NO. COA08-717

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

JOHN WILES, JAMES R. WILES,
and wife, IRENE N. WILES,
and Wiles Family Trust,

Petitioners,

v. Cabarrus County
No. 07 CVS 1969

THE CITY OF CONCORD ZONING
BOARD OF ADJUSTMENT,

Respondent.

Appeal by petitioners from order dated 1 April 2008 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 12 January 2009.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay, for petitioner-appellants.

The Brough Law Firm, by G. Nicholas Herman and Albert M. Benshoff, for respondent-appellee.

BRYANT, Judge.

John Wiles, James R. Wiles, Irene N. Wiles, and the Wiles Family Trust (petitioners) appeal from an order entered 1 April 2008 affirming the decision of the City of Concord Zoning Board of Adjustment. We affirm.

Facts

Petitioners are owners of a lot located at 3284 Eva Drive in Concord, North Carolina (the Wiles property). Additionally, John Wiles (Wiles) is the lessee of a lot owned by Eugene Otis Ennis, Jr. (Ennis) located at 3313 Weeping Willow Drive, Concord, North Carolina (the Ennis property). In 1996, the City of Concord annexed both lots and zoned the lots as residential. In 2000, the City adopted the Unified Development Ordinance (UDO). Under the UDO, both lots were classified as Residential Medium Density 2 (RM-2) which prohibits commercial use of the lots.

In January 2007, the Division of Code Enforcement determined that the Wiles and Ennis properties were in code violation and ordered the removal of approximately 71 vehicles and other items from the properties. City Code Enforcement Officers had determined that the properties were being operated as a commercial junk yard for the storage of junk cars, and various other items. City Code Enforcement Officers also determined that both properties were in violation of section 14.1.3.1 of the UDO which prohibits a preexisting, nonconforming use to be expanded, enlarged, or changed to another nonconforming use without prior approval from the City and in violation of 7.6.1 of the UDO prohibiting junkyards.

On 16 February 2007, petitioners appealed the enforcement action to the City's Zoning Board of Adjustment (ZBOA). As to the Wiles property, petitioners contended that the business was grandfathered from the time the property was annexed by the city. Petitioners contended they had not expanded, enlarged, or changed the use of the property since the annexation in 2005 and that the

current use did not violate the provisions of 14.1.3.1 of the UDO.

Wiles testified at the hearing before the ZBOA that for over 40 years he had used his property for repair work on cars, trucks, and bicycles, as well as an excavation and hauling site. He also testified that in 1995, when the City annexed the property, there were approximately 18 cars on the property. In 1998, 1999, and 2003, Wiles removed several junk vehicles from the property by order of the Code Enforcement Office. At the date of the hearing, Wiles testified he had approximately 59 cars on the property.

Wiles also testified that in 2000, the year in which the City adopted the UDO, he attempted to document the nature of his business by obtaining a letter from the Zoning Service Manager, Barry Mosley (Mosley). On 14 April 2000, Mosely submitted a letter which stated in pertinent part:

> This letter is written to verify that on April 14, 2000 we met to discuss the status of the business located at 163 Eva Drive. This letter does not grant any type of approval for expansion, change in use, resumption, etc., however, it does prove that documents were provided showing that a business was established in the County prior to being annexed into the City of Concord.
>
> You provided tax records dated from 1992 through 1998 and utility records showing a deposit in 1990 and utility billing to the present. According to your records a building permit was obtained from Cabarrus County in 1987 and an Excavation and Hauling business was established around 1989-90. The property may have been annexed into the City around 1995.

Wiles contended that the letter inaccurately described the nature of his business located on the property. However, Wiles had not obtained a business license to operate any business on the property. Wiles also did not submit any business records, tax returns, or other records which established the nature of his business at the time of the annexation.

Several neighbors testified during the ZBOA hearing. Angie Hensley testified on behalf of Wiles. Ms. Hensley stated she had known Mr. Wiles for seven and a half years and that he had always worked on cars. Lanny Lancaster testified that "no true business ha[d] ever been operated" on the property. Kay Honeycutt testified she had "not seen any activity, commercial or otherwise, occurring on the property." Sherry McMillan testified she grew up in the same neighborhood and moved away, but had returned to the neighborhood and lived in the area for the past four years. She stated she had "never seen anybody doing anything out there."

At the conclusion of the hearing, the ZBOA made findings of fact and entered an order requiring petitioners to comply with the code enforcement order by removing the various items and tagged vehicles by or before 30 June 2007. Petitioners appealed the ZBOA's decision by writ of certiorari to the Cabarrus County Superior Court. On 1 April 2008, the Cabarrus County Superior Court entered an order affirming the decision of the ZBOA. Petitioners appeal.

On appeal, petitioners present several arguments which can be summarized as follows: (I) the trial court erred in affirming the ZBOA's decision because the decision was not supported by competent evidence in the record; and (II) because the ZBOA failed to included photographs and written statements submitted by petitioner in the record submitted to the superior court, the case should be remanded.

