NO. COA13-1457

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

AARON BYRD and
ERIC COOMBS,
Petitioners,

v. Franklin County
No. 13 CVS 450

FRANKLIN COUNTY, NORTH
CAROLINA
Respondent.

Appeal by Petitioners from order entered 24 September 2013 by Judge Robert H. Hobgood in Franklin County Superior Court. Heard in the Court of Appeals 13 August 2014.

Currin & Currin, by Robin T. Currin, George B. Currin, and Catherine A. Hofmann, for petitioners-appellants.

Davis Sturges and Tomlinson, by Aubrey S. Tomlinson, Jr., for respondent-appellee.

DILLON, Judge.

Aaron Byrd and Eric Coombs ("Petitioners") appeal from a superior court's order affirming a decision by Franklin County, made by its Board of Adjustment, determining that Petitioners could not operate a shooting range on their property without a special use permit, requiring approval by the County's Board of

Commissioners. For the foregoing reasons, we affirm, in part, and reverse, in part, the superior court's order.

I. Background

This appeal involves the application of the Franklin County Unified Development Ordinance ("UDO") to a shooting range. Pursuant to the UDO, property in the County is divided into zoning districts. The UDO contains a Table of Permitted Uses (the "Table") and identifies in which zoning districts each use set out in the list may be allowed. For each use listed, the Table provides (1) in which zoning districts said use is allowed as a matter of right, without any further approval by the County; (2) in which zoning districts said use is a "conditional" use, requiring approval by the County Board of Adjustment; (3) in which zoning districts said use is a "special" use, requiring approval by the County Board of Commissioners; and (4) in which zoning districts said use is not allowed at all. The UDO further provides that any "[u]ses not specifically listed in the Table [] are prohibited." The Table does not specifically list shooting ranges or gun ranges.

Petitioners desire to operate a shooting range on a tract of land they own in Franklin County (the "Property"). In the Spring of 2012, Petitioners contacted County officials to

determine whether the UDO regulated their proposed shooting range.

Initially, the County Planning Director verbally informed Petitioners that the UDO did not allow a shooting range to operate in the County since this use was not listed in the UDO Table. The Planning Director recommended that Petitioners make a request to the County Board of Commissioners to amend the UDO to include shooting ranges as a use in the Table.

Subsequently, however, sometime prior to November 2012, the Planning Director had another conversation with Petitioners in which he informed them that their proposed shooting range *did* fall within a use category listed in the Table, namely the category entitled "Grounds and Facilities for Open Air Games and Sporting Events" (hereinafter "Open Air Games"). He informed Petitioners that an Open Air Game was considered a special use in the Property's zoning district, and, therefore, Petitioners would need to apply to the Board of Commissioners for a special use permit to operate a shooting range on the Property.

Based on this subsequent conversation, Petitioners applied for a special use permit; however, on 3 December 2012,

Petitioners' application was denied by the Board of Commissioners.[1]

Also, in December 2012, Petitioners received two written communications (the "December Letters") from a County code enforcement officer. The first communication, dated 9 December 2012, informed Petitioners that "in order to conduct the proposed shooting club a Special Use Permit must be obtained" and ordered Petitioners to "cease and desist any and all activity associated with a shooting range" on the Property. The second communication, dated 11 December 2012, stated that it was a "Final Notice of Violation" and ordered Petitioners to "halt all activities of the proposed shooting range immediately" or face "civil penalties," "legal action seeking injunction[,] and/or possible criminal action."

On 2 January 2013, Petitioners appealed from the December Letters to the Board of Adjustment. After conducting a hearing on the matter, the Board of Adjustment upheld the code enforcement officer's decisions in the December Letters, and ordered Petitioners to cease and desist all activities regarding the shooting range. The Board of Adjustment's order was

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[1] Petitioners filed a separate appeal to this Court (COA13-1456) challenging the trial court's order affirming the Board of Commissioners' denial of their special use permit.

affirmed by the Franklin County Superior Court by order entered on 24 September 2013. Petitioners filed written notice of appeal to this Court on 8 October 2013.

II. Jurisdiction

As a preliminary matter, the County contends that this Court need not consider the merits of Petitioners' appeal, arguing that Petitioners failed to file their original appeal to the Board of Adjustment within the time allowed under the UDO. Section 24-1 of the UDO states that "[a]n appeal from any final order or decision of the administrator may be taken to the board of adjustment by any person aggrieved" but that the appeal "**must be taken within 30 days** after the date of the decision or order appealed from." (Emphasis added). The County also contends that Petitioners waived any challenge to the decision that a special use permit was required by actually applying for the permit.

