilla or a permissible inference." *Id.*

An applicant makes a *prima facie* showing of entitlement to a conditional use permit when the applicant "produces competent, material, and substantial evidence of compliance with all ordinance requirements[.]" *SBA, Inc. v. City of Asheville City Council*, 141

N.C. App. 19, 27, 539 S.E.2d 18, 22 (2000). "Once an applicant makes this showing, the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit." *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002). "Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record." *Cumulus Broadcasting*, 180 N.C. App. at 427, 638 S.E.2d at 15. In *Howard*, this Court discussed the type of evidence a city council may rely upon to decide whether to issue a conditional use permit:

> A city council may not deny a conditional use permit in their unguided discretion or because, in their view, it would adversely affect the public interest. [A] city council's denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. Speculative assertions, mere expression of opinion, and generalized fears about the possible effects of granting a permit are insufficient to support the findings of a quasi judicial body. In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

Id. at 246, 558 S.E.2d at 227 (internal citations and quotations omitted).

"[S]peculative assertions or mere expression of opinion about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body." *Sun Suites*, 139 N.C. App. at 276, 533 S.E.2d at 530. "Further, the expression of

generalized fears does not constitute a competent basis for denial of a permit." *Id.* (quotations omitted).

I & II

Evergreen argues the trial court erred by affirming the City's denial of Evergreen's permit application because the decision was not supported by substantial competent evidence in the record. We agree.

Because Evergreen challenges whether the City's decision was supported by substantial competent evidence, the trial court was required to conduct a whole record review. The order from which Evergreen appeals indicates the trial court applied the appropriate standard of review and conducted a whole record review. We must now determine whether substantial evidence supported the City's decision and whether the evidence was competent, material, and substantial and was not "anecdotal, conclusory, and without a demonstrated factual basis." *Cumulus*, 180 N.C. App. at 429, 638 S.E.2d at 16.

The City of Kinston Unified Development Ordinance (UDO), Section 54 provides that conditional use permits *shall* be issued unless the council

> concludes, based upon the information submitted at the hearing, that:
>
> (1) The requested permit is not within its jurisdiction according to the Table of Permissible Uses; or
>
> (2) The application is incomplete; or
>
> (3) If completed as proposed in the application, the development will not comply

> with one (1) or more requirements of this chapter . . . .

The UDO further provides:

> (d) Even if the permit-issuing board finds that the application complies with all other provisions of this chapter, it may still deny the permit if it concludes, based upon the information submitted at the hearing, that if completed as proposed, the development:
>
> > (1) Will materially endanger the public health or safety; or
> >
> > (2) Will substantially injure the value of adjoining or abutting property; or
> >
> > (3) Will not be in harmony with existing development and uses within the area in which it is to be located; or
> >
> > (4) Will not be in general conformity with the land use plan, thoroughfare plan, or other plan officially adopted by the council.

The City found Evergreen's project would endanger the public health and safety; substantially injure the value of neighboring and abutting property; not be in harmony with existing development and uses; and would not conform to the land use plan, thoroughfare plan, or other plan officially adopted by the council. The City found Evergreen failed to meet the general conditions precedent for a conditional use permit and denied the application based upon UDO Section 54(d)(1)-(3).

The trial court affirmed the portion of the City's decision which concluded the proposed project would substantially injure the value of the adjoining and abutting property and would endanger the

public health and safety. However, the trial court concluded the City's findings that the project was not in harmony with existing development and uses and would not conform to land use, thoroughfare, or other plans were not supported by competent, material and substantial evidence in the record. We must determine whether the whole record supports the City's conclusions that were affirmed by the trial court.

Property Values

The City denied Evergreen's permit application because Evergreen's proposed project would "substantially injure the values of adjoining or abutting properties." The City based its decision to deny the permit on the testimony of "[n]eighboring residents with considerable real estate and/or appraisal experience." The City pointed to George Mewborn's testimony during the 16 April 2007 City Council meeting where he expressed a concern that the proposed lots were "roughly half the size of existing lots in the area" and "there [was] no way for [the] development not to negatively impact property values in the area." However, Tommy Lee, the Director of Planning, Inspections, and Code Enforcement for the City noted in a 25 April 2007 memorandum to the City Council that "[n]o evidence was presented to support" Mr. Mewborn's opinion. Further, in a 24 May 2007 memorandum to the City Council, Lee noted that Evergreen addressed the objection to the lot sizes by reducing the number of lots from 62 lots to 51 lots.

The City also relied on the testimony of Jim Hartis who, having appraised commercial and residential properties in the area,

was certain property values would fall immediately in the vicinity of the project and surrounding areas. Hartis had expressed concerns during the 16 April 2007 City Council meeting that Kinston needed to "rid itself of the title of having the most public supplemented housing of any city in the state," and in a letter dated 29 April 2007 that it would be "a terrible thing to do" to "place people needing to earn only $15,000 per year to buy one of [the proposed] houses." Hartis offered no evidence to support his opinion that property values would fall substantially if the permit was granted.

Finally, the City relied on the testimony of Tom Jarman who was "very concerned" how the project would impact him. Jarman offered no substantive evidence to support his concern that the project would "knock him off his feet." The only physical evidence submitted in support of the opponents' contention that Evergreen's proposed project would have a substantial negative effect on adjoining property values was a 1999 article studying the impact of Section 8 housing in Baltimore County, Maryland. However, Evergreen's proposed project was not to build Section 8 Housing, nor was it to be located in a county substantially similar to Baltimore County.