I

Petitioners argue the ZBOA's findings of fact were not supported by competent, substantial, and material evidence in the record. We disagree.

"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." *Harding v. Bd. of Adjust. of Davie Cty.*, 170 N.C. App. 392, 395, 612 S.E.2d 431, 434 (2005) (internal quotations omitted). "The reviewing court applies the 'whole record' test when the petitioner alleges that the decision was not supported by substantial evidence or was arbitrary and capricious." *Id.* "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." *Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528 (2000) (internal citations and quotations omitted). Here, the trial court applied the whole

record test. Thus, we are left to determine whether it did so properly.

"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." *Harding*, 170 N.C. App. at 396, 612 S.E.2d at 435 (quotations omitted). The decision of a board of adjustment, if supported by substantial evidence, will not be overturned unless is it shown to be arbitrary and capricious.

Petitioners challenge the following finding of the ZBOA:

> (5) Storage of junk vehicles constitutes a change of the Nonconforming Use of an Excavation and Hauling business in existence at the time of annexation. Such change in use would require a Certificate of Nonconformity Adjustment and said Certificate could only be issued if the proposed use more closely approximates the permitted uses in the zoning district in both scale and intensity. The storage of junk vehicles and other items, defined as debris such as tires, bathtubs lawnmowers, pipes, etc., is both a change in use and an increase in the scale and intensity of the property. Such a use does not "more closely approximate" the permitted residential uses of the zoning district.

Petioners also challenge the ZBOA's conclusions that:

> (1) The Code Enforcement Officer was indeed authorized to order the removal of the subject vehicles and other miscellaneous items.
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> . . .
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> (3) The letter issued to Theresa Wiser by Barry Mosely on or about April 14, 2000, did not approve the storage of junk vehicles or any other items and specifically did not "grant any approval for the expansion, change

> in use, resumption, etc.," of the then existing Excavation and Hauling business.
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> . . .
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> (6) No "grandfather" status was conferred for any commercial use of this specific property except that of an Excavation and Hauling business and only to the extent that said business been continuously in operation since the annexation of the property with no lapse of business of 180 days or more.
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> (7) It is not disputed that the expanded and changed use of the property includes vehicles located behind the subject property, on the Ennis property, as of January 24, 2007, on the Ennis property [sic]. Pursuant to City Code section 30-76, both the property owners, Wiles Trust and Mr. Ennis and the apparent owner of the vehicles, Mr. Wiles, were served with notice of the code enforcement action. Mr. Ennis was served as the owner of the property where the vehicles were located. Mr. Wiles was served as the apparent owner of the vehicles.

Having reviewed the whole record, we conclude the ZBOA's findings of fact were supported by competent evidence. At the time the property was annexed, there were approximately 18 vehicles located on the property. The number of vehicles located on the property had increased to approximately 79 vehicles at the time the code enforcement order was issued. The only evidence of a business in existence at the time the property was annexed was an excavation and hauling business. According to the letter issued by Mosely "grandfathering" the business on the Wiles property, business records were submitted that indicated an excavation and hauling business existed and that any vehicles repaired on the property pertained to the business.

Additionally, the testimony of the surrounding neighbors supports the ZBOA's findings: neighbors testified that the number of vehicles continued to increase since the property was annexed in 1995; neighbors also testified that despite having lived in the area for a number of years, they had not seen any type of business operated on the property. Further, although Wiles testified he had operated a repair business as well as an excavation and hauling business, he did not present any evidence such as tax records or a business license to support his contention.

Assuming arguendo a repair business was in existence at the time of the annexation, and had been grandfathered in by the Mosely letter of 14 April 2000, there was sufficient, competent evidence to support the ZBOA's finding that Wiles had violated UDO section 14.1.3.1 because of an "increase in scale and intensity of use of the property." The evidence indicated the number of vehicles stored on the property had increased over the years from 18 vehicles to over 70 vehicles.

The ZBOA's conclusions of law were supported by its findings of fact. The Mosely letter indicated the property was used for an excavation and hauling business. No testimony other than that given by Wiles indicated the property had been used for a repair business. Although differing evidence was presented, we must only determine whether the board's decision was supported by the evidence. *See Harding*, 170 N.C. App. at 396, 612 S.E.2d at 435 (court may not substitute its judgment between two conflicting views if evidence supports board's conclusion). We conclude the

board's findings were supported by competent evidence in the record and its conclusions of law were supported by the findings of fact. This assignment of error is overruled.

II

Petitioners argue this matter should be remanded because the ZBOA failed to include in the record materials that Wiles presented to the board during the hearing. However, petitioners have failed to cite any authority in support of their argument. Therefore, petitioners have failed to comply with N.C. R. App. P. 28(b)(6) (2007), and their assignment of error has been waived.

For the foregoing reasons, the order of the trial court is affirmed.

AFFIRMED

Chief Judge MARTIN and Judge BEASLEY concur.

Report per Rule 30(e).