IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-319

Filed: 20 March 2018

Union County, No. 16 CVS 01405

MICHAEL C. HAGERMAN and BIRGIT A. HAGERMAN, Petitioners,

v.

UNION COUNTY BOARD OF ADJUSTMENT and UNION COUNTY, NORTH CAROLINA, Respondents.

Appeal by petitioners from order entered 16 November 2016 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 1 November 2017.

Michael C. Hagerman and Birgit A. Hagerman, petitioner-appellants, pro se.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges, for respondent-appellee, Union County Board of Adjustment.

No brief filed for respondent-appellee, Union County, North Carolina.

ELMORE, Judge.

Property owners Michael and Birgit Hagerman (petitioners) appeal from a superior court order affirming on *certiorari* review the Union County Board of Adjustment's (respondent or "Board") decision that the continued accessory use of

their residentially zoned property to operate an animal boarding business violated its zoning ordinance.

On appeal, the Hagermans request that we reverse the superior court's order and enter a judgment allowing them to continue operating their business, arguing: (1) the presiding judge should have *sua sponte* recused himself from the case; (2) the Board violated their due process rights; (3) there were other legal errors in the Board's actions, deliberations, and ultimate decision; and (4) the Board abused its discretion by issuing an allegedly arbitrary and capricious decision. The Hagermans also challenge (5) the sufficiency of the superior court's order but request that, rather than remand the case to the superior court to cure these alleged deficiencies, we conduct our own review of the Board's decision. After careful review of the Board's decision, we affirm the trial court's order.

I. Background

The Hagermans own and live in a house sitting on approximately five acres of residential property located at 7604 Mill Pond Drive in the Deerfield Plantation subdivision of Waxhaw, in Union County. On 1 July 2013, when the Hagermans started operating their home-based dog boarding business, Doggie Nirvana, their property was subject to Union County's 2008 Land Use Ordinance ("LUO") and was zoned as an R-40 residential district. The LUO prohibited "animal boarding" as a principal use of residentially zoned property absent a special use permit. But the

LUO permitted as an accessory use of residential property certain "home occupations," provided in relevant part that their operation had "an insignificantly adverse impact on the surrounding neighborhood[.]" LUO § 180J. Relevant here, a home occupation might create a "[ ]significant[ ] adverse impact," and thus fail to qualify as a permissible home occupation, if its operation generated "objectionable noise" or used beyond a certain percentage of relative property space. LUO §§ 180J(e), (f).

On 1 May and 5 June 2014, in response to a nearby residential property owner's complaint of significant barking related to the Hagermans' operation of Doggie Nirvana, Lee Jenson, a Union County zoning administrator, issued the Hagermans two notices of violation (NOVs). These NOVs charged the Hagermans with violating the LUO on the ground that operating an animal boarding business was prohibited in their residential zoning district. There is no evidence that the Hagermans received these NOVs, and they continued operating Doggie Nirvana. Effective 6 October 2014, Union County adopted the Unified County Development Ordinance ("UDO"), and the Hagermans' property became subject to its provisions. Unlike the LUO, the UDO "expressly prohibited as suburban home occupations[ ] . . . [a]nimal . . . boarding businesses[ ] . . . ." UDO § 35.040-E(13)(i).

On 13 May 2015, the new zoning administrator, Jim King, issued the Hagermans an NOV entitled "final notice of violation," but charging the Hagermans

for the first time with violating UDO § 35.040-E by "[c]onducting a use (Kennel) which is expressly prohibited as a suburban home occupation" and informing the Hagermans that if they did not rectify the violation within fifteen days, legal enforcement and/or a penalty would be considered. The Hagermans received and timely disputed this NOV, arguing that Doggie Nirvana was "grandfathered-in" under the LUO. On 8 June 2015, King issued the Hagermans another NOV, again charging them with violating UDO § 35.040-E but this time addressing the Hagermans' argument by also concluding that "this use [their operation of Doggie Nirvana] has never conformed to [the LUO]." After the Hagermans unsuccessfully tried to amend the ordinance text, King issued the Hagermans a final adverse ruling on 25 January 2016. This final NOV charged the Hagermans again with currently violating the UDO and also concluded that their operation of Doggie Nirvana had previously violated the LUO, requesting that the Hagermans immediately cease and desist operating Doggie Nirvana. The Hagermans appealed this final adverse ruling to the Board.

