No. 8A25

No. _____ DISTRICT 16

SUPREME COURT OF NORTH CAROLINA

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DURHAM GREEN FLEA MARKET,

Petitioner,

v.

CITY OF DURHAM,

Respondent.

From Durham County
22CVS3973

From the Court of Appeals
COA24-246

****

NOTICE OF APPEAL
AND
CONDITIONAL PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Under sections 7A-30(2) and 7A-31(c) of the North Carolina General Statutes, as well as Rules 14 and 15 of the North Carolina Rules of Appellate Procedure, Petitioner Durham Green Flea Market (the Market) files a consolidated (1) notice of appeal based on a dissent in the Court of Appeals, and (2) a conditional petition for discretionary review.

NOTICE OF APPEAL BASED ON DISSENT IN THE COURT OF APPEALS

Under N.C. Gen. Stat. § 7A-30(2) and Appellate Rule 14(b)(1), Durham Green Flea Market appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals filed on 3 December 2024 in *Durham Green Flea Market v. City of Durham*, No. COA24-246, which was entered with a dissent. The majority and dissenting opinions of the

Court of Appeals are attached in the appendix.[1] App. 1-17. The dissenting opinion was based on the following issue, which the Durham Green Flea Market will present to this Court for appellate review:

Did Durham's notice of violation sufficiently describe the nature of the violation and the corrective measures available to the Market?

The Market recognizes that the General Assembly has eliminated the right to appeal to this Court when an opinion is issued by the Court of Appeals with a dissent. N.C. Sess. Law 2023-134, § 16.21(d). However, the Market retains its right to appeal because of the effective date in this change of law.

The part of the session law that repealed dissent-based appeals (subsection (d)) has its own effective date. That effective date states, "Subsection (d) of this section is effective when it becomes law and applies to appellate cases filed with the Court of Appeals on or after that date." N.C. Sess. Law 2023-134, § 16.21(e). In this case, the Market filed its notice of appeal in the superior court, giving notice of its appeal to the Court of Appeals, on 30 June 2023. (R p 193.) The session law became law three months later, on 3 October 2023. The record on appeal was docketed at the Court of Appeals on 2 April 2024. Docket Sheet, *Durham Green Flea Mkt. v. City of Durham*, No. COA24-246, *available at* https://appellate.nccourts.org/dockets.php?court=2&docket=2-2024-0246-001&pdf=1&a=0&dev=1.

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1 The decision of the Court of Appeals is a published opinion, but it has not yet been assigned a reporter citation.

The relevant date to decide whether a litigant still has a right to appeal based on a dissent is the date of the notice of appeal, not the docketing of the record on appeal. The Court of Appeals acquires appellate jurisdiction over a case when the notice of appeal is filed. Although "an appeal is not perfected until it is actually docketed in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal." *Swilling v. Swilling*, 329 N.C. 219, 225, 404 S.E.2d 837, 841 (1991). Because of the relation back, it's the filing of the notice of appeal, not the docketing of the record, which gives rise to the automatic stay under section 1-294 of further trial proceedings. *Id.*

The General Assembly intended to tether the effective date to the filing of the notice of appeal. The legislature is presumed to legislate with an understanding of existing statutes and case law. *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970); *Blackmon v. N.C. Dep't of Correction*, 343 N.C. 259, 265, 470 S.E.2d 8, 11 (1996). And the relation back of an appeal to the filing of the notice of appeal has been the law for over a century. *See Pruett v. Charlotte Power Co.*, 167 N.C. 598, 83 S.E. 830, 831 (1914).

Besides, a contrary interpretation, which looks only at the date of the first filing with the Court of Appeals, would lead to absurd results. Consider the following scenario:

- the notice of appeal is filed 1 September 2023,
- the Court of Appeals grants a motion to extend time to order transcripts on 14 September 2023,
- the effective date of the session law is 3 October 2023, and

- the record on appeal is docketed with the Court of Appeals on 31 December 2023.

In this scenario, since a motion was filed to extend a deadline with the Court of Appeals before the effective date of 3 October 2023, does the losing litigant have a right to appeal if there's ultimately a dissent? There was an appeal-related filing with the Court of Appeals before October 3. But it seems odd that the legislature would have cared about a motion to extend time filed with the Court of Appeals. Instead, it's more natural for the legislature to have targeted the filing that creates the appeal and sets in motion all the subsequent cascade of appellate deadlines: the notice of appeal. An appeal is filed with the Court of Appeals not when the record is docketed, or some motion is filed with that court, but when the notice of appeal is timely filed in the trial tribunal. All later filings with the Court of Appeals, which "perfect" the appeal, relate back in time, as a matter of law, to the date on which the notice of appeal was filed.

Thus, a litigant retains a right to a dissent-based appeal so long as he has timely filed a notice of appeal (later perfected) in the trial tribunal before 3 October 2023. Since that happened here, the Market has a right to appeal based on the dissenting opinion below.

All that said, the Market recognizes that the correct interpretation of the effective date for the repeal of dissent-based appeals is unsettled. For that reason, the Market is filing with this notice of appeal a conditional petition for discretionary review. *See* N.C. R. App. P. 14(a). The same issue in the dissenting opinion for which the Market believes that it has a right to appeal is presented in the petition as an issue for discretionary review. Should the

Court agree that the Market has a right to an appeal based on the dissenting opinion, it would be appropriate to deny the petition for discretionary review as moot.

CONDITIONAL PETITION FOR DISCRETIONARY REVIEW

Imagine a just-built home that's awaiting a certificate of occupancy. The building code inspector drops by for a final look. He then hands the owner a letter and walks off. The letter tells the owner that the home wasn't built according to the approved blueprints, so the owner has 30 days to fix it. But what part of the home wasn't built according to the blueprints? And what must the owner do to fix the problems? The inspector deliberately chooses not to tell the owner, leaving him in an impossible situation.

That's what happened to the Durham Green Flea Market. The Market is a bustling hub of commerce. The city of Durham approved a site plan for the Market, which the Market followed in its operations from 2008 to 2020. The site plan is a complex, scaled set of drawings drafted by an engineer.

Right before the pandemic, Durham mailed a "notice of violation" to the Market. The one-page notice told the Market it was violating city ordinances because of its "[f]ailure to comply with an approved site plan." The Market could bring itself into compliance, Durham explained, by following the site plan.

That notice of violation was as meaninglessly vague as the home inspector's letter. There was no way for the Market to know how it was violating the site plan, which is like a blueprint for a residence. The Market appealed the notice to the Board of Adjustment.

At the hearing before the Board, the Board members couldn't figure out what the allegations were either. Durham's planning staff began explaining how the site plan was violated—details found nowhere in the notice of violation. And when asked why this information wasn't in the notice, the staff testified that they did not want the Market to be able to fix the problems. One of the Board members objected that this was procedurally improper, but the others went along with the city's staff and rejected the appeal. The Board's decision was affirmed by the superior court and Court of Appeals.

But the Board got it wrong. When a notice of violation does not describe the alleged violation or the corrective measures, it doesn't meet the requirements imposed by the General Assembly. Our legislature did not intend to let local governments penalize landowners, and thereby restrict the free use of property, without specifying the charges against the landowners. Had that been the legislature's intent, it would deprive landowners of the use of their property without due process of law. Procedural due process mandates meaningful notice of the allegations against someone before a hearing occurs. Otherwise, the landowner cannot meaningfully defend itself, nor can it avoid litigation by curing the alleged violation.

Local governments across the state are constantly issuing notices of violation. But this Court has never considered the content requirement for the notices. If the decision by the Court of Appeals is allowed to stand, then there is no meaningful content requirement for these notices. Local governments can penalize landowners and restrict the use of their land without giving landowners procedural protections. As the dissent noted below, such

vagueness lets the government change or make up new allegations as the proceeding advances.

This petition gives this Court an opportunity to address the issue, one of first impression for the Court. Given the importance of these notices to landowners, the case presents an important issue for the public and the jurisprudence of our state.

BACKGROUND

A. The Notice of Violation

Robert Perry[2] and his son Trans Perry own the Durham Green Flea Market in Durham. (R p 163.) Before they bought it in 2008, it was dilapidated. (R pp 158-59.) With their improvements, it has become a clean and successful market. (R p 159.) Over 100 businesses operate at the Market. Gabi Mendick, IndyWeek, *For More than a Decade, the Durham Green Flea Market Has Been a Taste of Home for the Triangle's Hispanic Community* (Dec. 8, 2021), https://indyweek.com/food-and-drink/for-more-than-a-decade-the-durham-green-flea-market-closure-rumors/.

The City of Durham had approved a site plan for the property on which the Flea Market sits. By statute, Durham and other municipalities are allowed to issue a written "notice of violation" when city staff determines there is activity afoot that violates "terms of a development approval" or "other local development regulation." N.C. Gen. Stat. § 160D-404(a). For the notice's content, it "shall include a description of the violation and

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2 Robert Perry is also an attorney and has represented the Flea Market throughout this proceeding.

its location [and] the measures necessary to correct it." *Durham Green Flea Mkt. v. City of Durham*, No. COA24-246, 2024 WL 4941065, at *2 (N.C. Ct. App. Dec. 3, 2024) [App. 5]; *accord* (R p 9).[3]

In February 2020, staff in Durham's planning department mailed the Market a written notice of violation. (R p 30) [App. 19]. For the description of violation, the notice only said, "Failure to comply with an approved site plan." (R p 30) [App. 19]. For the corrective measures, the notice stated the inverse of the violation description: "Correction of this violation will require the violator to remove all alterations inconsistent with the approved site plan within thirty (30) days of the receipt of this notice." (R p 30) [App. 19]. The notice looked like this:

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3 *See* City of Durham & Cnty. of Durham, Unified Development Ordinance § 15.2.1(C), *available at* https://www.durhamnc.gov/DocumentCenter/View/54014/Durham-Unified-Development-Ordinance-UDO-Print-Version?bidId=. This portion of the ordinance is available in the appendix. App. 18.

The following zoning violation was observed during a recent field inspection:

Address: 1600 E. Pettigrew St	Durham Tax Parcel ID#: 119005
Zoning: IL	PIN #: 0831-18-42-0210
Violation: Failure to comply with an approved site plan (D1300045)	
To be corrected as noted below	

The above condition constitutes a violation of the Durham Unified Development Ordinance, Section 3.7.2, Applicability, Site Plan and 15.1.2 Violation (see attached).

Correction of this violation will require the violator to remove all alterations inconsistent with the approved site plan within thirty (30) days of the receipt of this notice.

This notice serves as a warning and explains what steps must be taken to comply with the ordinance. If you do not contact us and begin the process to correct this violation within the time frame specified above, you are subject to the imposition of civil penalties in an amount up to $500.00 per day for each day the violation exists after the deadline. The Durham UDO allows for the pursuit of (a) prosecution of this violation as a criminal misdemeanor, and (b) injunctive relief through the Durham County Courts. Additionally, Section 15.2.2(A) of the UDO allows a person charged with a violation of the Zoning Code the right to appeal the determination to the Durham Board of Adjustment within 30 days from the date of receipt of this notice.

(R p 30) [App. 19].

The site plan is a type of scaled map drawn up by an engineer. It contains many details, like buildings areas, setbacks, and utility lines. N.C. Gen. Stat. § 160D-102(29) (explaining what goes into a site plan). Site plans are submitted by landowners and approved by municipalities; agreement upon the minutiae in those plans is supposed to offer "clarity" to everyone involved. David Owens, N.C. Sch. Gov't, *What Conditions Can Be Included in Conditional Zoning?*, Coates' Canons NC Local Government Law (Nov. 11, 2021), https://canons.sog.unc.edu/2021/11/what-conditions-can-be-included-in-conditional-zoning/.

The Market's approved site plan is too large and complex to reproduce below, but it's in the record on appeal. (R pp 118-31.) The notice does not say what part of the site plan the Market has violated or how any violation can be corrected. (R p 30) [App. 19].

B. The Board of Adjustment

The Market appealed the notice of violation to the Durham's Board of Adjustment. (R p 36); N.C. Gen. Stat. § 160D-404(a) (allowing such appeals).

On appeal, the Board held an evidentiary hearing. The city went first, and a staffer fielded questions from the Board members. (R pp 156-57.) Some of the board members' questions sought to figure out what the notice of violation was asserting to begin with. (R pp 157-58.) One member asked, "And reading the Notice of Violation, I was unable to determine what the violation was. It was general. Why weren't some of the specific violations included in the Notice of Violation?" (R p 158.) Durham's staff began explaining in detail how the city believed the Market was not following its site plan. (R p 157.) The city complained about the conversion of required parking spots to outdoor vending areas, a new entrance, and the addition of outdoor storage. (R p 157.) None of this was described on the notice of violation. (R p 30) [App. 19].

Planning staff tried to justify the lack of any detail in the notice. (R p 158.) Staff explained that the notice of violation was drafted to be intentionally ambiguous. (R p 158.) As one staffer explained, "We didn't want to list just one thing because there several different issues and things that he has done to the property without site plan approval." (R p

158.) Continuing, he explained that he did not want the Market to be able to cure the problems:

> We don't want to issue something that says, "Hey, fix this, this this, and this," when there was a whole lot of things that were improved on the site. So, if we went through and listed it, he could fix those things and not fix the others. . . . So, usually what we like to do is keep it very broad in that type of situation because there were several different things that were improved.

(R p 158.) If staff listed these violations, then the Market could have simply proposed a new site plan showing the improvements, which would then be approved.[4] (R p 158.)

The notice of violation said that the only remedial measures that could be taken were to bring the Market into compliance with the existing site plan. (R p 30) [App. 19]. But, at the Board hearing, the city argued that the Market could either comply with the existing plan or submit a new plan. (R pp 162-63.) The city conceded, however, that its notice only advised the Market that it should bring the property into compliance with the existing plan; remedy by submitting a new plan was not mentioned in the notice. (R p 163.)

When the Market asked staff why it didn't give detail in its notice of violation, it responded, "We don't have to." (R p 159.) The Board asked Robert Perry, the Market's owner and attorney, whether he understood the notice: "Mr. Perry, when you received the NOV, were you able to determine the specific violations that were alleged what specific

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4 That said, approval of a new site plan is costly and slow. (R p 159.) The site plan must be drawn up by an engineer, which takes three months, and then it takes nine more months before the city approves it. (R p 159.) And that's to say nothing of the cost of changes that may be required to comply with new requirements from the city. (R p 159.)

action you needed to take to correct the violations?" (R p 160.) He responded, "No, I did not." (R p 160.) No contrary evidence was offered by Durham.

Before the Board, the Market objected to the notice of violation, arguing "that it was too general to place [the Market] on notice of the specific violations being cited." (R p 150.) One of the Board members agreed, expressing "concern about the general nature of the NOV and felt that it should have specifically cited each and every violation on the Property." (R p 150.) The Board member explained that he had reviewed over 100 prior notices of violation, and they had always listed the actual violations, unlike this notice to the Market: "If there's 20 or 30 [violations], it must list 20 or 30." (R p 165.) What was sent to the Market "is a boilerplate form and it doesn't meet the standards." (R p 165.) Highlighting the importance of getting the procedure right, he emphasized that the "first step" is a "written notice and this Notice is generic." (R p 165.)

