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NO. COA10-3

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

HARBOR BAPTIST CHURCH, a North
Carolina non-profit corporation,

Petitioner/Plaintiff,

v.

Mecklenburg County
No. 09 CVS 5598

CITY OF CHARLOTTE, a North Carolina
body politic and corporate, CITY OF
CHARLOTTE ZONING BOARD OF
ADJUSTMENT, an agency of the City of
Charlotte, and THE CENTER FOR
COMMUNITY TRANSITIONS, INC., a
North Carolina non-profit corporation,

Respondents/Defendants.

Appeal by plaintiff from judgment entered 5 October 2009 by
Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard
in the Court of Appeals 24 May 2010.

Kenneth T. Davies for plaintiff.

*Assistant City Attorney Chris Clare and Senior City Attorney
Terrie Hagler-Gray for defendants City of Charlotte and City
of Charlotte Zoning Board of Adjustment.*

*Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot, for
defendant The Center for Community Transitions.*

ELMORE, Judge.

At issue is the Mecklenburg County Superior Court's final
judgment affirming the City of Charlotte Zoning Board of

Adjustment's (ZBA) granting of a zoning variance to the Center for Community Transitions (CCT) for placement of a halfway house. Plaintiff Harbor Baptist Church's (Harbor Baptist) petition for review in the nature of certiorari was dismissed.

Plaintiff's first argument is that the trial court erred by failing to rule upon allegations of impermissible conflict on the part of ZBA, specifically member Jeffrey Davis. Plaintiff also argues that the trial court erred by affirming the decision because the findings of fact and conclusions of law are not supported by competent evidence. We disagree with plaintiff's assertions and affirm the decision of the trial court.

CCT bought a parcel of property situated between Harbor Baptist and the Pecan Grove motor home park (Pecan Grove) for the location of a new halfway house for women. CCT operates a similar facility in another part of Charlotte and purchased this parcel to provide a larger space. The parcel in question met all requirements as laid out by the Charlotte zoning classifications: it was not zoned residential, it was more than two acres in size, and it was not adjacent to any property that was zoned as residential.

Pecan Grove began its operation before the neighborhood in question had been zoned, and it has since been zoned I-2 for industrial use. However, because the park was in existence at the time of zoning, its non-conformity to zoning has been allowed to continue.

Upon purchase, CCT realized that the existing building on the property was less than 100 feet from structures in the mobile home park in violation of Charlotte Code § 9.503(9)(b)(i), which requires buildings for jails and prisons (including halfway houses) to be at least 100 feet from "the nearest residentially zoned or residentially used property." Charlotte Code § 9.503(9)(b)(I) (2010).¹ The current building on the property is only forty-two feet from the mobile home park property.

CCT filed an application with ZBA on 23 December 2008 requesting a variance of fifty-eight feet from the mobile home park. Notice of CCT's application was mailed to neighboring and otherwise affected property owners in January 2009, and the hearing was held 27 January 2009. Several members of plaintiff's congregation attended the hearing and voiced concerns about the granting of the variance. However, most of plaintiff's concerns were related to not wanting the halfway house to be in the adjacent property rather than factual reasons why the variance should not be granted.

Before the ZBA hearing, Vice Chairman Jeffrey Davis informed the Board that he had engaged in *ex parte* communications with one of CCT's board members, Jay Ashendorf, who works with Mr. Davis. Mr. Davis told the board the nature of the discussions, and ZBA asked if there were any objections to Mr. Davis continuing in his role on the board for the hearing. After hearing an objection from

¹ Charlotte Code § 9.503 has not been amended since the filing of plaintiff's complaint.

the crowd, ZBA's members discussed the issue and decided that Mr. Davis did not need to recuse himself from ZBA during the hearing. After hearing from CCT and members of Harbor Baptist, ZBA voted to grant CCT's request for a variance on 16 February 2009. On 10 March 2009, Harbor Baptist filed its petition for review in the nature of certiorari as well as a complaint for declaratory judgment that alleged that ZBA's decision to grant the zoning variance violated Harbor Baptist's procedural due process rights. CCT filed its response on 30 April 2009, and, with co-respondant City of Charlotte, filed a motion to dismiss pursuant to Rule 12(b)(6) Harbor Baptist's claim for declaratory judgment on 20 May 2009. Judge W. Robert Bell issued a writ of certiorari on 8 June 2009, and CCT filed its motion for summary judgment on 11 July 2009.