In the present case, Petitioners appealed from the December Letters to the Board of Adjustment on 2 January 2013, within 30 days of receiving them. The County, however, argues that the appeal was not timely because the 30-day appeal clock commenced, not when Petitioners received the December Letters, but months

earlier when the County Planning Director verbally informed Petitioners that they would need the special use permit.

Based on the facts of this case, we believe that the December Letters from the County represented "a final order or decision" from which Petitioners, as "aggrieved" parties, could appeal to the Board of Adjustment. Therefore, Petitioner's appeal was timely.

We also do not believe Petitioners waived their right to challenge the December Letters before the Board of Adjustment simply because they had previously been told by a County official that they would need a special use permit and Petitioners, out of an abundance of caution, followed this avenue before establishing a shooting range on the Property. Where a landowner can establish a use on its property as a matter of right without governmental approval, the landowner does not lose this right simply because the landowner applies for a special use permit at the direction of a governmental official rather than immediately challenging the officer's interpretation of the law. *See Graham Court Associates v. Town Council of Town on Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981) (a landowner was informed that he needed a special use permit; applied for a special use permit and was denied; then

challenged whether the special use permit was required and this Court held that it was not). Accordingly, the County's contentions are overruled, and we turn to the merits of Petitioners' arguments on appeal.

III. Analysis

In this appeal, Petitioners contend that the superior court erred in its interpretation of the UDO. Specifically, Petitioners argue that the UDO does not regulate shooting ranges and, therefore, they do not need any approval from the County to operate a shooting range on the Property. Petitioners also argue that the superior court erred by concluding that shooting ranges were regulated by the UDO as an Open Air Game. Petitioners primarily rely on this Court's holding in *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 697 S.E.2d 458 (2010).

Essentially, Petitioners challenge the interpretation of the UDO by the Board of Adjustment and superior court. "Reviewing courts apply de novo review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a municipal ordinance." *Morris Communs. Corp. v. City of Bessemer*, 365 N.C. 152, 155, 712 S.E.2d 868, 871 (2011) (citations omitted). "Under de novo review a reviewing court

considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Id.* at 156, 712 S.E.2d at 871 (citation omitted).

For the reasons stated below, we agree with Petitioners that the superior court erred in its interpretation of the UDO by concluding that the shooting range fell within the Open Air Games category in the Table. However, we disagree with Petitioners that the UDO does not regulate shooting ranges at all, but it does in fact prohibit shooting ranges anywhere in the County by providing that "[u]ses not specifically listed in the Table [] are prohibited." Accordingly, we hold that the superior court did not err in affirming the County's order that Petitioners cease and desist from operating a shooting range on the Property.

A. Shooting Ranges are not Open Air Games

Petitioners argue that the superior court erred in its interpretation of the UDO by concluding that shooting ranges fall within the Open Air Games category of the Table. Based on the superior court's interpretation, a shooting range would be allowed in the Property's zoning district with a special use permit approved by the Board of Commissioners. We agree with

Petitioners that, applying this Court's holding in *Land*, *supra*, shooting ranges do not fall within the Open Air Games category.

In *Land*, this Court held that a shooting range did not fall within the use category "privately owned outdoor recreational facility" contained in the Union County Land Use Ordinance. 206 N.C. App. at 132, 697 S.E.2d at 464. In the present case, the category at issue in the UDO Table describes the use as property used for "Grounds and Facilities for Open Air Games and Sporting Events[.]" However, the Table further qualifies this category description as those uses which fall within the NAICS code 713940.[2] NAICS code 713904 is labeled "Fitness and Recreational Sports Centers" and is comprised of establishments "primarily engaged in operating fitness and recreational sports facilities featuring exercise and other active physical fitness conditioning or recreational sports activities such as swimming, skating, or racquet sports." Shooting ranges, though, do not fall within NAICS code 713904, but rather under NAICS code 713990, labeled "All Other Amusement and Recreational Industries," a code which the County did not use as a reference for the Open Air Games category.

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[2] The North American Industry Classification System ("NAICS") is a number system used by businesses and governmental agencies throughout North America.

We note that there are other uses listed in the Table which do reference NAICS code 713990, the code assigned to shooting ranges. However, these categories are for "Golf Courses" and "Riding Stables" and not for any use within which a shooting range would fall. The UDO provides that the NAICS codes are meant to provide a reference to determine which uses fall within a given category, but the codes are not meant to enlarge the scope of a category beyond the category's descriptive title. Specifically, the UDO Table provides that the NAICS codes "are for reference purposes only, and do not mean that all uses under a specified code heading as provided in the [NAICS] Manual are permitted or conditional uses in the applicable zone."

Here, if the County had intended shooting ranges to be considered an Open Air Game, the County could have added the NAICS code assigned to shooting ranges as a reference for the category; however, the County did not do so. Accordingly, we believe the proper interpretation is that shooting ranges are not Open Air Games in the Table.

