IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-441

Filed: 20 November 2018

Cleveland County, No. 17CVS1137

PAUL GIESEKING and CRAZIE GOOSE, LLC, Petitioners,

v.

TOWN OF GROVER, a municipal corporation, Respondent.

Appeal by Plaintiff from Order entered 12 February 2018 by Judge Jesse B. Caldwell, III in Cleveland County Superior Court. Heard in the Court of Appeals 16 October 2018.

THE ODOM FIRM, PLLC, by David W. Murray, for Plaintiff-Appellants.

Jason White for Defendant-Appellee.

INMAN, Judge.

On 20 March 2017, Plaintiff-appellant Paul Gieseking and his business Crazie Goose, LLC (collectively, "Petitioners") applied to the Town of Grover's ("the Town") Board of Adjustment ("the Board") for a conditional use permit to operate the business. After a public hearing on 1 June 2017, the Board unanimously denied Petitioners' permit, concluding that Crazie Goose would not be in harmony with the

surrounding businesses. Petitioners appealed to the Cleveland County Superior Court, which affirmed the Board's determination. Petitioners now appeal from the trial court's ruling. Petitioners contend that the Board arbitrarily and capriciously denied their conditional use permit because, after establishing a *prima facie* case entitling them to the permit, its decision lacked substantial, material, and competent evidence to the contrary. After careful review of the record and applicable law, we reverse the trial court's order affirming the Board's decision.

Factual and Procedural Background

The record reflects the following facts:

Crazie Goose is based on the "Crazie Overstock Business Model," in which a retailer sells customers items and also awards cash prizes to customers who use "reward points" from their retail purchases to participate and win in an in-store video-gaming "dexterity test."[1] A customer can accumulate "award points" in one of three ways: buying items in the store, buying items online, or obtaining "e-coupons" exclusive to the store. The purchases are non-refundable, and the "dexterity tests" are optional and are only for people at least eighteen years old. The "dexterity test" requires the participant to stop a virtual "pointer" at a certain spot to convert the "points" into cash.

[1] The legality of Petitioner's business model is disputed in pending litigation, but is irrelevant for the purposes of this appeal.

Petitioners applied for a conditional use permit to operate Crazie Goose in a local shopping center in the Town, located in Cleveland County. The desired property is zoned "General Business" and several other businesses operate in its vicinity. According to the Town's Unified Development Ordinance ("UDO"), "Gambling and Video Gaming Machine(s)" are among a number of industries required to obtain a conditional use permit. Cleveland Cnty., N.C., Unified Development Ordinance § 12-124 (1990). Section 12-33 of the UDO requires an applicant to complete two steps to obtain a permit. First, the applicant must "submit[] to the board of adjustment" a "completed application" and a "site plan," which includes, among other things, specific details about the desired property, owner and adjacent-owner information, and any existing covenants. *Id.* § 12-33(a). Second, after a hearing, even if the Board finds that the application is complete, it can still deny the application if, based on information introduced at the hearing, it finds "more likely than not" that the development:

> (1) Will materially endanger the public health or safety;
> (2) Will substantially injure the value of adjoining or abutting property;
> (3) Will not be in harmony with the area in which it is to be located; or
> (4) Will not be in general conformity with the land use plan, thoroughfare plan, or other plan officially adopted by the board of commissioners.

Id. § 12-33(c).

After completing the application for the permit, Petitioners, "software supplier for the business" Phillip Caldwell ("Caldwell"), and Cleveland County Senior Planner Chris Martin ("Martin") appeared before the Board at a public hearing and presented evidence and remarks regarding the proposed business. Petitioner and Caldwell spoke about Crazie Goose's business model, while Martin discussed Petitioners' application and the Board's duties upon review of a conditional use permit application.

Petitioners described the business model to the Board and explained that all sales are final and customers do not run the risk of losing their purchases, only the ancillary "points" that they receive if they opt to play the "dexterity test." Petitioners testified that Crazie Goose is merely a "retail store" and would be harmonious with the surrounding businesses. When asked about the proposed hours of operation, Petitioners stated that Crazie Goose would be closed on Sundays and open from 8:00 am to 11:00 pm, Monday through Saturday.

