IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-236

Filed: 19 November 2019

Union County, No. 18 CVS 1410

GARY HANCOCK and CHANDRA HANCOCK, Individually, and d/b/a CHANKEN, LLC, Petitioners,

v.

THE CITY OF MONROE, Respondent.

Appeal by Petitioners from order entered 20 December 2018 by Judge Lori I. Hamilton in Union County Superior Court. Heard in the Court of Appeals 22 August 2019.

Goodman, Carr, Laughrun, Levine & Greene, PLLC, by Miles S. Levine, for Petitioners-Appellants.

Kitchen & Turrentine, by S. C. Kitchen, for Respondent-Appellee.

COLLINS, Judge.

Petitioners Gary and Chandra Hancock, individually and doing business as Chanken, LLC, appeal from the trial court's order affirming Respondent City of Monroe's Board of Adjustment's order dismissing as untimely Petitioners' appeal from a Notice of Violation of the City of Monroe Code of Ordinances. Petitioners

contend that the trial court erred by affirming the Board of Adjustment's order because (1) the Notice of Violation was not sent to the proper parties and (2) no affidavit of service concerning the Notice of Violation was filed. We affirm.

I. Background

Petitioners leased real property located at 402 Patton Avenue in Monroe (the "Property") from Gus Mihelakis who, together with Zoe Mihelakis, owned the Property (the "Landlords"), by Lease Agreement dated 1 June 2016. Gary Hancock sought a permit from Respondent allowing Petitioners to operate a business on the Property called KC's Variety Shop/Arcade, which Respondent approved on 17 June 2016 on the express condition that Petitioners not conduct any electronic gaming operation on the Property.

On 18 January 2017, Respondent's Zoning Enforcement Officer Doug Britt sent the Landlords (with copy to Chanken, LLC ("Chanken")) a Notice of Violation letter (the "NOV"). In the NOV, Britt: (1) told the Landlords that Respondent had conducted an investigation and concluded that the Property was being used as an electronic gaming operation in violation of the City of Monroe Code of Ordinances[1]

[1] *See* Monroe, N.C., Code (2017), *available at* http://library.amlegal.com/nxt/gateway.dll/North%20Carolina/monroe/monroenorthcarolinacodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:monroe_nc (last accessed 7 November 2019). Respondent's Code of Ordinances is organized into Titles, subparts of the Titles called Chapters, and subparts of the Chapters called Sections. Where this opinion refers to Chapter(s) and Section(s), we intend to refer to those portions of Respondent's Code of Ordinances: e.g., (1) Chapter 10 is Title I (entitled "GENERAL PROVISIONS"), Chapter 10 (entitled "GENERAL PROVISIONS"), and (2) Section 156.85 is Title XV (entitled "LAND USAGE"), Chapter 156 (entitled "ZONING CODE"), Section 156.85 (entitled "PERSONS LIABLE").

Chapter 156, Respondent's zoning code, also known as the Unified Development Ordinance (or "UDO"); and (2) ordered the Landlords to bring the Property into compliance with the UDO within 10 days. The NOV also stated the penalties for failing to bring the Property into compliance, and described the Landlords' rights to file an appeal from the NOV with Respondent's Board of Adjustment (the "BOA").

On 26 January 2017, the Landlords' real-estate agent sent Petitioners a letter (with copy to the Landlords and Britt) purporting to memorialize a conversation between the real-estate agent, the Landlords, and Petitioners concerning the NOV. In the letter, the real-estate agent (1) indicated that Petitioners had been provided with the NOV, (2) expressed the Landlords' understanding that Petitioners planned to resolve the violation directly with Respondent, and (3) told Petitioners that if they could not resolve the violation themselves, the Landlords would require Petitioners to vacate the Property.

On 16 February 2017, Gary Hancock and Chanken filed a conditional rezoning application with Respondent requesting a zoning-map amendment to allow electronic gaming on the Property. On 5 December 2017, Respondent disapproved the zoning-map amendment by resolution, and on 13 December 2017, Britt sent Gary Hancock a letter informing Hancock that the application had been denied, *inter alia*, because "the proposal violates state law."

