NO. COA14-539

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

MYC KLEPPER/BRANDON KNOLLS L.L.C.,
d/b/a Klepper Outdoor Advertising,
Petitioner,

v. Buncombe County
No. 11 CVS 2276

THE BOARD OF ADJUSTMENT FOR THE
CITY OF ASHEVILLE,
Respondent.

Appeal by petitioner from order entered 27 January 2014 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 October 2014.

*Kelly & Rowe, P.A., by James Gary Rowe, for petitioner-appellant.*

*City Attorney Robin T. Currin and Assistant City Attorney Jannice Ashley, for respondent-appellee.*

GEER, Judge.

Petitioner MYC Klepper/Brandon Knolls L.L.C., d/b/a Klepper Outdoor Advertising appeals an order affirming the decision of respondent the Board of Adjustment for the City of Asheville ("the Board") upholding the issuance of a Notice of Violation ("NOV") for a billboard sign owned by petitioner. On appeal, petitioner primarily argues that the sign should be allowed

pursuant to a variance granted in 1992 for a sign located on the same property. However, the City of Asheville's Code of Ordinances provides that legal nonconforming signs may not be reestablished after discontinued use for more than a year. Thereafter, the use of the structure must conform to the zoning ordinance. The prior sign was removed in 2007 and the structure was not in use for more than two years. Therefore, any newly constructed sign was required to conform to the zoning ordinance.

Although petitioner argues that the City Attorney failed to inform him that the previous sign could not be reestablished, representations by a city official cannot immunize a petitioner from violations of zoning ordinances. Because it is undisputed that the sign was installed without a permit and is larger than allowed by ordinance, we affirm.

Facts

On 27 October 2010, the City of Asheville issued an NOV to R.L. Jordan SV STA N.C. Inc., the owner of the property located at 1069 Sweeten Creek Road, Asheville, North Carolina ("the property"), for installing an off-premise sign without first obtaining a sign permit. Petitioner, the owner of the sign, appealed the NOV to the Board. The evidence at the hearing before the Board showed the following facts.

In 1992, Donald Feldbusch was granted a variance to erect a 199.88 square foot billboard on the property. Although the order granting the variance does not indicate that it was subject to any conditions, the ordinance in effect in 1992 required that all nonconforming billboards be removed or amortized within seven years of 1990, and the minutes from the board meeting when the variance was granted state that the variance was "good only through amortization period." Nevertheless, the sign was not removed when the amortization period ended in 1997, and no notice of violation was issued by the City of Asheville.

Sometime in 2007, the sign was removed and only poles remained. On 2 September 2010, petitioner purchased the billboard structure from James and Inger Campen. The sales contract described the billboard structure as one "once known to have been . . . located" on the property. After purchasing the billboard structure and related equipment, petitioner erected a 288 square foot billboard sign on the property.

On 11 October 2010, during a routine inspection of the area, the Asheville City Development Review Specialist, Shannon Morgan, noticed the billboard on the property for the first time. Mr. Morgan searched the City's system and discovered that no sign permit application had ever been submitted for the

billboard and that no sign permit for the billboard had ever been issued by the City. Consequently, on 27 October 2010, the City issued an NOV to the property owner for the installation of an off-premise sign without first obtaining a sign permit.

Following the hearing, the Board made the following pertinent findings in an order dated 28 March 2011:

> 6. Prior to 2007 a billboard did exist at the location of the sign that is the subject of the Notice of Violation, but at some time no later than the end of 2007 the sign had been removed, leaving only the poles that had supported the sign.
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> 7. That a sign at that location had been erected and maintained pursuant to a variance granted in 1992, but the minutes from the hearing at which such variance was granted reflect that the permit issued pursuant to such variance was still subject to the amortization rules of the sign ordinance requiring all non-conforming signs to be removed in 1997.
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> 8. That no sign existed at that location between some time in 2007 and the time the current sign was erected, a period of between two and three years.
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> 9. That even if the current sign could be maintained as a non-conforming sign, its use was discontinued for over two years and cannot be re-established. (UDO Section 7-13-8(f)(5) and Section 7-17-3 (a)).
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> 10. That the current sign ordinance allows off premise signs of no more than 12 square feet at the location of the subject sign, whereas the current sign is 288 square feet. (UDO Section 7-13-5(b)(1)).

11. That no permit for the current sign exists, and although the Appellant asserts that a permit was applied for in September of 2010, such permit would not have been issued for the sign that was constructed.

12. The Appellant spoke of use of the sign for a "Cap and Trade" transaction whereby he would either take down the subject sign so as to be allowed to erect a sign at another location, or that he would take down a sign at another location so as to be able to keep this sign, but illegal signs cannot be used to "trade" for signs elsewhere, and illegal signs cannot be erected and made "legal" as the result of having been the result of the removal of a legal sign elsewhere.

Based upon these findings, the Board concluded that:

1. The sign that presently exists at 1069 Sweeten Creek Road is an unlawful sign under the current sign ordinance, being larger than allowed by current code and having been constructed without a permit being obtained from the City.