B. The UDO Prohibits Shooting Ranges in the County

Petitioners argue that since the Table does not contain a category for shooting ranges, the UDO does not regulate shooting

ranges, and, therefore, the County cannot prevent them from operating a shooting range on their Property. We disagree.

Our Supreme Court has provided the following guidance when construing ordinances:

> Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the Ordinance as a whole. * * * Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly [within] their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property.

Yancey v. Heafner, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation and quotation marks omitted).

We believe that the UDO is unambiguous in prohibiting shooting ranges in the County. UDO section 6-1 states that "[u]ses not specifically listed in the Table of Permitted Uses are prohibited." Based on a "fair and reasonable construction" of this language, the County clearly recognized that it could not list every conceivable way that property could be used, and, therefore, it sought to provide that any use not listed would be prohibited unless and until any said use not listed was added to

the UDO through an amendment thereto approved by the Board of Commissioners. Otherwise, landowners would be allowed to operate a shooting range or any other use not specifically listed in the Table *anywhere* in the County.

Petitioners argue that our holding in *Land* compels us to conclude that since shooting ranges are not expressly excluded by the UDO, they *must* be allowed. We believe that Petitioners' interpretation of *Land* is overly broad and would lead to absurd results.

The central issue in *Land* was whether a shooting range on the property of the aptly named Dr. Land was regulated by the Union County Ordinance. The ordinance, like the UDO, contained a table of permitted uses. The ordinance also stated that "those uses that are listed shall be interpreted liberally to include other uses that have similar impacts to the listed use," and that "uses that are not listed [] and that do not have impacts that are similar to those of the listed uses are prohibited." *Land*, 206 N.C. App. at 129, 697 S.E.2d at 462. Union County opposed Dr. Land's shooting range.

This Court in *Land* rejected the interpretation of the ordinance advocated by Union County that "all uses not expressly permitted are implied prohibited." *Id.* at 130, 697 S.E.2d at

462. The Court disfavored the ordinance's approach towards unlisted uses, stating that "a citizen seeking to use his land for otherwise legal purposes would have to speculate as to which governmentally permitted use was 'similar to' a nebulous category in the [ordinance]" and further that the approach "leaves landowners exposed to decisions to the arbitrary and capricious whims of zoning authorities who may disagree with the landowner's decision concerning 'similarity of use.'" *Id.* at 132, 697 S.E.2d at 464. In conclusion, the Court held that "absent a clear [ordinance] regulating shooting ranges, Dr. Land was not required to obtain a special use permit." *Id.*

We construe this Court's holding in *Land* narrowly to the language of the ordinance that was before it, namely one which states that permitted uses are those uses which are listed and "other uses that have similar impacts to" those listed while prohibiting all other uses.[3] We believe that the language in the

[3] We need not address to what extent *Land* applies to the interpretation of ordinances which provide a means by which an unlisted use might be permitted if similar to a listed use. We note, for example, that in contrast to the *Land* Court's concern regarding unlisted uses and the "similar to" language as conferring too much discretion to county officials, this Court in *Fairway Outdoor Adver. v. Town of Cary*, applied the language of an "unlisted use" provision in an ordinance that provided for a level of discretion to the town's planning director to permit certain unlisted uses, but that ordinance provided criteria for exercising that discretion. ___ N.C. App. ___, ___, 739 S.E.2d

UDO is clear in prohibiting shooting ranges even though it does not specifically mention "shooting ranges" by name. Unlike the ordinance in *Land*, the UDO does not contain a similarity provision. It would be absurd to state that a use is allowed as a matter of right everywhere in a county, simply because the county failed to list the use expressly by name in its ordinance.[4] Otherwise where an ordinance provides that property within a residential district can only be used for residential purposes and for no other purpose and under Petitioners' interpretation, the residential property owner could use his property not only for residential purposes but also for any commercial use which the ordinance fails to specifically mention. Petitioners' argument is overruled.

579, 583 (2013). Further, we note that, more recently, this Court applied ordinance language providing that in determining whether an unlisted use is permitted, "the use addressed by this ordinance that is most closely related to the land use impacts of the proposed [unlisted] use shall apply[.]" *Fort v. County of Cumberland*, ___ N.C. App. ___, ___, 761 S.E.2d 744, 747 (2014) (concluding that a firearms training facility – a use not listed in the ordinance - was "similar" to the listed use category "Recreation/Amusement Outdoor").

[4] We have held that a firearms training facility was not allowed in a particular zoning district because this use did not fall within the use category "SCHOOLS, public, private, elementary or secondary." *Fort v. County of Cumberland*, ___ N.C. App. ___, 721 S.E.2d 350 (2012) ("*Fort I*").

