IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1235

Filed: 4 June 2019

Johnston County, No. 17 CVS 3879

THERON LEE MCLAMB, Petitioner,

v.

TOWN OF SMITHFIELD, Acting Through its Town Council, Respondent.

Appeal by respondent from order entered 31 May 2018 by Judge Jeffrey B. Foster in Johnston County Superior Court. Heard in the Court of Appeals 25 April 2019.

Hewett Law Group, P.A., by Alan B. Hewett and William J. Barham, for petitioner-appellee.

Spence, Berkau & McLamb, P.A., by Robert A. Spence, Jr., for respondent-appellant.

ARROWOOD, Judge.

The Town of Smithfield ("respondent" or "Smithfield" or "city council") appeals from the superior court's order reversing its decision to deny Theron Lee McLamb ("petitioner")'s application for a conditional use permit ("CUP"). For the reasons

stated herein, we affirm the superior court's order in part, and reverse and remand in part.

I. Background

On 2 June 2017, petitioner submitted an application for a CUP to develop his commercial property along Magnolia Drive in Smithfield ("the property") into a recreational vehicle park ("RV park") with cabins. At the time of petitioner's application, the property was in a B-3 (Business Highway Entrance) zoning district, which permits the development of RV parks so long as respondent grants the developer a CUP.

Respondent's Unified Development Ordinance ("the development ordinance") requires respondent to make four necessary findings of fact before issuing a CUP to assure that the proposed use is compatible with adjoining properties. The four necessary findings are:

> (A) That the use will not materially endanger the public health, safety, or general welfare if located where proposed and developed according to the plan as submitted and approved;
>
> (B) That the use meets all required conditions and specifications;
>
> (C) That the use will not adversely affect the use or any physical attribute of adjoining or abutting property, or that the use is a public necessity; and
>
> (D) That the location and character of the use, if developed according to the plan as submitted and

> approved, will be in harmony with the area in which it is to be located. . . .

Unified Development Ordinance, § 13-17 (2008).

Respondent's Planning Department reviewed petitioner's application, and determined it was "consistent with applicable adopted plans, policies and ordinances and" should be approved if respondent finds that all four of the necessary findings of fact can be affirmatively made. On 10 August 2017, Smithfield's Planning Board ("the Board") held a hearing on the petitioner's application. The Board recommended respondent deny the application because it did not find that the permit complied with the third necessary finding. However, the Board used the following text as the third necessary finding instead of applying the text of the ordinance:

> Based on the evidence and testimony presented it is the finding of the Planning Board that the application, if approved, will not substantially injure the value of adjoining or abutting property and will not be detrimental to the use or development of adjacent properties or other neighborhood uses or is approved with the following additional stated conditions.

Notably, this version added the requirement that the application must "not substantially injure the value of adjoining or abutting property[,]" which is not required by the ordinance. Applying this standard, the Board found the applicant did not establish the third necessary finding because the developer failed to show the

proposed development would not injure the property values of the adjoining or abutting properties.

Respondent held a quasi-judicial hearing on petitioner's application for a CUP on 3 October 2017. Respondent denied the application based on the third necessary finding, that: "the application[ ] will substantially injure the value of adjoining or abutting property and/or will be detrimental to the use or development of adjacent properties or other neighborhood uses in the following ways or for the following reasons. Based on the effects of potential injury to property values."[1]

Petitioner appealed from respondent's denial by filing a *writ of certiorari* in Johnston County Superior Court on 11 December 2017. The matter came on for hearing before the Honorable Jeffrey B. Foster in Johnston County Superior Court on 26 March 2018.

The superior court entered an order on 31 May 2018. The order concluded as a matter of law:

> 5. That the Petitioner presented competent, substantial, and material evidence to meet his burden of production and made a prima facie showing of entitlement to issuance of the requested CUP.
>
> 6. That pursuant to N.C. Gen. Stat. § 160A-393(k)(3), lay testimony as to how the use of property in a particular way would affect the value of other property is not

[1] Additionally, members of the city council were split three to three over whether the application met the requirements of the first and second necessary findings. Respondent stated the courts "may remand" the split votes back to the city council if necessary "because the Mayor did not vote."

considered competent evidence.

