IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1006

Filed 7 November 2023

Iredell County, No. 21 CVS 2693

SAM'S COMMERCIAL PROPERTIES, LLC, Petitioner,

v.

TOWN OF MOORESVILLE, Respondent.

Appeal by Petitioner from order entered 13 September 2022 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 7 June 2023.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, Jonathan H. Dunlap, and Brian D. Gulden, for petitioner-appellant.

Cranfill Sumner, LLP, by Stephen A. Bader, Patrick H. Flanagan, and Kayla N. McDaniel, for respondent-appellee.

MURPHY, Judge.

A Superior Court's—and, by extension, our—review of a zoning board's permit denial is limited to the bases on which the board rendered its decision. Furthermore, the appropriate remedy in the event of a permit denial that was predicated on an error of law is to remand to the zoning board for issuance of the permit. Here, where

the sole basis for the Mooresville Board of Adjustment's denial of Petitioner's billboard permit application was predicated on an erroneous interpretation of the Town of Mooresville's zoning ordinance, we reverse and remand to the Superior Court with instructions to further remand the case to the Board of Adjustment for issuance of Petitioner's permit.

BACKGROUND

This case arises from the denial of Petitioner's billboard permit application by the Mooresville Board of Adjustment ("BOA"). In 2021, Petitioner submitted a permit application to the Town of Mooresville ("the Town") to erect a digital billboard within city limits in a heavily commercialized road corridor near the intersections of Highway 150 and Highway 77. On 22 February 2021, the Planning and Community Development Director of Mooresville denied Petitioner's application. Petitioner appealed the director's decision to the BOA, which affirmed the permit denial on 12 August 2021.

In its order, the BOA listed three reasons for the denial of Petitioner's permit application:

> First, Section III(b) of page six of the Agreement between the State of North Carolina and the federal government states that local zoning authorities may establish effective control of outdoor advertising signs within zoned commercial areas through regulations or ordinances with respect to size, lighting, and spacing of outdoor advertising signs consistent with the intent of the Highway Beautification Act of 1965 and with customary use when

> the Federal Highway Administrator has been notified of such control by the local zoning authority. . . . Second, since the proposed sign is to be an electronic billboard, Section III(a)(3)(b) of page six of the Agreement between the State of North Carolina and the federal government prohibits signs which are not effectively shielded as to prevent beams or rays of light from being directed at any portion of the traveled ways of . . . [a] Federal Aid Primary highway which . . . impair the vision of driver[s]. . . . [A]nd third, no evidence was presented specifically defining a Federal Aid Primary sign.

(Marks and citations omitted). The BOA further noted that "it [did] not appear there [were] any contested facts to be resolved" since the case turned strictly on the interpretation of the ordinance.

After receiving the BOA's decision, Petitioner filed a petition for writ of certiorari with the Iredell County Superior Court pursuant to N.C.G.S. § 160D-1402. *See generally* N.C.G.S. § 160D-1402 (2021); *see also* N.C.G.S. § 160D-406(k) (2021) ("Every quasi-judicial decision shall be subject to review by the [S]uperior [C]ourt by proceedings in the nature of certiorari pursuant to [N.C.G.S. §] 160D-1402."). The Superior Court granted certiorari on 29 September 2021 and, on 22 September 2022, affirmed the BOA's decision and denied an outstanding motion for attorney fees by Petitioner in a one-page order.[1]

ANALYSIS

[1] The 22 September 2022 order professed to deny Petitioner's petition for certiorari; however, the Record is clear that certiorari had already been granted by the 29 September 2021 order. We therefore understand the 2021 order as denying Petitioner the relief *sought* in the petition rather than denying certiorari.

Petitioner raises several distinctly enumerated arguments on appeal. However, in substance, all of Petitioner's arguments concern (A) whether the BOA erred in denying Petitioner's request to place a billboard and (B) whether, if the Superior Court erred with respect to the allowance of the billboard, it further erred in denying Petitioner's request for attorney fees. The parties also disagree as to (C) the remedy in the event of an improper denial by the BOA. For the reasons discussed below, we hold the BOA incorrectly denied Petitioner's permit application and remand for issuance of the permit.

A. Permit Denial

When reviewing a decision of a county board of adjustment, the Superior Court must:

> (1) Review[] the record for errors of law,
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> (2) [E]nsur[e] that procedures specified by law in both statutes and ordinances are followed,
>
> (3) [E]nsur[e] that appropriate due process rights of a Plaintiff are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) [E]nsur[e] that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) [E]nsur[e] that decisions are not arbitrary or capricious.

