IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-265

Filed: 2 February 2016

Alexander County, No. 14 CVS 274

JEFFERY WHITEHURST, Petitioner-Appellant

v.

ALEXANDER COUNTY, ALEXANDER COUNTY PLANNING AND ZONING BOARD OF ADJUSTMENT and WILLIAM SIPES, Respondents-Appellees

Appeal by petitioner from order entered 18 November 2014 by Judge Theodore S. Royster, Jr. in Alexander County Superior Court. Heard in the Court of Appeals 9 September 2015.

Young, Morphis, Bach & Taylor, L.L.P., by Timothy D. Swanson, for petitioner-appellant.

Robert E. Campbell, P.L.L.C., by Larissa J. Erkman, for respondent-appellees Alexander County and Alexander County Planning and Zoning Board of Adjustment.

Gottholm, Ralston & Benton, P.L.L.C., by Matthew L. Benton, for respondent-appellee William Sipes.

CALABRIA, Judge.

Petitioner Jeffery Whitehurst ("Whitehurst") appeals from a superior court's order affirming the decision of the Alexander County Planning and Zoning Board of Adjustment ("Board") to dismiss the notification of zoning enforcement action issued against respondent William Sipes ("Sipes") for enlarging or extending his existing

nonconforming use of his property in violation of the local zoning ordinance. We affirm and remand for the correction of a clerical error.

I. Background

Sipes owns a 1.5-acre tract of land on 166 Fisherman's Cove Lane in Taylorsville, North Carolina. Since 1982, Sipes has used his property to operate a business that repairs watercraft engines ("boat repair business"). In 2000, Whitehurst purchased 135 Fisherman's Cove Lane for residential purposes. Although the properties were adjacent, at that time a line of pine trees located on Sipes' land obstructed Whitehurst's view of the boats, heavy equipment, and salvage parts located on Sipes' property that were associated with his business.

In 2001, the Alexander County Board of Commissioners enacted a countywide zoning plan and adopted the Alexander County Zoning Ordinance ("ACZO"). As a result of the ACZO, the property located on Fisherman's Cove Lane was zoned as a residential district. Since Sipes' boat repair business was a commercial enterprise located in an exclusively residential district, Sipes' business became a nonconforming use of property. However, Sipes learned a nonconforming use of land that predated the ACZO could continue so long as it was not "enlarged or extended" in any way. ACZO § 154.051(A)(1) (2001).

After enactment of the ACZO, Sipes made a few changes to his property. Sipes constructed structures with awnings that covered areas where he previously parked

boats. Sipes increased the number of boats, equipment, and salvage parts located on his property. And Sipes cleared the line of pine trees located on his property that previously obstructed Whitehurst's view of the boats and materials stored on Sipes' land.

In 2010, Whitehurst unsuccessfully attempted to sell his home, attributing this difficulty to the newly unobstructed view of boats, equipment, and salvage materials stored on Sipes' property. In 2011, Sipes parked numerous boats on property owned by Kevin Carter. Whitehurst filed a formal complaint with County Zoning Enforcement Officer Seth Harris ("Zoning Officer Harris"), who subsequently issued a zoning enforcement notice ("2011 Zoning Violation") against Sipes for unlawfully expanding his nonconforming use of land beyond the boundaries of his property. After learning of the violation, Sipes moved the boats back onto his property and no further action was taken.

When Zoning Officer Harris met with Sipes at his property to discuss the 2011 Zoning Violation, he discovered that Sipes' business had never been classified following the ACZO's enactment in 2001. Zoning Officer Harris asked Sipes about his business and observed the property's upper tract, but he did not inspect the lower tract. Zoning Officer Harris subsequently classified Sipes' business as a "watercraft maintenance facility," defined by the ACZO as "[a] commercial establishment devoted to the detailing and repair of privately owned watercraft." ACZO § 154.006.