7. That the testimony and evidence from the opponents to the CUP consisted of speculative opinions that assert generalized fears about the effects of granting a [CUP] for development and are not considered as substantial competent evidence to support the findings to deny the permit or rebut the Petitioner's prima facie showing.

. . . .

9. That the Respondent's determination was not based on competent, material, and substantial evidence in the record and was so arbitrary that it could not have been the result of a reasoned decision.

10. That the Respondent's decision to deny the CUP could not have resulted but for an abuse of discretion on the part of the Respondent.

11. That Petitioner is entitled to issuance of the requested CUP.

Therefore, the superior court reversed respondent's denial of the application, and remanded the matter to the city council with instructions to issue the CUP. The superior court also determined petitioner is entitled to reasonable attorneys' fees and costs pursuant to N.C. Gen. Stat. § 6-21.7 (2017).

Respondent appeals.

II. Discussion

Respondent argues the superior court erred by concluding: (1) respondent's determination was not supported by competent, material, and substantial evidence

in the record, and (2) petitioner is entitled to reasonable attorneys' fees. We address each argument in turn.

A. Denial of the Application

On appeal, respondent argues the superior court's determination that respondent's denial of petitioner's application was unsupported by the evidence and arbitrary and capricious was erroneous because there was competent, material, and substantial evidence to rebut petitioner's *prima facie* showing of entitlement to a CUP. We disagree.

A city council's decision to deny a CUP is "subject to review of the superior court in the nature of certiorari in accordance with [N.C. Gen. Stat. §] 160A-388." N.C. Gen. Stat. § 160A-381(c) (2017). The superior court sits in the posture of an appellate court, reviewing a conditional use permit for: (1) "errors in law[,]" (2) whether the procedures "specified by law in both statute and ordinance" were followed; (3) whether the "appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents[;]" (4) whether the "decisions of town boards are supported by competent, material and substantial evidence in the whole record[;]" and (5) whether the decision is arbitrary and capricious. *Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied,* 300 N.C. 562, 270 S.E.2d 106 (1980).

"The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation and internal quotation marks omitted). We review arguments based on errors of law *de novo*, and apply the whole record test when a petitioner "questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious." *Id.* (citation and internal quotation marks omitted). To apply the whole record test, "the reviewing court must examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by substantial evidence." *Id.* at 14, 565 S.E.2d at 17 (citation and internal quotation marks omitted).

When our Court reviews

> a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Id. at 14, 565 S.E.2d at 18 (citation and internal quotation marks omitted). Here, respondent does not dispute that the superior court exercised the appropriate scope of review. Rather, respondent contends the superior court did not properly apply the whole record test when it determined respondent's decision was unsupported by the evidence and arbitrary and capricious. We disagree.

N.C. Gen. Stat. § 160A-381(c) grants a municipality the power to issue conditional use permits. N.C. Gen. Stat. § 160A-381(c). "[A] conditional 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." *Coastal Ready-Mix Concrete Co., Inc.*, 299 N.C. at 623, 265 S.E.2d at 381 (citation and internal quotation marks omitted). Pursuant to N.C. Gen. Stat. § 160A-381(c),

> [t]he [city's zoning and development] regulations may . . . provide that the board of adjustment, the planning board, or the city council may issue . . . conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits.

N.C. Gen. Stat. § 160A-381(c). The board or city council must follow a two-step decision-making process in granting or denying an application for a conditional use permit:

> (1) When 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. (2) A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Coastal Ready-Mix Concrete Co., 299 N.C. at 625, 265 S.E.2d at 382 (citations, alternations, and internal quotation marks omitted). Stated differently, after a petitioner makes a *prima facie* showing of entitlement to a CUP, "[d]enial of a [CUP]

must [also] be based upon findings which are supported *by competent, material, and substantial evidence* appearing in the record." *Innovative 55, LLC v. Robeson Cty.*, __ N.C. App. __, __, 801 S.E.2d 671, 677 (2017) (citation and internal quotation marks omitted) (emphasis and alterations in original). As discussed *supra*, the only necessary finding of fact at issue in the present case is whether the use will not adversely affect the use or any physical attribute of adjoining or abutting property. Thus, we review the whole record for whether there is competent, material, and substantial evidence appearing in the record to rebut petitioner's *prima facie* showing of this finding, and to support the denial of the application on this basis.

i. Value of Adjoining or Abutting Property

As an initial matter, we note respondent's contention that respondent denied the application based on a finding that the proposed development would "adversely affect[ ] the 'use', not the value of the adjoining houses and subdivision."

