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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1183

Filed: 1 August 2017

Cabarrus County, No. 15 CVS 1805

JEFFREY D. COX, Petitioner,

v.

CITY OF KANNAPOLIS, and CITY OF KANNAPOLIS BOARD OF ADJUSTMENT, Respondents.

Appeal by petitioner from order entered 25 August 2016 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 18 April 2017.

Scarbrough & Scarbrough, PLLC, by John F. Scarbrough and James E. Scarbrough, for petitioner-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Keith J. Merritt, for respondents-appellees.

DAVIS, Judge.

Jeffrey D. Cox appeals from the trial court's order denying his petition for *certiorari* and affirming the decision of the City of Kannapolis Board of Adjustment (the "Board") denying his request for a certificate of nonconformity adjustment. On appeal, he argues that the trial court erred by affirming the Board's decision because

its conclusions of law were unsupported by its findings of fact. After careful review, we affirm.

Factual and Procedural Background

Cox owns a parcel of property (the "Property") located on China Grove Road in Kannapolis, North Carolina. In 2000, the Property began being used for certain trucking operations. That same year, the City of Kannapolis (the "City") adopted a Unified Development Ordinance ("UDO"), and "the property was zoned RM-2, Residential Medium Density." Because — pursuant to the UDO — trucking operations are not a permitted use in the RM-2 zoning district, the non-residential use of the Property was classified as a nonconforming use.

In 2015, Cox received notice of a zoning violation from the City "on the basis that the trucking business on the Property had expanded beyond the extent of its operations in 2000." Cox filed a request for a Certificate of Nonconformity Adjustment "to allow his existing nonconforming trucking business to continue to operate at the Property."

On 14 April 2015, the Board held a public hearing to consider Cox's request. Several homeowners who lived near the Property were present and made comments during the hearing. On 5 May 2015, the Board entered an order denying Cox's request for a certificate of nonconformity adjustment, finding — in pertinent part — that "the noise level produced by the tractor trailer trucks is beyond that consistent

with a dense residential area" and "[t]estimony from nearby property owners complained about noise especially in the early morning hours."

Cox appealed the denial of his request to Cabarrus County Superior Court. A hearing was held before the Honorable Martin B. McGee on 26 May 2016. On 25 August 2016, the trial court entered an order providing, in relevant part, that "the findings of fact contained in the BOA's determination letter are sufficient for this Court to understand the rationale used by the BOA to make its determination and are, therefore, legally adequate." The court denied Cox's petition for *certiorari* and affirmed the Board's decision. Cox filed timely notice of appeal.

Analysis

On appeal, Cox argues that the trial court erred by concluding that the Board's conclusions of law were supported by its findings of fact. We disagree.

"A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body." *Dellinger v. Lincoln Cnty.*, __ N.C. App. __, __, 789 S.E.2d 21, 26 (2016) (citation and quotation marks omitted), *disc. review denied*, __ N.C. __, 794 S.E.2d 324 (2016). "Our Supreme Court has recognized . . . due process requirements mandate that certain quasi-judicial land use decisions comply with all fair trial standards when they are made." *Id.* at __, 789 S.E.2d at 26 (citation, quotation marks, brackets, and emphasis omitted). "[T]hese fair trial standards . . . include an evidentiary hearing with the right of the parties to . . . have

written findings of fact supported by competent, substantial, and material evidence." *Id.* at __, 789 S.E.2d at 26 (citation and quotation marks omitted).

The Board's decision "shall be subject to review of the superior court in the nature of certiorari in accordance with G.S. 160A-388." N.C. Gen. Stat. § 160A-381(c) (2015). The superior court's role in reviewing the decision of the Board has been defined as follows:

> (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 town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Dellinger, __ N.C. App. at __, 789 S.E.2d at 26.

"If a petitioner appeals an administrative decision on the basis of an error of law, the trial court applies *de novo* review; if the petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test." *Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 367, 713 S.E.2d 511, 514 (2011)

(citation and quotation marks omitted). "The reviewing court does not make findings of fact, but instead, determines whether the Board of Adjustment made sufficient findings of fact which are supported by the evidence before it." *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (citation omitted).

We have emphasized that "[f]indings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which this Court can review the Board's decision." *Premier Plastic Surgery Ctr.*, 213 N.C. App. at 372, 713 S.E.2d at 517 (citation and quotation marks omitted). "As a general rule, zoning boards, in allowing or denying the application of use permits, are required to state the basic facts on which they relied with sufficient specificity to inform the parties, as well as the court, what induced their decision." *Ballas v. Town of Weaverville*, 121 N.C. App. 346, 350, 465 S.E.2d 324, 327 (1996) (citation, quotation marks, and brackets omitted).

This Court has previously held that where the process of logical reasoning was not evident upon consideration of either the board's findings of fact or the evidence of record, a remand for additional findings was necessary. *See, e.g.*, *id.* at 351, 465 S.E.2d at 327 (board's written decision did "not include any findings to identify the specific reasons for denying the permit[,]" the record did not provide information regarding "the basis of the decision[,]" and "some of the relevant evidence [was] in dispute"); *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C. App. 420, 423,

458 S.E.2d 510, 512 (1995) (board's decision was recorded on preprinted form and contained only one finding, which merely stated that "petitioner did not satisfy requirements set forth in opening statement" (quotation marks omitted)).