The Board held hearings on 23 March and 13 April 2016, considering evidence introduced by both the Hagermans and Union County. Twenty witnesses testified, including the Hagermans and their eight witnesses, as well as the two zoning administrators and eight nearby property owners called by the County. On 29 April 2016, the Board issued its final decision, affirming Zoning Administrator King's 25

January 2016 final adverse ruling. The Board concluded in relevant part that (1) the Hagermans' operation of Doggie Nirvana was "not a permitted use" in their residential district "under the LUO or the UDO[,]" and (2) Doggie Nirvana could not lawfully continue under the UDO because it was neither "a permitted Home Occupation under the LUO" nor "a principal use that can become a legal nonconforming use" under the UDO.

On 27 May 2016, the Hagermans petitioned the superior court for *certiorari* review of the Board's decision. On 17 August 2016, upon the Hagermans' motion, the trial court entered an order staying enforcement of the Board's decision pending resolution of their appeal. On 7 November 2016, the superior court heard Hagermans' petition for *certiorari* review.

At the hearing, before Mr. Hagerman introduced aerial photographs of his property, he asked the presiding superior court judge if he was familiar with the Deer Field Plantation subdivision in Waxhaw. The judge responded: "Maybe I should tell you I represented the Town of Waxhaw for so long that they gave me a watch when I quit." Mr. Hagerman raised no objection and continued with his argument.

After considering arguments and evidence from both parties, the trial judge entered an order on 16 November 2016 affirming the Board's decision that the Hagermans' operation of Doggie Nirvana "is in violation of the Union County Development Ordinance ('the UDO')." In its order, the trial judge acknowledged that

it reviewed *de novo* issues of law, including whether the Board committed legal error in its interpretation or application of its zoning ordinance or prejudiced the Hagermans' substantial rights, and that he reviewed the whole record to decide issues implicating the sufficiency of the evidence or whether the Board's decision was arbitrary or capricious. The Hagermans appeal.

II. Alleged Errors

On appeal, the Hagermans allege the following errors: (1) the superior court judge should have recused himself from presiding over the case because he had previously represented the Town of Waxhaw; (2) the order affirming the Board's decision lacks adequate factual findings, legal conclusions, or analysis of the issues raised in their *certiorari* petition; (3) the Board violated their due process rights; (4) the Board's actions, deliberations, and decision contained legal errors; and (5) there was insufficient evidence to support the Board's decision, rendering it arbitrary and capricious, and thus an abuse of discretion.

At the outset, we note that several issues raised are conditioned upon the premise that the Board's application, interpretation, or decision concerning the LUO are legally relevant if it properly determined that the Hagermans' continued operation of Doggie Nirvana would violate the UDO. Notwithstanding the two prior NOVs charging the Hagermans with violating the LUO, the catalyst for the Board's decision on appeal arose from charges that the Hagermans' were violating the UDO.

Further, because the alleged zoning violation was enforced and the Board's decision was entered after enactment of the UDO, that ordinance, not the LUO, was the proper ordinance to apply to determine whether the Hagermans' operation of Doggie Nirvana violated zoning. *See Overton v. Camden Cty.*, 155 N.C. App. 391, 394, 396, 574 S.E.2d 157, 160, 161 (2002) (deciding "which zoning ordinance to apply when an alleged violation occurs while one ordinance is in effect, but enforcement is sought only after a new ordinance has replaced the previous ordinance" and "hold[ing] that the zoning ordinance in effect at the time of the Board of Adjustment's decision is the correct ordinance to apply"). Accordingly, to the extent the Hagermans' operation of Doggie Nirvana violated the UDO, the Board's interpretations or applications of the LUO as another basis to support its ultimate decision were merely surplusage, and any issues raised challenging the Board's interpretation, application, or decision as it relates to the LUO would be legally irrelevant and need not be addressed.