Despite raising this argument on appeal, respondent clearly stated in its denial of the application that it did so "[b]ased on the effects of potential injury to property values." For this reason, the superior court addressed the effect of the proposed development on the value of the adjoining neighborhood. However, on appeal, respondent abandons its argument that the effect of the proposed development on the value of neighboring properties is a basis for the denial of a CUP, and, consistent with the development ordinance, now contends the issue is whether the proposed use

adversely affects the use or any physical attribute of adjoining or abutting property. Therefore, we need only address the superior court's order to the extent the denial of the application was based on the proposed development's effect on the use or any physical attribute of adjoining or abutting property.

ii. *Prima Facie* Case

The development ordinance expressly permits petitioner's proposed use upon proof that certain facts and conditions in the ordinance exist. "When an applicant for a conditional use permit produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made" the threshold "*prima facie* showing of entitlement to a permit." *Little River, LLC v. Lee Cty.*, __ N.C. App. __, __, 809 S.E.2d 42, 48 (2017) (citation and internal quotation marks omitted). A petitioner's burden to establish "*prima facie* compliance with all requirements and conditions of the [o]rdinance" is one of "*production*, and not a burden of proof." *Innovative 55, LLC*, __ N.C. App. at __, 801 S.E.2d at 676 (citation and internal quotation marks omitted) (emphasis in original). "Otherwise, [t]o hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit. An applicant need not negate every possible objection to the proposed use." *Little River, LLC*, __ N.C. App. at __, 809 S.E.2d at 48 (citation and internal quotation marks omitted).

Petitioner's evidence at the quasi-judicial hearing tended to show the proposed use will not adversely affect the use or any physical attribute of adjoining or abutting property. To evidence there would not be an adverse effect, petitioner produced testimony from Mr. Amos Daniel Simmons, Jr., who qualified as an expert witness in planning, zoning, and design; Mr. Keith Brinson, the Chairman of Johnston County Tourism Authority; Mr. David Gorin ("Mr. Gorin"), who qualified as an expert witness in RV parks; and Mr. Bruce Sauter, who qualified as an expert witness in property appraisals.

The testimony of these witnesses tends to show petitioner would not disturb a 50-foot buffer with mature pine trees between the proposed development and the adjoining property. Additionally, petitioner plans to plant additional shrubs and erect a 6-foot opaque fence between the proposed development and the adjoining neighborhood. Although there would be a knockdown gate between the development and the neighborhood, petitioner's evidence shows it will only be built to allow a power company to service its line on the property, or if an emergency vehicle needed to use the access. Regarding traffic and noise, the evidence tends to show the RV park would be set up for family use as opposed to a more transient population, which would create less traffic. Additionally, the proposed RV park would have quiet hours, and the RVs would only be permitted to enter and exit the park at certain times.

Based on this evidence, petitioner presented competent, material, and substantial evidence the proposed development will be established on land that was already zoned and permitted for the proposed use and the use will not adversely affect the use or any physical attribute of adjoining or abutting property. Nonetheless, respondent denied the CUP application based on the rebuttal evidence.

"If after presentation of rebuttal evidence [respondent] denies a [CUP] application, the denial must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record." *Little River, LLC*, __ N.C. App. at __, 809 S.E.2d at 50 (citation and internal quotation marks omitted). We review the whole record to determine the sufficiency of the evidence to rebut petitioner's *prima facie* case. As a reviewing court applying the whole record test, the superior court could "not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.* (citation and internal quotation marks omitted).