Subsequently, Whitehurst reported that Sipes' use of the property changed. On 14 November 2013, Zoning Officer Harris sent Sipes another zoning enforcement notice ("2013 Zoning Violation"). According to the 2013 Zoning Violation, the ACZO permitted expansion of a nonconforming use only upon approval of an application filed with the Board. However, it appeared that Sipes' "boat repair business . . . ha[d] been expanded to a junk/salvage business[,]" and the "expansion of [his] business *to another type of business operation* without permission of the Board" constituted a violation of the ACZO, subject to a fine of $50.00 per day. Sipes appealed to the Board, asserting that he had not changed his business operation since he began his business. After a hearing, the Board concluded Sipes "ha[d] not enlarged or extended the legal non-conforming use in any way within the meaning of the [ACZO]." Accordingly, on 25 April 2014, the Board overturned and dismissed the 2013 Zoning Violation issued to Sipes.

Whitehurst subsequently appealed the Board's decision to Alexander County Superior Court by filing a petition for writ of certiorari and a complaint for a declaratory judgment, requesting the superior court reverse the Board's decision and remand "with directions to uphold the enforcement action and declare the nonconforming use of the Property terminated[.]" In his petition, Whitehurst contended that the Board erred by (1) incorrectly interpreting the ACZO by concluding that Sipes' nonconforming use of property did not enlarge or expand from

a permissible watercraft repair business to a junk or salvage business; (2) failing to apply a provision of the ACZO relating to the enlargement of nonconforming buildings without Board approval; and (3) concluding that Sipes could still operate his business as a nonconforming use after the 2011 Zoning Violation. After a hearing, the superior court entered an order denying Whitehurst's petition and affirming the Board's decision to overturn the 2013 Zoning Violation issued against Sipes. Whitehurst appeals.

II. Standards of Review

A municipal board of adjustment's decision to overturn a zoning enforcement action is "subject to review by the superior court by proceedings in the nature of certiorari[.]" N.C. Gen. Stat. § 160A-388(e2)(2) (2015). Upon certiorari review of a board's quasi-judicial decision, the superior court acts as an appellate court and should:

> (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Cary Creek Ltd. P'ship v. Town of Cary, 207 N.C. App. 339, 341-42, 700 S.E.2d 80, 82-83 (2010) (citation omitted). Generally, whatever error the petitioner asserts determines the reviewing court's proper scope of review. "If a petitioner contends the

Board's decision was based on an error of law, 'de novo' review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test." *Four Seasons Mgmt. Servs. Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010) (citations and quotation marks omitted). However, regardless of the type of error the petitioner asserts, it is "the substantive nature of each assignment of error" that dictates the proper scope of review. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155, 712 S.E.2d 868, 870 (2011) (citations omitted).

"When this Court reviews a superior court's order which reviewed a zoning board's decision, we examine the order to: (1) determine whether the superior court exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly." *CRLP Durham, LP v. Durham City/Cty. Bd. of Adjustment*, 210 N.C. App. 203, 207, 706 S.E.2d 317, 320 (2011) (citation, brackets, and quotation marks omitted). For this reason, "the trial court, when sitting as an appellate court to review a decision of a quasi-judicial body, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (internal citations and brackets omitted).

In the instant case, Whitehurst raised three issues on appeal to the superior

court and asserted the Board's actions were "not supported on the record by competent, material, and substantive evidence and [were] contrary to law[.]" Whether the superior court should have exercised both de novo review and the whole record test depends upon each substantive issue raised. *See, e.g.*, *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted). However, neither standard of review is articulated in the superior court's order. The order appealed from states in full:

> THIS MATTER came on before the Court on Petitioner Jeffery Whitehurt's [sic] Petition for Writ of Certiorari seeking review of an April 25, 2014 decision of the Alexander County Planning & Zoning Board of Adjustment dismissing a Notification of Zoning Enforcement Action issued on November 14, 2013 (the "Petition");
>
> THE COURT, having considered the Petition, the record and arguments of counsel, concludes that the Petition should be DENIED.
>
> NOW, THEREFORE, IT IS HEREBY ORDERED that the Alexander County Planning and Zoning Board of Adjustment's decision dismissing the Notification of Enforcement Action issued on November 14, 2013 in connection with property located at 166 Fisherman's Cove Lane, Taylorsville, North Carolina is hereby AFFIRMED.