The Board members' statements during the hearing were primarily concerned with Crazie Goose's similarity to gambling and how it would affect the "harmony with the other business[es]." One Board member expressed concern with Petitioners' business operating near a "post office, antique store and a restaurant and a church," but Martin informed the Board that the business would also be near a "tattoo business and a thrift store."

The Board concluded the hearing, absent opposing witnesses and evidence, by unanimously denying Petitioners' application "due to the [lack of] harmony with the relevant business[es]."

On 30 June 2017, Petitioners filed a writ of certiorari with the Cleveland County Superior Court seeking review and reversal of the Board's denial of their conditional use permit. Following a hearing on 27 November 2017, the trial court issued an order on 12 February 2018 affirming the Board's decision. Petitioners timely filed a notice of appeal.

Standard of Review

In proceedings arising from applications for land use permits, "[a] local municipal board, a superior court, and this Court each have a particular standard of review." *Davidson Cnty. Broad. Co. v. Iredell Cnty.*, __ N.C. App. __, __, 790 S.E.2d 663, 666 (2016). The Board is the finder-of-fact and sits as a quasi-judicial body. *Id.* at __, 790 S.E.2d at 666. The decisions of the Board must be "based on competent, material, and substantial evidence" introduced at the public hearing. *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

The superior court reviews the Board's decisions "in the nature of certiorari," and acts as an appellate court, not as a fact-finder. *Innovative 55, LLC v. Robeson*

Cnty., __ N.C. App. __, __, 801 S.E.2d 671, 675 (2017) (quoting N.C. Gen. Stat. § 160A-381(c) (2017)). The superior court's role in reviewing the Board's decision includes:

> (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.

Coastal Ready-Mix Concrete Co., 299 N.C. at 626, 265 S.E.2d at 383. The superior court reviews the sufficiency of the evidence presented to the Board, but does not weigh the evidence presented to the Board and does not hear new evidence. *Id.* at 626-27, 265 S.E.2d at 383.

When reviewing a petitioner's appeal from the superior court's order regarding the Board's decision, this Court must "(1) determine whether the superior court exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly." *Dellinger v. Lincoln Cnty.*, __ N.C. App. __, __, 789 S.E.2d 21, 26 (2016). The applicable standard of review "depends on the nature of the error of which the petitioner complains." *Hopkins v. Nash Cnty.*, 149 N.C. App. 446, 448, 560 S.E.2d 592, 594 (2002). This Court employs *de novo* review for errors of law, while the whole record test applies to allegations that the Board's decision was not supported by the evidence or was arbitrary and capricious. *Id.* at 448, 560 S.E.2d at

594.

The whole record test requires this Court to "examine all competent evidence . . . in order to determine whether the agency decision is supported by substantial evidence." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 26, 539 S.E.2d 18, 22 (2000) (quotation and citation omitted). Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 26, 539 S.E.2d at 22 (quotations and citation omitted). Even if there exists evidence contravening the Board's findings, this Court cannot "substitute its judgment" for that of the Board. *Id.* at 27, 539 S.E.2d at 22 (quotation and citation omitted).

Analysis

Petitioners contend on appeal, as they contended before the trial court, that the Board's decision denying the conditional use permit was not supported by substantial, material, and competent evidence and was arbitrary and capricious. The trial court, in its order affirming the Board's decision, stated:

> The Court has considered the record of proceedings (as supplemented), authorities cited by the parties and the arguments of counsel. The Court conducted a *de novo* review as to Petitioners' alleged errors of law and a *whole record* review of Petitioners' allegations that the Board of Adjustment's findings of fact and conclusions were not supported by substantial, competent evidence. After conducting a complete review, the Court hereby concludes as a matter of law that the Board of Adjustment's June 1, 2017 [decision] should be affirmed in that the decision was

> free of errors of law and based upon substantial, competent evidence.

Because Petitioners' appeal concerns the Board's decision-making relative to the evidence introduced at the public hearing, this Court must review only whether the trial court properly applied the whole record test in deciding that issue.