A. Review Standard

On *certiorari* review of a county zoning board of adjustment's quasi-judicial decision, "the superior court sits as an appellate court," *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 585 (2010) (citation and quotation marks omitted), and is tasked with the following:

> (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). The superior court should apply *de novo* review to alleged errors implicating the first three enumerations and whole-record review to the last two. *See, e.g.*, *Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010) ("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." (citation and quotation marks omitted)).

On appeal from a superior court's order reviewing a zoning board's decision, our review is limited to "(1) determin[ing] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[ing] 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 and quotation marks omitted).

B. Alleged Judicial Misconduct

The Hagermans first argue that the presiding judge should have recused himself because he previously represented the Town of Waxhaw. Because the Hagermans never moved for the judge to recuse himself, we dismiss this issue as

unpreserved. *See, e.g.*, *In re D.R.F.*, 204 N.C. App. 138, 144, 693 S.E.2d 235, 240 (2010) ("When a party does not move for a judge's recusal at trial, the issue is not preserved for our review." (citations omitted)); *see also Sood v. Sood*, 222 N.C. App. 807, 812, 732 S.E.2d 603, 608 (2012) ("Where appellant failed to move that the trial judge recuse himself, he cannot later raise on appeal the judge's alleged bias based on an undesired outcome.").

C. Sufficiency of the Trial Court's Order

The Hagermans next argue that "the superior court abdicated its statutory duty by dismissing petitioners' appeal pursuant to an order devoid of findings of fact, conclusions of law, and analysis of petitioners' claims" (original in all caps). In light of our decision to award the Hagermans their requested appellate relief, in relevant part to "proceed with [our] own review of the BOA decision . . . and provide [our] own analysis rather than remand the matter[,]" we conclude this alleged error requires no further discussion.

D. Alleged Due Process Violations

The Hagermans next contend that the trial court erred by failing to find that the Board violated their due process rights on the grounds that (1) the 2014 NOVs charging them with violating the LUO arose from an unwritten and unsigned complaint in alleged violation of the LUO's procedural requirements, (2) the County allegedly engaged in *ex post facto* enforcement, and (3) the County failed to timely

produce public records requested by the Hagermans in alleged violation of N.C. Gen. Stat. § 132-6.

In its order, the superior court properly identified *de novo* as the appropriate standard to "determine whether substantial rights of the Petitioners were prejudiced because the [Board's] findings, inferences, conclusion, or decision were in violation of constitutional provisions," and properly concluded that the Board's actions did not violate the Hagermans' due process rights.

The Hagermans' first argument concerns the zoning administrator's alleged failure to follow the procedure set forth in the LUO and is therefore legally irrelevant. The NOVs underlying the Hagermans' instant appeal were issued under the UDO, which did not contain the same challenged language as the LUO. Nonetheless, we note that the Hagermans have advanced no argument as to how this alleged procedural impropriety under the LUO would invalidate or in any way implicate a subsequent NOV issued under the UDO that the Hagermans have not procedurally challenged. Accordingly, we overrule this argument. *See, e.g.*, *State v. Alston*, 341 N.C. 198, 224, 461 S.E.2d 687, 700 (1995) ("[A]n assignment of error is deemed abandoned if the [party] fails to cite reasonable authority in its support." (citation omitted)); *see also* N.C. R. App. P. 28(b)(6).

The Hagermans' second argument hinges upon the "inescapable inference" that the County's delay in officially citing the Hagermans for violating its zoning

ordinance "was designed to ensure that it could close Doggie Nirvana under the UDO since the LUO did not specifically bar such a home occupation." According to the Hagermans, the County deliberately elected not to enforce the two 2014 NOVs issued under the LUO and instead issued a subsequent NOV under the UDO, and elected only to enforce the alleged zoning violation under the UDO. The Hagermans' *ex post facto* argument fails in part because it hinges upon the unestablished premise that their operation of Doggie Nirvana was permissible under the LUO. Further, the Hagermans have neither advanced a meritorious argument that the County's actions in this respect amounted to *ex post facto* enforcement in violation of their due process rights, nor cited to any legal authority to support their argument. Accordingly, we deem this issue abandoned. *Alston*, 341 N.C. at 224, 461 S.E.2d at 700; N.C. R. App. P. 28(b)(6).