JWL Invs., Inc. v. Guilford Cnty. Bd. of Adjustment, 133 N.C. App. 426, 428-29 (citations omitted), *disc. rev. denied*, 351 N.C. 357 (1999). "If a [p]laintiff contends

the [b]oard's decision was based on an error of law, de novo review is proper." *Id.* at 429 (marks omitted). Meanwhile, "if the [petitioner] contends the [b]oard's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test." *Id.* "An appellate court's review of the [Superior] [C]ourt's zoning board determination is limited to determining whether the [S]uperior [C]ourt applied the correct standard of review, and . . . whether the [S]uperior [C]ourt correctly applied that standard." *Bailey & Assocs., Inc. v. Wilmington Bd. Of Adjustment*, 202 N.C. App. 177, 190 (2010). Furthermore, the Superior Court's review—and, by extension, our own review—is limited to the bases for the denial actually articulated by the BOA. *See Godfrey v. Zoning Bd. Of Adjustment of Union Cnty.*, 317 N.C. 51, 63-64 (1986) (marks omitted) ("[It was not] appropriate in this context for the panel below to affirm the decision of the Zoning Board of Adjustment by substituting for its basis a legal theory not relied upon by the Board. A court cannot affirm the administrative action of a board by substituting its own premises in sustaining that action for those which served as the basis of the agency's action.").

At the time of the BOA hearing, Chapter 8 of the Town's ordinance stated, in relevant part, that "no sign allowed by this chapter shall be constructed, erected, moved, enlarged, illuminated, altered, maintained, or displayed without first being issued a [permit] . . . in accordance with the standards of this chapter." MOORESVILLE, N.C., ZONING ORDINANCE ch. 8.2 (2020). Chapter 8 provided examples of "[a]llowable

[p]ermanent [s]igns" subject to permit requirements, including arm signs, awning signs, pole signs, and projecting signs, as well as "allowable temporary signs" subject to permit requirements, including "signs, flags, inflatables and streamers for special events[.]" MOORESVILLE, N.C., ZONING ORDINANCE ch. 8.3-8.4 (2020). It further provided examples of signs which "shall be prohibited, except as otherwise allowed in [the] [o]rdinance[,]" which included, in relevant part, "[o]ff-premise commercial advertising signs (e.g. billboards) of any size and in any area except those signs part of the Federal Aid Primary System (FAP) and subject to the requirements of the [Highway] Beautification [A]ct [('HBA')]." [2] MOORESVILLE, N.C., ZONING ORDINANCE ch. 8.7 (2020). Mooresville's ordinance further defined "billboard" as "[a]n advertising sign which exceeds the maximum height and/or sign message area limitations of this

[2] The ordinance in question featured a pictographic example ad and appeared in its entirety as follows:

[o]rdinance and directs the attention of the public to a commodity, product, service, activity or any other person, place or thing which is not located, found, or sold on the premises upon which such sign is located." MOORESVILLE, N.C., ZONING ORDINANCE ch. 13.2 (2020).

In its denial, the BOA determined the Town's ordinance generally prohibited billboards as a matter of law and interpreted the ordinance as definitively placing Petitioner's billboard permit request outside its exception. The BOA further noted that "it [did] not appear there [were] any contested facts to be resolved since the matter before [it could] be decided" entirely by determining whether the digital billboard Petitioner desired was prohibited under the language of the ordinance.

Reviewing the BOA's interpretation of the ordinance de novo and limiting our review to that issue, we disagree. *JWL Invs., Inc.*, 133 N.C. App. at 429; *Godfrey*, 317 N.C. at 63-64. When interpreting a municipal ordinance, a court applies the same principles of construction which it uses to interpret statutes. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adj.*, 365 N.C. 152, 157 (2011). To interpret the meaning of a statute, a court begins with the relevant statutory text. *U.S. v. Quality Stores, Inc.*, 572 U.S. 141, 145 (2014). "[A court's] job is to follow the [statutory] text[,] even if doing so will supposedly undercut a basic objective of the statute[.]" *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 135 (2015) (marks omitted). Thus, we review the BOA's decision de novo and interpret the relevant ordinance in accordance with its plain language.