Here, the development ordinance clearly provides that only the effect on the use of "adjoining or abutting" property is at issue. However, only one owner of "adjoining or abutting" property, Mrs. Flora Grantham ("Mrs. Grantham"), testified at the quasi-judicial hearing before respondent. According to her testimony, she was

concerned with noise and her view of the RV park when the trees lost their leaves in the winter months.

In considering Mrs. Grantham's concerns, the reviewing court could not wholly ignore the evidence presented by petitioner. Instead, a reviewing court must conduct the whole record test, thus, it cannot "consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.* (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). Taking into account petitioner's evidence that tends to show a 50-foot buffer with mature pine trees is between the proposed development and the adjoining property, and petitioner's plans to plant additional shrubs and erect a 6-foot opaque fence between the proposed development and the adjoining neighborhood, Mrs. Grantham's concerns are insufficient to rebut the *prima facie* case. Her speculative concerns about noise were also addressed by petitioner, who offered expert testimony from Mr. Gorin that the RV park would have "quiet hours," and the RVs would only be permitted to enter and exit the park at certain times.

In addition to Mrs. Grantham's testimony, neighboring homeowners expressed concerns about the effect of the development on their property values, traffic conditions, the appearance of the neighborhood, diminishing community pride, the inability to monitor sex offenders, and that the plan presented was "incomplete and

vague." To the extent respondent relied on the lay testimony that the proposed development would affect the value of other property or vehicular traffic, respondent erred. N.C. Gen. Stat. § 160A-393(k)(3) specifically prohibits the use of lay testimony to establish: (1) "[t]he use of property in a particular way would affect the value of other property[;]" and (2) "[t]he increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety." N.C. Gen. Stat. § 160A-393(k)(3)(a)-(b) (2017).

The fears regarding the appearance of the neighborhood, diminishing community pride, the inability to monitor sex offenders, and that the plan presented was "incomplete and vague" are only generalized fears and speculation by lay witnesses. Therefore this testimony is insufficient to rebut petitioner's *prima facie* showing. *See Little River, LLC*, __ N.C. App. at __, 809 S.E.2d at 50.

Accordingly, we agree with the superior court that respondent's findings are unsupported by competent, material, and substantial evidence, and its conclusions thereon are, as a matter of law, erroneous. We affirm the superior court's conclusion that opponents to the proposed development did not present competent, material, and substantial evidence to rebut the *prima facie* showing offered by petitioner.

B. Attorneys' Fees

Next, respondent argues the superior court erred by concluding petitioner is entitled to reasonable attorneys' fees. We agree.

> In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.

N.C. Gen. Stat. § 6-21.7 (2017).

Although the trial court has considerable discretion in affixing the amount of reasonable attorneys' fees under all attorneys' fees statutes, including N.C. Gen. Stat. § 6-21.7, "the trial court must make findings of fact to support the award." *Brockwood Unit Ownership Ass'n v. Delon*, 124 N.C. App. 446, 449, 477 S.E.2d 225, 227 (1996) (citation omitted). Specifically, it is well settled that "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney based on competent evidence" to determine an award of counsel fees is reasonable. *W. Through Farris v. Tilley*, 120 N.C. App. 145, 151-52, 461 S.E.2d 1, 4 (1995) (citation and internal quotation marks omitted).

Here, the superior court determined petitioner was entitled to attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.7 because respondent acted outside the scope of its legal authority and abused its discretion. However, the record contains no findings with regard to the reasonableness of the attorneys' fees awarded. The court only found:

> 13. That pursuant to N.C. Gen. Stat. § 6-21.7, the Petitioner is entitled to reasonable attorneys' fees and cost in this matter.
>
> 14. That Petitioner has submitted and filed an affidavit for legal fees in the amount of $13,136.34 and anticipates $1,200.00 being billed to Petitioner to conclude this matter, for a total of $14,336.34.

Therefore, we reverse the award of fees based on the superior court's failure to make findings of fact to support the award and remand for further review.

III. Conclusion

For the foregoing reasons, we affirm the portion of the superior court's order reversing respondent's decision to deny the CUP. However, we reverse the superior court's award of attorneys' fees, and remand for additional findings of fact as to the reasonableness of the fees.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED IN PART.

Judges INMAN and YOUNG concur.

Report per Rule 30(e).