The Hagermans also contend that Zoning Administrator King's "reverse enforcement" violated UDO § 1.120-B ("The adoption of this ordinance [the UDO] does not affect any pending or future prosecution of . . . violations of the previous [LUO] that occurred before [enactment of the UDO."). This argument fails because UDO § 1.120-B does not require the County to fully prosecute a pending NOV issued under the LUO before it may issue a subsequent NOV under the UDO. Without such a requirement, the County was permitted to prosecute the Hagermans under the UDO.

In their third due process argument, the Hagermans contend the County failed timely to produce "several documents," including a " 'lost' 2014 investigation report" that would have been helpful to their case before the Board. According to the Hagermans, the County waited until weeks after the Board hearings to produce these documents. However, the Hagermans have failed to identify or explain the subject matter of these "several" documents, and have failed to include the documents in the appellate record. *See Estate of Redden v. Redden*, 194 N.C. App. 806, 810, 670 S.E.2d 586, 589 (2009) ("It is appellant's duty to ensure that the record is complete. This Court will not consider matters discussed in a brief but not appearing in the record." (citations omitted)). Further, the Hagermans have failed to cite any relevant legal authority to support their argument. Accordingly, this issue is abandoned. *Alston*, 341 N.C. at 224, 461 S.E.2d at 700; N.C. R. App. P. 28(b)(6).

E. Alleged Legal Errors

The Hagermans next contend the superior court erred by concluding there were not errors of law in the Board's actions, deliberations, and decision. They argue (1) undisclosed "ex parte" communications by Board members violated N.C. Gen. Stat. § 160A-388(e)(2), and tainted the Board's impartiality; (2) the Board's counsel provided an erroneous instruction on "Nonconforming Uses" under the UDO; (3) the Board's findings regarding "objectionable noise" as defined in the LUO were based on a fatally subjective standard; and (4) the Board's findings regarding the space used

by Doggie Nirvana were based on a flawed interpretation of the LUO. The superior court properly identified *de novo* as the correct standard to review these alleged legal errors and properly concluded these issues were meritless.

1. Alleged "Ex parte" Communications

The Hagermans argue that certain undisclosed *ex parte* communications involving two Board members violated N.C. Gen. Stat. § 160A-388(e)(2) and their due process rights.

N.C. Gen. Stat. § 160A-388(e)(2) (2015) provides in pertinent part:

> (2) A member of any board exercising quasi-judicial functions . . . shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible violations of due process include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, *undisclosed ex parte communications*, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

(Emphasis added.)

On 17 March 2016, Rob Thornton, a Board member, emailed the Clerk to the Board, Pam Rivers, inquiring, *inter alia*, "How many animals[ ](pets) is a personal resident allowed before they are boarding?" Rivers forwarded this email to Zoning Administrator King and requested he "answer Mr. Thornton back about this

[because] [she] wanted to make sure [she] did not tell him anything wrong." About an hour later, King emailed both Rivers and Thornton, in pertinent part, that "[z]oning does not regulate the number of personal pets . . . ."

On 22 March, the day before the first hearing, Thornton emailed King directly, asking whether "the interior design business [was] still being operated out of the same address[.]" According to Thornton, King replied: "[W]e were hearing only the . . . dog operation . . . [and] that the [interior design business] was not part of what we were hearing today." Additionally, on 23 March, after the first day of the hearing, Mark Tilley, another Board member, emailed King directly inquiring: "Just out of curiosity having a guy work for 4 months around a house has any permits been gotten?" King responded: "Good question, I'll check on that."

Mr. Hagerman filed a public records request pursuant to the Freedom of Information Act on 29 January and 28 March 2016. These three email exchanges were first disclosed to the Hagermans on or before 13 April 2016, the second and final day of the Board hearing. On 13 April 2016, the Hagermans' attorney questioned both Thornton and Tilly about these emails, but never objected to their continued participation on the Board.