Petitioners argue they established a *prima facie* case entitling them to the conditional use permit, and that the Board arbitrarily and capriciously denied the application without substantial, material, and competent evidence to support the conclusion that the business was not in harmony with surrounding uses.[2] Our analysis of Petitioners' argument is twofold: whether Petitioners in fact made a *prima facie* case for the conditional use permit and, if so, whether evidence that Petitioners' use would not be in harmony with the surrounding uses supported the Board's decision to deny Petitioners' application. We agree with Petitioners on both points.

"[A]n applicant has the initial burden of showing compliance with the standards and conditions required by the ordinance for the issuance of a conditional use permit." *Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 217, 261 S.E.2d 882, 887 (1980). If the applicant "produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant

[2] Though Section 12-33(c) of the Town's UDO lists four independent bases for the Board to deny an applicant's conditional use permit, the Board identified only one basis—that Crazie Goose would not be in harmony with the surrounding businesses. As a result, we need only decide whether the Board's conclusion on the harmony issue was appropriate.

has made a *prima facie* showing of entitlement to a permit." *SBA, Inc.*, 141 N.C. App. at 27, 539 S.E.2d at 22. However, our Supreme Court has held that "the inclusion of [a] particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district." *Woodhouse*, 299 N.C. at 216, 261 S.E.2d at 886 (citation omitted); *see also American Towers, Inc. v. Town of Morrisville*, 222 NC. App. 638, 643, 731 S.E.2d 698, 702 (2012) (stating that a particular use included in the ordinance "establishes a *prima facie* case" that the use is in harmony with the surrounding area).

Section 12-124 of the UDO's "Table of Permitted Uses" lists "Gambling and Video Gaming Machine(s)" as a conditionally permitted use. Cleveland Cnty., N.C., Unified Development Ordinance § 12-124. An applicant for a conditional use permit, pursuant to Section 12-33, must first submit to the Board a "completed application" and "site plan," which requires certain information. *Id.* § 12-33(a). It was determined at the public hearing on 1 June 2017 and in Martin's 31 May 2017 staff report that Petitioners submitted a completed application and site plan to the Board containing all required information. By introducing that information as evidence in the hearing, Petitioners established a *prima facie* case entitling them to the conditional use permit.

Indeed, as stated above, even when an applicant makes a *prima facie* showing

that it is entitled to a conditional use permit, the Board can still deny the permit application if it finds that the development "[w]ill not be in harmony with the area in which it is to be located." *Id.* § 12-33(c)(2). However, the burden of persuasion was on the Board to support its denial with "competent, material, and substantial evidence appearing in the record." *Davidson Cnty. Broad. Co.*, __ N.C. App. at __, 790 S.E.2d at 668.

The record before this Court does not reflect that competent, material, and substantial evidence showing a lack of harmony was presented to the Board. None of the Board's sixteen findings of fact addressed why Crazie Goose would not be in harmony within the surrounding area. During the public hearing, Board members referred to certain businesses in the vicinity of Crazie Gooses's desired location—a tattoo shop, antique shop, thrift store, post office, restaurant, and a church. However, no witness presented evidence regarding those surrounding businesses and their potential relationship to Crazie Goose's presence. Moreover, while one could assume after reading the hearing minutes that the Board was worried about the optics of a quasi-gambling establishment operating in that location, no evidence validated its concern. Because the Board's "conclusions [were] unsupported by factual data or background," its decision to deny Petitioners' conditional use permit was "incompetent and insufficient to support [its] findings." *Humane Soc'y of Moore Cnty., Inc. v. Town of S. Pines*, 161 N.C. App. 625, 632, 589 S.E.2d 162, 167 (2003)

(quotations and citation omitted).