Here, the ordinance is broken into two parts. First, the ordinance lays out a general ban on billboards. Second, it provides an exception to this ban that allows the erection of signs which are both (1) part of the FAP and (2) in compliance with all requirements of the HBA. Petitioner argues its proposed billboard should be permitted under the ordinance's exception to its general ban, as its proposed billboard meets both requirements of the ordinance's exception.

1. Federal Aid Primary System

To determine whether Petitioner's proposed billboard satisfies the requirements of the ordinance's exception, we must first determine whether Petitioner's billboard is a "sign[] part of the Federal Aid Primary System[.]" Signs part of the FAP are set out in N.C.G.S. § 136-128(4), which reads as follows:

> "Primary systems" means the federal-aid primary system in existence on June 1, 1991, and any highway which is not on that system but which is on the National Highway System. As to highways under construction so designated as primary highways pursuant to the above procedures, the highway shall be a part of the primary system for purposes of this Article on the date the location of the highway has been approved finally by the appropriate federal or State authorities.

N.C.G.S. § 136-128(4) (2021). Signs which are permissible as part of the FAP are defined as follows:

> No outdoor advertising[3] shall be erected or maintained within 660 feet of the nearest edge of the right-of-way of the interstate or primary highway system in this State so as to be visible from the main-traveled way thereof after the effective date of this Article as determined by [N.C.G.S. §] 136-140, except the following:
>
> (1) Directional and other official signs and notices, which signs and notices shall include those authorized and permitted by Chapter 136 of the General Statutes, which include but are not limited to official signs and notices pertaining to natural wonders, scenic and historic attractions and signs erected and maintained by a public utility, electric or telephone membership corporation, or municipality for the purpose of giving warning of or information as to the location of an underground cable, pipeline or other installation.
>
> (2) Outdoor advertising which advertises the sale or lease of property upon which it is located.
>
> . . . .
>
> (3) Outdoor advertising which advertises activities conducted on the property upon which it is located.
>
> (4) *Outdoor advertising, in conformity with the rules and regulations promulgated by the Department of Transportation, located in areas which are zoned industrial or commercial under authority of State law.*
>
> (5) Outdoor advertising, in conformity with the rules and regulations promulgated by the Department of Transportation, located in unzoned commercial or industrial areas.

[3] The term "outdoor advertising" includes billboards. N.C.G.S. § 136-128(3) (2021) ("'Outdoor advertising' means any outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or any other thing which is designed, intended or used to advertise or inform, any part of the advertising or information contents of which is visible from any place on the main-traveled way of the interstate or primary system, whether the same be permanent or portable installation.").

N.C.G.S. § 136-129 (2021) (emphasis added).

Petitioner's proposed billboard would be erected in an area zoned for commercial use and built along Highway 150, a Federal Aid Primary highway. *See* N.C.G.S. § 136-128(4) (2021). Thus, so long as Petitioner's proposed billboard is also in conformity with the rules and regulations promulgated by the North Carolina Department of Transportation ("NCDOT"), its billboard would satisfy prong four of N.C.G.S. § 136-129. *See Naegele Outdoor Advert., Inc. v. Hunt*, 121 N.C. App. 205, 207-08 (1995), *disc. rev. denied*, 342 N.C. 895 (1996). NCDOT's rules and regulations governing the erection and maintenance of signs read in relevant part as follows:

> (1) Signs shall be configured and sized as follows:
>
> (a) the maximum area for any one sign shall be 1,200 square feet with a maximum height of 30 feet and maximum length of 60 feet. All measurements shall include any border and trim, but shall exclude the base or apron, embellishments, embellished advertising space, supports, and other structural members;
>
> (b) the maximum size limitations shall apply to each side of a sign structure. Signs placed back-to-back, side-to-side, or in V-type construction with no more than two displays to each facing shall be considered as one sign. The maximum size limitations shall apply to each facing of a sign structure;
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> (c) Side-by-side signs shall be structurally tied together to be considered as one sign structure;
>
> (d) V-type and back-to-back signs shall not be considered as one sign if located more than 15 feet apart at their nearest points;