Respondent sent the Landlords civil citations on 20 December 2017, 5 January 2018, and 26 January 2018 (with copy to the Property and to Petitioners' counsel) for failure to bring the Property into compliance with the UDO.

On 5 February 2018, more than one year after the NOV was issued, Petitioners filed an appeal from the NOV with the BOA (the "BOA Appeal"), claiming as justification, *inter alia*, that (1) Petitioners' business "was not being used as an electronic gaming operation[,]" (2) the NOV "was not directed to or sent to a person liable" under Section 156.85, and (3) the period to appeal from the NOV had not expired because no affidavit of service had been filed by Respondent as contemplated by Section 10.19(C)(1). Respondent moved to dismiss the BOA Appeal on 13 March 2018, arguing that the BOA Appeal was untimely.

On 21 March 2018, Britt signed and had notarized affidavits of service affirming that he had served the Landlords and Chanken with the NOV on 18 January 2017, and the citations on 20 December 2017, 5 January 2018, and 26 January 2018. That same day, the BOA conducted a hearing on Respondent's motion to dismiss the BOA Appeal (the "BOA Hearing").

On 4 May 2018, the BOA entered an order granting Respondent's motion to dismiss (the "BOA Order"). In the BOA Order, the BOA found, *inter alia*, that: (1) the NOV had been sent to the Landlords and Chanken; (2) the citations issued following the NOV had been sent to the Landlords and Petitioners' counsel; (3) Petitioners'

prior counsel left Britt voicemails in early 2017 "referr[ing] to a zoning issue concerning electronic gaming operations"; (4) the Landlords' real-estate agent's 26 January 2017 letter "shows that the original [NOV] was received by Chandra Hancock" and that "the Hancocks and Chanken[] received constructive notice" of the NOV therefrom; and (5) an affidavit of service had been completed in accordance with Section 10.19 stating that the NOV had been sent on 18 January 2017 to the Landlords, the Landlords' real-estate agent, and Chanken. The BOA Order also concluded that under Chapter 156: (1) a notice of violation of the UDO must be sent to the subject property's owner, but need not be sent to the tenant or occupant of the subject property; and (2) any person with standing to appeal a notice of violation has 30 days from actual or constructive notice of the notice within which to file an appeal. Based upon the foregoing, the BOA concluded in the BOA Order that Respondent "sent the proper party notice" of the NOV, and that the appeal period had expired on 20 February 2017. Because the BOA Appeal was not filed until 5 February 2018, the BOA concluded that the BOA Appeal was untimely, and granted Respondent's motion to dismiss.

On 6 June 2018, Petitioners filed a petition for a writ of certiorari in Union County Superior Court (the "trial court") seeking review of the BOA Order pursuant to N.C. Gen. Stat. § 160A-393. In its petition, Petitioners claimed that the BOA had made various erroneous findings of fact and conclusions of law in the BOA Order,

including that (1) the NOV was not sent to a "PERSON[] LIABLE" within the meaning of Section 156.85 and (2) the affidavit of service was not compliant with Section 10.19(C), and that Petitioners' procedural due process rights had been violated as a result. The trial court issued the writ of certiorari the same day, and Respondent answered on 9 July 2019.

On 20 December 2018, the trial court entered an order affirming the BOA Order (the "Trial Court Order"), in which the trial court determined that the BOA Order "was supported by competent, material, and substantial evidence in the record, was consistent with applicable North Carolina General Statutes, was not affected by error of law, and was not arbitrary or capricious."

Petitioners timely appealed the Trial Court Order to this Court.