Although the superior court's order affirming the Board's decision was incomplete, the record before us enables our resolution of the dispositive issues presented. *See Morris Commc'ns*, 365 N.C. at 158-59, 712 S.E.2d at 872-73 ("Remand is not automatic when an appellate court's obligation to review for errors of law can

be accomplished by addressing the dispositive issue(s). Under such circumstances the appellate court can determine how the trial court *should have* decided the case upon application of the appropriate standards of review.") (internal citations, brackets, and quotation marks omitted); *see also Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17. Therefore, we identify and apply the appropriate standards of review to the dispositive issues presented.

III. Analysis

Whitehurst contends that the superior court misinterpreted and misapplied the ACZO by affirming the Board's conclusions that Sipes had not "enlarged or extended" (1) the nonconforming buildings on his property, or (2) the nonconforming use of his land. We disagree.

A. Interpretation of the ACZO

"The superior court reviews a board of adjustment's interpretation of a municipal ordinance *de novo." Fort v. Cty. of Cumberland*, __ N.C. App. __, __, 761 S.E.2d 744, 749 (citation omitted), *disc. review denied,* 367 N.C. 798, 766 S.E.2d 688-89 (2014); *see also* N.C. Gen. Stat. § 160A-393(k)(2) ("When the issue before the court is whether the decision-making board erred in interpreting an ordinance, the court shall review that issue de novo."). Similarly, "[o]n appeal of the judgment of the superior court, this Court must apply a *de novo* standard of review in determining whether the superior court committed error of law in interpreting and applying the

municipal ordinance, and may also freely substitute its judgment for that of the superior court." *Four Seasons Mgmt. Servs.,* 205 N.C. App. at 76, 695 S.E.2d at 463 (quotation marks and citation 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." *Morris Commc'ns*, 365 N.C. at 155, 712 S.E.2d at 871.

Zoning ordinances are interpreted "to ascertain and effectuate the intent of the legislative body." *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 138, 431 S.E.2d 183, 187 (1993) (citation omitted). "The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Four Seasons Mgmt. Servs.,* 205 N.C. App. at 76, 695 S.E.2d at 463 (citations omitted). The language of the specific zoning ordinance controls. *See In re O'Neal*, 243 N.C. 714, 723, 92 S.E.2d 189, 195 (1956). An undefined term "should be assigned its plain and ordinary meaning." *Ayers v. Bd. of Adjustment*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28-29 (1994). Appellate courts do "not read segments of a statute in isolation[,]" but rather strive to give effect to every provision. *MMR Holdings, LLC v. City of Charlotte*, 174 N.C. App. 540, 545, 621 S.E.2d 210, 213 (2005) (quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004)). Furthermore, "[n]onconforming uses and structures are not favored under the public policy of North Carolina, and zoning

ordinances are construed against indefinite continuation of a non-conforming use." *Jirtle v. Bd. of Adjustment for the Town of Biscoe*, 175 N.C. App. 178, 181, 622 S.E.2d 713, 715 (2005) (citations omitted). However, a well-recognized "rule of construction [is] that zoning ordinances are strictly construed in favor of the free use of real property." *Morris Commc'ns*, 365 N.C. at 162, 712 S.E.2d at 874.

B. Enlargement of Nonconforming Buildings

Whitehurst first argues the "trial court erred in interpreting and applying the [ACZO] and concluding that . . . Sipes had not enlarged or extended the nonconforming buildings on his property." We disagree.

Section 154.052 of the ACZO governs the use of nonconforming buildings and provides:

> **§ 154.052 CONTINUING THE USE OF NONCONFORMING BUILDINGS; CESSATION.**
>
> (A) ***Continuing use***. The conditions under which the nonconforming building shall be continued are set forth as follows:
>
> > (1) *Extension of uses*. Nonconforming buildings and nonconforming uses of buildings may be enlarged upon the existing lot or tract which was, at the time of passage of this chapter, part of a business or industrial lot or tract and intended for such use where, if in the opinion of the Board of Adjustment, such extension would not substantially increase traffic volumes, air pollution, water pollution, noise pollution, provision of services and utilities or in some other way adversely affect the health, safety or welfare of the residents of the area. In permitting

> such extension, the Board of Adjustment may require appropriate conditions and safeguards in accord with the provisions of this chapter.
>
> (2) *Change of use*. Any nonconforming building or use of buildings may be changed with the approval of the Board of Adjustment to any use more in character with uses permitted in the district. In permitting such change, the Board of Adjustment may require appropriate conditions and safeguards in accord with the provisions of this chapter.
>
> (B) ***Cessation of use***. If active operations are discontinued for a continuous period of 180 days with respect to a nonconforming use of building, such nonconforming use shall thereafter be occupied and used only for a conforming use.