"The failure to make findings of fact is not, however, fatal if the record sufficiently informs the court of the basis of decision of the material issues or if the facts are undisputed and different inferences are not permissible." *Ballas*, 121 N.C. App. at 350-51, 465 S.E.2d 324, 327 (citation, quotation marks, brackets, and ellipsis omitted); *see, e.g.*, *Dockside Discotheque v. Bd. of Adjustment of Southern Pines*, 115 N.C. App. 303, 308, 444 S.E.2d 451, 453 (determining remand was not necessary where Board made no findings or conclusions but record "present[ed] no genuine issues of material fact, and a complete understanding of the issues presented [could] be had from the record on appeal"), *disc. review denied*, 338 N.C. 309, 451 S.E.2d 634 (1994).

In the present case, the Board was required to approve or deny Cox's request for a certificate of nonconformity adjustment pursuant to the City's UDO, which states, in pertinent part, as follows:

> After the hearing for a nonconformity adjustment, the Board of Adjustment will either approve or deny the request. The Board's decision to approve may be based upon the applicant agreeing to site changes. The decision to approve or deny will be made based on the following criteria:
>
> – Noise. Does the nonconformity create noise

> above and beyond levels considered normal to the area?
>
> – Traffic. Does the nonconformity generate or have the potential to generate a significantly higher volume of traffic than surrounding land use?
>
> – Other measurable, physical effects. Does the nonconformity generate any other negative effects including but not limited to: dust, air pollution, foul smell, etc.?
>
> – Surrounding property values. Does the nonconformity detract from the prevailing property values?
>
> – Aesthetics. Does the nonconformity compliment [sic] or detract from the overall aesthetic character of the area?

Kannapolis, N.C., Unified Development Ordinance art. 13, § 13.1.6.3 (2000).

The primary issue in this appeal is whether the Board's finding with respect to noise level was legally sufficient to support the denial of Cox's request. The Board made the following pertinent finding with respect to noise level:

> 1. Does the nonconformity create noise above and beyond levels considered normal to the area?
>
> (a) The Board finds that the noise level produced by the tractor trailer trucks is beyond that consistent with a dense residential area.
>
> (b) Testimony from nearby property owners complained about noise especially in the early morning hours.

While these findings are admittedly bare bones, the minutes of the Board's 14 April 2015 meeting provide further insight into the Board's decision. The minutes of the public hearing contained the following pertinent testimony:

> Deb Goodale . . . remarked that she is tired of being woken up by the trucks coming and going early in the morning and late at night. She had been awakened as late as 11:05 at night and as early as 5:00 in the morning. She commented that she does not want to have to be medicated or have to move because of the trucks.
>
> Chair Jeff Parker asked if other trucks wake her to which she replied not at those hours. . . . Her biggest concern was the noise caused by the trucks coming and going.
>
> . . . .
>
> A.L. Davenport . . . has been living there since 1965 and used to be a truck driver. . . . Mr. Davenport's main concern is noise and safety.
>
> . . . .
>
> Attorney Safrit asked if it was possible to limit the ingress and egress such as time limits of operating the business. Mr. Cox said the normal working hours are 7 a.m. until 9 p.m. but if a job requires they be on the site by 7 in the morning they would have to move their trucks as early as 6:30. He also remarked they do have to meet other people's schedules, to which Chair Jeff Parker responded "you are not running a business 24/7"? Jeffrey Cox answered no and once the needed changes were made it will decrease the amount of time the trucks are running.
>
> . . . .
>
> Board Member Colby Meadows . . . asked if there would be any occasion when a truck may come in after 9 p.m. and

> Mr. Cox said yes, trucker's hours are limited and as long as they have legal time to run they could possibly come on in.
>
> . . . .
>
> [Board Member] Thomas Van Etten said there is going to be higher noise levels because of higher traffic volume and Jeff Parker asked for recommendations. Thomas Van Etten did not offer specific recommendations but again mentioned the higher noise level could detract from property value, to which Attorney Walter Safrit said although there is some decline in property values; the reason for the decline is not known. Thomas Van Etten then said he would like to make a motion to revise because of concern over the time it will take to have an adequate noise buffer.
>
> Board Member Scott Wilson feels the noise level does not conform to what is expected in a mid-residential area and would offer the Finding of Facts be changed to a yes.
>
> . . . .
>
> Board Member Scott Wilson said it is not reasonable to ask residents to wait for 8 to 10 years to mitigate the increased noise.

Based on our review of the record, we are satisfied that the Board's findings were legally sufficient and based on adequate evidence. *See Dockside Discotheque*, 115 N.C. App. at 308, 444 S.E.2d at 453 (affirming board's decision where "a complete understanding of the issues presented c[ould] be had from the record on appeal"). The evidence from the public hearing supported the Board's finding as to the noise level factor, and this finding was — by itself — sufficient to support the Board's denial of Cox's request for a certificate of nonconformity adjustment. Therefore, we need not

address Cox's remaining arguments regarding the Board's findings as to other factors. *See In re A.L.T.*, __ N.C. App. __, __, 774 S.E.2d 316, 319 (2015) ("[W]e do not address all of these challenged findings of fact because they are unnecessary to support the ultimate conclusions, and any error in them would not constitute reversible error."). Accordingly, we conclude that the trial court did not err in affirming the Board's decision.

Conclusion

For the reasons stated above, we affirm the trial court's 25 August 2016 order.

AFFIRMED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).