Lastly, contrary to the Town's argument on appeal, the facts in this case are far different than the three cases the Town relies on to support the Board's decision. In *Vulcan Materials Co. v. Guilford Board of County Commissioners*, Vulcan Materials Company ("Vulcan") applied for a conditional use permit to construct a stone quarry in Guilford County. 115 N.C. App. 319, 320, 444 S.E.2d 639, 640 (1994). While Vulcan did establish a *prima facie* entitlement to the permit, in that the quarry would be in harmony with the area—a quarry was listed as a conditional use in the county's ordinance—the Guilford County Board of Commissioners ("the Commissioners") ultimately denied Vulcan's permit. *Id.* at 322, 444 S.E.2d at 641. On appeal, the superior court reversed the Commissioners' decision. This Court reversed the superior court, holding that the Commissioners' denial was supported by competent evidence that the quarry was not in harmony with surrounding uses, including evidence projecting diminished property values; disruptions in traffic flow; conflict with another planned development; Vulcan's past responsibility for injuries; and scholarship correlating quarries with emission of toxic chemicals. *Id.* at 321, 444 S.E.2d at 641.

In *Hopkins*, two petitioners applied for a conditional use permit to use land for

a "stump dump"[3] and a landfill originally zoned for agricultural purposes. 149 N.C. App. at 447, 560 S.E.2d at 593. Again, much like the scenario in *Vulcan Materials Co.*, the petitioners established a *prima facie* entitlement to the permit, but the Nash County Board of Adjustment denied the request due to the use's inharmonious nature in the desired location. *Id.* at 447, 560 S.E.2d at 593. At the public hearing, "[t]hirty-five adjoining property owners were represented by counsel" and presented a multitude of facts against the petitioners' requested use, including: damaging the environment in residential areas adjacent to the proposed site; heavy traffic obstruction; the site's long hours of operation per day; and the site's tendency to be a nuisance. *Id.* at 451, 560 S.E.2d at 595-96. This Court affirmed the superior court and held that the opposing evidence was "competent, material, and substantial" enough to deem the petitioners' potential use to "not [be] in harmony with the surrounding area." *Id.* at 451, 560 S.E.2d at 596.

In the last decision relied upon by the Town, *Davidson County Broadcasting Co.*, the petitioners argued that the Iredell County Board of Adjustment ("the Board") erroneously denied their conditional use permit without competent, material, and substantial evidence to support the denial. __ N.C. App. at __, 790 S.E.2d at 665. Petitioners wanted to build a 1,130-foot radio tower on property in a residential area.

[3] A "stump dump" is a colloquial term used to refer to the extraction of clay from a pit, with the pit later being filled with tree stumps and limbs. *Hopkins*, 149 N.C. App. at 447, 560 S.E.2d at 593.

Id. at __, 790 S.E.2d at 665. Opposing evidence introduced at a public hearing consisted of: testimony by other property owners; photos and a diagram of the property depicting the proposed tower; testimony that the tower, due to its size, would "change the rural landscape" of the area; interferences stemming from the tower's strobe lights; and evidence that the tower "would change the character of the small rural community." *Id.* at __, 790 S.E.2d at 669. This Court, affirming the superior court, held that the Board had enough evidence to find that the tower would not be in harmony with the surrounding area, despite the petitioners' *prima facie* entitlement to the permit. *Id.* at __, 790 S.E.2d at 669.

In contrast with the decision-making bodies in *Vulcan Materials Co.*, *Hopkins*, and *Davidson County Broadcasting Co.*, which based their decisions on actual, concrete opposing evidence, the Board here relied on, at best, "[s]peculative opinions that merely assert[ed] generalized fears about the effects of granting" Petitioners' conditional use permit. *Humane Soc'y of Moore Cnty., Inc.*, 161 N.C. App. at 631, 589 S.E.2d at 167; *see also Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002) ("[T]he denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use."). Thus, the Board's decision was not based upon competent, material, and substantial evidence, so the Town could not overcome the "legal presumption that [Crazie Goose] would be in harmony" within the desired

location. *Davidson Cnty. Broad. Co.*, __ N.C. App. at __, 790 S.E.2d at 667. In concluding otherwise, without identifying any such evidence in the record, the trial court erred in its review. Accordingly, we reverse the trial court's order and remand for it to enter an order reversing the Board's decision.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).