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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-101

Filed: 4 October 2016

Iredell County, No. 15 CVS 01179

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v.

THE CITY OF STATESVILLE, NORTH CAROLINA, LOVE'S TRAVEL STOPS & COUNTRY STORES, INC., and ROSEROCK HOLDINGS, LLC, Respondents

Appeal by petitioners from order entered 12 October 2015 by Judge Mark Klass in Iredell County Superior Court. Heard in the Court of Appeals 8 August 2016.

Parker Poe Adams & Bernstein, LLP, by Anthony Fox, Benjamin R. Sullivan, and Nicolas E. Tosco, for petitioner-appellants.

Homesley, Gaines, Dudley & Clodfelter, LLP, by Edmund L. Gaines and Lea Gaines Messick, for respondent-appellee The City of Statesville, North Carolina.

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Homesley & Wingo Law Group PLLC, by Clifton W. Homesley and Clark D. Tew, for respondent-appellees Love’s Travel Stops & Country Stores, Inc., and Roserock Holdings, LLC.

CALABRIA, Judge.

Residents and business owners (“petitioners”) in the City of Statesville (“the City”) appeal an order of Iredell County Superior Court, which affirmed the determination of the City Council approving a site development plan (“the Plan”) in the B-4 Zoning District. For the reasons that follow, we affirm.

I. Factual and Procedural Background

In March of 2012, Love’s Travel Stops & Country Stores, Inc., and Roserock Holdings, LLC (collectively, “Love’s”) contacted the City’s Planning Department for the purpose of approving its plan to build a truck stop on a roughly 14.4-acre site (“the site”) in the City’s B-4 Zoning District. The City’s Planning Director, David Currier, approved of this use, and petitioners sought review in Iredell County Superior Court by petition for writ of certiorari. The trial court held that Currier’s opinion was merely advisory. Subsequently, the City revised its Unified Development Code, and approved the construction of truck stops in the B-4 Zoning District. Petitioners again sought review by petition for writ of certiorari, but the trial court affirmed the zoning decision. Petitioners appealed the matter to this Court, and on 3 May 2016, we filed our opinion. *Campbell v. City of Statesville*, ___ N.C. App. ___,

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786 S.E.2d 433 (2016) (unpublished) (hereinafter *Campbell I*). The foregoing facts were determined in *Campbell I*, and we incorporate the factual and procedural background of that case by reference. The instant case arises from those same facts, along with new ones presented below.

On 13 May 2015, petitioners once more sought a writ of certiorari from the trial court. This petition was substantially similar to the petition in *Campbell I*, in that it alleged various harms that would be suffered by petitioners, contended that the City Council¹ made numerous errors of law, and contended that the City Council's decision was not supported by adequate findings. Where the petition in the instant case distinguished itself, however, was that petitioners also contended that (1) the City Council improperly placed a burden of proof on petitioners, rather than on Love's; (2) the City Council wrongly excluded one of its own members; and (3) the City Council failed to adequately consider the adverse impact a truck stop would have on adjoining properties. The trial court granted certiorari, and on 12 October 2015, entered an order affirming the decision of the City Council.

Petitioners appeal.

II. Standard of Review

Our standard of review, as stated in *Campbell I*, is to “examine[] the court's order for error of law. The process has been described as a twofold task: (1)

¹ In *Campbell I*, the contention was that the City Board of Adjustment, not the City Council, made numerous errors of law.

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determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *Welter v. Rowan Cty. Bd. of Comm’rs*, 160 N.C. App. 358, 362, 585 S.E.2d 472, 476 (2003) (citations and quotations omitted). Where petitioners correctly contend that a decision was unsupported by the evidence or was arbitrary and capricious, the standard of review is the whole record test. *Tucker v. Mecklenburg Cty. Zoning Bd. Of Adj.*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001), *aff’d in part, review dismissed in part*, 356 N.C. 658, 576 S.E.2d 324 (2003). Where petitioners correctly contend that a decision was based on an error of law, *de novo* review is required. *Id.*

III. Substantial Evidence

In their first argument, petitioners contend that the City Council’s decision to approve the Plan was unsupported by competent and substantial evidence. We disagree.

