

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-596

No. COA21-37

Filed 2 November 2021

New Hanover County, No. 20 CVS 1980

COSWALLD, LLC, by and through its Agent TRIBUTE INVESTMENT AND DEVELOPMENT, INC., Petitioners,

v.

NEW HANOVER COUNTY and the NEW HANOVER COUNTY BOARD OF COUNTY COMMISSIONERS, Respondents.

Appeal by Petitioners from judgment entered 19 October 2020 by Judge George F. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 22 September 2021.

Kip D. Nelson and Thomas E. Terrell, Jr. for Petitioners-Appellants.

Deputy County Attorney Sharon J. Huffman for Respondents-Appellees.

GRIFFIN, Judge.

¶ 1 Coswald, LLC and its agent Tribute Investment and Development, Inc. (collectively, “Petitioners”) argue that their opponents did not present competent, material, and substantial evidence to rebut Petitioners’ *prima facie* case of entitlement to a special use permit. Petitioners argue that the superior court erred by upholding the denial of their permit. Upon review, we agree that the rebuttal

evidence was not competent, material, and substantial. We reverse and remand for issuance of the permit.

I. Factual and Procedural Background

A. Application for Special Use Permit

¶ 2 Coswald, LLC owns an approximately 30-acre parcel of land, located near the intersection of Market Street and Lendire Road, in New Hanover County. In July 2019, Tribute Investment and Development, Inc., as agent for Coswald, applied for a special use permit to develop 15.6 acres within this parcel.

¶ 3 Petitioners proposed a mixed-used development of the property, including multi-family apartment buildings with limited commercial uses. Petitioner’s proposal included two access points to the property: one on Lendire Road and one on “Old” Lendire Road.

¶ 4 The New Hanover County Zoning Ordinance then in effect provided that the New Hanover County Board of Commissioners

shall approve an application for a special use permit if it reaches each of the following conclusions based on findings of fact supported by competent, substantial, and material evidence presented at the hearing.

(1) The use will not materially endanger the public health or safety if located where proposed and approved.

(2) The use meets all required conditions and specifications of the Zoning Ordinance;

COSWALLD, LLC v. NEW HANOVER CTY.

2021-NCCOA-596

Opinion of the Court

(3) The use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity.

(4) 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 and in general conformity with the Comprehensive Land Use Plan for New Hanover County.

New Hanover County, N.C., New Hanover County Zoning Ordinance art. 7, § 70-7 (2019). After considering Tribute’s application in a 3 October 2019 meeting, the County’s planning board and the County manager recommended approval of the application.

B. 21 October 2019 Hearing

¶ 5 A public hearing on the application was held before the New Hanover County Board of Commissioners on 21 October 2019. Individuals who opposed issuance of the permit presented public comments, a PowerPoint presentation, and sworn testimonies. The evidence pertinent to this appeal centered on the development’s potential danger to public health and safety.

1. Traffic

¶ 6 Petitioners presented a traffic impact analysis (“TIA”) which had been approved by NCDOT and the Wilmington Metropolitan Planning Organization. The engineer who had prepared the TIA testified at the hearing. The TIA indicated that

the development would slightly increase the time it takes for vehicles to get through certain intersections nearby, but would not reduce the overall level of service in those intersections from the projected level of operation for 2021.

¶ 7

Opponents presented lay opinions regarding road conditions and the development's potential impact on traffic. A local resident testified, "The current volume of traffic on Lendire [Road] has caused it to be unsafe at the present time." She described the poor condition of Lendire Road and referred to a Board resolution from 2005 that stated, "This segment of Market Street is highly congested with traffic movements already failing at many locations." The PowerPoint presentation contained photographs depicting maintenance issues and congested traffic on Lendire Road. Public comments from local residents referred generally to congested traffic and accidents in the area; the comments predicted that the development would increase traffic. Some comments also noted the poor condition of Lendire Road. The opponents presented no expert testimony or quantitative data regarding traffic and road conditions, nor did they cross-examine the Petitioners' expert witnesses regarding those issues.

2. Stormwater

¶ 8

Petitioners presented expert testimony from an engineer who testified that through this project, stormwater runoff would be reduced (for all storms less than a 100-year storm) compared to the current stormwater runoff as an undeveloped piece

COSWALLD, LLC V. NEW HANOVER CTY.

2021-NCCOA-596

Opinion of the Court

of land. New Hanover County requires controlling for stormwater that occurs from a 25-year storm. Petitioners offered to control for stormwater that occurs from a 100-year storm.