Judge Bell dismissed Harbor Baptist's declaratory judgment claim, but remanded the matter back to ZBA, stating that the findings of fact from the 16 February 2009 order were "inadequate to permit judicial review," and that ZBA should establish additional findings of fact and conclusions of law with regards to the standard for granting a variance. ZBA met on 25 August 2009 to further discuss the matter and approved additional findings of fact and conclusions of law on 3 September 2009. The trial court conducted a second certiorari hearing on 23 September 2009, and it issued a final judgment on 5 October 2009 that affirmed ZBA's revised decision and dismissed Harbor Baptist's claims.

When reviewing a decision of a zoning board of adjustment, a trial court is limited to:

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

Showcase Realty & Construct. Co. v. City of Fayetteville Bd. of Adjust., 155 N.C. App. 548, 550, 573 S.E.2d 737, 739 (2002) (quoting *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 624, 265 S.E.2d 379, 382 (1980)). For plaintiff's assertion that ZBA's decision is not supported by competent evidence and findings of fact, the trial court's standard of review is "whole record." *Robertson v. Zoning Bd. of Adjust. for City of Charlotte*, 167 N.C. App. 531, 533, 605 S.E.2d 723, 725 (2004). For plaintiff's assertion that ZBA's decision was based on an error of law, the standard of review for the trial court is *de novo*. *Id.*

When reviewing a trial court's order regarding a decision by a zoning board, this Court must determine whether the trial court "(1) exercised the proper scope of review, and (2) correctly applied this scope of review," and does so using the same standard of review as the trial court. *Robertson* at 533, 605 S.E.2d at 725 (quotations and citations omitted).

Harbor Baptist argues that the trial court erred by affirming ZBA's decision because ZBA did not fully address all potential impermissible conflicts. Members of a board of adjustment are not allowed to participate in a vote if they have an impermissible conflict that would violate the affected party's constitutional right to an impartial decision maker.

Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed *ex parte* communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

N.C. Gen. Stat. § 160A-388(e1) (2009).

Plaintiff alleges that ZBA failed to consider all of Mr. Davis's impermissible conflicts with the parties involved, and, as such, denied Harbor Baptist's constitutional rights to an impartial decision maker. Plaintiff suggests that, because ZBA only discussed the *ex parte* conversations between Mr. Davis and Mr. Ashendorf, and not the "close familial, business, or other associational relationship" between the two men, ZBA failed to fully consider all impermissible conflicts.

At the time Mr. Davis revealed his *ex parte* conversations with Mr. Ashendorf, he also revealed the nature of the relationship between the two men.² It was at that point, after disclosure of

² Mr. Davis denied that the two men were friends, stating instead: "He's a coworker; I've worked with [Mr. Ashendorf] for

both the *ex parte* communications and the working relationship between Mr. Davis and Mr. Ashendorf, that someone from the audience voiced his or her objection to Mr. Davis participating in the vote. Therefore, when the board members discussed whether Mr. Davis should recuse himself from the board for this case, they did so in consideration of all of Mr. Davis's disclosures leading up to the objection -- both the *ex parte* communications and the working relationship with Mr. Ashendorf. Though it appears that no official vote was held to determine whether Mr. Davis should remain on the panel, each of the remaining members had an opportunity to voice concern over his presence on the panel, and did so in front of ZBA's counsel. The members of ZBA were unanimous in their desire for him to remain on the panel. As the panel followed the procedure specified by N.C. Gen. Stat. § 160A-388(e1), Mr. Davis's presence on the panel did not deny Harbor Baptist its constitutional right to an impartial decision maker.

Plaintiff's second and third arguments are that findings of fact 9-14 are not based on competent evidence and, in turn, that the conclusions of law are not supported by valid findings of fact. We disagree. Findings of fact 9-14 collectively address Charlotte Code § 5.108, which sets forth standards for granting a zoning variance.

