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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-475

Filed: 20 December 2016

Henderson County, No. 15 CVS 2084

STANLEY RAY SHELLEY and ELIZABETH J SHELLEY, Petitioners,

v.

COUNTY OF HENDERSON, of the State of North Carolina and WILLIAM CRANE and TAMRA CRANE, Respondents.

Appeal by petitioners from order entered 9 March 2016 by Judge Richard L. Doughton in Henderson County Superior Court. Heard in the Court of Appeals 6 October 2016.

Christopher S. Stepp for respondent-appellees William Crane and Tamra Crane.

Charles Russell Burrell for respondent-appellee County of Henderson.

Prince, Youngblood & Massagee, PLLC, by B. B. Massagee, III, Sharon B. Alexander, and Sarah Renee Massagee, for petitioner-appellants.

McCULLOUGH, Judge.

Stanley Ray Shelley and Elizabeth J. Shelley ("petitioners") appeal an order of the trial court, affirming the Henderson County Zoning Board of Adjustment's ("ZBA") grant of a special use permit to William Crane and Tamra Crane

("respondents"). Based on the reasons stated herein, we affirm the order of the trial court.

I. Background

On or about 18 August 2015, respondents submitted to the County of Henderson ("County"), a special use permit application form ("application") to construct a "small place of assembly" as defined by Henderson County Code of Ordinances 42-62 ("ordinance"). Respondents are owners of real property located in Hendersonville, North Carolina. The application stated that the "small place of assembly" would consist of a barn that would be primarily used for events such as weddings, receptions, and birthday parties. The events would mostly occur on weekends with a maximum occupancy of 150 people.

The ZBA considered the application at a quasi-judicial public hearing held on 30 September 2015. On 28 October 2015, the ZBA entered an order granting the special use permit. The ZBA made the following findings of fact, in pertinent part: the ZBA accepted into evidence a staff memorandum, maps, pictures, application, and site plan; respondents requested a special use permit; the application was reviewed by the Technical Review Committee ("TRC") at their 1 September 2015 meeting and the TRC recommended the ZBA approve the special use permit with conditions that the applicant obtain a North Carolina Department of Transportation ("NCDOT") driveway permit and apply for a public water supply permit or connect to municipal

water; the surrounding uses are mixed residential and educational uses; there are currently a house, two garages, and an existing barn on the property; the proposed use will be conducted in a new barn that will be constructed on the property and the new barn will be approximately 3,000 square feet; the event space will be used for weddings, receptions, and birthday parties with a maximum occupancy of 150 people; respondents will be onsite during all events; events will not go past 10:00 p.m.; NCDOT will approve a driveway permit for an entrance off of Bradley Road; property lines are buffered by a wooden fence on the southern boundary and mature pine trees on the northern boundary; outdoor lighting will be aimed at parking lots; events may have alcohol, music, and they may be outdoors; and, events most likely will take place in the evenings, on the weekends, and primarily from May to October.

The ZBA also made the following findings: concerns were raised about parking lot lighting on the surrounding residences because of the elevation of the subject property; concerns were raised about the numerous accidents on Country Road and the increase of traffic due to the events; concerns were made about music and alcohol from the events and their effect on property values; concerns were raised about being able to see the subject property through the pine trees; concerns were raised about how the event space would interrupt the peace and quietness of the neighborhood; and, concerns were raised about privacy, littering, security, and the effect that events might prevent surrounding property owners from using their property. The ZBA

found that Mark White ("Mr. White"), a property appraiser, testified that "an event venue in the neighborhood would have a significant negative effect on property values and make it harder to find potential buyers but did not prepare any data to present to the Board on the actual effect on property values."

The ZBA concluded that the special use permit met all the standards of the ordinance and granted the special use permit based on the following reasons, in pertinent part:

> a. The project does not materially endanger the public health, safety or welfare because the driveway on Haywood Road will be personal use only[.]
>
> b. The project will not substantially injure the value of property or improvements in the area because it is zoned Residential 2 and surrounding uses include a middle school, high school and educational farm. Applicants will continue to reside on the subject property.
>
> c. The project is in harmony with the surrounding area because it is zoned Residential 2 and in the Urban Service Area of the Comprehensive Plan.
>
> d. The project complies with all applicable local, state and federal statutes, ordinances and regulations because it meets the Special Requirements of the Land Development Code and the requirements of the NC Department of Transportation driveway permit[.]
>
> . . . .
>
> f. The project minimizes the effects of noise, glare, dust, solar access and odor on those persons residing or working in the neighborhood of the proposed use

> because it will require light mitigation and there are fences and trees on the perimeter[.]
>
> g. The project minimizes the environmental impacts on the neighborhood, including the following[:] groundwater, surface water, wetlands, endangered/threatened species, archeological sites, historic preservation sites and unique natural areas because the additional building will not substantially increase impervious surfaces[.]