¶ 9 In rebuttal, opponents presented lay testimony about past flooding in the area. For example, a local resident testified, “Multiple residents have had to move off of their property for over a year after storm events due to flooding.” Another resident opined that

[Petitioners are] saying that the water is not going to outfall here. It will outfall here and it will go back into our neighborhoods. This water will not stay in this 100-year flood retention pond. There are retention ponds back here that are cresting at any summer rain at any time.

The resident further testified, “Across the street here where that water was supposed to go out to Howe’s Creek, it washed out. It took the DOT a year to get that fixed where the new Publix is.”

¶ 10 The opponents’ PowerPoint presentation included photographs of past flooding. A testifying resident referred to letters from the County manager which generally discussed the importance of maintaining the County’s ecological systems. Public comments from local residents described past flooding and poor drainage in the area; the comments predicted that any further development would worsen these problems. The opponents did not present any expert testimony or quantitative data about flooding, and there was no cross-examination of the Petitioners’ expert

witnesses regarding the issues of stormwater runoff or the condition of the public streets.

3. Other Public Safety Concerns

¶ 11 Local residents expressed other public safety concerns at the hearing. One resident stated, “A child was just hit this morning while crossing the street to get to the school bus,” and asked, “Who will take responsibility if and when a child is injured on this road[?]” Another resident testified, “We have a rapist right now in o[u]r neighborhood going around early in the morning trying to get these women alone and raping. . . . So we worry about that and we worry about even letting ou[r] dogs out.”

C. Denial of Application

¶ 12 Based on the evidence presented to the Board, the Deputy County Attorney opined that “a denial of the special use permit would not be upheld. I think it would be returned for issuance of the special use permit.”

¶ 13 At the conclusion of the 21 October 2019 meeting, the Board voted to table the application for 90 days. Nearly eight months later, on 1 June 2020, the Board denied Petitioners’ application. In support of its conclusion that the proposed use did not satisfy the requirement that the use not “materially endanger the public health or safety[,]” the Board relied on a single finding of fact: “Drainage improvements have not been completed and traffic improvements planned for the area have not been

completed.” The Board concluded that the proposed use met the other three requirements for a special use permit.

D. Appeals

¶ 14 On 26 June 2020, Petitioners filed a Petition for Writ of Certiorari and for Judicial Review. The matter was heard in New Hanover County Superior Court on 17 September 2020.

¶ 15 In its judgment dated 19 October 2020, the superior court made 68 findings of fact. The superior court’s conclusions of law included the following:

76) The testimony of lay witnesses offering only opinions (as opposed to facts and/or observations within their personal knowledge), speculative assertions, and/or generalized fears, is not competent evidence. Accordingly, citizens’ opinions and/or testimonies as to the proposed use’s effects upon, including but not limited to: crime, aesthetics, education, increased traffic, etc[.] are not competent, material, and substantial evidence in opposition to the proposed use.

77) The testimony of a lay witness(es) in the form of an opinion as to the direction of stormwater effluent outfall on property which he or she neither owns nor resides upon is not competent, material, and substantial evidence as same constitutes matters about which only expert testimony would generally be admissible under the rules of evidence. NCGS [§] 160A-393(k)(3).

78) The testimony and/or opinion of an individual as to facts within the personal knowledge and/or personal observation(s) of the individual is, except as to matters specifically deemed incompetent by NCGS § 160A-393, competent. Furthermore, the afore-mentioned

testimony(ies) and/or opinion(s) was/were admitted without objection and the same appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the Board of Commissioners to rely upon it.

Ultimately, the superior court concluded there was “competent, material, and substantial evidence” sufficient to rebut Petitioners’ “*prima facie* showing of entitlement to issuance of the requested Special Use Permit.”

¶ 16 The superior court affirmed the Board’s denial of the permit. Petitioners timely appealed the superior court’s judgment.

II. Analysis

¶ 17 Respondents concede that Petitioners “initially presented competent, material, and substantial evidence sufficient to establish a *prima facie* case of entitlement to the permit.” *See Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974) (“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.”). Further, Respondents do not argue that competent, material, and substantial rebuttal evidence showed that Petitioners failed to meet requirements (2), (3), or (4) of the New Hanover County Zoning Ordinance requirements for a special use permit. The sole issue on appeal is whether there was competent, material, and substantial evidence to rebut the Petitioners’ *prima facie* case that the

proposed development “would not materially endanger the public health or safety.” We agree with Petitioners that the evidence presented in rebuttal was not competent, material, and substantial.

A. Standard of Review

¶ 18 “A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body.” *Sun Suites Holdings, L.L.C. v. Board of Aldermen of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000) (citing *Humble Oil & Ref. Co.*, 284 N.C. at 469, 202 S.E.2d at 136-37). Its decisions “shall be subject to review by the superior court by proceedings in the nature of certiorari.” *Capricorn Equity Corp. v. Chapel Hill*, 334 N.C. 132, 135, 431 S.E.2d 183, 186 (1993) (internal quotation marks omitted) (citing N.C. Gen. Stat. § 160A-388(e) (Supp. 1992)). “The superior court is not the trier of fact but rather sits as an appellate court.” *Id.* at 136, 431 S.E.2d at 186. The superior court’s responsibilities on review include

- (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

COSWALLD, LLC v. NEW HANOVER CTY.