On appeal, the Hagermans fail to explain how these emails evidenced any sort of bias or partiality, or how the participation of these Board members prejudiced the hearings in any respect. Accordingly, we overrule this argument. *See JWL Invests.,*

Inc. v. Guilford Cty. Bd. of Adjustment, 133 N.C. App. 426, 430, 515 S.E.2d 715, 718 (1999) ("The petitioners did not object during the hearing to this member's presence on the Board. Furthermore, petitioners have made no showing that they were prejudiced by this member's participation in the case. Thus, we find this assignment of error to be without merit.").

Additionally, because no objection was lodged to Thornton and Tilly continuing to serve on the Board, the Hagermans' argument that the Board committed statutory error by "failing to rule on these members' fitness to proceed as required by N.C. Gen. Stat. § 160A-388(e)(2)" is meritless. Such a ruling is required only where an objection is raised and a Board member refuses recusal. *See* N.C. Gen. Stat. § 160A-388(e)(2). Further, the Hagermans fail to advance any meritorious argument or cite any legal authority to support their argument that these emails, disclosed before the second day of the Board hearing, violated their due process rights. This argument is overruled. *Alston*, 341 N.C. at 224, 461 S.E.2d at 700; N.C. R. App. P. 28(b)(6).

2. Alleged Erroneous Application and Interpretation of the UDO

The Hagermans next assert that the Board misinterpreted and misapplied the UDO in reaching their conclusion that Doggie Nirvana, even if it were a permissible home occupation under the LUO, could not lawfully continue under the UDO because it would be an accessory use to the primary residential use of their property.

"Questions involving the interpretation of ordinances are questions of law, and in reviewing the trial court's review of the Board of Adjustment's decision, this Court applies a *de novo* standard and may freely substitute its judgment for that of the trial court." *Fehrenbacher v. City of Durham*, 239 N.C. App. 141, 150, 768 S.E.2d 186, 193 (2015) (citation and internal quotation marks 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." *See Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment,* 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (citation omitted).

" 'The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances.' " *Four Seasons Mgmt.*, 205 N.C. App. at 76, 695 S.E.2d at 463 (quoting *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965)).

> Statutory interpretation properly begins with an examination of the plain words of the statute. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, when the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.

Lanvale Props., LLC v. Cty. of Cabarrus, 366 N.C. 142, 154, 731 S.E.2d 800, 809–10 (2012) (citations, quotation marks, and brackets omitted).

To support its conclusion that Doggie Nirvana could not continue as a legal nonconforming use under the UDO, the Board made the following relevant findings:

> 2. The principal use of the Hagerman residence is a residence.
>
> . . . .
>
> 29. Even if the Hagermans' animal boarding business qualified as a Home Occupation under the LUO, it cannot continue after October 6, 2014, under the UDO, unless it meets the requirements to become a Legal Nonconforming Use.
>
> 30. According to Section 90.040-A of the UDO, the description of a Legal Nonconforming Use is as follows:
>
> > 90.040-A Description
> > A nonconforming use is a principal use that was lawfully established in accordance with all regulations in effect at the time of its establishment but that is no longer allowed by the use regulations of the zoning district in which the use is now located. . . .
>
> 31. . . . [O]nly a nonconforming principal use can become a legal nonconforming use under the UDO. The principal use of the Hagerman Residence is a residence. The operation of an animal boarding business at the Hagerman Residence is not a principal use and thus, cannot become a legal nonconforming use under the UDO.

Based on these findings, the Board issued the following challenged conclusion:

> 4. The Hagermans' animal boarding business is not a legal nonconforming use under the UDO because . . . it is not a principal use that can become a legal nonconforming use.

The Hagermans argue the Board erroneously applied UDO § 90.040-A and improperly concluded that Doggie Nirvana could not lawfully continue as a legal nonconforming use, when it should have applied UDO § 90.010-C ("Authority to Continue") and concluded that Doggie Nirvana was permitted to lawfully continue under the UDO. According to the Hagermans, Doggie Nirvana "is a simple 'nonconformity' under Section 90.010-C, a term not defined under the UDO," and thus it should have been permitted "to continue . . . despite the UDO's prohibition."