Having reviewed the evidence before the City regarding the effect of Evergreen's proposed project on neighboring property values, we conclude the City's decision that the project would "substantially injure the values of adjoining or abutting properties" is not supported by substantial evidence in the record.

Consequently, the City's decision to deny Evergreen's application can not be upheld on this basis.

Public Health & Safety

We next consider whether competent evidence was submitted to support the City's decision to deny Evergreen's application on the basis that the project would "materially endanger the public health and safety."

During the hearing, two speakers touched on the issue of public health and safety. Larry Benton testified he had experienced water drainage issues firsthand because of flooding in his workshop located to the rear of his house. He felt his situation could "only get worse" if there was construction on the proposed site. Attorney Dal Wooten submitted a memo challenging Evergreen's permit application and contended that the project would harm the public welfare because it did not address drainage issues. Wooten also contended the developers had proposed detention ponds in other developments but had eliminated the detention ponds or reduced the size of the ponds. Wooten did not offer any evidence that the reduction in size or elimination of the detention ponds in the other developments had caused drainage issues.

In contrast to the personal opinions submitted by the hearing attendees, in an 25 April 2007 Memorandum, Director Lee noted drainage issues were "serious" for the proposed parcel as well as undeveloped areas surrounding the parcel and that the proposed development "should relieve some of the drainage problems along the Hodges Road properties." Director Lee also noted in the 24 May

2007 Memorandum to the City Council that Evergreen had addressed the drainage issue "to the extent [it could] control." Essentially, the testimony presented during the hearing only confirmed Director Lee's indication that drainage problems existed on the property and surrounding properties. None of the testimony rebutted Director Lee's suggestion that Evergreen's proposed project would actually alleviate some of the drainage issues instead of adding to the problem; neither was there evidence presented indicating the project would increase drainage issues.

Testimony was also presented that the proposed development would endanger public health and safety because of an increase in traffic flow on neighboring streets. Elaine and Del Nix submitted a letter stating additional traffic would increase the chances of traffic accidents and that they had experienced several "near misses" on a daily basis. Also, Attorney Wooten estimated an increase in traffic of up to 615 trips per day based on calculations derived from Transportation Modeling Standards. However, Director Lee indicated in the 25 April 2007 Memorandum to the Planning Board that "increased traffic generation was not a significant concern when traffic engineering standards [were] considered." Because of "concerns," Director Lee suggested changes to the proposed project, which Evergreen accepted and implemented into the revised project as indicated by the 29 May 2007 planning board meeting. In the 12 June 2007 Memorandum to the Mayor and City Council in which the Planing Board recommended approval of Evergreen's request, Director Lee indicated that the changes would

considerably lessen "the overall impact [of traffic] on Hodges [Road]."

Having reviewed the evidence before the City regarding the effect of Evergreen's proposed project on public health and safety, we conclude the City's decision that the project would "materially endanger the public health and safety" is not supported by substantial evidence in the record. Consequently, the City's decision to deny Evergreen's application can not be upheld on that basis.

The City cites *Howard* as support for its contention that substantial evidence supported its decision to deny Evergreen's application. 148 N.C. App. at 246, 558 S.E.2d at 227. However, the present case is distinguishable from *Howard* where the city denied the petitioner's conditional use permit application because a significant increase in traffic posed a danger to the public health and safety. In *Howard*, the city based its decision on the testimony of a member of the City Planning Board who concluded the proposed project would significantly increase vehicular traffic. *Id.* In conjunction with the planning Board's conclusion, the City also relied on the testimony of a resident who testified about the adverse affect the proposed project would have on safety and traffic congestion.

In the instant case, residents testified and expressed concern over the increase of traffic. However, unlike *Howard*, the Planning Board in this case recommended approving the application and noted that Evergreen had adequately addressed the concerns about an

increase in traffic expressed during the public hearings by revising the access streets. As stated by our Supreme Court in *Humble Oil & Refining Co. v. Board of Aldermen of Chapel Hill*, "[a]n increase in traffic does not necessarily mean an intensification of traffic congestion or a traffic hazard." *Id.*, 284 N.C. 458, 469, 202 S.E.2d 129, 136 (1974).

Like the instant case, this Court in *Sun Suites* reversed an order of the trial court affirming the Town of Garner's decision to deny the petitioners application for a conditional use permit. The Town denied the application on the basis that the permit would substantially injure the value of adjoining property and materially endanger the public health and safety. *Sun Suites*, 139 N.C. App. at 271, 533 S.E.2d at 527. This Court conducted a whole record review and determined that the testimony of neighboring residents who opposed the permit was "speculative," only "relat[ed] their generalized fears and impressions that traffic and crime would be affected by the project," and was insufficient to support the Town's decision. *Id.* at 277, 533 S.E.2d at 530.

As in *Sun Suites*, the trial court's findings in the instant case that there was substantial, competent evidence to support the City's decision to deny the permit is unsupported by the record. The testimony in opposition to granting the conditional use permit was from witnesses relying solely on their personal knowledge and observations. None of the testimony rebutted Evergreen's *prima facie* showing of an entitlement to the permit. Without substantial evidence in the record to uphold either of the City's basis for

denying Evergreen’s permit application, the permit should have been granted. We reverse the trial court’s decision and remand for an order to be entered in accordance with this opinion.

Because of our holding, we need not address Evergreen’s remaining assignment of error.

Reversed and remanded.

Judges WYNN and ARROWOOD concur.

Report per Rule 30(e).