2021-NCCOA-596

Opinion of the Court

competent, material[,] and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

PHG Asheville, LLC v. City of Asheville, 374 N.C. 133, 149-50, 839 S.E.2d 755, 766 (2020) (citations omitted).

¶ 19 Our “task on review of the superior court’s order is twofold: (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *Jubilee Carolina, LLC v. Town of Carolina Beach*, 268 N.C. App. 90, 94, 834 S.E.2d 665, 669 (2019) (citation and internal quotation mark omitted).

¶ 20 Here, the issue on appeal is whether competent, material, and substantial evidence was admitted to rebut Petitioners’ *prima facie* case. “Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record.” *Humane Soc’y of Moore Cty. v. Town of S. Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (2003) (citation omitted). “The extent to which ‘the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.’” *PHG Asheville*, 374 N.C. at 150, 839 S.E.2d at 766 (quoting N.C. Gen. Stat. § 160A-393(k)(2) (2019)).

B. The Rebuttal Evidence was Not Competent, Material, and Substantial.

¶ 21 The superior court concluded that the record contained competent, material, and substantial evidence sufficient to rebut Petitioners' *prima facie* entitlement to a special use permit. We disagree.

1. *Traffic*

¶ 22 North Carolina statutory and case law conclusively establishes that “lay testimony concerning traffic conditions is not competent in conditional use permit proceedings.” *Id.* at 156, 839 S.E.2d at 770; *see also* N.C. Gen. Stat. § 160A-393(k)(3)(b) (2019) (providing that “competent evidence” shall “not be deemed to include the opinion testimony of lay witnesses as to [whether] . . . [t]he increase in vehicular traffic resulting from a proposed development would pose a danger to public safety”).

¶ 23 Here, the rebuttal evidence concerning the project's potential impacts on traffic consisted exclusively of lay opinions in the form of testimony and comments from local residents. The rebuttal evidence did not include any expert testimony or quantitative data regarding the project's potential impact on traffic. This evidence concerning traffic was not competent to rebut Petitioners' *prima facie* case.

¶ 24 Further, we note that the rebuttal evidence regarding an increase in traffic from the proposed development was not substantial. Although the lay comments predicted that the development would increase traffic, no evidence specified what amount the traffic would purportedly increase. “[A] mere increase in traffic does not

necessarily mean an intensification of traffic congestion or a traffic hazard that would materially endanger the public . . . safety.” *Sun Suites Holdings*, 139 N.C. App. at 277, 533 S.E.2d at 530 (concluding there was no “substantial” evidence that the proposed project would “materially endanger the public health or safety”) (citations and internal quotation marks omitted).

¶ 25 Respondents argue that the Board and the superior court did not rely on evidence regarding traffic congestion, but instead relied on evidence concerning the poor condition of Lendire Road. This evidence was not material to whether the proposed use posed a danger to public health or safety. Petitioners did not own Lendire Road, and no evidence suggests they had any ability to remedy it. Regardless of whether the special use permit was issued, Lendire Road would have been in poor condition. There is no competent evidence in the Record that the condition of the roadway would be worsened beyond its designed lifespan by allowing this permit. To deny Petitioners the special use permit (to which they were *prima facie* entitled) on this basis would deprive them of their right to use their property as authorized by ordinance. *See Woodhouse v. Bd. of Comm’rs*, 299 N.C. 211, 219-20, 261 S.E.2d 882, 888 (1980) (noting that “the concern over fire-fighting facilities would exist regardless of the type of use or development of the property involved here” (citing *Nalitt v. Millburn*, 66 N.J. Super. 292, 299, 168 A.2d 864, 868 (1961) (reasoning that the purported hazard would equally apply “to any structure which might be erected on

the site, the logical result then being that the lands would remain in an unimproved condition and the owners thereof would be deprived of the right to put the premises to the uses authorized by the ordinance itself.”)). Respondents’ argument is without merit.