Specifically, petitioners contend that, pursuant to the Unified Development Code, a Plan “shall be compatible with and shall not adversely impact adjoining properties whether residential or nonresidential.” Statesville, N.C., Unified Dev. Code § 2.15(D) (2015). In its order, the trial court noted petitioners’ arguments, and entered several findings. The trial court observed that the site was located in a wedge of property between two highways, “Interstate 40 and U.S. Highway 64, both multi-

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lane, federally-maintained, large-scale highways[.]” and that the site “is intended to serve traffic from both I-40 and U.S. 64.” The trial court further observed that:

[T]his Site Development Plan was specifically compatible with traffic concerns in the area; in fact the evidence even went so far as to show that in the future, traffic would be enhanced by the improvements the Site Development Plan would add to the area. This evidence is reliable, and was presented through quantitative data explained by an expert in the area of traffic analysis. This evidence was also not rebutted by the Petitioners, because the Petitioners only presented general opinion testimony that two adjoining property owners believe congestion on this road would be worsened through the Site Development Plan, which evidence is inadmissible per N.C. Gen. Stat. § 160A-393(k)(3). Even if this testimony is considered, it does not provide a credible basis for denying the Site Development Plan. The Record therefore shows substantial and competent evidence to support the determination that the traffic generated by this development would not adversely impact adjoining property owners. There was no expert testimony presented by the Petitioners directed to any specifics of the Site Development Plan itself.

The evidence in the record also demonstrates that the Site Development Plan was generally compatible with adjoining properties. The Planning Director of the City of Statesville testified that the Site Development Plan was compatible with the provisions and objective criteria of the Unified Development Code. The essence of this Code is to make surrounding developments compatible to one another. Unified Dev. Code § 1.02(C-G). There is also evidence in the record that some aspects of the Site Development Plan surpass the Code’s requirements. For instance, the Applicant planted additional vegetation on the property line of an adjoining property owner, also a Petitioner in this action, to allow a more substantial buffer, and Applicant is also using specialized lighting to control

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unnecessarily bright lights and light pollution from escaping the site. An expert for Love's, Ross Grimball, provided his testimony that the site plan included every design factor that would mitigate the impact of the site upon adjoining properties.

Overall, there is substantial and competent evidence found within the record which shows that this Revised Site Development Plan is compatible with, and would not adversely impact adjoining properties. Even if this or another Court could reach a different conclusion, this Court cannot replace its judgment for that of the Board on a whole record review. This record contains relevant evidence that a reasonable mind would accept as adequate to support the conclusion.

These comprehensive findings embrace the appropriate standard of review, namely whole record review; enumerate the various evidentiary factors considered by the trial court in affirming the decision of the City Council; and properly apply the standard to the evidence in concluding that the City Council's decision was supported by competent evidence in the record.

Upon review of the whole record, we agree. Petitioners' arguments, in essence, amount to contentions that their evidence below should have been given more weight. However, that is not our standard of review. The whole record test "does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views[.]" *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted). Instead, it merely requires us to "examine all competent evidence (the 'whole record') in order to determine whether the agency

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decision is supported by ‘substantial evidence.’ ” *Amanini v. N.C. Dep’t. of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (citation omitted). In the instant case, we agree with the trial court that the City Council’s decision was indeed supported by substantial evidence, and to that extent, the trial court did not err in affirming the decision of the City Council.

This argument is without merit.

IV. Errors of Law

In their second argument, petitioners contend that the City Council committed several errors of law in reaching its decision to approve the Plan. We disagree.

A. Conclusory Findings

Petitioners first contend that the City Council’s decision was based on “only conclusory findings[,]” and that the City Council therefore “failed to provide a basis for its conclusions.” Petitioners contend that the written decision by the City Council “generally restated relevant portions of the Code, state statute, as well as procedural and background facts[,]” and that it then went on to offer conclusory statements that the Plan met all requirements, and was not incompatible with nor did it negatively impact adjoining properties. Petitioners contend that these findings were conclusory and insufficient.