ACZO § 154.052.

Sipes concedes that nonconforming buildings located on his property were enlarged after the ACZO was enacted. Whitehurst argues the Board's conclusion that Sipes did not enlarge the nonconforming buildings on his property was erroneously based upon its finding that "no such buildings have been located beyond the boundaries of the [s]ubject [p]roperty as shown in the aerial photographs[.]" Whitehurst contends that "[c]ontrary to what the Board may have believed, the 2001 Ordinance does not require that the enlargement of a nonconforming building go beyond the boundaries of the subject Property in order for there to be a violation." In Whitehurst's view, Sipes violated the ACZO by constructing nonconforming buildings prior to obtaining the Board's approval. This argument is immaterial in light of

section 154.052(A)(1) of the ACZO, which grants the Board the authority to allow an enlargement or extension of nonconforming buildings. Section 154.052(A)(1) explains that nonconforming buildings

> *may be enlarged . . . if in the opinion of the Board . . .*, such extension would not substantially increase traffic volumes, air pollution, water pollution, noise pollution, provision of services and utilities or in some other way adversely affect the health, safety or welfare of the residents of the area.

ACZO § 154.052(A)(1) (emphases added). This language indicates that if the Board opines that the extension or enlargement of nonconforming buildings would not adversely affect the health, safety, or welfare of the residents of the area, it may permit such changes.

While it is true that the language of the ACZO indicates a preference for Board approval before nonconforming buildings are enlarged, failure to obtain prior approval does not automatically revoke one's right to use nonconforming buildings. Nor does the provision indicate that the Board cannot consider and approve the enlargement of nonconforming buildings after the enlargement occurs. "[O]ur Courts have no power to add to or subtract from the language of [an ordinance]." *Etheridge v. Cty. of Currituck*, __ N.C. App. __, __, 762 S.E.2d 289, 296 (2014) (citation and quotation marks omitted); *see also Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) ("[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not

used.") (citations omitted).

In the instant case, the Board explicitly considered the new structures on Sipes' property and set forth the following findings in its written decision:

> 17. Buildings in the lower lying area have been added since the adoption of countywide zoning, but no such buildings have been located beyond the boundaries of the Subject Property as shown in the aerial photographs and all of the buildings have been added in areas where boat [sic] previously appeared to be parked. The buildings appear to cover pre-existing boat repair areas.
>
> . . . .
>
> 21. There is no evidence the legal non-conforming business has increased the traffic volumes, air pollution, water pollution, noise pollution, caused other disruption to the neighborhood, or adversely affected the health, safety, or welfare of the residents of the area.

Based on these findings, the Board concluded that Sipes had not enlarged or extended the nonconforming use within the meaning of the ACZO because, *inter alia*,

> C. The subject legal non-conforming business has not increased the traffic volumes, air pollution, water pollution, noise pollution, caused other disruption to the neighborhood, or adversely affected the health, safety or welfare of the residents of the area.

The Board considered Sipes' nonconforming buildings and found no adverse effect on residents in the area. Therefore, the Board properly exercised its discretionary authority to allow Sipes' enlargement of the nonconforming buildings on his property. Accordingly, we overrule Whitehurst's challenge.

C. Nonconforming Use of Land

1. Interpretation of "Enlarged" and "Extended"

Whitehurst next contends that "[t]he trial court erred in interpreting and applying the [ACZO] and concluding that . . . Sipes had not enlarged and extended the nonconforming use of his property." Whitehurst's argument appears to be that the Board, and by extension the superior court, erred in interpreting the terms "enlarged" and "extended" under the ACZO. We disagree.