Nonetheless, the other six board members disagreed and rejected the Market's appeal. (R pp 150-51, 166.) Still, some of these Board members were bothered by the notice. (R p 165 ("I agree that the Notice of Violation could have been more detailed and perhaps would have been helpful had it been more detailed and perhaps even have stopped us from having to be here had it been more detailed . . . .").)

C. Judicial Proceedings

The Market sought judicial review in superior court. (R p 5.) The Market argued to the court that the notice of violation was facially deficient due to its lack of detail about the

alleged violations committed and specific steps needed for remediation. (R p 9.) The court rejected the argument and dismissed the petition. (R p 191.)

The Market appealed to the Court of Appeals. (R p 193.) That court affirmed in a split, published decision. App. 1-17. In the majority opinion, written by Judge Gore and joined by Judge Flood, the court first held that the notice of violation sufficiently described the alleged violations and described the corrective measures to be taken by the Market. *Durham Green Flea Mkt.*, 2024 WL 4941065, at *2 [App 5]. Next, the majority rejected the Market's procedural due process argument. *Id.* at *2-3 [App. 5-6]. Although the court recognized that the Market was entitled to notice and an opportunity to be heard, the court held that, if the Market wanted better notice of the alleged violations, then it should have called Durham's staff to find out. *Id.* at *3 [App 5-6].

Judge Tyson dissented. He would have held that Durham did not sufficiently allege the violations of the site plan or the necessary corrective measures in the notice of violation. *Id.* at *4-5 (Tyson, J., dissenting) [App. 9, 12]. This failure not only violated Durham's own ordinance but also constituted a deprivation of procedural due process under the state and federal constitutions. *Id.* at *4-6 [App. 9, 12-15].

REASONS WHY DISCRETIONARY REVIEW SHOULD BE ALLOWED

I. The Required Content for a Municipality's Notice of Violation Is an Important Jurisprudential Question for Landowners.

A notice of violation is a critical document in the enforcement of land-use laws. When drafted correctly, it describes how the local government believes the landowner is

violating the law through the use of his property, and how the landowner can bring the property into legal compliance. When the landowner receives a notice with that level of specificity, he can decide whether and how to defend against the allegations, or he can choose to cure the problems. But when the notice lacks that specificity, the landowner is in limbo. He can't know how to defend himself in a hearing, nor can he determine how to avoid future sanctions.

A. Enforcement of land-use law begins with a notice of violation.

Small businesses like the Market are critical to local economies. Indeed, the Market, by bringing together buyers and sellers, provides lifeblood for a market economy. Mendick, *supra* ("An entrepreneurial mindset started the market and now it's entrepreneurs that are keeping it going."). Businesses are generally subject to local land-use laws. Indeed, North Carolina's 100 counties and over 500 municipalities are constantly engaged in land-use and development planning and approval.

Local governments also enforce their land-use laws. The procedure for doing so is prescribed by the General Assembly. Proceedings to enforce land-use ordinances against landowners begins with service of a notice of violation on the landowner. N.C. Gen. Stat. § 160D-404(a). Remedies for violations of land-use laws can be severe: the local government could make the landowner stop construction or tear down completed work. *Id.* § 160D-404(b), (c)(1). Local governments can also impose monetary penalties on landowners, as the Board threatened to do against the Market. (R p 30) [App. 19]. Ordinances can also be enforced through criminal actions. N.C. Gen. Stat. § 160A-175(a). *See generally*

Trey Allen, N.C. Sch. Gov't, *Ordinance Enforcement Basics*, Coates' Canons (Feb. 1, 2016), https://canons.sog.unc.edu/2016/02/ordinance-enforcement-basics/ (describing the basics of ordinance enforcement).

The notice of violation functions as a complaint. The landowner can respond to the notice by undertaking the corrective measures described in the notice. Or the landowner can respond by appealing the notice of violation to a board of adjustment. N.C. Gen. Stat. § 160D-405(a). An evidentiary hearing—a trial—is then conducted before the board to determine whether the landowner committed the violations alleged in the notice of violation. *Id.* § 160D-406. That decision is then subject to judicial review. *Id.* § 160D-406(k).

B. A notice of violation must describe the land-use violation with enough detail for the landowner to prepare a defense.

The law requires that a notice of violation, like a complaint or indictment, sufficiently describe the landowner's land-use violations with enough detail so that the landowner can prepare a defense against the allegations.

The notice-of-violation statute does not specify what the local government must allege in the notice of violation. N.C. Gen. Stat. § 160D-404(a). Nor are there any judicial decisions in the state interpreting the statute and deciding the content requirement. However, both the traditional practice of local governments, as well as due process principles, require that the notice provide enough detail for the landowner to adequately prepare a defense or cure the violation.

Durham's ordinance is typical, even though the city didn't follow it. It provided that the notice "shall include a description of the violation and its location [and] the measures necessary to correct it." (R p 9; App. 18). Other towns likewise require a description of the violations and potential corrective measures. *E.g.*, *Funderburk v. City of Greensboro*, 264 N.C. App. 134, 823 S.E.2d 165 (2019) (unpublished) [App. 40] (notice of violation describes violation and corrective measures); *Thompson v. Union Cnty.*, 283 N.C. App. 547, 550, 874 S.E.2d 623, 626-27 (2022) (same); *Bojangles' Restaurants, Inc. v. Town of Pineville*, 216 N.C. App. 182, 716 S.E.2d 441 (2011) (unpublished) [Add. 45] (same); *Tucker Chase, LLC v. Town of Midland*, 264 N.C. App. 641, 825 S.E.2d 276 (2019) (unpublished) [App. 50-51] (same). Other statutes with a "notice of violation" framework also require the notice to explain the violations and the needed corrective measures. *See, e.g.*, *Midway Grading Co. v. N.C. Dep't of Env't, Health & Nat. Res., Div. of Land Res.*, 123 N.C. App. 501, 505, 473 S.E.2d 20, 22 (1996) (notice shall "describe[e] the violation with reasonable particularity").

Whether or not an ordinance or statute specifies the content requirement for a notice of violation, due process sets a constitutional floor for the notice's content. Both the state and federal constitutions protect against the deprivation of property without due process of law. *City of Randleman v. Hinshaw*, 267 N.C. 136, 139, 147 S.E.2d 902, 904 (1966); N.C. Const. art. I, § 19 (law of the land clause); U.S. Const. amend. XIV (due process clause).

Due process sets the minimum process needed before the government can deprive an owner of his property or impose sanctions against him. The two basic requirements of due process are meaningful notice and an opportunity to be heard in a meaningful way. *See Peace v. Emp. Sec. Comm'n of N.C.*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998).

This case is about the adequacy of the notice in the notices of violation that local governments send to landowners under section 160D-404. A hearing can't be meaningful if the notice is inadequate. *See, e.g.*, *City of W. Covina v. Perkins*, 525 U.S. 234, 240 (1999) ("The right to be heard has little reality or worth unless one is informed that the matter affecting one's property rights is pending and can choose for himself whether to appear or default, acquiesce or contest." (cleaned up)). The function of the notice "is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact." *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). Some level of specificity, therefore, is required in a pre-hearing notice.

The U.S. Supreme court has repeatedly required that the government provide clarity and precision in notices provided in advance of hearings at which a protected right may be affected. For instance, before government benefits may be withheld, due process requires "adequate notice detailing the reasons for a proposed termination." *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). In the prison-discipline context, the prisoner must be given advance notice that "set[s] forth the alleged misconduct with particularity." *In re Gault*, 387 U.S. 1, 33 (1967). The same is true for attorney discipline. *Taylor v. Hayes*, 418 U.S. 488, 498-99 (1974) ("[B]efore an attorney is finally adjudicated in contempt and

sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf."). And in the administrative context more broadly, "[a] party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 289 n.4 (1974).

This Court has likewise explained that due process requires specificity in a pre-hearing notice before protected rights are affected. *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 439 (1998) ("In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him."); *In re Lamm*, 116 N.C. App. 382, 386, 448 S.E.2d 125, 128-29 (1994), *aff'd per curiam*, 341 N.C. 196, 458 S.E.2d 921 (1995) ("At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard.").

The original public meaning of due process confirms these principles. At the time of the founding, the common law provided for specificity in the charges against a person in civil cases. *Sessions v. Dimaya*, 584 U.S. 148, 178 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). Someone haled into court "would know with particularity what legal requirement they were alleged to have violated and, accordingly, what would be at issue in court." *Id.*

Due process protections should be at their apex with cases like this one, because they involve government restrictions on real property. Real property is the core type of property protected by the guarantee of due process. *Staton v. Norfolk & C.R. Co.*, 111 N.C. 278, 16 S.E. 181, 183 (1892) (explaining that the law of the land clause in the Magna Carta protected against not only "the mere taking of property," but also the owner's "free use and enjoyment, without any control or diminution" of his property).

Yet the notice of violation here gave no specificity. All it said was that the Market was not complying with its site plan. But the site plan has loads of minute details. (R pp 118-31.) And Durham wasn't contending that every detail on the site plan was violated.

What Durham did here is akin to filing a complaint and saying that someone committed a tort, but without naming the tort and without alleging any facts so that the defendant could know what transaction or occurrence is at issue.[5] Notice pleading demands very little of a plaintiff because of "the liberal opportunity for discovery and the other pretrial procedures established by the Rules [of Civil Procedure] to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Pyco Supply Co. v. Am. Centennial Ins. Co.,* 321 N.C. 435, 442-43, 364 S.E.2d 380, 384

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5 Or akin to merely pointing to generally worded administrative regulations. *See Watkins v. Greene Metro. Hous. Auth.*, 397 F. Supp. 3d 1103, 1108-09 (S.D. Ohio 2019) ("Courts routinely find notice insufficient where such notice simply parrots the broad language of applicable regulations. This is because such notices do not alert individuals of the specific behavior that led to the termination of their benefits, and they are thus unprepared to combat the charges against them." (cleaned up)).

(1988). Yet even here a notice-pleading standard wasn't met. The notice of violation gave no meaningful notice to the Market.

C. A notice of violation must sufficiently describe the corrective measures.

A notice of violation must also give sufficient detail so that the landowner can correct the alleged violations and avoid sanctions.

As the Board itself admitted in its brief to the Court of Appeals, one of the purposes of the notice is "give [the violator] an opportunity to bring itself into complete compliance." Respondent-Appellee's Br. at 14, No. COA24-246, *available at* https://www.ncappellatecourts.org/show-file.php?document_id=355765 (quoting *Karr v. Hefner*, 475 F.3d 1192, 1201 (10th Cir. 2007)). Voluntary compliance by the landowner is far preferable to litigation or sanctions. But if both the violation and corrective measures are unclear, then the notice cannot possibly prod the landowner into compliance with what the law requires.

The proposed corrective measure in the notice of violation to the Market was useless for these purposes. The violation was a generic reference to the site plan, and the corrective measure just stated that the Market needed to bring its property into compliance with the site plan. As the dissenting judge explained, this kind of "inverse statement" is useless:

> Providing the "measures necessary to correct" any purported violation as an inverse statement of the violation itself is insufficient notice of the City's expectations or means to comply. Without this specific information, correction of the violation requires the property owner to guess or infer what issue, or possibly several issues, the City is referring to or the "measures necessary" to abate or cure them.

Durham Green Flea Mkt., 2024 WL 4941065, at *6 [App. 14] (Tyson, J., dissenting) (citation omitted).

The dissent got it right. The state's public policy encourages settlement of disputes out of court. *Penn Dixie Lines, Inc. v. Grannick*, 238 N.C. 552, 555, 78 S.E.2d 410, 413 (1953); *Bromhal v. Stott*, 341 N.C. 702, 705, 462 S.E.2d 219, 221 (1995). The General Assembly hoped notices of violation would be resolved through settlement, so long as the notice is clear on the violation and the corrective measure. The local government does not itself commence an adjudicative proceeding by issuing the notice of violation. Instead, the landowner-defendant commences the adjudicative proceeding only if he declines to take corrective measures and appeals. N.C. Gen. Stat. §§ 160D-404(a), -405(a). If the local government withholds a description of satisfactory corrective measures, the legislature's hope for informal resolution is defeated.

* * *

For these reasons, the case presents an important legal principle of major significance to the jurisprudence of North Carolina. N.C. Gen. Stat. § 7A-31(c)(2).

II. The Decision of the Court of Appeals Conflicts with Prior Decisions of that Court and This Court.

This decision below also collides with precedent from this Court. Just last month, this Court issued two opinions that confirmed longstanding principles that should have caused this case to come out the other way.

First, in *Schooldev East v. Town of Wake Forest*, this Court emphasized "our state's longstanding public policy favoring the 'free and unrestricted use and enjoyment of land.'" No. 268A22, 2024 WL 5101073, at *9 (N.C. Dec. 13, 2024) [App. 33] (quoting *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 853, 852, 786 S.E.2d 919, 924 (2016)). This policy "preserves the foundational place of property rights in our constitutional order." *Id.* [Add. 33]. Thus, ambiguities in laws restricting property rights must be resolved "in favor of the free use of property." *Id.* [Add. 34] (quoting *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966)).

These principles show the importance of giving clear notice to property owners of alleged violations of ordinances. When a property owner receives a notice of violation, he should receive sufficient notice to let him determine whether to defend against the allegations or whether to cure the violations: "Property owners should not need law degrees to figure out what local government ordinances allow them to do with their own land." *Id.* [Add. 34]. If there is any ambiguity in the notice-of-violation statute, N.C. Gen. Stat. § 160D-404, then it should be interpreted in favor of property owners, and thereby require more information, not less.

These principles bear heavily in this case because Durham's planning staff admitted that it sent an intentionally ambiguous notice of violation to the Market. (R p 158.) That is not how local governments should treat the rights of property owners. *See Schooldev East*, 2024 WL 5101073, at *9 [Add. 34] ("If local governments adopt ordinances that interfere with property rights, they owe it to property owners to use plain language.").

This kind of intentional ambiguity is not only unfair but tends to subject landowners to arbitrary government action. *Wolff*, 418 U.S. at 558 ("The touchstone of due process is protection of the individual against arbitrary action of government."). Below, the dissenting judge correctly recognized the bad incentives caused by the majority's ruling: "This lack of specificity [in the notice of violation] allows the City of Durham to 'make it up' at the hearing or as the process proceeds." *Durham Green Flea Mkt.*, 2024 WL 4941065, at *6 [Add. 15] (Tyson, J., dissenting).

This is similar to the problem of agency deference in the administrative law context. Some courts have deferred to an agency's interpretation of its own ambiguous rules. But "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk Am., Inc. v. Mich. Bell Tele. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). That's the same kind of mischief at work here.

Second, this Court considered a procedural due process challenge in *In re Chastain*, No. 283A22-2, 2024 WL 5100940 (N.C. Dec. 13, 2024) [App. 20]. *Chastain* was a proceeding to remove an elected clerk of court from office. By statute, the removal process begins with a filed affidavit. *Id.* at *5 [App. 24]. The statute must state the "grounds for removal." *Id.* (quoting N.C. Gen. Stat. § 7A-66). Although the statutes did not expressly state that the clerk could be removed only based on the grounds of misconduct set out in the affidavit, the requirements of due process led the Court to interpret those statutes to require that the final order of removal be limited to consideration of the grounds set out in the charging

affidavit: "procedural due process requires that removal only be based upon incidents identified in the sworn affidavit that initiates the removal procedure." *Id.* at *7 [App. 26].