In its order, the ZBA established the following conditions on respondents' special use permit: respondents must agree to in writing the provisions of this order; respondents must comply with Supplemental Requirement 5.17; respondents are bound to the site plan; 50 foot setback from property line; no parking in setback; designated parking needs to be buffered by vegetation or fencing; no events to take place outside the hours of 10:00 a.m. to 10:00 p.m.; and, no event to have more than 150 people.

In November 2015, petitioners filed a petition for writ of certiorari to the Superior Court of Henderson County, appealing the decision of the ZBA. Petitioners argued that the ZBA's decision was unsupported by substantial, competent evidence in view of the entire record; inconsistent with applicable procedures specified by statute or ordinance; and was arbitrary and capricious.

On 9 March 2016, the trial court affirmed the decision of the ZBA. The trial court made similar findings of fact as those set out in the ZBA's order. The trial court found that petitioners alleged three issues for the trial court's review: whether the

ZBA order was supported by competent evidence; whether the ZBA order was inconsistent with applicable procedures specified by statute or ordinance; and, whether the ZBA's order was rendered arbitrarily and capriciously. The trial court concluded as follows, in pertinent part:

> 3. This Court is to review the decision of the decision-making board, the Henderson County ZBA to ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
>
>   a. Inconsistent with applicable procedures specified by statute or ordinance
>
>   b. Unsupported by substantial competent evidence in view of the entire record
>
>   c. Arbitrary or capricious[.]
>
> 4. The Order granting the Special Use Permit was not inconsistent with applicable procedures specified by statute or ordinance.
>
> 5. The Order granting the Special Use Permit was supported by substantial competent evidence in view of the entire record.
>
> 6. The Order granting the Special Use Permit was not arbitrary or capricious[.]
>
> 7. The ZBA properly granted the Applicant/Respondent a Special Use Permit[.]
>
> 8. The ZBA followed the applicable rules, statutes and ordinances and its decision should be AFFIRMED[.]

Petitioners appeal the 9 March 2016 order of the trial court.

II. Standard of Review

"[T]he terms 'special use' and 'conditional use' are used interchangeably[.] . . . [A] conditional use or a special use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 319, 752 S.E.2d 524, 526 (2013) (citation omitted).

"A particular standard of review applies at each of the three levels of this proceeding – the [ZBA], the superior court, and this Court. First, the [ZBA] is the finder of fact in its consideration of the application for a special use permit." *Davidson County Broad., Inc. v. Rowan County Bd. of Comm'rs,* 186 N.C. App. 81, 86, 649 S.E.2d 904, 908 (2007). The ZBA is required to

> follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. If a *prima facie* case is established, [a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.
>
> . . . .
>
> Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 12, 565 S.E.2d 9, 16-17 (2002) (internal citations and quotation marks omitted). A Board's "findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Id.* at 12, 565 S.E.2d at 17 (citation omitted).

> Upon appeal from the Board to the superior court, the superior court acts as a court of appellate review. The superior court's task is:
>
> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of . . . boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Davidson County Broad., 186 N.C. App. at 86-87, 649 S.E.2d at 909 (internal citations omitted).

> The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. When the petitioner questions (1) whether the agency's

> decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test. However, [i]f a petitioner contends the [b]oard's decision was based on an error of law, "de novo" review is proper.

Mann Media, 356 N.C. at 13, 565 S.E.2d at 17 (internal citations and quotation marks omitted). "The 'whole record' test does not allow the reviewing court to replace the board'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*." *Davidson County Broad.*, 186 N.C. App. at 87, 649 S.E.2d at 910 (citation omitted).

Finally, "[w]hen this Court reviews a superior court's order regarding a zoning decision by a Board . . . , we examine the order to: '(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.' " *Blair Invs.*, 231 N.C. App. at 320, 752 S.E.2d at 527 (citation omitted).

III. Discussion

Petitioners argue that the trial court erred in affirming the decision of the ZBA. Specifically, petitioners contend that the trial court failed to conclude that the ZBA's findings, conclusions, and decisions were (A) unsupported by substantial, competent evidence; (B) inconsistent with the applicable procedures specified by statute or ordinance; and, (C) arbitrary and capricious. We address each argument in turn.