The ACZO provides: "Nonconforming uses of land shall not hereafter be *enlarged or extended* in any way." ACZO § 154.051(A) (emphasis added). The terms "enlarged" and "extended" are not defined. "Where words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used." *Reg'l Acceptance Corp. v. Powers,* 327 N.C. 274, 278, 394 S.E.2d 147, 149 (1990). "To ascertain the ordinary meaning of undefined and ambiguous terms, courts may appropriately consult dictionaries." *Morris Commc'ns*, 365 N.C. at 158, 712 S.E.2d at 872. "Enlarge" has been defined as "to make larger; increase in quantity or dimensions; extend in limits" and "to increase the capacity of; give . . . greater scope to." Merriam Webster's Third New International Dictionary 754 (1976). Another dictionary defines "enlarge" as "to make or grow larger." The Merriam-Webster Dictionary 239 (6th ed. 2004). "Extend" has been defined as "to cause to be of greater

area or volume; increase the size of; make greater in extent." Merriam Webster's Third New International Dictionary 804 (1976). Another dictionary defines "extend" as "to make greater or broader[;]" "to stretch out or reach across a distance, space, or time." The Merriam-Webster Dictionary 253 (6th ed. 2004).

In the instant case, the Board interpreted the ACZO to conclude that Sipes' nonconformance had been neither enlarged nor extended in violation of the ACZO because his business "ha[d] not changed in nature or scope" nor "enlarged or extended its physical footprint or area[.]" Without giving the Board any deference, *see Morris Commc'ns*, 365 N.C. at 156, 712 S.E.2d at 871, we conclude that the Board correctly interpreted the terms "enlarged" and "extended" to contemplate a nonconformance that increased in either (1) physical footprint or (2) nature and scope. Therefore, we overrule Whitehurst's challenge to the Board's interpretation of the terms "enlarged" and "extended" within the ACZO.

2. Forfeit of Nonconforming Use

Whitehurst next contends that the Board erred in its interpretation and application of the ACZO because in 2011, Sipes enlarged his nonconforming use of property by parking boats on Kevin Carter's property without approval. Specifically, Whitehurst contends that this violation of the ACZO "revoked Sipes['] right to continue the nonconforming use of his Property." We disagree.

It is true that if Sipes parked boats incident to his business beyond the boundaries of his property, this would constitute an enlargement or extension of his nonconformance in violation of the ACZO. However, Whitehurst cites to no legal authority or provision of the ACZO, nor does he advance any legal argument to support his assertion that a zoning violation that was later corrected and passed on by the Board automatically forfeits one's right to continue the existing nonconforming use of property. *See Goodson v. P.H. Glatfelter Co.,* 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."); *see also Viar v. N.C. Dep't of Transp.,* 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). Indeed, the ACZO indicates otherwise.

Section 154.345 of the ACZO sets forth the zoning enforcement officer's duties and provides in pertinent part:

> (B) If the Zoning Enforcement Officer finds that any of the provision [sic] of this chapter are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of the illegal use of land, buildings, or structures; removal of illegal buildings or structures or of additions, alterations or structural changes thereto; discontinuance of any illegal work being done; or shall take any other action authorized by this chapter to insure compliance with or to prevent violation of its provisions.

ACZO § 154.345(B). By extension, the Board "ha[s] the powers of the administrative official from whom the appeal is taken." ACZO § 154.336.

In the instant case, after issuing the 2011 Zoning Violation, Zoning Officer Harris "order[ed Sipes to take] the action necessary to correct [his violation]." When Sipes learned of the 2011 Zoning Violation, he moved the boats. The broad phrase in the ACZO "shall take any other action" modifies the words "to insure compliance with or to prevent violation of its provisions." This phrase not only grants zoning enforcement administrators the authority to order the discontinuance of an existing nonconforming use, but also indicates, to a stronger degree, the intent to confer on zoning enforcement administrators the authority to exercise discretion in ordering the remedy of a violation.

Furthermore, sections 154.050 through 154.053 of the ACZO govern the continuation of nonconforming uses of land and buildings. The only provision which indicates an intent to automatically revoke a nonconforming use pertains to the cessation of activity of a nonconforming building which exceeds 180 continuous days. According to that provision: "If active operations are discontinued for a continuous period of 180 days with respect to a nonconforming use of building, *such nonconforming use shall thereafter be occupied and used only for a conforming use*." ACZO § 154.052(B). No other provision contemplates a situation which results in an automatic revocation of an existing legal nonconforming use. While "zoning

ordinances are construed against indefinite continuation of a non-conforming use[,]" *Jirtle*, 175 N.C. App. at 181, 622 S.E.2d at 715 (citation omitted), "our Courts have no power to add to or subtract from the language of [an ordinance]." *Etheridge*, __ N.C. App. at __, 762 S.E.2d at 296 (citation and quotation marks omitted). Therefore, we overrule Whitehurst's challenge.