II. Discussion

A. Standards of Review

A city "board of adjustment shall hear and decide appeals from decisions of administrative officials charged with enforcement of the zoning or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development[.]" N.C. Gen. Stat. § 160A-388(b1) (2018). A party may seek review of a board of adjustment's quasi-judicial decision[2] by filing a petition

[2] The BOA Order was a quasi-judicial decision within the meaning of N.C. Gen. Stat. § 160A-393. *See* N.C. Gen. Stat. § 160A-393(b)(3) (2018) (defining "Quasi-judicial decision" for purposes of N.C. Gen. Stat. § 160A-393 as "includ[ing] decisions involving . . . appeals of administrative

for review in the nature of certiorari pursuant to N.C. Gen. Stat. § 160A-393 "by the later of 30 days after the decision is effective or after a written copy thereof is given[.]" N.C. Gen. Stat. § 160A-388(e2)(2) (2018). N.C. Gen. Stat. § 160A-393(k) sets forth the scope of review applied by a superior court reviewing a board of adjustment decision on appeal from an administrative decision to issue a notice of violation, as follows (in relevant part):

> (1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
>
> a. In violation of constitutional provisions, including those protecting procedural due process rights.
>
> b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
>
> c. Inconsistent with applicable procedures specified by statute or ordinance.
>
> d. Affected by other error of law.
>
> e. Unsupported by substantial competent evidence in view of the entire record.
>
> f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k) (2018).

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determinations"); *MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjustment for City of Asheville*, 238 N.C. App. 432, 436, 767 S.E.2d 668, 671 (2014) (city board of adjustment's decision regarding appeal of a notice of violation of a local zoning ordinance is a "[q]uasi-judicial decision[]" that is "subject to review by the superior court by proceedings in the nature of certiorari pursuant to [N.C. Gen. Stat. §] 160A-393" (quotation marks and citations omitted)).

Regarding subsections (a)-(d) above, "[i]f a petitioner contends the [b]oard's decision was based on an error of law, '*de novo*' review is proper." *NCJS, LLC v. City of Charlotte*, 803 S.E.2d 684, 688 (N.C. Ct. App. 2017) (quotation marks and citation omitted). "When the issue before the court is whether the decision-making board erred in interpreting an ordinance . . . [t]he court shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate." N.C. Gen. Stat. § 160A-393(k)(2); *see Morris Commc'ns Corp. v. City of Bessemer City Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (holding that it was error to accord deference to a board interpretation of a local zoning ordinance).

"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." *NCJS*, 803 S.E.2d at 688 (quotation marks and citation omitted). In applying the "whole record" test, the reviewing court must "inspect all of the competen[t] evidence which comprises the 'whole record' so as to determine whether there was indeed substantial evidence to support the Board's decision. Substantial evidence is that which a reasonable mind would regard as sufficiently supporting a specific result." *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 162 N.C. App. 603, 615, 592 S.E.2d 205, 213 (2004) (citation omitted). "The 'whole record' test does not allow the reviewing court to replace the [b]oard'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*." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17-18 (2002) (quotation marks and citation omitted).

On appeal to this Court, we review the trial court's decision to determine "(1) whether the superior court applied the correct standard of review, and to determin[e] (2) whether the superior court correctly applied that standard." *Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013) (internal quotation marks, brackets, and citations omitted).

B. Analysis

Petitioners contend that the trial court erred by affirming the BOA Order because (1) the BOA's finding that the NOV was sent to a "PERSON[] LIABLE" as required by Section 156.85 was not supported by substantial evidence and (2) the BOA committed legal error in ruling that the time Petitioners had to appeal from the NOV was not tolled until Respondent filed an affidavit of service concerning the NOV as contemplated by Section 10.19(C). We address each argument in turn.

1. "PERSONS LIABLE"

"The *owner, tenant, or occupant of any building or land or part thereof* . . . may be held responsible for" a violation of the UDO. Section 156.85 (emphasis added) (entitled "PERSONS LIABLE"). The city administrator finding a violation of the

UDO must "send a written notice to *the person responsible* for such violation, indicating the nature of the violation and ordering the action necessary to correct it[,]" and "[a]dditional written notices may be sent at the Administrator's discretion." Section 156.86(A) (emphasis added) (entitled "PROCEDURES UPON DISCOVERY OF VIOLATIONS"). Finally, within Chapter 10, its "GENERAL PROVISIONS" chapter, Respondent's Code of Ordinances sets forth that assessment of a civil penalty for a violation of the Code of Ordinances generally requires that "the city [] cause a notice of violation to be issued to *the violator* by the appropriate official of the city and served on the violator or his agent[.]" Section 10.19(C)(1) (emphasis added) (entitled "ENFORCEMENT OF ORDINANCES").