A. Substantial, Competent Evidence

Petitioners contend that the trial court erred in failing to conclude that the ZBA's findings, conclusions, and decisions were not supported by substantial, competent evidence in view of the entire record. Specifically, petitioners claim that respondents offered no evidence at the hearing before the ZBA "other than they do not feel like there will be a problem with these issues" while testimony was offered by "numerous neighbors to [respondents'] property . . . of the damaging effect of the place of assembly due to the traffic, noise, and lighting resulting therefrom." In addition, petitioners contend that their expert witness, Mr. White, testified that the small place of assembly would have a significant negative effect on the value of petitioners' property and surrounding area.

We first determine if the trial court exercised the appropriate scope of review. Here, the trial court concluded in its 9 March 2016 order that the ZBA's order, granting the special use permit, was "supported by substantial[,] competent evidence in view of the entire record." Thus, we hold that the trial court employed the appropriate scope of review, the whole record test.

Next, we must determine whether the trial court applied the whole record test properly.

As noted above, "when an applicant for a special or conditional use permit produces competent, material, and substantial evidence of compliance with all

ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 27, 539 S.E.2d 18, 22 (2000). "[S]ubstantial, competent, material evidence is evidence that is admissible, relevant to the issues in dispute, and sufficient to support the decision of a reasonable fact-finder." *Blair Invs.,* 231 N.C. App. at 321, 752 S.E.2d at 527.

Pursuant to the Henderson County Code of Ordinances 42-356(H)(1):

> The ZBA shall not approve a permit unless it makes written findings that the regulations of this Chapter that set forth specific standards for the *use* have been met. The ZBA may consider the type of *use*, size of the *use*, size of the property and other relevant factors in evaluating the permit application. *The applicant will not bear the burden of proving that all of the site standards (as listed below) have been met; however, the applicant will be required to produce evidence sufficient to rebut any evidence presented that the site standards would not be met or that a condition is necessary*. The *applicant* may be required, in his/her rebuttal, to show that the proposed use will:
>
> a. Not materially endanger the public health, safety or welfare;
>
> b. Not substantially injure the value of property or improvements in the area; and
>
> c. Be in harmony with the surrounding area.

Henderson County Code of Ordinances § 42-356(H) (emphasis added).

Reviewing the record before this Court, it appears that the trial court considered substantial, competent, and material evidence presented before the ZBA, prior to affirming the ZBA's grant of a special use permit, including the following

evidence: admission, without objection, of the TRC's staff report, maps, pictures, application, and site plan from Toby Linville ("Mr. Linville"), the Zoning Administrator of Henderson County; Mr. Linville's testimony that TRC recommended approval of the site plan and approval of the special use permit with conditions that respondents obtain a NCDOT driveway permit and apply for a public water supply permit or connect to municipal water; Mr. Linville's testimony that the property is zoned Residential 2 or "R2," has mixed residential and educational uses, and is zoned urban services in the comprehensive plan; the event space will have a maximum occupancy of 150; there is a barn, stable, and residence on respondents' property; respondents planned on still residing on their property; the proposed new use would take place in a 3,000 square foot new barn to be constructed on respondents' property; respondents had an existing, personal driveway on Haywood Road; impervious surfaces on the property will be increased for the new barn construction and proposed parking lots; and, respondents' application stated that events will not go past 10:00 p.m.

Based on the foregoing, the trial court concluded that the special use would be permitted because

> a. The project does not materially endanger the public health, safety or welfare because the driveway on Haywood Road will be personal use only[.]
>
> b. The project will not substantially injure the value of property or improvements in the area because it is

> zoned Residential 2 and surrounding uses included a middle school, high school and educational farm. Applicants will continue to reside on the subject property.
>
> c. The project is in harmony with the surrounding area because it is zoned Residential 2 and in the Urban Service Area of the Comprehensive Plan[.]

Under the whole record test, these conclusions must stand if there is competent, material, and substantial evidence, even if the trial court could have reached a different result had the matter been before it *de novo*. Accordingly, we hold that the TRC's staff report, in conjunction with testimony, constituted "competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit[.]" *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 16.

Once respondents made a *prima facie* showing of entitlement to the special use permit, the burden then falls on petitioners to establish that the approval of the special use permit would endanger the public health, safety and welfare, substantially injure the value of property in the area, and that it would not be in harmony with the surrounding area. *See Blair Invs.*, 231 N.C. App. at 323, 752 S.E.2d at 528. We must now determine whether there was competent, material, and substantial evidence in opposition to respondents' application upon which the ZBA could base a denial of the special use permit.