D. Sipes' Alleged Enlargement of Nonconforming Use of Land

Whitehurst next contends that the trial court erred as a matter of law by concluding that Sipes did not enlarge his nonconforming use of land. Specifically, Whitehurst contends that Sipes enlarged his nonconforming use of his property by: (1) "clearing pine trees on the northeastern edge of his Property for additional boat storage," (2) "storing repaired boats rather than returning them to their owners," and (3) "beginning to recycle aluminum within the last two years." We disagree.

While Whitehurst attempts to advance these challenges under the rubric of errors of law, the substantive nature of these issues pertain to the sufficiency of the evidence before the Board and, therefore, required whole record review. *See Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 209, 747 S.E.2d 338, 343 (2013) (reviewing under the whole record test an issue asserted as a challenge to a board of adjustment's interpretation of a zoning ordinance, because the substance of the issue–whether a particular street met a certain zoning classification–"focuse[d] on the sufficiency of the evidence"); *Blue Ridge Co. v. Town of Pineville*, 188 N.C. App.

466, 470, 655 S.E.2d 843, 846 (2008) (approving the trial court's use of the whole record test to resolve the issue of whether "petitioner met the technical requirements of the ordinance").

The whole record test

> requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the Board's decision is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The reviewing court should not replace the Board's judgment as between two reasonably conflicting views; while the record may contain evidence contrary to the findings of the Board, this Court may not substitute its judgment for that of the Board.

Coucoulas/Knight Props., LLC v. Town of Hillsborough, 199 N.C. App. 455, 458, 683 S.E.2d 228, 230 (2009) (citation and brackets omitted), *aff'd per curiam*, 364 N.C. 127, 691 S.E.2d 411 (2010).

1. Clearing Pine Trees for Boat Storage

Whitehurst contends that Sipes enlarged the nonconforming use of his property by clearing the pine trees and other vegetation on his land for additional boat storage. We disagree.

Whitehurst cites to *Stokes Cty. v. Pack.*, 91 N.C. App. 616, 372 S.E.2d 726 (1988), to support his position; however, *Stokes* is distinguishable. In *Stokes*, the petitioners owned a ten-acre lot and cleared five acres to use for the operation of a repair garage. *Id.* at 620, 372 S.E.2d at 728. After the land was zoned, the repair

garage was deemed a nonconforming use of property. At issue was whether the petitioners had unlawfully expanded the nonconforming use of their property by increasing the number of vehicles stored on the property. *Id.* The zoning ordinance was virtually identical to the instant case and read:

> Section 70. Continuing the Use of Non-Conforming Land
>
> 70.1 Extensions of Use. Non-Conforming uses of land shall not hereafter be enlarged or extended in any way.

Id. at 619, 372 S.E.2d at 728. This Court held that the addition of vehicles on the five acres already cleared and in use for the business constituted a lawful "completion" of the nonconforming use of land. However, this Court noted that the Board could prohibit the petitioners from using the undeveloped five acres for business purposes. *Id*. at 620, 372 S.E.2d at 728-29. This Court explained that "[t]his would be a non-conforming use and as such would violate Section 70 of the Zoning Ordinance of Stokes County. Such an enlargement lies within the discretion of the Stokes County Board of Adjustment." *Id*. at 620, 372 S.E.2d at 729.

In the instant case, during the appeal hearing, the Board reviewed aerial photographs of Sipes' property that were obtained by the county via Geographical Information Systems ("GIS"). The Board considered photos taken before and after the pines were cut and made the following findings of fact:

> 14. . . . . Based on the aerial photography, the Board finds the footprint, or area, of the business as shown in the aerial phonographs [sic] from 2013 has not changed since 1999 in

> that there has been no expansion of the area used by the Property Owner for his boat repair business on the Subject Property. . . . Various boats and equipment have been moved in and out over time, and the number of boats and equipment has changed over time, but the use of the property in connection with the legal non-conforming boat repair business has not changed over time.
>
> 15. The GIS maps show that an area along the existing roadway has more recently been cleared of small pine trees and other vegetation, and the Property Owner testified he cut the vegetation from that area of the Subject Property in order to clear his property of pine needles, which tended to collect in the boats parked on the Subject Property. . . .
>
> . . . .
>
> 20. There is no evidence the legal non-conforming business has expanded in its physical footprint or area since the adoption of countywide zoning[.]