In *Chastain*, the trial court erroneously considered both the grounds for removal in the affidavit, as well as additional grounds pressed at trial. Here, the charging document—the notice of violation—didn't specify any grounds with meaningful clarity. When it comes to procedural due process, these problems are the same. A landowner receiving a notice of violation is entitled to "adequate notice of the charges and a fair opportunity to meet them." *Lamm*, 116 N.C. App. at 386, 448 S.E.2d at 128. Whether the charges change without notice, or whether the grounds were meaninglessly vague from the outset, the landowner has been deprived of his property without due process and in violation of the law of the land.

The Court of Appeals should not have needed either of these new decisions since it had its own precedent on the content requirement for notices of violation. *See Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 750 S.E.2d 46 (2013). *Lipinski* also involved the content requirement for notices of violation and was also an appeal from a decision by a board of adjustment. The notice of violation in that case said that the property owner had constructed "a fence using materials of a prohibited type," which violated particular ordinances, and which could be cured by removing the prohibited materials. *Id.* at 307, 750 S.E.2d at 48. As the property owner understood from the notice, the issue was whether the tarps he had installed on the fence were flammable and thus impermissible. *Id.* After failing

to informally resolve the charge of violation, the property owner appealed to the board of adjustment, and ultimately to the Court of Appeals. *Id.*

The court first acknowledged that the notice of violation had to meet the requirements of procedural due process since the property owner had a property interest in his fence. *Id.* at 308, 750 S.E.2d at 48. The court held that the notice was sufficient because he agreed at the hearing that he understood the scope of the charges presented in the notice of violation. *Id.* at 309, 750 S.E.2d at 49.

Here, the Court of Appeals tried to analogize to *Lipinski*, asserting that the Market could have tried asking Durham informally what the charges against it was. *Durham Green Flea Mkt.*, 2024 WL 4941065, at *3 [App. 6]. But the burden was not on the Market to force Durham to give notice, as the dissent correctly noted. *Id.* at *6 [App 12]; *MR Ent., LLC v. City of Asheville*, 905 S.E.2d 246, 251 (N.C. Ct. App. 2024) ("The City carries the burden of proving the existence of a violation of a local zoning ordinance."). Just as importantly, unlike in *Lipinski*, the Market had no idea what the scope of the charges were in the notice of violation at the hearing, (R p 160), just like the board members had no idea what the allegations were, (R pp 158-59).

This case cannot be reconciled with this Court's opinions in *Schooldev* and *Chastain*. Nor did the Court of Appeals follow its own binding precedent in *Lipinski*, drawing distinctions that had nothing to do with *Lipinski*'s reasoning. Because of any of these conflicts, discretionary review is warranted. *See* N.C. Gen. Stat. § 7A-31(c)(3).

III. This Case Is an Appropriate Vehicle for Discretionary Review.

This case is a good vehicle to resolve the issue about the specificity of the notice in a notice of violation. The notice of violation here said virtually nothing. (R p 30) [App. 19]. Durham admitted at the hearing before the Board that it had intentionally kept the notice vague, (R p 158), and the Board members themselves could not understand what the allegations in the notice were without being informed of them by staff during the hearing, (R pp 158-59). Durham's staff knew that the Market could not cure the violation in advance of a hearing with the Board because the Market could not have possibly understood what cures would have satisfied Durham's planning staff. If the notice of violation in this case stands, then there is no meaningful requirement for the notice.

The threshold issue here is important to landowners, but not usually appealed. Throughout North Carolina, everyday there is a landowner somewhere receiving a notice of violation from some local government. To be sure, most local governments follow the law and provide an adequate notice of violation, describing the violation and corrective measures. But in cases of inadequate notices, like this one, few landowners can afford to litigate the adequacy of the notice. Most will capitulate without putting the government to the test or will otherwise default by not appealing the notice of violation. That risks civil penalties and criminal liability, as the notice against the Market threatened. (R p 30) [App. 19]. And once civil penalties are imposed, it's too late to challenge the notice of violation. *See Town of Midland v. Harrell*, 282 N.C. App. 354, 363, 871 S.E.2d 392, 398 (2022), *aff'd on other grounds*, 385 N.C. 365, 892 S.E.2d 845 (2023); *Grandfather Vill. v. Worsley*, 111 N.C.

App. 686, 689, 433 S.E.2d 13, 15 (1993) (landowner lost right to dispute later civil penalties because notice of violation was not appealed).

When the notice of violation is deficient, but the notice isn't appealed, the government gets unfair enforcement leverage over the landowner, who may well have done nothing wrong. This case, however, is the rare one in which a landowner is willing to litigate this important threshold step that local governments take in enforcing their land-use laws.

Ultimately, the question presented in this appeal is an important one for landowners and this Court has never had occasion to address it. Discretionary review is appropriate to answer it.

ISSUE TO BE BRIEFED

Should the Court grant the petition for discretionary review, the Market intends to present the following issue:

Did Durham's notice of violation sufficiently describe the nature of the violation and the corrective measures available to the Market?

CONCLUSION

The Durham Green Flea Market respectfully requests that this Court exercise jurisdiction over this case as a dissent-based appeal, or else allow the conditional petition for discretionary review.

This the 6th day of January, 2025.

Electronically submitted
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I certify that a copy of the foregoing document was electronically filed and served this day by email as follows:

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This the 6th day of January, 2025.

/s/ Troy D. Shelton
Troy D. Shelton

No. _____ DISTRICT 16

SUPREME COURT OF NORTH CAROLINA
****

DURHAM GREEN FLEA MARKET,

Petitioner,

v.

CITY OF DURHAM,

Respondent.

From Durham County
22CVS3973

From the Court of Appeals
COA24-246

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CONSOLIDATED APPENDIX AND ADDENDUM

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Appendix Pages:

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-246

Filed 3 December 2024

Durham County, No. 22CVS3973

DURHAM GREEN FLEA MARKET, Petitioner,

v.

CITY OF DURHAM, Respondent.

Appeal by petitioner from order entered 9 June 2023 by Judge James E. Hardin Jr. in Durham County Superior Court. Heard in the Court of Appeals 9 October 2024.

Perry, Perry, & Perry, PA, by Robert T. Perry, for petitioner-appellant.

Durham City Attorney's Office, by John P. Roseboro and Aarin K. Miles, for respondent-appellee.

GORE, Judge.

Petitioner, Durham Green Flea Market ("DGFM"), appealed the decision of the Board of Adjustment for the City of Durham and Durham County ("BOA") that denied petitioner's appeal of a Notice of Violation ("NOV"). The Superior Court, Durham County, entered an Order on 9 June 2023: (1) affirming the BOA's administrative decision and (2) ordering petitioner to bring the property at issue into full compliance with a new site plan. Petitioner gave timely notice of appeal to this Court from the trial court's final Order. This Court has jurisdiction to hear and decide petitioner's appeal pursuant to N.C.G.S. § 7A-29. Upon review, we affirm.

In this case, respondent, City of Durham, issued a NOV to petitioner. The NOV indicated the violation: "Failure to comply with an approved site plan (D130045)." The NOV further specified, "[t]he above condition constitutes a violation of the Durham Unified Development Ordinance [("UDO")], Section 3.7.2, Applicability, Site Plan and 15.1.2 Violation (see attached). Correction of this violation will require the violator to remove all alterations inconsistent with the approved site plan within thirty (30) days of the receipt of this notice."

Upon receiving the NOV, petitioner filed an application for appeal of the NOV with the respondent's BOA. Petitioner alleged the NOV was issued in a discriminatory manner and was made contrary to respondent's policy (ordinance) and agreement with petitioner. The BOA held a hearing for this matter virtually on 22 September 2020. This case was continued, however, until the BOA resumed in-person hearings on 22 June 2022.

At the 22 June 2022 hearing, respondent's staff alleged the NOV:

> was [for] improvements to the property without site plan approval. There was a wide variety of things that was done to the property at the time that was without site plan approval, one of which was a permanent structure that covered handicap parking. . . . [S]o, we issued a [NOV] for numerous things. We didn't want to list just one thing because there were several different issues and things that [petitioner] has done to the property without site plan approval.

After a hearing on the NOV, the BOA voted 6 to 1 to uphold respondent's decision to issue a NOV to petitioner. The dissenting voter reasoned, "I cannot support

[respondent's] action due to the wording of the NOV . . . . [T]he NOV must list the violations. If there's 20 or 30, it must list 20 or 30. What this Notice is is a boilerplate form that doesn't meet the standards."

Petitioner appealed the BOA's decision to Superior Court, Durham County. The trial court determined that the NOV was properly issued by respondent's staff and that petitioner's due process rights were not violated. The trial court further ordered petitioner "to bring the property . . . into full compliance with a site plan, approved by the Durham City-County Planning Department, within thirty-six (36) months of the filing of the Order."

Petitioner presents two issues for review: (1) whether the trial court erred in concluding that petitioner's due process rights were not violated; and (2) whether the trial court abused its discretion by ordering petitioner to bring the property at issue into full compliance with a new site plan within thirty-six (36) months of the filing of the Order.

> The standard of review depends on the issues presented on appeal. When the issue is (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. However, if a petitioner contends the board's decision was based on an error of law, de novo review is proper.

Lipinski v. Town of Summerfield, 230 N.C. App. 305, 308 (2013) (cleaned up) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.,* 356 N.C. 1, 13 (2002)). "In reviewing a superior court order from an appeal of an agency decision, this Court has

a two-fold task: (1) determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) decide whether the court did so properly." *Kea v. Dep't of Health & Hum. Servs.*, 153 N.C. App. 595, 602 (2002) (cleaned up).

First, we address petitioner's due process arguments that the NOV "was not implemented in a fair manner" because: (1) respondent's staff failed to adhere to UDO § 15.2.1.A and 15.2.1.C; (2) the NOV was insufficient to inform petitioner in advance of the basis of the proceedings against petitioner; and (3) petitioner was not given notice and opportunity to be heard. In reviewing this claim, the superior court properly employed the de novo standard of review. *See* N.C.G.S. § 150B-51(b)(1)–(4), (c) (2023). We are unpersuaded by petitioner's arguments.

The UDO specifies, in relevant part: "When a violation is discovered, and is not remedied through informal means, written notice of the violation shall be given." UDO § 15.2.1.A. "Where the language of a[n] [ordinance] is clear and unambiguous, there is no room for judicial construction, and the courts must give [the ordinance] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575 (2002) (cleaned up). The plain language of this section does not mandate the use of "informal means" before written NOV is given—it provides that when a violation is discovered, "informal means" are permitted. North Carolina General Statutes § 160D-404(a) ("Notices of Violation") contains no such limitation—it imposes no superseding requirement that informal means be

exhausted before written NOV is issued.

Petitioner contends respondent's staff improperly issued the NOV because it failed to adhere to UDO § 15.2.1.C, which requires, in relevant part: "The notice shall include a description of the violation and its location, the measures necessary to correct it[.]" The NOV in question does, however, include these necessary components. The written NOV describes the violation: "Failure to comply with an approved site plan (D130045)[,]" includes attached images with location for reference, and specifies, "correction of this violation will require" removal of "all alterations inconsistent with the approved site plan[.]"

Petitioner generally argues respondent's NOV was "not implemented in a fair manner" because the NOV was insufficient to inform petitioner in advance of the basis of the proceedings against petitioner, and petitioner was not given sufficient opportunity to be heard. We disagree.

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Emp. Sec. Comm'n of N. Carolina*, 349 N.C. 315, 322 (1998) (citing *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985)). "Moreover, the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)).

The facts before us are like those in *Lipinski*, a case in which we held the "petitioner had adequate notice of the purpose and scope of the hearing" and was

"given notice and an opportunity to be heard[ ]" at a subsequent hearing. 230 N.C. App. at 309. Here, the NOV listed the violation and provided contact information with the option to reach respondent's staff directly to inquire about the violation at issue. Petitioner had two opportunities to be heard on the violation. At a quasi-judicial hearing, an attorney appearing on their behalf presented argument and testimony.

Based upon the record, N.C.G.S. § 160D-404(a), and UDO § 15.2.1, the trial court properly concluded that petitioner's due process rights were not violated.

In the second issue presented, petitioner argues the trial court abused its discretion by ordering petitioner to bring the property at issue into full compliance with a new site plan within thirty-six (36) months of the filing of the Order. We disagree.

Here, the trial court affirmed the BOA's order, which states, "[T]he requirements for reversing the [NOV] in [this case] have NOT been met, and that appeal is DENIED." The written NOV required compliance with an approved site plan "within thirty (30) *days* of the receipt of this notice." The Order of the trial court affirmed the BOA's decision and provided petitioner with additional time to bring their property into compliance. Petitioner has not shown an abuse of discretion where the trial court implemented a three (3) *year* window to bring the site into compliance instead.

For the foregoing reasons, the NOV was issued in compliance with N.C.G.S. §

160D-404(a), UDO § 15.2.1.C, UDO § 15.2.1.A, and in a fair manner in compliance with the due process. The trial court applied the appropriate standard of review, properly upheld the BOA's decision, and did not abuse its discretion in expanding the time constraints for petitioner to bring their site into compliance.

AFFIRMED.

Judge FLOOD concurs.

Judge TYSON dissents by separate opinion.

No. COA24-246 – *Durham Green Flea Market v. City of Durham*

TYSON, Judge, dissenting.

The trial court unlawfully denied Durham Green Flea Market its Due Process rights. The City failed to enforce the statutory and city ordinance requirements for issuing a lawful notice of violation. The city also did not comply with the constitutional requirements to hold an impartial, quasi-judicial hearing. I respectfully dissent.

I. Background

The City of Durham issued a purported Notice of Violation ("NOV") to Durham Green Flea Market ("DGFM") based upon the City of Durham's Unified Development Ordinance ("UDO") § 15.2.1.A, which specifies "[w]hen a violation is discovered, and is not remedied through informal means, *written notice of the violation shall be* given." (emphasis supplied). When such a notice is issued, UDO § 15.2.1.C mandates it "*shall include a description of the violation and its location*, the *measures necessary to correct it*, the possibility of civil penalties and *judicial enforcement* action, and *notice of the right to appeal*." UDO § 15.2.1.C (emphasis supplied).

The NOV issued to DGFM wholly failed to comply with these mandates. The notice identified the sole alleged violation as a "failure to comply with an approved site plan" and stated, "[c]orrection of this violation will require the violator to remove all alterations inconsistent with the approved site plan" as the measures necessary to correct the purported violation.

DFGM timely appealed. At the Board of Adjustment hearing, the dissenter to the board's decision correctly identified the NOV as unlawful and inadequate:

> "I cannot support the City's action due to the wording of the Notice of Violation. . . . [I]n my opinion, the Notice of Violation must list the violations. If there's 20 or 30, it must list 20 or 30. What this Notice of Violation is [ ] a boilerplate form and it doesn't meet the standards. . . . [E]ven if there's numerous obvious violations going on, the City must follow the correct procedures."