The trial court addressed this argument below, and found:

These findings are not conclusory or insufficient in form simply because the language mirrored that of the

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ordinance. While the Decision of the City Council does in part mirror some language found within the City's ordinance, this Decision goes beyond this language to make proper findings of fact. For instance, the City Council found: (1) a description of the property; (2) the zoning for the property; (3) the procedural path this Site Development Plan has taken; (4) improvements that were made to the Plan, which mitigates the traffic generated by this development; (5) that Lassiter Transportation Group had conducted a traffic study and evaluation; and (6) that the Plan complied with each and every objective criteria of the City of Statesville's Unified Development Code and regulations. This list is not exhaustive of additional findings of fact made by the City Council, but instead serves to illustrate how proper findings of fact were made that went beyond merely mirroring the language of the ordinance. Therefore, the Statesville City Council made proper findings of fact in their Decision and committed no error of law.

The trial court's standard of review of the City Council's decision for an alleged error of law was *de novo*. Upon review of the record, we agree that the trial court properly applied the correct standard of review. The trial court examined the record anew, and determined that the City Council did not merely offer conclusory repetitions of statute, but in fact applied the statute to the relevant facts of the case. As such, we hold that the trial court did not err in its determination that the City Council's conclusions were not baseless or conclusory.

B. Wrongful Exclusion

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Petitioners next contend that the City Council erred by granting Love's motion to recuse Dr. Michael Schlesinger, a member of the City Council, from participating and voting during the hearing on the Plan.

Love's had sought to recuse Dr. Schlesinger on the grounds that he had expressed a fixed opinion prior to the hearing that was not susceptible to change, that he had a close relationship with an affected party to the proceedings, and that he had a financial interest in the matter. Dr. Schlesinger objected to these allegations. With respect to the first allegation, that he had expressed a fixed prior opinion, Dr. Schlesinger averred that his statements opposing the plan were made over two years prior, before he was elected to the City Council. With respect to the second allegation, that he had a close relationship with an affected party, Dr. Schlesinger acknowledged that he and his wife lived a mere half-mile from the site, but contended that so many parties lived within that radius that it would be unreasonable to recuse anyone who lived in that area. With respect to the third allegation, that he had a financial interest in the outcome of the matter, Dr. Schlesinger acknowledged that the Plan might impact the value of his home, but contended that the impact of the Plan on his property value was not sufficient to merit recusal.

The trial court reviewed petitioners' arguments, and determined the following:

The Petitioners have argued that there was no basis for Councilman Schlesinger's recusal. On a review of the general statutes and record before the Court, this Court holds that Councilman Schlesinger was rightly recused. A

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member of a quasi-judicial board shall not participate in a quasi-judicial matter affecting a persons' [sic] constitutional right to an impartial decision maker. N.C. Gen. Stat. § 160A-388(e)(2). An applicant's due process rights would be violated if the decision maker had either a fixed opinion prior to the hearing that is not susceptible to change or a financial interest in the outcome; these are not the only bases for disqualification, as the statute allows for other, unlisted reasons, to serve as the basis for recusal provided they affect the applicant's due process rights. *Id.* The evidence here shows Councilman Schlesinger had both a fixed opinion not subject to change and a financial interest in the outcome of this proceeding. Councilman Schlesinger has participated in prior litigation opposing the truck stop as a sort of “named Plaintiff”, and he purchased an Internet domain (“Nosvltruckstop.com) devoted to opposing the truck stop and promulgated a message on this website in opposition to this development. This website even went so far as to say, “we are firmly against any action which may lead to the approval of a truckstop at the intersection of Old Mocksville Road and Highway 64.” He also testified in a prior hearing that he believed the value of his home would decline if the truck stop were developed on this site. Therefore, and to keep safe the Constitutional Due Process rights of these Applicants, this Court has no choice but to hold that the Statesville City Council rightfully recused Councilman Schlesinger and committed no error of law.

This court further holds that, in addition to the implications of the listed reasons for recusal in § 160A-388(e)(2), to permit Councilman Schlesinger to have heard and voted on this matter would have been akin to allowing a Judge who had previously expressed vocal, public opposition to a particular party to litigation – and participated in that litigation extensively – to later sit in judgment of that party in the same or any closely related litigation. Insofar as the N.C. Code of Judicial Conduct would prohibit similar behavior, and insofar as common sense would demonstrate that allowing Councilman

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Schlesinger to participate would have given a clear and distinct impression of impropriety, the City Council's vote to recuse him was valid and not erroneous.