(1) Before granting a variance, the Board of Adjustment shall find:

(a) That practical difficulties or unnecessary hardship would result from the strict application of these regulations; and

seven years."

(b) That the spirit of these regulations should be observed by taking into consideration the general intent of these regulations. The Zoning Board of Adjustment may also consider any adopted district plan or area plan covering the property, any other adopted written policies governing land development and the construction and improvement of public facilities; and
(c) That the public safety and welfare have been protected and substantial justice done.

* * *

(3) Only the following three conditions shall constitute a practical difficulty or unnecessary hardship and all must be met:

(a) The difficulty or hardship would result only from these regulations and from no other cause, including the actions of the owner or previous owners of the property; and

(b) The difficulty or hardship is peculiar to the property in question and is not generally shared by other properties in the same neighborhood and/or used for the same purposes; and

(c) The difficulty or hardship resulting from the application of these regulations would prevent the owner from securing a reasonable return or making a reasonable use of the property. The fact that the property could be utilized more profitably or conveniently with the variance than without the variance shall not be considered as grounds for granting the variance.

Charlotte Code § 5.108 (2010).

Finding of Fact 9 establishes that the existence of the residential use of the mobile home park in the abutting lot, although zoned for industrial use, would create practical difficulties and unnecessary hardships if the ordinance were strictly applied, due to the fact that CCT cannot use the property in its current state in a manner that would be allowed if the use in the abutting lot were conforming. This contention is factually supported by CCT's admission that the Charlotte Zoning Board

informed CCT that they should look for any two-acre (or more) property that was zoned anything other than residential. Even though the property itself meets the zoning requirements, the non-conforming existence of the mobile home park on the adjacent property creates a hardship for CCT because the existing building does not meet the setback requirements. The only reason that the existing building does not meet the setback requirements is because of the neighboring property's non-conforming use as a mobile home park. These facts satisfy the requirements of Charlotte Code § 5.108(1)(a).

Finding of fact 10 establishes that the three requirements for showing a practical difficulty or unnecessary hardship as set out in § 5.108(3) are met. Finding of fact 10 establishes that the hardship suffered by CCT is a result of the non-conforming use of the adjoining property, not actions of either CCT or the previous owner. The hardship is also particular to the property in question and not shared by other properties in the neighborhood because of the location of the non-conforming mobile home park. As discussed during the hearing, if the mobile home park ceased to operate in a residential manner, the property and the building would immediately be available to CCT for its desired use.

Finding of fact 10 also addresses whether CCT was prevented from securing a reasonable use of the property. During its deliberation, ZBA stated that it was unreasonable for a property owner to have to move a building twenty feet to comply with a requirement that could cease to be a requirement if and when the

mobile home park ceased to exist. These facts satisfy the requirements set out in § 5.108(3).

Findings of fact 11 and 12 address the adherence to the "spirit of these regulations" as well as the maintenance of public safety and welfare as required by § 5.108(1)(b)-(c) manifested by ZBA's insistence that the project include a fence and landscaping buffer. During the deliberations, this was addressed clearly by ZBA member Andy Zoutewelle: "[T]he purpose of the hundred feet is separation. And if we're going to reduce that hundred feet then it seems very logical and very directly associated with the purpose of the ordinance in order to put some sort of barrier like a fence."

Findings of fact 13 and 14 serve to further address the requirements set out in § 5.108(3)(b)-(c) by restating that the underlying reason for the variance was not the result of actions of the previous owner or shared by other properties in the neighborhood. As stated earlier, the property in question satisfies the zoning requirements for a private prison, just not with the building in its current location on the property. The location in question is zoned I-2, and the surrounding properties are also zoned appropriately for the intended use. The only reason that CCT needed the variance was the existence of the mobile home park, which is a non-conforming use under the current zoning scheme.

Having found that the challenged findings of fact are based on credible and competent evidence, we hold that the challenged conclusions of law are supported by the findings of fact.

The trial court addressed all implications of impermissible conduct on the part of ZBA and correctly determined that no impermissible conduct occurred. The trial court also correctly decided that ZBA's findings of fact were based on competent evidence, and that the conclusions of law were adequately supported by the findings of fact. Accordingly, we affirm the judgment of the trial court.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).