I agree. The NOV failed to specify how the property owners had purportedly failed to comply with the site plan, which violates the UDO § 15.2.1.C requirement for all notices to contain a "description of the violation[.]" The notice also failed to list the "measures necessary to correct it" or describe any specific measures DGFM could implement to be in full compliance. UDO § 15.2.1.C. These failures clearly conflict with the notice of violation requirements provided in UDO § 15.2.1.C, the mandates established in N.C. Gen. Stat. § 160D-1402(k) (2023), and the statutory rules of construction favoring the free use of property. *See Innovative 55, LLC v. Robeson Cty.*, 253 N.C. App. 714, 720, 801 S.E.2d 671, 676 (2017). DGFM was denied adequate notice and a fair hearing. The City of Durham violated DGFM's rights to Due Process under the law. U.S. Const., amend. XIV, § 1; N.C. Const. art. I, § 19.

II. Standard of Review

When reviewing a superior court's order regarding a quasi-judicial zoning board of adjustment's decision, this Court is tasked with "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2)

deciding whether the court did so properly." *Harding v. Bd. of Adjustment of Davie Cnty.*, 170 N.C. App. 392, 395, 612 S.E.2d 431, 434 (2005) (citations omitted). When reviewing whether a superior court's order regarding "a zoning board of adjustment's decision [was proper], [t]he scope of our review is the same as that of the trial court." *Id.* (citations and quotations omitted). The proper standard of review "depends upon the particular issues presented on appeal." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation omitted).

Where the petitioner alleges "'the Board's decision was based on an error of law, 'de novo' review is proper.'" *Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527-28 (2000) (quoting *JWL Invs., Inc. v. Guilford County Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717). "Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment,* 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (citation omitted).

III. Plain Language

"'[A] zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property.'" *Innovative 55*, 253 N.C. App. at 720, 801 S.E.2d at 676 (first quoting *Dobo v. Zoning Bd. of Adjustment of Wilmington*, 149 N.C. App. 701, 712, 562 S.E.2d 108, 115 (2002) (Tyson, J., dissenting), *rev'd per curiam*, 356 N.C. 656, 576 S.E.2d 324 (2003)); and then citing

City of Sanford v. Dandy Signs, Inc., 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983)).

When the language of an ordinance is clear and unambiguous, "the courts must give it its plain and definite meaning." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974). The "words should be given their natural and ordinary meaning, and need not be interpreted when they speak for themselves." *Grassy Creek Neighborhood All. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citations omitted).

The plain language of UDO § 15.2.1 is unambiguous. "When a violation is discovered, *and is not remedied through informal means*, *written notice of the violation shall be given*." UDO § 15.2.1.A (emphasis supplied). "The City must follow the requirements of the statute and charter, and the ordinances and procedures it established." *State ex rel. City of Albemarle v. Nance*, 266 N.C. App. 353, 361, 831 S.E.2d 605, 611 (2019).

Based upon the plain language and mandate of the ordinance, written notice of specific violation(s) must be issued *after* a violation was not remedied through informal means. *See* UDO § 15.2.1.C. The City immediately issued the purported NOV to DGFM without attempting to resolve the dispute informally or by allowing DGFM an opportunity to abate or cure any purported violation. *See MR Ent., LLC v. City of Asheville*, __ N.C. App. __, __, 905 S.E.2d 246, 251 (2024). The City failed to issue a lawful NOV according to the unambiguous language of the ordinance and

governing statutes. UDO § 15.2.1.C.

Additional language within the ordinance further supports this conclusion. The NOV must also include "a description of the violation and its location, the measures necessary to correct it, the possibility of civil penalties and judicial enforcement action, and notice of the right to appeal." UDO § 15.2.1.C.

As the dissenting member of the board correctly noted, the notice fails to allege which elements of the approved site plan were non-compliant or "the measures necessary to correct" them. UDO § 15.2.1.C. The City carries the burden of proving the existence of a violation of a local zoning ordinance. *City of Winston-Salem v. Hoots Concrete Co.,* 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980). Because the City further failed to provide DGFM the informal means to cure or abate and failed to describe the specific measures required to correct the property's unstated inconsistencies with or deviations from the site plan, the NOV fails to satisfy the plain language requirements of the ordinance. *See id.*; UDO § 15.2.1.C.

IV. Judicial Notice and Due Process

"To receive adequate notice, the bases for the sanctions must be alleged. . . . In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him." *Dunn v. Canoy*, 180 N.C. App. 30, 40, 636 S.E.2d 243, 250 (2006) (brackets, citation, and quotations omitted). The mandates of Due Process and adequate notice is to inform a party of alleged failure to comply with the law and an opportunity to cure before depriving

the owner of their property rights. *McMillan v. Robeson Cnty.,* 262 N.C. 413, 417, 137 S.E.2d 105, 108 (1964).

The UDO mandates the purported non-confirming party must have the opportunity to cure and rectify the violation and the opportunity to be heard. *See* UDO § 15.2.1.C; *City of Randleman v. Hinshaw*, 267 N.C. 136, 139-40, 147 S.E.2d 902, 904-05 (1966). "[T]he opportunity to be heard must be 'at a meaningful time and in a meaningful manner.'" *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 309, 750 S.E.2d 46, 49 (2013) (quoting *Peace v. Employment Sec. Com'n of North Carolina*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998)).

In *Lipinski*, this Court held the petitioner's procedural Due Process rights were not violated because a meaningful opportunity to be heard was provided. *Id.* The petitioner was sent and received notice of a city ordinance violation, was able to meet with the town attorney to clarify the specific violation, and the parties agreed upon the scope and issues of the hearing beforehand. *Id.* At the hearing, the petitioner testified and was able to present evidence and ask questions. *Id.*

Unlike the petitioner in *Lipinski*, DGFM was unaware of the specific nature of the purported violations, and it was not given the opportunity before the hearing to informally meet with the site compliance officer to clarify, cure, or abate the specific violation(s). DGFM was not afforded a meaningful opportunity to be heard at the hearing. DGFM was barred from presenting evidence at the hearing of the alleged discriminatory and selective enforcement of the ordinance compared to similarly-

situated businesses in the area.

According to *Lipinski*, Due Process mandates a party purportedly violating a city ordinance must be notified of and given an opportunity to abate and cure the specific violations, afforded a pre-hearing conference to determine the scope of the hearing, and given the opportunity to be meaningfully heard. *Id.* The City has the burden and cannot reasonably show DGFM was afforded adequate Due Process under the law. *Id.*; *City of Winston-Salem,* 47 N.C. App. at 414, 267 S.E.2d at 575.

A property owner must be sufficiently informed, not only of the proceedings against him, but also provided a "description of the violation and its location" and the "measures necessary to correct it." UDO § 15.2.1.C. A property owner in violation of a non-specific "failure to comply" cannot be characterized as being "on notice" of the violation itself or of the measures necessary to abate, correct, or cure the violation. Providing the "measures necessary to correct" any purported violation as an inverse statement of the violation itself is insufficient notice of the City's expectations or means to comply. *See id.* Without this specific information, correction of the violation requires the property owner to guess or infer what issue, or possibly several issues, the City is referring to or the "measures necessary" to abate or cure them.

Without evidence of the specific violations and ameliorative measures, DGFM could not rectify the violations it believes the City complains of without being in violation of other unidentified problems. The proposed remedy for DGFM's unspecified "failure to comply with [the] site plan" cannot merely be another

unspecified "word salad" of "compliance with the site plan." *Id.*

This lack of specificity allows the City of Durham to "make it up" at the hearing or as the process proceeds and transforms the unlawful Notice of Violation into a prohibited "General Warrant", proscribed by the Due Process clause of the Fifth Amendment and prohibited by the Fourteenth Amendment. *See Andresen v. Maryland*, 427 U.S. 463, 491-92, 49 L. Ed. 2d 627, 649 (1976); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950) ("An elementary and fundamental requirement of Due Process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); U.S. Const., amends. V, XIV, § 1; N.C. Const. art. I, § 19.

The mandates of Due Process and notice is to specifically inform a party of its failure to comply with the law before depriving him of rights to the property. *McMillan,* 262 N.C. at 417, 137 S.E.2d at 108; *Innovative 55, LLC.*, 253 N.C. App. at 720, 801 S.E.2d at 676.

The City failed to provide adequate advance notice of the specified site plan violations and, as such, DGFM did not have the necessary information to abate, cure, or be adequately heard or present evidence at a fair and impartial hearing, in violation of DGFM's Due Process rights. *Id.*

V. Abuse of Discretion

The superior court is empowered by N.C. Gen. Stat. § 160D-1402(k) to "affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." N.C. Gen. Stat. § 160D-1402(k) (2023).

The trial court affirmed the Board of Adjustment's denial of appeal and *sua sponte* ordered DGFM to "bring the property . . . into full compliance with a site plan, *approved by the Durham City-County Planning Department*." (emphasis supplied). The order instructed DGFM to comply with filing a new site plan, rather than specifying the requirements for DFGM to achieve full conformity with the existing, approved site plan. The order merely reiterated the directions the court had made to counsel "for petitioner to submit for review and approval a site plan which is compliant with the law, for which the Durham City County Board has authority, or to come into compliance with the current site plan."

The statute does not authorize the superior court under *certiorari* and appellate review to both affirm the Board and further enlarge the burdens on Petitioner in its order. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11-12, 387 S.E.2d 655, 662 (1990) ("In its capacity as an appellate court reviewing the town's quasi-judicial subdivision permit hearing, the superior court could not properly grant summary judgment. . . . The superior court judge may not make additional findings." (citations omitted)). The trial court committed an error of law and abused its discretion by creating and modifying the instructions for how DGFM may come into unspecified compliance with the site plan, including by requiring DGFM to submit a

new site plan, when DFGM was provided defective and unspecified notice and no fair opportunity to be heard. N.C. Gen. Stat. § 160D-1402(k).

VI. Conclusion

The trial court failed to correctly interpret and apply the plain meaning of the UDO's mandates. UDO § 15.2.1.C. The City of Durham failed to provide an informal means to correct, cure, or abate, or to issue a specific notice of violation, or to provide a fair hearing. *See id.*; N.C. Gen. Stat. § 160D-1402(k); *Lipinski*, 230 N.C. App. at 309, 750 S.E.2d at 49; *McMillan,* 262 N.C. at 417, 137 S.E.2d at 108; *Innovative 55, LLC.*, 253 N.C. App. at 720, 801 S.E.2d at 676; *Mullane,* 339 U.S. at 314, 94 L. Ed. at 873. The trial court also failed to protect DGFM's Due Process rights under the ordinance and statute. *Id.* In doing so, the trial court and the City denied DGFM of specific notice and an opportunity to abate or cure and its statutory and Due Process rights to present evidence, testimony, or be impartially heard. *See Lipinski*, 230 N.C. App. at 309, 750 S.E.2d at 49; *Mullane,* 339 U.S. at 314, 94 L. Ed. at 873. The order is affected by prejudicial errors mandating reversal and remand for entry of dismissal of the purported violations. *See MR Ent.*, __ N.C. App. at __, 905 S.E.2d at 251. I respectfully dissent.

Sec. 15.2 Determination of Violation

15.2.1. Notice of Violation

A. When a violation is discovered, and is not remedied through informal means, written notice of the violation shall be given. This notice shall be delivered by:

1. Hand delivery or certified mail to the violator's last known address; or

2. Certified mail or hand delivery to the property in violation; or

3. Posting the notice at the property in violation.

B. When service is made by certified mail, a copy of the notice may also be sent by regular mail. Service shall be deemed sufficient if the certified mail is unclaimed or refused, but the regular mail is not returned by the post office within 10 days after mailing.

C. The notice shall include a description of the violation and its location, the measures necessary to correct it, the possibility of civil penalties and judicial enforcement action, and notice of the right to appeal. The notice shall also state the time period allowed, if any, to correct the violation, which time period may vary depending on the nature of the violation and knowledge of the violator.

D. This notice shall be an administrative determination subject to appeal as provided below.

E. A notice of violation shall not be required where a notice of the same violation has been issued to the same violator at the same property within the previous two years. In such cases, the violator may be charged with a continuing violation without further notice. A notice shall also not be required where action is taken under paragraph 15.3.5, Judicial Action to Collect Civil Penalty, or paragraph 15.3.6, Permit Denial or Conditions.

15.2.2. Appeal to Board of Adjustment

A. A violator who has received a notice of violation may appeal the Director's determination that a violation has occurred to the Board of Adjustment by making a written request and paying the appropriate fee within 30 days of receipt of the notice of violation.

B. Citations that follow the original notice of violation may not be appealed to the Board.

C. The Board shall hear the appeal and may affirm, modify, or revoke the determination of a violation. If there is no appeal, the Director's determination of the nature and degree of violation are final.

15.2.3. Failure to Comply with Notice or Board of Adjustment Decision

If the violator does not comply with a notice of violation which has not been appealed, or with a final decision of the Board of Adjustment, the violator shall be subject to enforcement action as prescribed in State law or by this Ordinance.

DURHAM
1869
CITY OF MEDICINE

CITY OF DURHAM | DURHAM COUNTY
City-County Planning Department
101 CITY HALL PLAZA | DURHAM, NC 27701
919.560.4137 | F 919.560.4641

DURHAM
COUNTY

NOTICE OF VIOLATION

RECEIVED FEB 10 2020

February 10, 2020

2619-1117
Certified Mail
7014 2120 0001 2285 7659
Return Receipt Requested
Copy Via First Class Mail

Robert T. Perry
Durham Green Flea Market LLC
601 Fayetteville St, Suite 300
Durham, NC 27701

The following zoning violation was observed during a recent field inspection:

Address: 1600 E. Pettigrew St	Durham Tax Parcel ID#: 119006
Zoning: IL	PIN #: 0831-18-42-0210
Violation: Failure to comply with an approved site plan (D1300045)	
To be corrected as noted below	

The above condition constitutes a violation of the Durham Unified Development Ordinance, Section 3.7.2, Applicability, Site Plan and 15.1.2 Violation (see attached).

Correction of this violation will require the violator to remove all alterations inconsistent with the approved site plan within thirty (30) days of the receipt of this notice.

This notice serves as a warning and explains what steps must be taken to comply with the ordinance. If you do not contact us and begin the process to correct this violation within the time frame specified above, you are subject to the imposition of civil penalties in an amount up to $500.00 per day for each day the violation exists after the deadline. The Durham UDO allows for the pursuit of (a) prosecution of this violation as a criminal misdemeanor, and (b) injunctive relief through the Durham County Courts. Additionally, Section 15.2.2(A) of the UDO allows a person charged with a violation of the Zoning Code the right to appeal the determination to the Durham Board of Adjustment within 30 days from the date of receipt of this notice.

Please note that if the same violation as noted above is repeated within the next two years, the violation will be viewed as a continuation of this violation and may subject the violator to civil penalties without prior notification, as allowed in Section 15.2.

If you notify me when you have corrected the violation I will close out this case. The best way to reach me is by email at Kim.Roberts@DurhamNC.gov.