For the foregoing reasons, we reverse that portion of the trial court's order determining that the UDO required Petitioners to obtain a special use permit to operate their shooting range. However, in light of our holding that Petitioners' shooting range was not a permitted use within the County, we affirm the ultimate result reached by the trial court albeit on different grounds.

AFFIRMED IN PART, REVERSED IN PART.

Judge DAVIS concurs.

Judge HUNTER, Robert C., concurs in part and dissents in part.

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Filed: 18 November 2014

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Petitioners,

v. Franklin County
No. 13 CVS 450

FRANKLIN COUNTY, NORTH CAROLINA,
Respondent.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

I concur with the majority's conclusion that the trial court erred by interpreting the Franklin County Unified Development Ordinance ("UDO") as including shooting ranges under the category of "Open Air Games." However, because I believe that *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 697 S.E.2d 458 (2010), is controlling, I respectfully dissent from the majority's position that the UDO prohibits any land use that it does not specifically name.

In *Land*, the landowner challenged a cease-and-desist order issued by a zoning administrator prohibiting him from using a shooting range on his private property. *Land*, 206 N.C. App. at 126, 697 S.E.2d at 460. The trial court found in favor of the landowner, and the Village of Wesley Chapel ("the Village") appealed. *Id.* at 124, 697 S.E.2d at 459. The Village argued

that its land use ordinance regulated every conceivable use of property, whether or not the use was specifically mentioned. *Id.* at 129, 697 S.E.2d at 462. The applicable provisions of the ordinance read as follows:

> (a) The presumption established by this ordinance is that all legitimate uses of land are permissible within at least one zoning district with the county. Therefore, because the list of permissible uses set forth in Section 146 (Table of Permissible Uses) cannot be all-inclusive, those uses that are listed shall be interpreted liberally to include other uses that have similar impacts to the listed uses.
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> (b) *All uses that are not listed in Section 146 and that do not have impacts that are similar to those of the listed uses are prohibited.* Nor shall Section 146 be interpreted to allow a use in one zoning district when the use in question is more closely related to another specified use that is permissible only in other zoning districts.

Id. (emphasis added). Thus, the Village argued that because its ordinance did not list the operation of a shooting range as a permissible land use, such use was implicitly prohibited under subsection (b).

Citing long-standing common law principles of the "free use of property," this Court rejected the philosophy embedded in the Village's ordinance, and in the UDO here, that "everything is proscribed except that which is allowed." *Id.* at 131, 697

S.E.2d at 463. The problem with such an ordinance, as expressed by the Court, was that "it fails to clearly place the public on notice as how a particular use is to be classified absent an explicit mention in the [ordinance]." *Id.* Citing *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966), which itself quoted Yokley, *Zoning Law and Practice*, Second Edition (1962 supplement), Vol. 1, Section 184), this Court reaffirmed the notion that "[z]oning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly [sic.] their express terms." *Id.* Based on these principles, the Court held that, despite the language in subsection (b) prohibiting all uses not explicitly mentioned in the ordinance, the landowner was not required to obtain a special use permit absent a clear mandate within the ordinance regarding shooting ranges. *Id.* at 132, 697 S.E.2d at 464.

I find *Land* to be dispositive on the issue presented here. The majority attempts to distinguish *Land* on the fact that the Village's ordinance contained a provision allowing "other uses that have similar impacts" to those explicitly mentioned, and the UDO does not contain a similar clause. I do not find this distinction material to our analysis. Rather than relying on the "similar impacts" provision to form the basis of its

holding, the *Land* Court cited long-standing precedent in rejecting the notion that a zoning ordinance may prohibit uses not explicitly allowed. *See, e.g.*, *In re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) ("A zoning ordinance, however, is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use."); *In re Couch*, 258 N.C. 345, 346, 128 S.E.2d 409, 411 (1962) ("Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner." (internal quotation marks omitted)); *Coleman v. Town of Hillsborough*, 173 N.C. App. 560, 564, 619 S.E.2d 555, 559 (2005) ("Zoning regulation is in derogation of common law property rights and therefore must be strictly construed to limit such derogation to that intended by the regulation.").

The *Land* Court made clear that the law favors uninhibited free use of private property over governmental restrictions. Despite this principle, the majority asserts that it would be absurd for a use to be allowed as a matter of right because the county failed to expressly restrict the use in its zoning ordinance. I believe that it would be similarly absurd, but more importantly, unlawful, to support the notion that an

otherwise legal use of private property is automatically *disallowed* simply because the government failed to identify it by name in a zoning ordinance.

Based on the holding in *Land*, I am bound to conclude that the UDO's provision prohibiting all uses not explicitly allowed in the ordinance is in derogation of the common law and is without legal effect. Therefore, I would reverse the trial court's order.