Citing to Britt's testimony at the BOA Hearing agreeing that "[t]he tenant was the violator, not the landlord[,]" Petitioners contend that: (1) they were the "violator[s]" within the meaning of Section 10.19(C), the "person[s] responsible" within the meaning of Section 156.86, and the "PERSONS LIABLE" within the meaning of Section 156.85; and (2) the Landlords were not responsible for the UDO violation the NOV sought to address, and therefore were not "PERSONS LIABLE" within the meaning of Section 156.85. Accordingly, Petitioners argue that: (1) the BOA Order's finding that the NOV was sent to a "PERSON[] LIABLE" within the meaning of Section 156.85 was not supported by competent, material, and substantial evidence in light of the whole record; and (2) Respondent failed to follow Section

156.86's prescribed procedures, and thereby violated Petitioners' procedural due process rights.

Petitioners' arguments are based upon a misconstruction of the applicable ordinances. First, the BOA Order includes a finding that the Landlords are the owners of the Property, which is uncontested and therefore binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). By setting forth that "[t]he owner. . . of any building or land or part thereof . . . may be held responsible for" a violation, Section 156.85 plainly contemplates the Landlords as "PERSONS LIABLE" within the meaning of that subsection. Second, even assuming *arguendo* that there was insufficient evidence that Petitioners were sent the NOV, the BOA Order includes a finding that the NOV was sent to the Landlords. Petitioners also do not contest that finding, which is also binding for purposes of our analysis. *Koufman*, *supra*. Because it is uncontested both that (1) the Landlords were the owners of the Property (and were thus "PERSONS LIABLE" within the meaning of Section 156.85) and (2) the Landlords were sent the NOV, Petitioners' argument that the record lacks competent, material, and substantial evidence to support a finding that the NOV was sent to a "PERSON[] LIABLE" is without merit.

The question remains whether Sections 156.86(A) or 10.19(C)(1)—which respectively require that a notice of violation be sent to the "person responsible" for a UDO violation and the "violator" of Respondent's Code of Ordinances more generally—support Petitioners' argument that Respondent failed to follow the required procedures. The definitions sections governing Chapters 156 and 10 do not define either term. *See* Sections 156.14, 10.05. However, because Section 156.85 sets forth that the "owner[s]" of real property "may be held responsible for" a violation of the UDO occurring thereupon, and Respondent elected to hold the Landlords responsible for the violation by addressing the NOV to them, we conclude (without deferring to the BOA's construction of the ordinances, *Morris Commc'ns*, *supra*) that the Landlords were the "person[s] responsible" within the meaning of Section 156.86(A) with respect to the violation here at issue.

For the same reasons, we also conclude that the Landlords were the "violator[s]"[3] within the meaning of Section 10.19 with respect to the violation. To the extent "person responsible" and "violator" could be construed as having different meanings, thereby creating a conflict regarding who must be sent a notice of violation in a situation where both a property owner and a tenant could be held responsible for a zoning code violation, Section 10.19 expressly sets forth that "[i]n the event any

[3] Petitioners' invocation of Britt's testimony regarding his understanding of who the "violator" of the statute was—like Britt's understanding of what an affidavit of service is intended to accomplish, *see infra* section II(B)(2)—does not support Petitioners' argument, because Britt's understanding is not relevant for a court interpreting *de novo* what city ordinances mean as a matter of law.

provision of [Section 10.19] is found to be in conflict with any other provision of any other ordinance or code of the city, the more specific provision shall prevail." Section 10.19(D). Accordingly, in such a case, the more-specific provisions of Chapter 156 (entitled "ZONING CODE") trump the less-specific provisions of Chapter 10 (entitled "GENERAL PROVISIONS"), and only the person held responsible under Chapter 156 must be sent the notice of violation.