Kim Roberts

Kim Roberts, CZO
Senior Planner, Site Compliance Officer

2024 WL 5100940
Only the Westlaw citation is currently available.
Supreme Court of North Carolina.

In the MATTER OF: Patricia Burnette CHASTAIN

No. 283A22-2
|
Filed December 13, 2024

Synopsis

Background: County attorney commenced a proceeding seeking removal of county clerk of superior court based on allegations of misconduct and conduct prejudicial to the administration of justice. The Superior Court, Franklin County, Thomas H. Lock, J., 2020 WL 11039112, entered an order permanently removing clerk from her elected position. Clerk appealed, and the Court of Appeals, 281 N.C.App. 520, 869 S.E.2d 738 (*Chastain I*), vacated and remanded. On remand, the Superior Court, Lock, J., 2022 WL 20306036, issued an order permanently disqualifying clerk from holding office. Clerk appealed, and a divided panel of the Court of Appeals, 289 N.C.App. 271, 889 S.E.2d 462 (*Chastain II*), affirmed. Clerk appealed based on the dissent in Court of Appeals opinion, and the Supreme Court granted the parties' petitions for discretionary review on additional issues.

Holdings: The Supreme Court, Riggs, J., held that:

superior court judge commissioned to replace recused resident superior court judge had the authority to remove clerk from her elected office;

judge presiding over removal proceeding was required by both due process and statutory removal process to consider only the allegations contained in charging affidavit; and

removal of a clerk of court may be based on misconduct, even if that conduct would not rise to the level of willful misconduct.

Chastain II vacated; *Chastain I* overruled, and remanded.

Discretionary review improvidently allowed in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 271, 889 S.E.2d 462 (2023), affirming an order entered on 5 April 2022 by Judge Thomas H. Lock in Superior Court, Franklin County. On 15 December 2023, the Supreme Court allowed petitioner's and respondent's petitions for discretionary review as to additional issues. Heard in the Supreme Court on 19 September 2024.

Attorneys and Law Firms

Fox Rothschild LLP, by Kip D. Nelson, Greensboro, and Elizabeth Brooks Scherer, Raleigh; and Davis, Sturges & Tomlinson, PLLC, Louisburg, by Conrad B. Sturges III, for petitioner-appellee.

Zaytoun & Ballew, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, Raleigh, and Zachary R. Kaplan, for respondent-appellant.

Opinion

RIGGS, Justice.

***1** Clerks of the superior court are constitutional officers elected by qualified voters in the county where they serve. N.C. Const. art. IV, § 9(3). The North Carolina Constitution allows for removal of a duly-elected clerk "for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county." N.C. Const. art. IV, § 17(4).

In this case, we consider the proper procedure for removal of a clerk in accordance with Article IV of the North Carolina Constitution. We hold that when the senior regular resident superior court judge is recused from the case and a replacement judge is commissioned to serve in that position for the removal proceeding, the replacement judge, serving in the official role of senior regular resident superior court judge in that matter, has the authority to remove the clerk. Further, we hold that procedural due process requires that the clerk only be subject to removal for conduct identified in the sworn affidavit that initiates the removal proceeding under N.C.G.S. § 7A-105. Lastly, we hold that removal of a clerk under Article IV is on the basis of the misconduct standard set forth in the plain language of Article IV, Section 17(4) of the North Carolina Constitution, not under the willful misconduct standard articulated in N.C.G.S. § 7A-105.

For these reasons, we vacate the decision of the Court of Appeals in *In re Chastain* (*Chastain II*), 289 N.C. App. 271, 889 S.E.2d 462 (2023), overrule the holding of *In re Chastain* (*Chastain I*), 281 N.C. App. 520, 869 S.E.2d 738 (2022), and remand the case for reconsideration of removal under Article IV not inconsistent with the standards established in this opinion.

I. Facts & Procedural Background

In May 2013, Patricia Burnette Chastain was appointed to the position of clerk of superior court in Franklin County. In the November 2013 election, the voters in Franklin County elected her to a four-year term as clerk. She was reelected to a second term in 2017.

On 13 July 2020, Jeffrey Thompson, an attorney in Franklin County, requested "an inquiry be commenced by the Senior Resident Judge of the Ninth Judicial District to determine if it is appropriate to remove Ms. Chastain as Clerk of the Franklin County Superior Court." Mr. Thompson filed an affidavit pursuant to N.C.G.S. § 7A-105 (Charging Affidavit) identifying the specific incidents that motivated his desire for an inquiry. The Charging Affidavit accused Ms. Chastain of willful misconduct, willful and persistent failure to perform her duties, habitual intemperance, and conduct prejudicial to the administration of justice. Mr. Thompson alleged[1] in the Charging Affidavit that Ms. Chastain, acting in her official capacity as clerk: (1) distributed gift certificates for smoothies to jurors in a criminal case; (2) allowed a judicial candidate to address a jury venire[2]; (3) acted unprofessionally with correctional officers at the Franklin County Detention Center and demanded access to detainees; (4) injected herself in a property dispute without proper authority and attempted to mediate the dispute outside the presence of the parties' attorneys; (5) attempted to mediate a child custody dispute that she did not have jurisdiction over; (6) requested medical records on official judicial letterhead without authority to request the records; (7) failed to timely and accurately reconcile bank records and report on financial matters within the clerk's office; (8) made inappropriate comments about the chief magistrate to members of the public; and (9) kept irregular work hours and acted erratically while at work.

***2** On the day the Charging Affidavit was filed, Judge John M. Dunlow, Franklin County's senior resident superior court judge, entered an order suspending Ms. Chastain and set the matter for a hearing on 6 August 2020. Ms. Chastain filed a motion to recuse Judge Dunlow and the only other Franklin County superior court judge, Cindy Sturges, from presiding over the removal inquiry because of their involvement in one of the incidents in the Charging Affidavit. Special Superior Court Judge J. Stanley Carmical granted the motion of recusal. Based upon the recusal of these judges, the Chief Justice of the Supreme Court of North Carolina commissioned Superior Court Judge Thomas H. Lock to preside over the removal inquiry.

Judge Lock held an evidentiary hearing on 28 through 30 September 2020. After considering the evidence, Judge Lock entered an order on 16 October 2020 (2020 Removal Order), permanently removing Ms. Chastain from her elected position as clerk based upon the removal procedures found in N.C. Const. art. IV, § 17(4) and N.C.G.S. § 7A-105. In the 2020 Removal Order, Judge Lock made findings of fact regarding the allegations in the Charging Affidavit. Additionally, Judge Lock made findings of fact about two allegations that were not included in the Charging Affidavit. The additional allegations were: (1) Ms. Chastain frequently approached District Attorney Michael D. Waters on "behalf of citizens charged with traffic and minor criminal offenses and ask[ed] him to reduce or dismiss their charges"; and (2) Ms. Chastain frequently asked Chief District Court Judge W. Davis to strike orders for arrest. Judge Lock concluded that "[e]ven if Respondent's acts of misconduct viewed in isolation do not constitute willful misconduct, her knowing and persistently repeated conduct prejudicial to the administration of justice itself rises to the level of willful misconduct" and "warrant[ed] her permanent removal from the office" of Franklin County Clerk of Superior Court. Ms. Chastain appealed.

The Court of Appeals concluded that Article IV "confers on a single individual[ ], the authority to remove the elected Clerk in a county; namely, the senior regular resident Superior Court Judge in that same county." *Chastain I*, 281 N.C. App. at 523, 869 S.E.2d 738. For this reason, the Court of Appeals held that the replacement judge, Judge Lock, lacked authority to consider Ms. Chastain's removal under Article IV. *Id.* at 524, 869 S.E.2d 738. The Court of Appeals then considered "the other constitutional avenue by which a sitting Clerk may be removed," concluding that Ms. Chastain could "be removed from her current term as a consequence of being disqualified from holding any office under Article VI [if] she is adjudged guilty of corruption or malpractice in any office." *Id.* at 524–25, 869 S.E.2d 738 (cleaned up). The court went on to define "corruption and malpractice," ultimately holding that "acts of

willful misconduct which are egregious in nature" constitute "corruption or malpractice" under Article VI. *Id.* at 528, 869 S.E.2d 738 (citing *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978)). The Court of Appeals vacated the order and remanded for reconsideration of whether Ms. Chastain's conduct rose to the level of corruption or malpractice under Article VI. *Id.* at 530, 869 S.E.2d 738.

On remand, Judge Lock entered a new order on 5 April 2022 (2022 Removal Order), concluding Ms. Chastain was "permanently disqualified from serving in the Office as Clerk of Superior Court of Franklin County." Judge Lock concluded that "[e]ven if Respondent's acts of misconduct viewed in isolation do not constitute willful misconduct, her knowing and persistently repeated conduct prejudicial to the administration of justice itself rises to the level of willful misconduct [and] is equivalent to corruption or malpractice under Article VI of the Constitution of North Carolina and warrants permanent disqualification from office." Ms. Chastain again appealed to the Court of Appeals.

***3** During the second appeal, a divided panel at the Court of Appeals affirmed the 2022 Removal Order, holding that the findings of fact supported the conclusion that Ms. Chastain's conduct rose to the level of corruption or malpractice. *Chastain II*, 289 N.C. App. at 291, 889 S.E.2d 462. The majority, however, went on to note its disagreement with the holding in *Chastain I*. *Id.* at 292, 889 S.E.2d 462. Specifically, the majority in *Chastain II* opined that Article VI, Section 8, "concerns disqualification for office, not removal from office," *id.* at 292, 889 S.E.2d 462, and thus the *Chastain II* majority did not believe removal from office would be proper under Article VI, *id.* at 294, 889 S.E.2d 462. Instead, the majority in *Chastain II* believed that the Court of Appeals in *Chastain I* should have remanded the matter for further proceedings by Judge Dunlow under Article IV. *Id.* 294–95, 889 S.E.2d 462. Notwithstanding that disagreement, the *Chastain II* majority proceeded, consistent with *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30 (1989), and followed the *Chastain I* decision on Article VI. *Id.*

Judge Wood dissented from the holding that Ms. Chastain's conduct rose to the level of corruption or malpractice. *Id.* at 300, 889 S.E.2d 462 (Wood, J., dissenting). In her view, Ms. Chastain's conduct was "not *egregious* as to merit her disqualification and removal from the elected office of Clerk of Superior Court" under Article VI. *Id.*

Ms. Chastain appealed to this Court based on Judge Wood's dissent. We also allowed Ms. Chastain's petition for discretionary review as to additional issues and Mr. Thompson's petition for discretionary review as to additional issues.

II. Analysis

This case addresses the proper procedure for the removal of a duly-elected clerk of superior court. At the outset, we acknowledge that the Court of Appeals in *Chastain II* was bound to consider whether Ms. Chastain's removal was proper under Article VI based upon the earlier Court of Appeals' decision in *Chastain I*, as opposed to revisiting the decision about Article IV removal. *Chastain II*, 289 N.C. App. at 274, 889 S.E.2d 462; *see also In re Civ. Penalty*, 324 N.C. at 384, 379 S.E.2d 30 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

However, we do not agree with the Court of Appeals' holding in *Chastain I* that the "only individual" with authority under Article IV to remove Ms. Chastain was Judge Dunlow, Franklin County's senior regular resident superior court judge. *Chastain I*, 281 N.C. App. at 523, 869 S.E.2d 738. The Constitution designates the senior regular resident superior court judge as the judicial officer with the authority to preside over a removal proceeding when charges are brought against a clerk. N.C. Const. art. IV, § 17(4). Because that proceeding is judicial in nature, when the senior resident superior court judge has a conflict of interest and cannot fairly conduct that proceeding, the judicial branch may designate another superior court judge to preside. Therefore, when Judge Dunlow was recused from the matter and Judge Lock was commissioned to replace him, Judge Lock had the constitutional authority under Article IV to preside over the removal hearing.

Next, in both *Chastain I* and *Chastain II*, the Court of Appeals recognized that removal of a clerk is only proper based upon allegations put forth in the affidavit that initiates the proceeding. *Chastain I*, 281 N.C. App. at 528–29, 869 S.E.2d 738; *Chastain II*, 289 N.C.App. at 277–78, 889 S.E.2d 462. We affirm the determination that removal under Article IV is only properly based upon allegations identified in the affidavit that initiates the removal process per N.C.G.S. § 7A-105.

Lastly, neither *Chastain I* nor *Chastain II* laid out the proper standard for removal under Article IV. We clarify that the proper standard for the removal of a clerk under Article IV is misconduct—as stated in the Constitution—rather than the willful misconduct standard identified in N.C.G.S. § 7A-105. *See* N.C.G.S. § 7A-105 (2023). On remand, Judge Lock should consider whether removal is proper based upon the standard for misconduct described below.

A. Article IV Removal Hearing

***4** A clerk of superior court is an elected constitutional and judicial officer with "jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable to every county of the State." N.C. Const. art. IV, §§ 9(3), 12(3). The Constitution also sets forth conditions under which an elected clerk may be removed from office; clerks "may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county." N.C. Const. art. IV, § 17(4).

In *Chastain I*, the Court of Appeals interpreted the language in Section 17(4) to "confer on a single individual[ ], the authority to remove the elected Clerk in a county" and "no other judge may be conferred with jurisdiction over the subject matter of removing a Clerk for misconduct under Article IV." *Chastain I*, 281 N.C. App. at 523, 869 S.E.2d 738. However, "issues concerning the proper construction and application of ... the Constitution of North Carolina can only be answered with finality by this Court." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473 (1989). In interpreting our Constitution, where the meaning is clear from the words, there is no need to search for meaning elsewhere. *Id.* When interpreting the "clemency power" granted to the Governor under Article III, Section 5(6) of the Constitution, this Court held that only the Governor, and no other executive branch official, can exercise the power of clemency. *Bacon v. Lee*, 353 N.C. 696, 718, 549 S.E.2d 840 (2001). In *Bacon*, a death row inmate sought to have the Governor—who was involved in prosecuting the inmate's criminal case—delegate the clemency power to the Lieutenant Governor, who had no potential conflict of interest. *Id.* In rejecting this request, this Court held that "only the Governor ... may exercise the clemency authority established by the people of North Carolina in their Constitution." *Id.*

Following this reasoning, the Court of Appeals in *Chastain I* held that only the senior regular resident superior court judge serving Franklin County could conduct the removal proceeding in this case and, if that judicial official could not do so, no other judge could replace him. However, examining Article IV, Section 17(4), within the structure of Article IV as a whole explains why the analogy to the executive's clemency power does not answer the question here.

The position of "senior regular resident Superior Court Judge"[3] appears three times in Article IV. *See* N.C. Const. art. IV, §§ 9(3), 10, 17(4). The first two provisions grant the senior regular resident superior court judge the power to appoint other public officials: allowing appointment of a temporary clerk, *id.* art. IV, § 9(3); and allowing appointments of magistrates, *id.* art. IV, § 10. The third provision—removal of a clerk of superior court—is at issue in this case. *Id.* art. IV, § 17(4).