> (e) the height of any portion of the sign structure, excluding cutouts or embellishments, as measured vertically from the adjacent edge of pavement of the main traveled way shall not exceed 50 feet; and
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> (f) Double-decking of sign faces so that one is on top of the other is prohibited.
>
> (2) Signs shall be spaced as follows:
>
> (a) Signs shall not be located in a manner to obscure, or otherwise physically interfere with the effectiveness of any traffic sign, signal, or device, or to obstruct or physically interfere with a driver's view of approaching, merging, or intersecting traffic;
>
> (3) Signs shall meet the following lighting requirements:
>
> (a) No sign shall contain, include, or be illuminated by any flashing, intermittent, or moving light or lights, including animated or scrolling advertising except as allowed by Item (4) of this Rule or it is giving public service information, such as time, date, temperature, or weather;
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> (b) No light emitted or reflected off of a sign shall be of an intensity or brilliance as to cause glare or to impair the vision of a driver, or which otherwise interfere with the operation of a motor vehicle;
>
> (c) No sign shall be so illuminated that it interferes with the effectiveness of, or obscures an official traffic sign, device, or signal.

19A N.C. Admin. Code 2E.0203 (2023). Petitioner's proposed billboard satisfies each of these rules and regulations; therefore, Petitioner's billboard is part of the FAP and satisfies the first requirement of the exception to the Town's zoning ordinance.

2. Highway Beautification Act

Next, we must determine whether Petitioner's proposed billboard meets the requirements of the HBA. The HBA was adopted by Congress to control "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent" to the interstates and federal aid primary highways. 23 U.S.C. § 131(a) (2018). The HBA penalizes states which fail to maintain "effective control" over advertising signs by withholding federal funding. 23 U.S.C. § 131(b) (2018). Under North Carolina's federal-state agreement, the State must maintain effective control over the erection and maintenance of outdoor advertising signs, displays, and devices erected after the effective date of the agreement, 7 January 1972. 19A N.C. Admin. Code 2E.0202 (2023). The HBA defines "effective control" in 23 U.S.C. § 131(c) as follows:

> Effective control means that such signs, displays, or devices after [1 January] 1968, if located within six hundred and sixty feet of the right-of-way and, on or after [1 July] 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to
>
> (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other

> requirements as may be appropriate to implement this section,
>
> (2) signs, displays, and devices advertising the sale or lease of property upon which they are located,
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> (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located,
>
> (4) signs lawfully in existence on [22 October] 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic significance the preservation of which would be consistent with the purposes of this section, and
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> (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

23 U.S.C. § 131(c) (2018) (formatting added).

The Town argues that, under the HBA, billboards are restricted to the five usage types listed in 23 U.S.C. § 131(c)—"directional and official signs and notices," "signs[] . . . advertising the sale or lease of property upon which they are located[,]" "signs[] . . . advertising activities conducted on the property on which they are located[,]" "landmark signs[,]" and "signs . . . advertising . . . free coffee[.]" 23 U.S.C. § 131(c) (2018). Petitioner's proposed billboard does not meet any of these usage types. However, Petitioner argues that its billboard is nevertheless permissible under subsection (d) of the HBA, which reads as follows:

> In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority.

23 U.S.C. § 131(d) (2018); *see also Naegele*, 121 N.C. App. at 207-08 (holding that both the Highway Beautification Act at U.S.C. § 131(d) and N.C.G.S. § 136-129(4) "allow[] the erection and maintenance of outdoor advertising within 660 feet of the right-of-way in areas which have been zoned commercial or industrial 'under authority of State law'").

Under subsection (d), whenever a local zoning authority has made a determination of customary use, such determination will be accepted instead of the standards which are set forth in the State's federal-state agreement if the area is zoned for commercial or industrial use and within the jurisdiction of the local zoning authority. *Id.* However, here, it is unclear from the face of the ordinance and the

zoning of the property in light of N.C.G.S. § 136-129 whether such a determination of customary use was made. The zoning of the subject property, as discussed previously, is commercial, which would ordinarily suggest customary use inclusive of the erection of billboards. However, the language of the ordinance itself, as it pertains to the HBA exception, traps the reader in an indeterminate interpretive feedback loop: despite the ordinance's phrasing initially indicating a general billboard ban, the very language of the HBA exception requires us to refer back to the policy aims of the statute for a determination of customary use pursuant to 23 U.S.C. § 131(d), which, in turn, cannot be determined without knowing the scope of the exception. Put differently, the very references incorporated into the exception in the ordinance render the scope of the exception unknowable.

Under these circumstances, our inability to derive clear meaning from the HBA exception requires recourse to North Carolina's longstanding principle that, where the language of a zoning ordinance is indeterminate, we must resolve the ambiguity in favor of free use:

> Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions of a [z]oning [o]rdinance should be resolved in favor of the free use of property.