Whitehurst does not challenge that the Board's findings were unsupported by the evidence, nor does he point to any record evidence to support his assertion that Sipes used the cleared area for additional boat storage. The Board's finding that Sipes' property had not enlarged in physical footprint, based upon aerial photographs of Sipes' property, therefore eviscerates Whitehurst's challenge. In other words, based on the Board's unchallenged finding that Sipes' business did not expand in physical footprint or area following adoption of the ACZO, it follows that Sipes had not used previously undeveloped land to park additional boats.

Furthermore, Sipes testified before the Board that the pines existed on a portion of the property that was "real steep[,]" akin to "a house with a 90 degree

roof[.]" This testimony further suggests that Sipes could not use the cleared vegetation for any business purpose. Rather, the record indicates that Sipes cleared the trees to prevent pine needles from accumulating on boats and other equipment lawfully stored on his property. Sipes' clearing of the pine trees to maintain the boats and other equipment can properly be considered a "completion" of his nonconforming use rather than an illegal enlargement. *See Stokes Cty.*, 91 N.C. App. at 620, 372 S.E.2d at 729. Substantial competent evidence was presented to support the Board's conclusion that Sipes did not enlarge his nonconforming use of property by clearing the pine trees. Therefore, we overrule Whitehurst's challenge.

2. Storing Boats and Equipment

Whitehurst next asserts that Sipes unlawfully enlarged or extended the nonconforming use of his property by storing boats on his property that had been abandoned by customers. Specifically, Whitehurst argues that "[b]y keeping abandoned boats Sipes has changed the nature of his nonconforming business from a marine engine repair business to a junk or salvage business. This is not merely an intensification of use, but is an enlargement of use." We disagree.

The ACZO does not define "marine engine repair business," but it defines "JUNK or SALVAGE YARDS" as:

> The use of any unenclosed portion of a lot or tract for the storage or abandonment of junk, including scrap metals and other scrap material, or dismantling or abandonment of automobiles or other vehicles or machinery, but not

> including the temporary storage of damaged vehicles in connection with the operation of a repair garage. The deposit or the storage on a lot not in use as a repair garage of one or more wrecked or broken down vehicles titled in the name of the property owner for more than 90 days shall also be deemed a salvage yard.

The validity of Whitehurst's argument hinges upon the assumption that Sipes' business was accurately classified prior to the 2013 Zoning Violation. This the record fails to disclose.

Zoning Officer Harris testified that Sipes' property had never been classified under the ACZO until the 2011 Zoning Violation was issued. He stated that he classified Sipes' nonconforming use of property as a "watercraft repair business" for the first time in 2011 by "observ[ing] . . . the property and [engaging in] conversations with Mr. Sipes." The ACZO defines a "watercraft maintenance *facility*," as "[a] commercial establishment devoted to the detailing and repair of privately owned watercraft." ACZO § 154.006 (emphasis added).

However, Sipes testified that since 1985, his business has been one which "work[s] on marine engines[,]" and does not engage in boat repair. When asked to explain a particular pile of equipment and materials shown in the aerial photographs introduced at the hearing, Sipes testified: "Well, they're boats, and cars, motors and stuff like that[.]" When asked what happens to parts of boats that have been dismantled, he responded: "Well, . . . a lot of times there's so many parts been [sic] discontinued you've got to buy one to get the pieces off to repair one with. And

eventually, I take it apart[.]" Sipes further testified that he has kept scrap metal, engine parts, and other equipment on his property "ever since [he has] been there." Sipes also confirmed that he has allowed his customers' boats to be stored on his property until such time as they may come back to collect them and that it has always been his business practice to do so. He explained:

> [If a customer] brings [a boat] there and leaves it and if they don't come back and get it . . . I ain't inclined to sell nobody's stuff. We just let it sit there. Sooner or later they may come back and get it. I ain't going to throw their stuff away.