Petitioners contend that there were several parties who testified regarding their concerns of the possible negative impacts of the small place of assembly and that respondents failed to rebut their evidence. However, after thorough review, we note that the only evidence offered in opposition to the issuance of the special use permit consisted of comments about concerns from owners of surrounding property and from Mr. White. The comments from owners of surrounding property involved concerns about: increased traffic; security; litter; quality of life; and, the peace and quiet of the neighborhood. This testimony "consisted entirely of speculative opinions, unsupported by any documentary or testimonial evidence, or of statements informing the [ZBA] that the speaker had a question or a 'concern' about a particular issue." *Id.* at 325, 752 S.E.2d at 529. Because petitioners rely on testimony that is "incompetent as opinion testimony and is highly speculative in nature[,]" we find their contention meritless. *Id.* at 325, 752 S.E.2d at 530. The testimony of Mr. White, a property appraiser, was of highly limited assistance to a determination of the effect of property values because he had no data on the actual effect of property values. Given the limitations of Mr. White's testimony, respondents were not required to rebut this testimony under the ordinance as it did not constitute substantial evidence.

In conclusion, we hold that the trial court applied the appropriate whole record standard of review and applied the whole record test appropriately. Petitioners' argument that the trial court erred in failing to conclude that the ZBA's findings,

conclusions, and decisions were not supported by substantial, competent evidence in view of the entire record is meritless.

B. Procedures Specified by Statute or Ordinance

Next, petitioners argue that the trial court failed to conclude that the ZBA's findings, conclusions, and decisions were inconsistent with applicable procedures specified by statute or ordinance. Specifically, petitioners argue that respondents failed to rebut petitioners' evidence that the proposed use would materially endanger the public health, safety, or welfare and therefore, was in violation of the procedures set out in the Henderson County Code of Ordinances § 42-356(H)(1)(a), (b), and (c).

Here, the trial court made a finding that Henderson County had a Code of Ordinances that "sets fort[h] a process for an application for a special use permit and also for a quasi-judicial hearing conducted by the local ZBA. Section 42 of the Henderson County Code of Ordinances was followed by the ZBA." The trial court then properly concluded that the ZBA's order granting the special use permit "was not inconsistent with applicable procedures specified by statute or ordinance."

Petitioners' arguments are premised on the notion that the comments of concerns from surrounding property owners and testimony from Mr. White constituted material, competent, and substantial evidence. However, as previously discussed, the expression of generalized fears from surrounding property owners is incompetent as opinion testimony and highly speculative in nature. *See id.* ("The

evidence relied upon by the respondent [] to supports its finding is incompetent as opinion testimony and is highly speculative in nature. The denial of a special exception permit may not be founded upon conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the use requested.") (citation and internal quotation marks omitted). In addition, the testimony of Mr. White was of highly limited assistance because it was not supported by any data on the actual effect of property values. As such, petitioners were not required, pursuant to the applicable ordinance, to rebut such evidence. We hold that the trial court did not err by failing to conclude that the ZBA's decision was inconsistent with applicable procedures.

C. Arbitrary and Capricious

Lastly, petitioners contend that the trial court failed to conclude that the ZBA's findings, conclusions, and decisions were arbitrary and capricious. Petitioners assert that the ZBA failed to discuss the evidence presented of the effect on the property values and *if* the special use should be approved, making it "apparent from the record that the ZBA had its mind made up before the hearing started."

A review of the record establishes that the premise of petitioners' argument is incorrect. In its order, the ZBA included several findings of fact regarding concerns raised by surrounding property owners and Mr. White of the effect of the special use permit on property values:

> 38. Mary Stepp . . . raised concerns about music and alcohol from the events and the effect on property values[.]
>
> . . . .
>
> 41. Witness Mark White, property appraiser, testified that an event venue in the neighborhood would have a significant negative effect on property values and make it harder to find potential buyers but did not prepare any data to present to the Board on the actual effect on property values.
>
> . . . .
>
> 44. Alan Windham testified about the negative effect this would have on the quality of life for his two small children and on his property value[.]

The foregoing findings of fact demonstrate that the ZBA considered the differing testimony and evidence offered at the hearing. We reiterate that the whole record test does not allow the trial court to replace the ZBA's judgment as between two reasonably conflicting views. *See Davidson County Broad.*, 186 N.C. App. at 87, 649 S.E.2d at 910. The trial court reviewed, utilizing the whole record test, the decision of the ZBA and concluded that the order granting the special use permit was not arbitrary or capricious. Accordingly, petitioners' arguments are without merit.

IV. Conclusion

We affirm the order of the trial court, affirming the decision of the ZBA to grant respondents' application for a special use permit.

AFFIRMED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).