In each provision, the constitution provides the senior resident superior court judge with special authority that would not function unless only one person could wield it at any given time. *See id.* But unlike the other two provisions—which grant appointment power—the removal proceeding in Section 17(4) of Article IV requires the judge to preside over a hearing and enter a judgment according to law. *Id.* In other words, it requires the judge to wield the judicial power. When adjudicating cases, all superior court judges are judicial officers of the Superior Court Division of our General Court of Justice. *See id.* art. IV, § 2. Thus, in this context, the senior regular resident superior court judge has no unique constitutional power greater than other judges of the superior court. *See also* N.C.G.S. § 7A-41.1(c) (2023) ("Senior resident superior court judges and regular resident superior court judges possess equal judicial jurisdiction, power, authority and status[.]").

***5** Article IV, Section 17 of the Constitution does not limit the authority to preside over a clerk's removal proceeding to a single judge in the same way that Article III, Section 5 limits the clemency power solely to the Governor. Instead, Section 17 of Article IV identified the position of senior regular resident superior court judge serving the county as the default judicial officer who must adjudicate charges brought against a clerk of superior court under Article IV. *Id.* art. IV, § 17(4). But in a circumstance where that superior court judge has a conflict of interest and cannot fairly hear the case, the judicial branch may substitute another superior court judge of the General Court of Justice to preside over the proceeding and enter the judgment of the trial division. *See* N.C. Const. art. IV, § 9(1) (granting the General Assembly the authority to provide by general law for the selection or appointment of special or emergency Superior Court Judges);

see also N.C.G.S. § 7A-41.1(e) (providing the Chief Justice the authority to appoint an acting senior resident superior court judge when the regular senior resident superior court judge is unable to perform their duties).

That is the scenario in this case. When Judge Dunlow was recused from this case, the Chief Justice exercised her authority to appoint Judge Lock as the superior court judge authorized to preside over the matter. Accordingly, we hold that Judge Lock properly had the constitutional authority to preside over the Article IV removal proceeding in this case.

The Court of Appeals went on to acknowledge that where the disqualification of a judge "would result in a denial of a litigant's constitutional right to have a question properly presented" to a court of last resort, then the Rule of Necessity operates to allow a judge to hear a matter notwithstanding that their participation may violate a judicial ethical canon. *Chastain I*, 281 N.C. App. at 523, 869 S.E.2d 738 (quoting *Lake v. State Health Plan for Tchrs. & State Emps.*, 376 N.C. 661, 664, 852 S.E.2d 888 (2021)). But here Judge Dunlow's recusal would not deny Ms. Chastain her constitutional right to have the removal question presented to the court. The Chief Justice has authority to appoint a judge to step into the position of senior regular resident superior court judge to preside over the removal hearing. Because Judge Dunlow was recused and Judge Lock was properly appointed, Judge Lock had jurisdiction to preside over the Article IV removal proceeding.

B. Due Process for the Removal Proceeding

Having concluded that Judge Lock had subject matter jurisdiction over the Article IV removal proceeding, we turn our attention to the question of whether removal under Article IV can only be based upon acts identified in the affidavit used to initiate the proceeding. *See* N.C.G.S. § 7A-105 (mandating that "the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides"). A proceeding resulting in the removal of an elected public official must afford the individual all the benefits of due process of law. *In re Spivey*, 345 N.C. 404, 413–14, 480 S.E.2d 693 (1997) (concluding that the North Carolina Constitution does not prohibit the General Assembly from enacting a statutory method of removal so long as the removal process provides due process of law). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *McLean v. McLean*, 233 N.C. 139, 146, 63 S.E.2d 138 (1951) (quoting *Mullane v. Cent. Hanover Bank & Tr., Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

Because a removal proceeding is neither a civil nor criminal proceeding, the only notice a respondent receives of the removal proceeding is the affidavit that initiates the process. *See* N.C.G.S. § 7A-105 (outlining the procedures for removal of a clerk and incorporating by reference the requirements for removal of a district attorney under N.C.G.S. § 7A-66); *see also* N.C.G.S. § 7A-66 (2023) (outlining the procedures for removal of district attorneys). The statutory process designates that the affidavit which initiates the proceeding must state the grounds for removal. N.C.G.S. § 7A-66 ("A proceeding ... is commenced by filing ... a sworn affidavit charging ... one or more grounds for removal."). Additionally, the General Assembly requires "immediate written notice of the proceedings and a true copy of the charges" and that "the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter." *Id.* So long as the statutory language does not conflict with the Constitution, we presume that the procedure set forth in the statute is valid. *See State ex rel. Martin*, 325 N.C. at 448–49, 385 S.E.2d 473 ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.").

***6** Ms. Chastain argues that the 2020 and the 2022 Removal Orders relied upon acts not identified in the Charging Affidavit as some partial basis for removal. The Court of Appeals in *Chastain I* agreed with Ms. Chastain as to the 2020 Removal Order and concluded that reliance on "acts that were not alleged in [the Charging Affidavit] violated Ms. Chastain's due process rights." *Chastain I*, 281 N.C. App. at 529, 869 S.E.2d 738. The Charging Affidavit contained a long list of alleged misconduct, including nine specific incidents where Mr. Thompson asserted that Ms. Chastain acted in a manner constituting willful misconduct, willful and persistent failure to perform her duties, habitual intemperance, and conduct prejudicial to the administration of justice. As part of the removal proceeding, Judge Lock made more than thirty findings of fact about the allegations identified in the Charging Affidavit.[4]

However, during the removal hearing, Judge Lock also heard testimony and made findings about two additional allegations of misconduct that were not identified in the Charging

Affidavit. Those allegations were that Ms. Chastain asked the district attorney to reduce or dismiss charges for traffic and minor criminal offenses and that Ms. Chastain asked the chief district court judge to strike orders for arrest. Relying on allegations not proffered in the Charging Affidavit does not comport with the procedures for removal of a clerk set forth by the General Assembly; specifically, our statutes require that the grounds for removal are identified in the sworn affidavit that initiates the removal proceeding. *See* N.C.G.S. §§ 7A-105, -66.

In a removal proceeding, which by statute must commence within thirty days after the filing of the affidavit, respondents must have notice of all allegations in the affidavit so that they can mount a defense against those allegations. Therefore, on remand, Judge Lock may only consider the allegations in the Charging Affidavit as grounds for removal under Article IV.

C. Standard for Removal Under Article IV

Lastly, we consider the standard for the removal of a clerk of superior court under Article IV. Section 17(4) of Article IV states that a clerk "may be removed from office for *misconduct* or mental or physical incapacity." N.C. Const. art. IV, § 17(4) (emphasis added). Notably, subsection four does not use the "willful misconduct" standard which is used in Section 17(2) of Article IV, addressing removal of judges and justices. *See* N.C. Const. art. IV, § 17(2). The statutory procedure for removal or suspension of a clerk, though, identifies that higher standard for removal—willful misconduct—as the applicable standard. N.C.G.S. § 7A-105. However, when "there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *City of Asheville v. State*, 369 N.C. 80, 88, 794 S.E.2d 759 (2016) (quoting *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 690, 249 S.E.2d 402 (1978)). The constitutional language controls and, therefore, removal of a clerk under N.C. Const. art. IV, § 17(4) and N.C.G.S. § 7A-105 may be based upon misconduct, even if that conduct would not rise to the level of willful misconduct.

Nevertheless, this Court has not defined "misconduct" in the context of removal of a clerk under Article IV. The Court of Appeals, in the context of the Crime Victims Compensation Act, looking at whether a claimant's own misconduct was a proximate cause of his or her injury, recognized that misconduct is conduct "not within the accepted norm or standard of proper behavior." *Evans v. N.C. Dep't of Crime Control & Pub. Safety*, 101 N.C. App. 108, 117, 398 S.E.2d 880 (1990). "While misconduct includes unlawful conduct as a matter of law, it may be something less than unlawful conduct, though more than an act done in poor taste." *Id.* In the context of the removal of a prosecutor, this Court recognized that misconduct includes the "official doing of a wrongful act, or the official neglect to do an act which ought to have been done" even without a corrupt or malicious motive. *State ex. rel. Hyatt v. Hamme*, 180 N.C. 684, 688, 104 S.E. 174 (1920). These definitions align with the definition of misconduct found in Black's Law Dictionary: "dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust." *Misconduct*, Black's Law Dictionary (12th ed. 2024). Applying these standards to the constitutional office of clerk of superior court, we conclude that misconduct for a clerk is wrongful, unlawful, dishonest, or improper conduct performed under the color of authority for the clerk of superior court as identified in N.C.G.S. § 7A-103. *See* N.C.G.S. § 7A-103 (2023) (outlining the authority of clerk of superior court).

***7** Because the 2020 Removal Order is not before us, we do not simply reinstate that order. Nor do we suggest that the 2020 Removal Order, without factual findings on acts not identified in the Charging Affidavit, is necessarily inconsistent with this opinion. Thus, we remand this case to the Court of Appeals for further remand to Judge Lock to consider, consistent with this opinion, whether the findings of fact demonstrate misconduct sufficient to justify removal.

D. Disqualification of a Clerk Under Article VI

In his petition for discretionary review, Mr. Thompson asked this Court to outline the governing legal and procedural standard for removal under Article IV, Section 17(4), and disqualification under Article VI, Section 8, for a clerk of superior court. *See* N.C. Const. art. IV, § 17(4); N.C. Const. art. VI, § 8. Because we hold that Judge Lock has the authority to consider removal under Article IV, we do not need to consider the question of the proper legal and procedural standard for disqualification of a clerk under Article VI. We decline to reach that question until it is properly presented to this Court. Accordingly, we conclude that the petition for discretionary review as to the issue of the proper procedure for disqualification under N.C. Const. art. VI, § 8, was improvidently allowed.

III. Conclusion

In sum, we hold that after Judge Lock was commissioned to oversee the removal proceeding, he assumed the position of senior regular resident superior court judge for Article IV, Section 17(4) purposes and therefore, had authority to consider the removal of Ms. Chastain under N.C. Const. art. IV, § 17(4). Furthermore, procedural due process requires that removal only be based upon incidents identified in the sworn affidavit that initiates the removal procedure pursuant to N.C.G.S. § 7A-105. Lastly, we affirm that the standard for removal of a clerk under Article IV as set forth in the Constitution is misconduct. For these reasons, we overrule the holding in *Chastain I*, 281 N.C. App. 520, 869 S.E.2d 738, that Judge Lock did not have jurisdiction to remove Ms. Chastain under N.C. Const. art. IV, § 17(4). Additionally, we vacate the Court of Appeals' decision in *Chastain II*, 289 N.C. App. 271, 889 S.E.2d 462.

We remand the case to the Court of Appeals with instructions to further remand to Judge Lock for consideration of whether removal is proper under N.C. Const. art. IV, § 17(4) based upon the incidents identified in the Charging Affidavit and the standard for removal set forth in this opinion. Judge Lock retains the discretion to determine whether an additional hearing is necessary on this matter. Lastly, we note that discretionary review was improvidently allowed as to the proper procedure and guidelines for disqualification of a clerk of superior court under N.C. Const. art. VI, § 8.

VACATED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice ALLEN did not participate in the consideration or decision of this case.

All Citations

--- S.E.2d ----, 2024 WL 5100940

Footnotes

1 Mr. Thompson acknowledged in his affidavit that he did not have first-hand knowledge of all the allegations; he clarified that the information in the affidavit was based upon information gained in his professional role, from his review of documents, and from information told to him by others.

2 Prior to the removal hearing, District Attorney Michael D. Waters sent a letter to Ms. Chastain advising her of the impropriety of her actions and requesting that she refrain from any contact with jury venires.

3 In Section 17, the position is styled as senior regular resident Superior Court Judge. In Sections 9 and 10, the position is styled as senior regular resident Judge of the Superior Court.

4 The trial court noted in the order that the affiant expressly abandoned the allegation of irregular work hours and intemperance and that the affiant did not provide any evidence in support of the allegations of "interference in a child custody case" and "unauthorized demands for medical records." Therefore, those allegations were not considered as bases for the removal.

2024 WL 5101073
Only the Westlaw citation is currently available.
Supreme Court of North Carolina.

SCHOOLDEV EAST, LLC

v.

TOWN OF WAKE FOREST

No. 268A22
|
Filed December 13, 2024

Synopsis

Background: Real estate developer seeking to build a charter school brought action against town, seeking review of town board of commissioners' (BOC) orders denying developer's applications for a major subdivision plan permit and a major site plan permit based on failure to comply with town's unified development ordinance connectivity requirements for schools. The Superior Court, Wake County, Vince M. Rozier, Jr., J., affirmed the board's decisions. Developer appealed. The Court of Appeals, 284 N.C.App. 434, 876 S.E.2d 607, affirmed. Developer appealed, and parties filed petitions for discretionary review, which were granted.

Holdings: The Supreme Court, Allen, J., held that:

BOC's orders qualified as "quasi-judicial decisions";

superior court did not utilize appropriate standard of review when it applied whole records review; and

developer was entitled to have permits granted because it supported its applications with competent, material, and substantial evidence of compliance with ordinance.

Reversed and remanded with instructions.

Riggs, J., filed dissenting opinion in which Earls, J., joined.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 434, 876 S.E.2d 607 (2022), affirming an order entered on 14 April 2021 by Judge Vince Rozier in Superior Court, Wake County. On 6 April 2023, the Supreme Court allowed respondent's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 9 April 2024.

Attorneys and Law Firms

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Robinson, Bradshaw & Hinson, P.A., Charlotte, by Richard A. Vinroot and Jazzmin M. Romero, for North Carolina Coalition of Charter Schools, amicus curiae.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, Asheville; and J. Michael Carpenter, for North Carolina Home Builders Association, Inc., amicus curiae.

Opinion

ALLEN, Justice.

***1** The public policy of North Carolina encourages "the free and unrestricted use and enjoyment of land." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852, 786 S.E.2d 919 (2016) (cleaned up). This policy advances our state's enduring commitment to property rights. *See id.*, at 852–53, 786 S.E.2d 919 ("The fundamental right to property is as old as our state." (citing N.C. Const. of 1776, Declaration of Rights § XII; *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 9 (1787))).

At the same time, laws enacted by our General Assembly grant counties and municipalities significant authority to adopt and enforce zoning and other land use ordinances that limit what property owners may do with or on real property. Although this Court will uphold legitimate ordinances, the state's public policy disfavoring property restrictions influences how we construe unclear or ambiguous ordinance provisions in disputes between property owners and local governments. Specifically, this Court will resolve any well-founded doubts about a provision's meaning in favor of "the free use of land." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 308, 554 S.E.2d 634 (2001).

The outcome of this litigation between respondent Town of Wake Forest and petitioner Schooldev East, LLC, depends on the proper interpretation of a provision in the Town's Unified Development Ordinance (UDO). The Town relied on the provision to deny petitioner's applications for permits necessary for the construction of a proposed charter school. Because the provision's meaning is unclear, the Court of Appeals should have construed it in favor of the free use of land. The Court of Appeals instead adopted the Town's interpretation and ruled against petitioner. When properly construed, the UDO provision does not sustain the denial of petitioner's applications, which petitioner supported with competent, material, and substantial evidence. We therefore reverse the decision of the Court of Appeals and remand this case with instructions to the Town to approve petitioner's applications.