Once again, we hold that the trial court properly applied *de novo* review of the record in considering this issue. The trial court examined the record anew, and determined that Dr. Schlesinger's prior comments, activities, and litigation demonstrated a fixed opposition to the Plan, which would harm Love's due process rights to an impartial and unbiased consideration of its application. The trial court went even further, noting that the inclusion of Dr. Schlesinger, particularly after his participation in separate litigation in a related matter, would create the appearance of impropriety in this quasi-judicial proceeding. We hold that the trial court did not err in its determination that the City Council's decision to recuse Dr. Schlesinger was not improper.

C. Improper Burden of Proof

Lastly, petitioners contend that the City Council improperly placed the burden of proof on petitioners to establish the negative impact of the Plan, rather than on Love's to establish compliance with the Uniform Development Code.

The burden is on an applicant to produce evidence that an application meets the standards of an ordinance. Once such evidence is produced, however, the applicant is *prima facie* entitled to the requested use, and a denial should be based only upon findings supported by competent, substantial evidence in the record. *See*

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Humble Oil & Ref. Co. v. Bd. of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). Thus, the burden was on Love's to establish that the Plan complied with the Unified Development Code; thereafter, the burden would shift to petitioners to establish proof of non-compliance. Petitioners contend, however, that comments made by members of the City Council show that the City Council believed that the burden was entirely on petitioners.

The trial court examined this argument, and reached the following determination:

Petitioners have argued that the City Council improperly placed the burden of proof on the Petitioners, rather than Love's. However, in considering this issue anew, this Court does not need to determine if the proper burden of proof was applied, because Love's made a prima facie showing that this Site Development Plan was compatible with, and did not adversely impact adjoining properties. Love's met this burden through quantitative data and expert testimony. The Petitioners presented evidence, which they argue shows the Site Development Plan's incompatibility with adjoining properties. However, this evidence does not pinpoint an inconsistency in the actual site development plan. This evidence instead addressed the Petitioner's general and non-quantitative concerns regarding the incompatibility of truck stops in general with the surrounding uses.

This Court holds that, insofar as it must consider truck stops/travel stops a use allowed as a matter of right in the B-4 zone, evidence about the effects of the use in general, which evidence is not tied to any particular features of the site plan, is irrelevant. Therefore, even when the burden of proof is most strictly placed entirely upon Love's, the greater weight of the evidence shows that this Site

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Development Plan is compatible with adjoining properties. This Court does not believe that the burden is or should be strictly placed on Love's, however. It is well-settled law that in a special use permit application process, while the applicant bears the burden of proof, a burden-shifting test is applied, in which the party challenging the application bears a burden of production, that is, of producing evidence that challenges the applicant's *prima facie* case. This sort of matter – that is, the appeal of a site plan design that relates to a use *as-of-right* – should, at the minimum, have no greater burden placed on an Applicant in seeking a special use permit. Certainly, in this case, the Petitioners did not meet their burden of production in producing evidence that contradicted Love's *prima facie* case; the evidence provided by Petitioners was thoroughly rebutted before the City Council by Love's own evidence. This Court believes that the burden of proof in this matter should likely be even more favorable, therefore requiring the Petitioners – in other words, the party seeking to challenge the Site Plan – to bear the burden of proof in attempting to prevent an *as-of-right* use from being built based on technical design grounds, but this Court has no need to assess under that burden, as it would be moot based on its holding herein.

We hold that once again the trial court correctly applied *de novo* review to the issue. The trial court, examining the evidence anew, correctly noted that Love's application demonstrated compliance with the Unified Development Code, which shifted the burden to petitioners. Petitioners' evidence of impact was limited primarily to assertions of non-compatibility with surrounding property, and was rebutted by evidence presented before the City Council.

On appeal, petitioners contend that comments by the City Council prior to the vote, that petitioners “didn't prove adverse impact” and “didn't prove

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noncompatibility[,]” improperly placed the burden of proof on petitioners. However, the placement of a burden on petitioners was appropriate where the applicant had already made a *prima facie* showing of compliance; such was the case here. We hold that the trial court did not err in its determination that the City Council did not place an improper burden on petitioners.

This argument is without merit.

V. Conclusion

The trial court properly applied the whole record test in determining that the City Council’s decision was supported by competent and substantial evidence. The trial court properly applied *de novo* review in determining that the City Council’s findings were not conclusory and baseless, that it did not improperly recuse Council Member Dr. Schlesinger, and that it did not place an improper burden on petitioners.

AFFIRMED.

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).