The Board retorts that the Hagermans misinterpret UDO Article 90 (governing "Nonconformities") by relying on UDO § 90.010-C, a more general provision governing all nonconformities, and ignoring UDO § 90.040-A, a more specific provision governing nonconforming uses. Since UDO § 90.040-A describes a "nonconforming use" as a "principal use," not an accessory use, the Hagermans' operation of Doggie Nirvana, an undisputed accessory use to their primary residential use, could not qualify as a legal nonconformity under the UDO.

Article 90 of the UDO, entitled "Nonconformities," is divided into six sections. The first section, Section 90-010 ("General"), is further divided into subsections. UDO § 90-010. Subsection (A) ("Scope") provides:

> The regulations of this article *govern nonconformities, which are lots, uses, and structures* that were lawfully established but—because of the adoption of new or amended regulations—no longer comply with one or more requirements of this ordinance.

UDO § 90.010-A (emphasis added). Subsection (C) ("Authority to Continue") provides:

> *Any nonconformity* that existed on the [UDO] effective date or any situation that becomes nonconforming upon adoption of any amendment to this ordinance may be continued *in accordance with the regulations of this article* unless otherwise expressly stated. . . .

UDO § 90.010-C (emphasis added). The remaining sections of Article 90 govern five types of nonconformities: Section 90-020 ("Nonconforming Lots"), Section 90-030 ("Nonconforming Structures"), Section 90-040 ("Nonconforming Uses"), Section 90-050 ("Nonconforming Development Features"), and Section 90-060 ("Nonconforming Signs").

As the Hagermans' operation of Doggie Nirvana constituted a use of their property, the Board properly applied Section 90.040 and relied on any regulations that section imposed in determining whether Doggie Nirvana could continue as a legal nonconformity under the UDO. Section 90.040 describes a "nonconforming use" as a "*principal* use" and fails to acknowledge that an accessory use may constitute a nonconforming use that may lawfully continue. The Board thus properly interpreted the plain language of UDO § 90.040-A as contemplating that only primary uses, not accessory uses, may qualify as legal nonconforming uses under the UDO.

In its decision, the Board found, and the Hagermans do not dispute on appeal, that the primary use of their property was residential. Under the LUO, the

Hagermans' operation of Doggie Nirvana must have be an accessory use to their principal residential use or it was prohibited in their district without a special permit, which the Hagermans never obtained. *See* LUO § 150. Under the UDO, a home occupation must be an accessory use to the principal residential use. *See* UDO § 35-040-E. Accordingly, the Board properly concluded that, even if the Hagermans' operation of Doggie Nirvana constituted a permissible home occupation under the LUO, because it was an undisputed accessory use, it could not continue as a legal nonconforming use under the UDO.

We acknowledge the Hagermans' argument that such an interpretation should be disregarded under the absurdity canon of construction on the ground that no home occupation permissible under the LUO could then legally continue under the UDO. Notwithstanding the fact that the UDO permits a variety of home occupations that meet its regulations, *see* UDO § 35-040, because Section 90.040's language clearly and unambiguously contemplates that only principal uses may qualify as legal nonconforming uses permitted to continue under the UDO, the canons of judicial construction have no applicability here, and "our Courts have no power to add to or subtract from the language of [an ordinance]." *Etheridge v. Cty. of Currituck*, 235 N.C. App. 469, 479, 762 S.E.2d 289, 296 (2014) (citation and quotation marks omitted). Accordingly, the Board properly interpreted and applied the UDO in

concluding that Doggie Nirvana could not continue as a legal nonconforming use under the UDO.