I. Background

Petitioner proposed to build a charter school in the Town. To that end, petitioner agreed to purchase some thirty-five acres of a roughly sixty-eight-acre tract of land owned by Jane Harris Pate and located on Harris Road. On 4 November 2019, petitioner applied to the Town for a major subdivision plan permit and a major site plan permit.[1] If granted, the subdivision permit would have resulted in the division of the Pate tract into three parcels, with petitioner's thirty-five-acre parcel in the middle. The site plan permit application sought approval for the construction of the charter school on the middle parcel (campus lot).

***2** On 3 September 2020, pursuant to procedures outlined in the Town's UDO, the Town's planning board and board of commissioners (BOC) held a joint public hearing and quasi-judicial hearing during which petitioner's legal counsel presented evidence including maps, graphs, reports, and witness testimony in support of petitioner's applications. A substantial portion of the presentation was devoted to explaining how the applications complied with section 3.7.5 in the UDO's supplemental use standards for elementary and secondary schools, which reads in pertinent part:

> **A. For Schools in the RD[2] Zone Only:** To encourage walking and bicycle accessibility by schoolchildren to schools, it shall be required by the applicant to demonstrate how such accessibility can be achieved, given the low density nature of this district. Accommodation may include the construction of additional off-premise sidewalks, multi-use trails/paths[,] or greenways to connect to existing networks.
>
> **B. For All Schools:**
>
> ....
>
> 2. Connectivity (vehicular and pedestrian) to surrounding residential areas is required. Where a full vehicular connection is impractical, a multi-use trail connection shall be provided.

Petitioner's evidence indicated that petitioner intended to construct a ten-foot-wide multi-use path along the entire Harris Road frontage of the campus lot. The multi-use path would have provided pedestrian and bicycle access to Joyner Park, a public park across the road from the campus lot with more than three miles of paved trails. It would also have provided pedestrian and bicycle access to a future 273-home subdivision on the other side of Harris Road.

No one challenged petitioner's evidence or introduced evidence in opposition thereto. On the contrary, the Town's planning staff advised the planning board and the BOC that N.C.G.S. § 160A-307.1 prevented the Town from requiring petitioner to "install[ ] road, curb/gutter[,] and multiuse path improvements." Under that statute, "[a] city may only require street improvements related to schools that are required for safe ingress and egress to the municipal street system and that are physically connected to a driveway on the school site." N.C.G.S. § 160A-307.1 (2023).

By a four-to-three vote, the planning board recommended that the BOC deny petitioner's applications. The BOC subsequently considered the applications at its meeting on 20 October 2020. According to the UDO, each application had to comply with the following standards:

1. The plan is consistent with the adopted plans and policies of the town;
2. The plan complies with all applicable requirements of this ordinance;
3. There exists adequate infrastructure (transportation and utilities) to support the plan as proposed; and
4. The plan will not be detrimental to the use or development of adjacent properties or other neighborhood uses.

Town of Wake Forest UDO, §§ 15.8.2(J) (major site plans), 15.9.2(J) (major subdivision plans).

The Town attorney advised the commissioners that they could not simply endorse the planning board's recommendation. Rather, they had to determine independently whether "competent, substantial, and material evidence in the record" satisfied the four UDO standards listed above.

***3** The BOC took up petitioner's site plan first. Despite the Town attorney's admonition, the commissioners' deliberations went beyond the evidence introduced at the quasi-judicial hearing. Some commissioners worried that the proposed charter school would have a negative impact on a nearby public elementary school. One commissioner remarked that the elementary school had an occupancy level of just sixty-seven percent. Another opined that "with [the charter school] directly abutting [the elementary] school that's below occupancy," the charter school would "draw students from [the elementary school] which means less money going into [the elementary] school."

Ultimately, one of the commissioners moved to deny the site plan for lack of compliance with Standards 1 and 2.[3] With respect to Standard 1, the commissioner asserted that the site plan was inconsistent with aspects of the Town's comprehensive plan. *See generally* N.C.G.S. § 160D-501(a1) (2023) ("A comprehensive or land-use plan is intended to guide coordinated, efficient, and orderly development within the planning and development regulation jurisdiction based on an analysis of present and future needs.").[4] In particular, the commissioner pointed to the comprehensive plan's statement that school designs should allow safe pedestrian access from adjacent neighborhoods. To justify denial under Standard 2, the commissioner highlighted the residential connectivity requirement in UDO § 3.7.5(B). The commissioners unanimously voted in favor of the motion to deny the site plan.

The BOC's discussion of the subdivision plan centered on UDO § 3.7.5(A). Several commissioners expressed their belief that the subdivision plan did not provide adequate pedestrian and cycling accessibility. The discussion then turned to whether the Town could lawfully mandate that developers construct sidewalks connecting schools to surrounding neighborhoods. The Town attorney advised the BOC that N.C.G.S. § 160A-307.1 preempted such action. The commissioners disregarded that advice and unanimously voted to deny the subdivision plan based on lack of compliance with UDO § 3.7.5(A).

The BOC reduced its decisions to writing in two orders dated 17 November 2020. The first denied the site plan application because petitioner "failed to demonstrate compliance with UDO [§ 3.7.5(B)], which requires connectivity (vehicular and pedestrian) to surrounding residential areas." The second order denied the subdivision plan application because "the evidence submitted failed to demonstrate how the application was complying with UDO [§ 3.7.5(A)], which states that, schools in the RD zone are to encourage walking and bicycle accessibility by school children to schools."

Petitioner sought review of the BOC's orders in the Superior Court, Wake County. Following a hearing, the superior court entered an order on 14 April 2021 affirming those orders. The court rejected petitioner's contention that the denial of its applications violated N.C.G.S. § 160A-307.1. According to the court, the BOC "properly analyzed the scope of [N.C.G.S. § 160A-307.1] and determined that it did not preempt Town plans and ordinances requiring [petitioner] to demonstrate pedestrian and bicycle connectivity." The superior court further concluded, based on a review of the whole record, that the site plan failed to satisfy "the Town's plans and ordinances requiring pedestrian and bicycle connectivity" and "[a]s a result, the [BOC] properly denied both the [s]ite [p]lan [a]pplication and the [s]ubdivision [a]pplication." Petitioner appealed.

***4** A divided panel of the Court of Appeals affirmed the superior court's order. *Schooldev E., LLC v. Town of Wake Forest*, 284 N.C. App. 434, 448, 876 S.E.2d 607 (2022). As a threshold matter, the majority agreed with petitioner that the superior court "erred when it applied whole record review to the issue of whether the burden of production is met." *Id.* at 444, 876 S.E.2d 607 (cleaned up). The superior court "should have 'applied *de novo* review to determine the initial legal issue of whether [p]etitioner had presented competent, material, and substantial evidence.' " *Id.* (quoting *PHG Asheville, LLC v. City of Asheville*, 262 N.C. App. 231, 241, 822 S.E.2d 79 (2018), *aff'd*, 374 N.C. 133, 839 S.E.2d 755 (2020)). Nonetheless, the majority held that the superior court "correctly affirmed the [BOC's] decisions because [p]etitioner failed to meet its burden of production to show it [was] entitled to the requested permits." *Schooldev*, 284 N.C. App. at 444, 876 S.E.2d 607.

In reaching its holding, the majority acknowledged that N.C.G.S. § 160A-307.1 restricts the ability of municipalities to require street improvements for new schools. *Id.* at 447–48, 876 S.E.2d 607. The majority reasoned, however, that the statute did not control the outcome of this case because "the term 'street improvements' referred to in [N.C.G.S.] § 160A-307.1 does not include sidewalk improvements." *Id.* at 448, 876 S.E.2d 607.

Turning to UDO Standard 1 (consistency with the Town's plans and policies), the majority examined whether petitioner made a sufficient showing that its site and subdivision plans were "consistent with the adopted plans and policies of the Town." *Id.* at 449, 876 S.E.2d 607 (cleaned up). It noted that the BOC considered the comprehensive plan's policy that "school campuses shall be designed to allow safe, pedestrian access from adjacent neighborhoods."[5] *Id.* at 450, 876 S.E.2d 607 (cleaned up). Although comprehensive plans themselves are merely advisory in nature, the majority characterized UDO § 3.7.5 as "an ordinance by which [this policy] was implemented." *Id.* at 451, 876 S.E.2d 607; *see also* N.C.G.S. § 160D-501(c) (stating that comprehensive plans "shall be advisory in nature without independent regulatory effect"). Thus, "[p]etitioner's failure to satisfy UDO § 3.7.5 was a proper basis on which the Town denied [p]etitioner's applications." *Schooldev,* 284 N.C. App. at 451, 876 S.E.2d 607.

Similarly, the majority determined that UDO Standard 2 (compliance with UDO requirements) mandated that petitioner's site and subdivision plans satisfy UDO § 3.7.5. *Id.* The majority expressly rejected petitioner's argument that UDO § 3.7.5 was a zoning ordinance and therefore was "inapplicable to [petitioner's] subdivision request." *Id.* It then explained why, in its view, petitioner's evidence did not rise to the level of competent, material, and substantial evidence.

> Our review of the record shows [p]etitioner brought forth evidence demonstrating it would dedicate a twenty-five-foot right of way line along the frontage of the property and provide a ten-foot-wide multi-use path one foot behind the right of way line. Petitioner also offered testimony tending to show the proposed sidewalk would align with the entrance into Joyner Park and the trails within Joyner Park. Since [p]etitioner demonstrates that it would provide pedestrian connectivity to only one residential neighborhood through Joyner Park located to the south of the proposed school, we hold the superior court did not err in affirming the [BOC's] decision to deny the [a]pplications.

***5** *Id.* at 452–53, 876 S.E.2d 607 (cleaned up).

The dissenting judge agreed that the superior court erred by applying the whole record test. *Id.* at 453, 876 S.E.2d 607 (Tyson, J., concurring in part and dissenting in part). Unlike the majority, however, the dissenting judge would have held (1) that N.C.G.S. § 160A-307.1 barred the Town from requiring petitioner and other school developers to construct "sidewalks, bike paths, trails, etc. to link ... school campus[es] to surrounding neighborhood[s]" and (2) that "[p]etitioner clearly produced competent, material, and substantial evidence to make a *prima facie* showing of entitlement to the respective permits." *Id.* at 461, 463, 876 S.E.2d 607.

Petitioner filed a notice of appeal based on the dissent in the Court of Appeals. Although it has since been repealed, N.C.G.S. § 7A-30(2) then created a right of appeal to this Court "from any decision of the Court of Appeals rendered in a case ... [i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges." *See* N.C.G.S. § 7A-30(2) (2023), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf. Pursuant to N.C.G.S. § 7A-31, the parties filed petitions for discretionary review asking us to consider additional issues. We allowed their petitions.[6]

II. Judicial Review of Quasi-Judicial Decisions

"Quasi-judicial decisions involve the application of ordinance policies to individual situations rather than the adoption of new policies." David W. Owens, *Land Use Law in North Carolina* 6 (4th ed. 2023). The BOC's decisions in this case qualify as quasi-judicial because in making them the BOC had to "find[ ] ... facts regarding the specific proposal[s] and ... exercise ... some judgment and discretion in applying predetermined policies to the situation." *Id.*; *see also* *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507, 434 S.E.2d 604 (1993) ("In the zoning context, these quasi-judicial decisions involve the application of zoning policies to individual situations, such as variances, special and conditional use permits, and appeals of administrative determinations.").

When considering permit applications in a quasi-judicial capacity, a local government board "must determine whether '[the] 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 [the requested] permit.' " *PHG Asheville*, 374 N.C. at 149, 839 S.E.2d 755 (quoting *Humble Oil & Refin. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129 (1974)). Competent evidence is evidence that is relevant and admissible. *Competent Evidence*, Black's Law Dictionary (12th ed. 2024). Material evidence has "some logical connection with the facts of the case or the legal issues presented." *Material Evidence*, Black's Law Dictionary (12th ed. 2024). Substantial evidence consists of "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Humble Oil*, 284 N.C. at 470–71, 202 S.E.2d 129 (cleaned up).

***6** By satisfying its initial burden of production, an applicant makes a prima facie case that the permit should be issued. *Id.*, at 468, 202 S.E.2d 129. The board must then grant the application unless it makes contrary findings that are likewise supported by "competent, material, and substantial evidence appearing in the record." *Id.* A decision to deny the application must rest on one or more grounds set out in the ordinance. *Id.* In short, the board must base its decision on the evidence and the text of the ordinance, not on the biases or whims of its members.

"Appeals of [a local government board's] quasi-judicial decisions go directly to superior court." Owens, *Land Use Law*, at 266; *see also* N.C.G.S. § 160D-1402(b) (2023) ("An appeal in the nature of certiorari shall be initiated by filing a petition for writ of certiorari with the superior court."). When reviewing a quasi-judicial decision by a local government board, the superior court does not function as a trial court; rather, it "sits in the posture of an appellate court[ ] and ... reviews th[e] evidence presented to the [local government] board." *PHG Asheville*, 374 N.C. at 149, 839 S.E.2d 755 (quoting *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 12–13, 565 S.E.2d 9 (2002)).

The superior court reviews the board's decision to determine whether it was:

a. In violation of constitutional provisions, including those protecting procedural due process rights[;]

b. In excess of the statutory authority conferred upon the local government, including preemption, 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 competent, material, and substantial evidence in view of the entire record[; or]

f. Arbitrary or capricious.

N.C.G.S. § 160D-1402(j)(1).

The standard of review used by the superior court depends on the precise issues raised on appeal. *PHG Asheville*, 374 N.C. at 150, 839 S.E.2d 755. If a petitioner alleges that the board made an error of law, the court reviews the alleged error de novo, "consider[ing] the matter anew and freely substitut[ing] its own judgment for the [board's] judgment." *Id.* (quoting *Mann Media*, 356 N.C. at 13–14, 565 S.E.2d 9); *see also* N.C.G.S. § 160D-1402(j)(2) ("The court shall consider the interpretation of the decision-making board [when reviewing an alleged error of law], but is not bound by that interpretation, and may freely substitute its judgment as appropriate.").

On the other hand, if a petitioner alleges that the board's action was unsupported by competent, material, and substantial evidence or was arbitrary or capricious, the court undertakes a whole record review. *PHG Asheville*, 374 N.C. at 150–51, 839 S.E.2d 755. "In conducting a whole record review, the [superior] court must examine all competent evidence (the 'whole record') in order to determine whether the [board's] decision is supported by substantial evidence." *Id.*, at 151, 839 S.E.2d 755 (cleaned up).