2. *Stormwater*

¶ 26 “[T]he expression of ‘generalized fears’ does not constitute a competent basis for denial of a permit.” *Sun Suites Holdings*, 139 N.C. App. at 276, 533 S.E.2d at 530 (citation omitted). “[S]peculative assertions or mere expression of opinion about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body.” *Id.*

¶ 27 Here, the rebuttal evidence concerning stormwater runoff was generalized and speculative. The lay testimony and public comments described past flooding and poor drainage in the area, but did not articulate any causal connection between these problems and the proposed development or explain relevant similarities to other causes of flooding, except to speculate that *any* further development would exacerbate flooding. *See id.* at 276-77, 533 S.E.2d at 530 (concluding there was no material rebuttal evidence when “no evidence was presented suggesting any relevant similarities” between the proposed project and a purportedly problematic building apart from the allegation that both were “‘extended-stay’ hotels”).

COSWALLD, LLC v. NEW HANOVER CTY.

2021-NCCOA-596

Opinion of the Court

¶ 28 This case is analogous to *Ecoplexus Inc. v. Cty. of Currituck*, 257 N.C. App. 9, 809 S.E.2d 148 (2017). In *Ecoplexus*, residents who opposed issuance of a special use permit testified as to flooding and drainage concerns. *Id.* at 16-11, 809 S.E.2d at 152. This Court concluded that their testimony was not competent, and noted that “[e]ven if true, this flooding [was] based upon current conditions from the defunct golf course and not due to conditions or uses proposed by [the petitioners].” *Id.* at 17-18, 809 S.E.2d at 156. Similar to *Ecoplexus*, here opponents presented evidence of past flooding in the area that was caused by factors other than “conditions or uses proposed by Petitioners.” *Id.*

¶ 29 Further, the opposing evidence did not address Petitioners’ expert testimony that the proposed development would actually reduce stormwater runoff (for all storms less than a 100-year storm) compared to leaving the land undeveloped. One resident disagreed with this expert testimony by testifying that the stormwater would “not stay in [Petitioners’] 100-year flood retention pond.” As support for his prediction, the resident only stated that “[t]here are retention ponds back here that are cresting at any summer rain at any time.” This “vague” and “speculative” evidence was insufficient to oppose issuance of the special use permit. *See Woodhouse*, 299 N.C. at 220-21, 261 S.E.2d at 888 (“Evidence that similar sewage plants gave off offensive odors is insufficient standing alone to show that petitioners’

plant will do likewise. Such evidence is hypothetical as to the operation of the proposed plant.” (citations omitted)).

3. *Other Public Safety Concerns*

¶ 30 Opponents of the development expressed additional fears about public safety, namely that there was a rapist in the neighborhood, that the residents were afraid to let their dogs out, and that a child had been hit by a car while crossing the street. This testimony was incompetent to rebut Petitioners’ *prima facie* case. See *Sun Suites Holdings*, 139 N.C. App. at 276, 533 S.E.2d at 530 (“[T]he expression of ‘generalized fears’ does not constitute a competent basis for denial of a permit.” (citation omitted)). “[T]he speculative comments of neighborhood residents relating their ‘generalized fears,’ and impressions that . . . crime would be affected by the project cannot be characterized as ‘substantial’ evidence and were insufficient to support the Board’s decision.” *Id.* at 277, 533 S.E.2d at 530 (citations omitted).

C. The Superior Court Erred in its Review.

¶ 31 On appeal of an administrative board’s decision, “[i]t is not the function of the reviewing court . . . to find the facts[.]” *Capricorn Equity Corp.*, 334 N.C. at 136, 431 S.E.2d at 186 (citations omitted); see also *Batch v. Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662 (1990) (when reviewing an administrative decision, “[t]he superior court judge may not make additional findings [of fact]” (citation omitted)).

¶ 32 The superior court made inconsistent conclusions of law. Conclusion of Law 76 noted that lay testimony is incompetent when in the form of “opinions . . . , speculative assertions, and/or generalized fears.” Conclusion of Law 77 held that “testimony of a lay witness(es) in the form of an opinion as to the direction of stormwater effluent outfall on property which he or she neither owns nor resides upon is not competent, material, and substantial evidence.” Together, Conclusions of Law 76 and 77 excluded virtually all the rebuttal evidence as incompetent. Despite these conclusions, the superior court proceeded to hold that there existed “competent, material, and substantial evidence” sufficient to rebut Petitioners’ *prima facie* entitlement to the special use permit. As discussed *supra*, the rebuttal evidence in the Record was not competent, material, and substantial.

III. Conclusion

¶ 33 The Board’s finding that the proposed development posed a danger to public health and safety was unsupported by competent, material, and substantial evidence. The superior court erred in affirming the Board’s denial of the special use permit. We reverse and remand the judgment of the superior court with instructions that the matter be remanded to the Board of County Commissioners with an instruction to issue the special use permit.

REVERSED AND REMANDED.

Judges TYSON and ARROWOOD concur.

COSWALLD, LLC v. NEW HANOVER CTY.

2021-NCCOA-596

Opinion of the Court

Report per Rule 30(e).