The Hagermans also contend that they never argued before the Board that Doggie Nirvana constituted a legal nonconforming use under Section 90.040-A, and that the County's failure to "broach[ ] this 'Nonconforming Use' issue during the Hearings preclud[ed] any debate on the matter." However, once the County established that the Hagermans' operation of Doggie Nirvana violated the UDO, which "expressly prohibited as suburban home occupations . . . animal . . . boarding businesses," UDO § 35-040-E, "the burden of proof shift[ed] to the [Hagermans] to establish the existence of a legal nonconforming use or other affirmative defense." *Shearl v. Town of Highlands*, 236 N.C. App. 113, 118, 762 S.E.2d 877, 882 (2014) (citation omitted); *see also City of Winston-Salem v. Hoots Concrete Co., Inc.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980) ("The city had the burden of proving the existence of an operation in violation of its zoning ordinance. It was defendant's burden to prove the city had already made a determination that the operation was permissible and did not violate the zoning ordinance."). Accordingly, we overrule this argument.

In light of our decision that the Board properly concluded that the Hagermans' operation of Doggie Nirvana could not lawfully continue under the UDO, the Hagermans' remaining challenges to the Board's interpretation or application of the

LUO to support its conclusion that Doggie Nirvana was an impermissible home occupation under the LUO are legally irrelevant and need not be addressed.

F. Alleged Arbitrary and Capricious Nature of the Board's Decision

The Hagermans next contend the superior court erred by concluding that the Board's decision was supported by substantial competent evidence and was not arbitrary, capricious, or an abuse of discretion. They argue the Board failed to (1) consider petitioners' evidence, (2) present substantial competent evidence of "objectionable noise" under the LUO, and (3) present substantial competent evidence of the space used under the LUO. They also claim there were (4) "other factors adding to 'arbitrary or capricious" which all arise from some alleged impropriety as it relates to the Board's determination that Doggie Nirvana was not a permissible home occupation under the LUO. However, because we hold that the Board properly concluded that Doggie Nirvana could not continue as a legal nonconformity under the UDO, these issues implicating the sufficiency of evidence to support the Board's findings or conclusions that Doggie Nirvana was not a permissible home occupation under the LUO, or whether that particular determination was arbitrary or capricious, need not be addressed.

The only remaining issue, that the Board allegedly failed to consider the Hagermans' evidence, should have been reviewed *de novo*, as it implicates due process. *Four Seasons Mgmt.*, 205 N.C. App. at 75, 695 S.E.2d at 462 (explaining that

on *certiorari* review the superior court should "ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence[ ] . . . ." (citation omitted)). The Hagermans assert baldly that the Board failed to consider their evidence, but fail to identify any particular evidence that was not considered; rather, the transcript indicates that the Board considered all evidence offered by the Hagermans, including their own testimony and testimony by eight witnesses they called, as well as affidavits and documents they introduced at the hearings before the Board. Additionally, the Hagermans fail to cite to any legal authority to support their argument. Accordingly, this alleged error is overruled. *Alston*, 341 N.C. at 224, 461 S.E.2d at 700; N.C. R. App. P. 28(b)(6).

III. Conclusion

Several issues the Hagermans raised on appeal were summarily addressed because the UDO was the proper ordinance to apply in determining whether the Hagermans' operation of Doggie Nirvana violated zoning, and the Board properly concluded that the Hagermans' operation of Doggie Nirvana could not lawfully continue under the UDO. Therefore, the Board's interpretations or applications of the LUO, or their decision that Doggie Nirvana was not a permissible home occupation under the LUO, were legally irrelevant to our review. The Hagermans' remaining arguments were either unpreserved, abandoned, or meritless.

The Hagermans failed to preserve any issue relating to the superior court judge's alleged impropriety in failing to recuse himself from presiding over the case. The Hagermans' arguments concerning the alleged inadequacies of the superior court's order were immaterial in light of our decision not to remand the matter to the superior court and fully analyze the issues raised in their appeal. The Hagermans failed to advance any meritorious or legally supported due process argument. Further, the Hagermans have failed to demonstrate that the Board committed any reversible or remandable legal error, or that its decision was arbitrary or capricious. The Board properly determined that the Hagermans' operation of Doggie Nirvana violated the UDO. Accordingly, we affirm the superior court's order affirming the Board's decision.

AFFIRMED.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).