We accordingly conclude that Respondent followed the required procedures by sending the NOV to the Landlords, and that Petitioners' argument that Respondents' purported failure to send the NOV to them requires reversal fails.

2. Affidavit of Service

Section 10.19(C) sets forth that the "city official serving the notice of violation shall sign and have notarized an affidavit describing the type of service and the date of service[,]" and that "[t]he violator must file an appeal from a notice of violation within 10 days from the service date of the notice of violation as indicated on the affidavit of service." Sections 10.19(C)(1), (2).

The BOA found, and the record reflects, that Britt did not sign and have notarized an affidavit of service affirming that he had served the Landlords and Chanken with the NOV until the date of the BOA Hearing, 21 March 2018. Again citing to Britt's testimony—this time that it was his understanding that the purpose of an affidavit of service was to "give notice of when [a violator] had to appeal"—

Petitioners contend that Section 10.19(C) required Britt's affidavit of service to be filed before the period the Petitioners had to file an appeal from the NOV began to run. This argument fails for a number of reasons.

First, Section 10.19(C)(1) does not require that the affidavit of service it contemplates be filed, instead requiring only that the "city official serving the notice of violation [] sign and have notarized an affidavit describing the type of service and the date of service." The record reflects that city official Britt sent the NOV by mail to the Landlords and Chanken on 18 January 2017, signed the affidavit of service describing the type and date of service, and had the affidavit notarized. Although Britt did not sign the affidavit of service and have it notarized until 21 March 2018, Section 10.19(C)(1) does not specify that the affidavit of service must be signed and notarized by any particular date. Accordingly, Respondent complied with the express terms of Section 10.19(C)(1).

Second, Section 10.19(C)(2) sets forth that the appeal period expires "10 days from the service date of the notice of violation as indicated on the affidavit of service[,]" but does not say that the appeal period is at all subject to the date the affidavit of service is signed, notarized, or filed. And Section 10.19(C)(1) specifically sets forth that "[t]he violator shall be deemed to have been served upon the mailing or personal service of the notice of violation[.]" By the plain language of the ordinance, then, it is the date upon which the notice of violation is deemed served—

rather than the date upon which an affidavit of service is signed, notarized, or filed—that triggers the ten-day period to file an appeal from the notice of violation contemplated by Section 10.19.

Finally, even assuming *arguendo* that Section 10.19(C)(2) was intended to toll the period a party has to appeal a notice of violation until an affidavit of service is filed as Petitioners suggest, by setting forth that "[i]n the event any provision of [Section 10.19] is found to be in conflict with any other provision of any other ordinance or code of the city, the more specific provision shall prevail[,]" Section 10.19(D) requires that Section 10.19(C)(2) yield to the more-specific provision in Section 156.65 governing appeals of decisions under the zoning code, which sets forth the relevant appeal period and when it begins to run. *See* Section 156.65(C) ("The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days[4] from receipt from any source of actual or constructive notice of the decision within which to file an appeal."). Because Section 156.65 does not require that an affidavit of service concerning the NOV be signed, notarized, or filed before the appeal period

[4] Petitioners' argument that the NOV provided "contradictory and ambiguous information regarding the time for Appealing to the Board of Adjustment" fails to raise any possible prejudice, since Petitioners failed to file their appeal from the NOV outside of the 30-day period they argue caused them uncertainty. *Andrews v. Haygood*, 188 N.C. App. 244, 249, 655 S.E.2d 440, 443 (2008) ("verdicts and judgments will not be set aside for harmless error, or for mere error and no more. Instead, [an appellant] must show not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right." (internal quotation marks and citations omitted)).

begins to run, even if we were to read Section 10.19(C)(2) as containing such a requirement as Petitioners suggest, we would still conclude that Petitioners' argument regarding the affidavit of service fails.

III. Conclusion

Because we conclude that the trial court did not err by affirming the BOA Order, we affirm.

AFFIRMED.

Judges BERGER and ARROWOOD concur.

Report per Rule 30(e).