2. That any previously existing legal sign of the size and at the location of the present sign should have been removed in 1997.

3. That if the sign had been a non-conforming sign that could have continued in use after 1997, it still could not be re-established after being removed for more than two years.

4. The Appellant has presented no competent evidence to support his argument for reversal of the decision of City staff to issue a Notice of Violation.

The Board, by a vote of five to zero, upheld the NOV.

Petitioner filed a petition for writ of certiorari seeking review of the Board's decision pursuant to N.C. Gen. Stat. § 160A-393. The petition was granted and a hearing on the matter was held in Buncombe County Superior Court on 19 December 2013. On 27 January 2014, the superior court entered an order affirming the Board's decision. Petitioner timely appealed the order to this Court.

I

We first address the Board's contention that the trial court erred in denying its motion to dismiss the petition for lack of subject matter jurisdiction. This Court reviews the trial court's decision to grant or deny a motion to dismiss for lack of subject matter jurisdiction de novo. *Hardy v. Beaufort Cnty. Bd. of Educ.*, 200 N.C. App. 403, 408, 683 S.E.2d 774, 778 (2009).

Quasi-judicial decisions by a city's Board of Adjustment are "subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2013). N.C. Gen. Stat. § 160A-393(e) (2013) provides that "[t]he respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed[.]" In this case, petitioners named the

Board of Adjustment for the City of Asheville as respondent instead of naming the City of Asheville, as required by N.C. Gen. Stat. § 160A-393(e). The Board contends that this failure deprived the trial court of subject matter jurisdiction. We disagree.

The defect in the petition in this case amounts to a failure to join a necessary party. *See Mize v. Cnty. of Mecklenburg*, 80 N.C. App. 279, 283, 341 S.E.2d 767, 769 (1986) (holding that petitioner failed to join a necessary party when petition for writ of certiorari named only the County of Mecklenburg as respondent and did not name Mecklenburg County Zoning Board of Adjustment when seeking review of the Zoning Board's decision). This Court has expressly held that "a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 573, 344 S.E.2d 789, 793 (1986). *See also Phillips v. Orange Cnty. Health Dep't*, No. COA13-1463, ___ N.C. App. ___, ___ S.E.2d ___, 2014 WL 6435697, *3, 2014 N.C. App. LEXIS 1142, *8 (Nov. 18, 2014) (rejecting defendant's argument that trial court lacked subject matter jurisdiction in part "because failure to join a necessary party does not negate a court's subject matter jurisdiction"); *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*,

143 N.C. App. 1, 8, 545 S.E.2d 745, 750 (holding "despite Lee Cycle's failure to name Lee Motor as a plaintiff, the trial court had subject matter jurisdiction over the action"), *aff'd per curiam*, 354 N.C. 565, 556 S.E.2d 293 (2001).

Accordingly, we hold that petitioner's failure to name the City of Asheville as respondent in the petition did not deprive the trial court of subject matter jurisdiction over the proceedings. Additionally, we note that the Board does not dispute the trial court's finding that "the City was on notice of this action and participated in the defense thereof." Because the City's participation in the proceedings cured the defect in the petition, we hold that the trial court did not err in denying the Board's motion to dismiss the petition. *Cf. In re J.T.(I), J.T.(II), A.J.*, 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009) (holding failure to name juveniles as respondents in summons as required by the juvenile code was cured by participation of juveniles' GAL in the proceedings).

The Board, nevertheless, cites two recent unpublished decisions, *Whitson v. Camden Cnty. Bd. of Comm'rs*, ___ N.C. App. ___, 748 S.E.2d 775, 2013 WL 3770664, 2013 N.C. App. LEXIS 766 (2013) and *Philadelphus Presbyterian Found., Inc. v. Robeson Cnty. Bd. of Adjustment*, ___ N.C. App. ___, 754 S.E.2d 258, 2014 WL 47325, 2014 N.C. App. LEXIS 51, *disc. review denied*, ___ N.C.

___, 758 S.E.2d 873 (2014), in support of its argument that the trial court lacked subject matter jurisdiction. In each of these cases, the petitioner, an outside party, sought review of the decision-making board's grant of a conditional use permit ("CUP") to an applicant, but failed to name the applicant as a respondent in the petition as required by N.C. Gen. Stat. § 160A-393(e). The respondents moved to dismiss pursuant to Rule 12(b)(7) for failure to join a necessary party, and the trial courts granted their motions. This Court affirmed, and additionally held that the trial courts lacked subject matter jurisdiction.

We first note that these are unpublished opinions and therefore not binding on this Court. Secondly, to the extent that these cases hold that failure to join a necessary party deprives the trial court of subject matter jurisdiction, they are contrary to this Court's holding in *Stancil*. Finally, there is no indication that the defects in the petitions in *Whitson* or *Philadelphus* were cured by the unnamed respondents' notice of and participation in the proceedings, as was the case here. Accordingly, we are not persuaded that the trial court erred in denying respondent's motion to dismiss the petition, and we will review the merits of petitioner's appeal.