Yancey v. Heafner, 268 N.C. 263, 266 (1966) (marks omitted). We therefore hold that the BOA erred in its interpretation of the Town's ordinance and that, by extension, the Superior Court erred in upholding the denial of Petitioner's permit.[4]

B. Attorney Fees

Petitioner argues the Superior Court erred in denying its motion for attorney fees under N.C.G.S. § 6-21.7. We disagree. N.C.G.S. § 6-21.7 states, in pertinent part:

> In any action in which a city or county is a party, upon a finding by the court that the city or county violated a statute or case law setting forth unambiguous limits on its authority, the court shall award reasonable attorney[] fees and costs to the party who successfully challenged the city's or county's action.

N.C.G.S. § 6-21.7 (2021).

"It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *TAC Stafford, LLC v. Town of Mooresville*, 282 N.C. App. 686, 694 (quoting *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 365 (2015)), *disc. rev. denied*, 383 N.C. 681 (2022). Thus, N.C.G.S. § 6-21.7 provides for mandatory attorney fees. *Id.* However, to order a city or county to pay mandatory attorney fees, the Superior Court must find "that the city

[4] Petitioner also argues that the BOA's reasoning for denying its permit was "ill-founded and nonsensical" and that the BOA's decision "lacked substantial, competent evidence and was arbitrary and capricious" under the "whole record review" test. Additionally, it argues the Superior Court erred in denying its motion to strike improper arguments by the Town. However, because we hold that the BOA erred as a matter of law by denying Petitioner's application based on an incorrect interpretation of the ordinance, both of these issues are moot.

or county violated a statute or case law setting forth G*unambiguous* limits on its authority." N.C.G.S. § 6-21.7 (2021) (emphasis added).

For purposes of N.C.G.S. § 6-21.7, "'unambiguous' means that the limits of authority are not reasonably susceptible to multiple constructions." *TAC Stafford*, 282 N.C. App. at 695 (citing N.C.G.S. § 6-21.7 (2021)). The Town did not violate a statute or caselaw setting forth *unambiguous* limits on its authority when it denied Petitioner's permit application as, for the reasons explained in Part A, a plain meaning cannot be accurately derived from the language of the HBA exception. Therefore, N.C.G.S. § 6-21.7 does not apply, and the Superior Court correctly denied Petitioner's motion for attorney fees.

C. Remedy

Finally, the parties disagree as to the appropriate remedy in this case. Petitioner argues the appropriate remedy is an order reversing the Superior Court's and the BOA's decisions and remanding with a mandate to entry of order for the Town to issue the requested zoning permit. Meanwhile, the Town asks that we remand for further proceedings before the BOA.

The General Assembly has provided for the appropriate remedy. In the event a determination of the BOA is overturned on appeal, N.C.G.S. § 160D-1402(k)(3) requires remand for issuance of the permit:

> If the court concludes that the decision by the decision-making board is not supported by competent, material, and substantial evidence in the record or is based upon an error

> of law, then the court may remand the case with an order that directs the decision-making board to take whatever action should have been take had the error not been committed or to take such other action as is necessary to correct the error. Specifically:
>
> a. If the court concludes that a permit was wrongfully denied because the denial was not based on competent, material, and substantial evidence or *was otherwise based on an error of law*, the court *shall* remand with instructions that the permit be issued, subject to any conditions expressly consented to by the permit applicant as part of the application or during the board of adjustment appeal or writ of certiorari appeal.

N.C.G.S. § 160D-1402(k)(3)(a) (2021) (emphases added). The language of N.C.G.S. § 160D-1402(k)(3)(a) clearly mandates that, as here, in the event of a denial predicated on an error of law, the Superior Court is required to remand with instructions to award the permit. *Id.*; *TAC Stafford*, 282 N.C. App. at 694. Accordingly, we reverse and remand to the Superior Court with further instructions to remand the case to the BOA for issuance of Petitioner's permit.

CONCLUSION

The BOA's interpretation of the Town's ordinance was an error of law, and its denial of Petitioner's billboard permit application on that basis was therefore incorrect. The Superior Court erred in affirming that determination, and Petitioner is entitled under N.C.G.S. § 160D-1402(k)(3)(a) to the issuance of the requested permit.

REVERSED AND REMANDED.

Judges TYSON and STADING concur in result only.

Report per Rule 30(e).