Furthermore, Zoning Officer Harris issued Sipes the 2013 Zoning Violation for unlawfully expanding his nonconforming use from a "watercraft repair facility" to a "junk/salvage yard." He explained that he issued the violation after receiving another complaint from Whitehurst about Sipes' property in 2013:

> After visiting the property and speaking with Mr. Sipes, it became apparent that he was stock piling scrap metal for purposes other than those with his watercraft repair business. It was also apparent that a large dump truck, a heavy machinery trailer, and numerous boats had been stored on the property since the initial investigation in 2011.

However, on cross-examination, Zoning Officer Harris conceded that prior to classifying Sipes' property in 2011, he never visited or observed the lower portion of his tract of land. Viewing the aerial photographs, Zoning Officer Harris admitted that "all the things that that map indicates would be the junk . . . the things [he]

placed in . . . [his] record – rusted metal, inoperable boats, scrap, things of that nature. All that's on the lower part of the property[.]" Zoning Officer Harris ultimately confirmed he had no knowledge of how Sipes used the lower tract of his property when he testified that the use of the property had changed from 2011 to 2013. In sum, with no accurate parameters to define the exact nature and scope of Sipes' use of the entire tract of his property, a violation for its expansion or enlargement cannot logically be sustained.

Substantial competent evidence was presented to support the Board's conclusion that Sipes did not enlarge his nonconforming use of property by changing the nature of his business. Therefore, we overrule Whitehurst's challenge.

3. Recycling Aluminum

Whitehurst also contends that Sipes enlarged the nonconforming use of his property by starting to recycle aluminum on his property. We disagree.

During the hearing before the Board, Sipes was questioned about a particular pile of materials shown in an aerial photograph. The following exchange occurred, which Whitehurst contends supports his assertion that Sipes enlarged the nonconforming use of his property:

> A: [T]hat's recyclable aluminum.
> Q: Okay. How long has that been there?
> A: Oh, I've been recycling there for about two years. Something like that.

However, Sipes later confirmed that he had been storing scrap metal on his property ever since he has been there. Substantial competent evidence was presented to support the Board's conclusion that Sipes did not enlarge his nonconforming use of property by starting to recycle aluminum on the property. Therefore, we overrule Whitehurst's challenge.

IV. Correction of Clerical Error

As a secondary matter, we note that the trial court erred in its order by stating that it denied Whitehurst's petition, because it granted Whitehurst's petition.

N.C. Gen. Stat. § 160A-388 governs certiorari review of decisions of municipal boards of adjustment and provides in pertinent part: "Every quasi-judicial decision shall be 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). N.C. Gen. Stat. § 160A-393 provides in pertinent part: "The clerk shall issue the writ [of certiorari] . . . if the petition has been properly filed and the writ is in proper form." N.C. Gen. Stat. § 160A-393(f).

In the instant case, Whitehurst petitioned the superior court for certiorari and the clerk of Alexander County Superior Court issued the writ. The Board sent the transcript of the hearing underlying its decision to the superior court, who subsequently held a hearing, reviewed the Board's decision, and then affirmed it by written order. Therefore, the superior court granted Whitehurst's petition requesting

the issuance of a writ of certiorari; however, it denied Whitehurst's request that the superior court reverse the Board's decision and declare Sipes' nonconforming use terminated. Accordingly, we vacate the portion of the trial court's order stating it denied the petition and remand for the limited purpose of correcting its clerical error. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.") (citation and quotation marks omitted).

V. Conclusion

Although the superior court's order was incomplete, we identified and applied the proper standards of review to resolve the dispositive issues before us. We reviewed de novo Whitehurst's challenges to the Board's interpretation and application of the ACZO. Moreover, we reviewed Whitehurst's challenges that required a consideration of the evidence before the Board under the whole record test. We concluded that Sipes had not enlarged nor extended his nonconforming use of property in violation of the ACZO. Therefore, we affirm the trial court's order that upheld the Board's decision to overturn the 2013 Zoning Violation issued against Sipes. In addition, we remand to the superior court for the limited purpose of correcting the clerical error in its order.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges STROUD and INMAN concur.

Report per Rule 30(e).