II

In a proceeding in the nature of certiorari, the superior court reviews the board of adjustment's decision to determine whether the decision was:

> a. In violation of constitutional provisions, including those protecting procedural due process rights.
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> b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
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> c. Inconsistent with applicable procedures specified by statute or ordinance.
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> d. Affected by other error of law.
>
> e. Unsupported by substantial competent evidence in view of the entire record.
>
> f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k). "'The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal.'" *Myers Park Homeowners Ass'n v. City of Charlotte*, ___ N.C. App. ___, ___, 747 S.E.2d 338, 341 (2013) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

Questions of law are reviewed de novo, while questions whether the decision is supported by the evidence or is arbitrary or capricious are reviewed under the whole record test. *Id.* at ___, 747 S.E.2d at 342.

> "Under a *de novo* review, the superior court considers the matter anew[] and freely substitut[es] its own judgment for the agency'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 agency decision is supported by substantial evidence. The whole record test does not allow the reviewing court to replace the [b]oard'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 ___, 747 S.E.2d at 342 (quoting *Mann Media, Inc.*, 356 N.C. at 13-14, 565 S.E.2d at 17-18). This Court reviews the superior court's order to determine whether it applied the correct standard of review and, if so, whether it did so properly. *Id.* at ___, 747 S.E.2d at 342.

In this case, the Board upheld the NOV based upon its finding that the sign is larger than permitted by the ordinance and was constructed without a permit. Petitioner does not dispute this finding, but argues that the sign should be allowed based on the 1992 variance, which, petitioner contends, was not subject to the amortization rules. Alternatively, petitioner argues that the sign should be deemed legal because the City failed to notify petitioner or any prior owner of the sign of the "cap and replace" provisions adopted by the City in 2004.[1]

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[1]The "cap and replace" provisions, set forth in Section 7-

These first two arguments are immaterial in light of Asheville, N.C., Code of Ordinances §§ 7-13-8(f)(5) and 7-17-3 (2014). Section 7-13-8(f)(5) provides that a legal nonconforming sign cannot be reestablished after its discontinued use for 60 days. As further explained in section 7-17-3(a), "[a] nonconforming use shall be deemed discontinued after a period of 365 consecutive days regardless of any substantial good faith efforts to re-establish the use. Thereafter, the structure or property associated with the use may be used only for conforming use." Thus, if a nonconforming sign that has been deemed legal by the granting of a variance or through a "cap and replace" agreement is not used for 425 consecutive days, the sign loses the benefit of the variance or the "cap and replace" agreement, and any new sign must comply with all ordinances.

Here, it is undisputed that the prior sign was removed from the property in 2007 and that no sign existed on the property until the current sign was built in 2010. Because the sign was

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13-8(g) of the City's Code of Ordinances, provide an option whereby certain qualified nonconforming signs may enter an agreement with the City providing for the removal, relocation, or reconstruction of the sign. Section 7-13-8(g)(2) requires the City planning and development director to notify the owners of nonconforming signs of the adoption of the "cap and replace" option. A sign cannot qualify for the program unless the owner registers the sign with the City's planning and development office within 180 days of receipt of the notice. Asheville, N.C., Code of Ordinances § 7-13-8(g)(2)(b) (2014).

not in use during a period of more than 425 consecutive days, the new sign constructed in 2010 was required to conform with the ordinance. Accordingly, the Board correctly found that even "if the sign had been a non-conforming sign that could have continued in use after 1997, it still could not be re-established after being removed for more than two years."

Petitioner next argues, without citing any authority, that he should be able to reestablish the sign because he relied upon the advice of the City Attorney, Mr. Oast. Petitioner consulted Mr. Oast during the time the previous sign was not in use and was being considered for replacement. Mr. Oast did not inform petitioner that there was a time limit for re-establishing the sign and in fact told petitioner that he was proceeding properly.

It is well established, however, "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past." *City of Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950). This is because "[i]n enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State[,]" and such power "cannot be bartered away by contract, or lost by any other mode." *Id.*

Accordingly, Mr. Oast's mistaken representations do not immunize petitioner from liability for zoning violations. *See also Helms v. City of Charlotte*, 255 N.C. 647, 652, 122 S.E.2d 817, 821 (1961) (holding fact that city official mistakenly issued to plaintiff permit to install subterranean oil tanks on his property in violation of city ordinance and plaintiff incurred expenses in reliance on permit did not estop City from seeking to enforce ordinance); *Overton v. Camden Cnty.*, 155 N.C. App. 391, 398, 574 S.E.2d 157, 162 (2002) (holding that county was not estopped from enforcing uniform development ordinance against plaintiff even though it had not done so at earlier hearing).

In reviewing the decision of the Board, the trial court applied whole record review and determined that the Board's findings were supported by substantial evidence in the record. It applied de novo review to the questions of law and determined that the Board correctly interpreted and applied the applicable provisions of the city Code of Ordinances and did not commit any errors of law. We hold that the trial court applied the correct standard of review, and, for the foregoing reasons, did so correctly.

Affirmed.

Judges STROUD and BELL concur.