The decision of the superior court is subject to appeal. In such cases, the Court of Appeals analyzes the superior court's order for errors of law by "(1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (quoting *Mann Media*, 356 N.C. at 14, 565 S.E.2d 9). "In the event that the case under consideration reaches this Court after a decision by the Court of Appeals, the issue before this Court is whether the Court of Appeals committed any errors of law." *Id.*

III. Analysis

To examine the Court of Appeals' decision for errors of law, this Court must "make the same inquiry that the Court of Appeals was called upon to undertake in reviewing the [superior] court's order. As a result, we will now examine whether the [superior] court utilized the appropriate standard of review and, if so, whether it did so properly." *See id.*

***7** As we have seen, whole record review is the proper standard of review for allegations that a local government board did not base its quasi-judicial decision on competent, material, and substantial evidence. Yet the question before the superior court was not whether competent, material, and substantial evidence in the record supported the BOC's decision. Instead, the question was whether the evidence petitioner submitted to satisfy its initial burden of production amounted to competent, material, and substantial evidence. Under this Court's precedent, answering that second question "involves the making of a legal, rather than a factual, determination." *PHG Asheville*, 374 N.C. at 152, 839 S.E.2d 755. Accordingly, the Court of Appeals majority rightly held that the superior court erred by not conducting a de novo review. *Id.*, at 152–53, 839 S.E.2d 755; *see also* N.C.G.S. § 160D-1402(j)(2) ("Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.").

"If a [superior] court fails to properly make a de novo review" of alleged errors of law, "the appellate court can apply a de novo review rather than remand the case" where, as here, "the record on appeal ... provide[s] the requisite information for the review." Owens, *Land Use Law*, at 653. Consequently, we review de novo whether petitioner met its initial burden of production.

In its principal brief to this Court, petitioner offers three main reasons for reversing the Court of Appeals majority's ruling that "[p]etitioner failed to meet its burden of production to show it met [UDO § 3.7.5] to establish a *prima facie* case for entitlement of the permits." *Schooldev*, 284 N.C. App. at 453, 876 S.E.2d 607. First, petitioner argues that the Town exceeded its statutory authority by, among other things, erroneously relying on UDO § 3.7.5 to deny petitioner's subdivision permit request even though UDO § 3.7.5 is a zoning ordinance, not a subdivision ordinance. *See generally Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 158-59, 731 S.E.2d 800 (2012) (explaining that "subdivision ordinances control the development of specific parcels of land while general zoning ordinances regulate land use activities over multiple properties located within a distinct area of the [local government's] territorial jurisdiction"). Second, petitioner maintains that N.C.G.S. § 160A-307.1 largely preempts the pedestrian and bicycle connectivity requirements in UDO § 3.7.5. Third, petitioner argues that it presented sufficient evidence of compliance with UDO § 3.7.5 and so should have been granted the requested permits in any event.

We agree with petitioner's third argument. As explained below, petitioner carried its initial burden of production by presenting competent, material, and substantial evidence of compliance with UDO § 3.7.5, and the BOC did not have before it any competent, material, and substantial evidence to support a finding to the contrary. Hence, the BOC should have approved petitioner's permit applications regardless of whether UDO § 3.7.5 qualifies as a subdivision ordinance or N.C.G.S. § 160A-307.1 preempts UDO § 3.7.5. We therefore do not reach petitioner's first two arguments.

In its brief to this Court, the Town argues that petitioner's evidence was insufficient because UDO § 3.7.5 "does not require connectivity to just one 'surrounding residential area,' but instead to all surrounding residential areas." The Court of Appeals majority appears to have adopted the Town's interpretation of UDO § 3.7.5. *See Schooldev*, 284 N.C. App. at 453, 876 S.E.2d 607 (noting that petitioner's plans "would provide pedestrian connectivity to only one residential neighborhood").

The dispositive issue on appeal is thus whether UDO § 3.7.5 mandates pedestrian and bicycle connectivity to *all* residential areas surrounding the campus lot. To resolve this matter, we again refer to the text of UDO § 3.7.5.

> **A. For Schools in the RD Zone Only:** To encourage walking and bicycle accessibility by schoolchildren to schools, it shall be required by the applicant to demonstrate how such accessibility can be achieved, given the low density nature of this district. Accommodation may include the construction of additional off-premise sidewalks, multi-use trails/paths[,] or greenways to connect to existing networks.
>
> ***8 B. For All Schools:**
>
> ....

2. Connectivity (vehicular and pedestrian) to surrounding residential areas is required. Where a full vehicular connection is impractical, a multi-use trail connection shall be provided.

Although UDO § 3.7.5(A) requires a permit applicant to demonstrate how its plans can achieve pedestrian and bicycle connectivity, it does not expressly declare that the applicant's plans must provide connectivity to *all* surrounding residential areas. Similarly, while UDO § 3.7.5(B)(2) declares that pedestrian connectivity "to surrounding residential areas is required," it does not state that connectivity to *all* surrounding residential areas is necessary.

In some of its arguments to this Court, the Town essentially concedes that UDO § 3.7.5 is unclear. It admits that municipalities lack statutory authority to compel developers to build streets or roads outside their respective subdivisions. *See* *Buckland v. Haw River*, 141 N.C. App. 460, 463, 541 S.E.2d 497 (2000) (holding that the subdivision enabling statute "does not empower municipalities to require a developer to build streets or highways *outside* its subdivision"). For this reason, the Town insists that UDO § 3.7.5 should not be interpreted to require the construction of sidewalks or other improvements across land outside a developer's subdivision site. Thus, according to the Town, the term "off-premise" in UDO § 3.7.5(A) does not refer to areas outside a subdivision; rather, "off-premise" means "off the school's premises (the school's campus) but still within the subdivision site." While the Town's narrow interpretation of "off-premise" may not contradict anything in UDO § 3.7.5(A), it is not obvious from the text of the ordinance that the BOC used the term with that meaning in mind.

Furthermore, if we accept the Town's position that UDO § 3.7.5 does not mandate off-site improvements, it appears that there could be scenarios in which UDO § 3.7.5(B)(2) would not mandate pedestrian connectivity to all surrounding residential areas. Under the Town's reading, UDO § 3.7.5(B)(2) cannot be understood to require connectivity to a surrounding residential area if providing it would entail the construction of a sidewalk or multi-use path outside the developer's subdivision. This situation might arise, for instance, where an empty lot separates the subdivision site for a proposed school from a nearby neighborhood. Perhaps the BOC did not intend the phrase "surrounding residential areas" in UDO § 3.7.5(B)(2) to include any neighborhood that does not actually share a border with the developer's subdivision site. We cannot reach that conclusion based solely on the text of UDO § 3.7.5 or related UDO provisions, however.

As if it were checkmate, our dissenting colleagues point to dictionary definitions of "surrounding" to argue that the phrase "surrounding residential areas" is not ambiguous. Specifically, they maintain that, because "surrounding" has been defined as "all around a place or thing" and "enclosing or encircling," the BOC did not need to use the term "all" in UDO § 3.7.5(B)(2) to express its intent that developers provide connectivity to every residential area located around a proposed school.

***9** Courts often rely on dictionary definitions when construing terms in statutes or ordinances—we did so earlier in this very opinion—but this practice can do more harm than good when courts apply the definitions to manufacture a false certainty. Our dissenting colleagues ignore that modifiers such as "completely," "entirely," and "all" are commonly attached to "surrounding," "surrounded," and similar words. We might say, for example, that a military unit is "completely surrounded" by hostile forces. Likewise, one dictionary defines "encompass" to mean "to surround *entirely.*" *Encompass*, *Oxford Dictionary of English* (3d ed. 2010) (emphasis added). Another dictionary defines "surround" as "to enclose *on all sides.*" *Surround*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007) (emphasis added). Thus, even lexicographers sometimes add modifiers to words like "surround" to ensure clarity.

Because UDO § 3.7.5 is unclear, we consult this Court's precedents on the correct interpretation of uncertain provisions in land use ordinances. These precedents instruct us to resolve any "well-founded doubts" about a provision's meaning "in favor of the free use of property." *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440 (1966) (cleaned up); *see also* *Westminster Homes,* 354 N.C. at 308, 554 S.E.2d 634 ("[A]mbiguous zoning statutes should be interpreted to permit the free use of land ....").

This is no arbitrary canon of construction. It reflects our state's longstanding public policy favoring the "free and unrestricted use and enjoyment of land." *Kirby*, 368 N.C. at 853, 786 S.E.2d 919 (quoting *J.T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174 (1981)). That public policy recognizes and preserves the foundational place of property rights in our constitutional order. *See id.*, at 852–53, 786 S.E.2d 919 ("The fundamental right to property is as old as our state." (citing N.C. Const. of 1776, Declaration

of Rights § XII; *Bayard*, 1 N.C. (Mart.) at 9)). If local governments adopt ordinances that interfere with property rights, they owe it to property owners to use plain language. *See Arter v. Orange Cnty.*, 386 N.C. 352, 352, 904 S.E.2d 715 (2024) ("Local governments have a responsibility to enact clear, unambiguous zoning rules."). Property owners should not need law degrees to figure out what local government ordinances allow them to do with their own land.

Consistent with our precedents, we resolve our doubts about the meaning of UDO § 3.7.5 against the Town and in favor of the free use of property. Thus, we do not interpret UDO § 3.7.5 to require pedestrian and bicycle connectivity to all residential areas surrounding the campus lot. Petitioner satisfied its initial burden by presenting competent, material, and substantial evidence that its proposed multi-use path would provide pedestrian and bicycle access to the public park and 273-home subdivision on the other side of Harris Road.

Because petitioner carried its initial burden of production and no one offered any evidence in opposition to its applications, the BOC had no basis on which to conclude that petitioner's applications failed to satisfy Standards 1 and 2 of the UDO. Consequently, the superior court erred by affirming the BOC's orders denying the applications, and the Court of Appeals erred in turn by affirming the superior court's order.

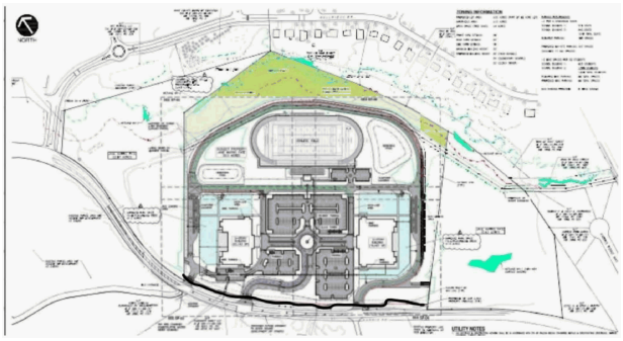
IV. Conclusion

For the reasons explained above, we reverse the decision of the Court of Appeals and remand this case with instructions to the Town to approve petitioner's site plan and subdivision plan applications. Inasmuch as our resolution of this case makes it unnecessary to reach the additional issues raised in the parties' petitions for discretionary review, we further conclude that discretionary review was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice RIGGS dissenting.

***10** In our system of law, we develop factual records for a reason. And we, as appellate courts, understand that we should treat with deference the evidence presented to and found by decision makers. Although a trite saying, the adage "a picture is worth a thousand words" carries much significance in this matter.



The site plan map above answers so many questions about the matter at hand, but rather than examine it and meaningfully engage with what it shows, the majority ignores this evidence and renders a clear ordinance meaningless. How does it do this? By invoking the "free use of land" canon of statutory construction. That canon, though, is reserved only for ambiguous ordinances. And even when it is appropriate, it merely calls for a strict interpretation of the ordinance; the canon does not permit a court to entirely disregard the ordinance's language. Further, the canon cannot be used to sidestep the ordinance's purpose.

Notwithstanding the ordinance's straightforward language and purpose, the majority invokes the free use of land canon to defang a legitimate local regulation of property rights. In doing so, the majority provides no clarity for what level of connectivity is required under the Town's ordinance. For these reasons, I respectfully dissent.

I. The Free Use of Land Canon

Municipal corporations, upon creation, "take[ ] control of the territory and affairs over which [they are] given authority." *Parsons v. Wright*, 223 N.C. 520, 522, 27 S.E.2d 534 (1943). Indeed, the very "object of incorporating a town or city is to invest the inhabitants of the municipality with the government of all matters that are of special municipal concern." *Id.* Zoning ordinances fall into this neat category, and the General Assembly has "delegated [the original zoning power] to the legislative body of municipal corporations." *Allred v. City of Raleigh*, 277 N.C. 530, 540, 178 S.E.2d 432 (1971) (cleaned up); *see also* N.C.G.S. § 160A-174(a) (2023) ("A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the

city ....”). Zoning laws are, thus, products of our political processes just like any other type of legislation. They “involve a reciprocity of benefit as well as of restraint” and “balanc[e] public against private interests.” *McKinney v. City of High Point*, 237 N.C. 66, 71, 74 S.E.2d 440 (1953) (quoting 8 McQuillin, *The Law of Mun. Corps.* § 25.25 (3d ed. 1949)). Moreover, they are emblematic of legislation dedicated to the public welfare and serve a “fundamental purpose[ ]” in “stabiliz[ing], conserv[ing], and protecting ... uses and values of land and buildings.” *Id.* (quoting *The Law of Mun. Corps.* § 25.25).

That is not to say that “[v]ast property rights are [not] affected by zoning regulations.” *Id.* As far back as 1919, this Court took notice of the rule that “all statutes in derogation of the common law are to be construed strictly” unless the common law was “changed by express enactment.” *Price v. Edwards*, 178 N.C. 493, 500, 101 S.E. 33 (1919) (cleaned up). Among the examples noted by this Court were statutes “impos[ing] restrictions upon the control, management, use, or alienation of private property.” *Id.* (cleaned up). For that exact reason, our jurisdiction and others have adopted the rule of construing ambiguous land ordinances “strictly in favor of the free use of real property.” *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 157, 712 S.E.2d 868 (2011).

***11** For example, a little under sixty years ago, in *Yancey v. Heafner*, 268 N.C. 263, 150 S.E.2d 440 (1966), we allowed the construction of a high school athletic stadium despite zoning restrictions. *Id.*, at 263, 150 S.E.2d 440. Neighbors of the high school were upset about the potential lighting and noise disturbances, so they filed suit challenging the validity of the permit. *Id.*, at 263, 265, 150 S.E.2d 440. When the case reached this Court, we concluded that the applicable zoning ordinance was silent as to whether athletic facilities were “forbidden in zones where schools are permitted.” *Id.*, at 264, 150 S.E.2d 440. To this Court, that silence was dispositive; it signified that the city council did not contemplate prohibiting athletic stadiums and, thus we leaned on the adage 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.” *Id.*, at 266, 150 S.E.2d 440 (quoting 1 Yokley, *Zoning Law & Practice* § 184 (2d ed. 1962)).

Notwithstanding this canon, this Court does not find default ambiguity in order to minimize restrictions on the free use of land. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 308, 554 S.E.2d 634 (2001) (“While ambiguous zoning statutes should be interpreted to permit the free use of land, ... no such ambiguity exists here.”); *see also* 1 Arthur H. Rathkopf & Daren A. Rathkopf, *Ruthkopf's The Law of Zoning and Planning* § 5:14 (Sara C. Bronin & Dwight H. Merriam eds., 2024) (“The doctrine that zoning ordinances should be construed in favor of the free use of land operates *only* where ambiguity exists.” (emphasis added)); *id.* (“[T]his rule of construction favoring the free use of land should not be applied where common sense indicates the result would be contrived, unreasonable, or absurd in view of the manifest object and purpose of the ordinance.”).

Indeed, in *Westminster Homes*, we abstained from invoking the free use of land canon where a conditional use permit expressly allowed homeowners to install “fences” but did not mention “gates.” 354 N.C. at 300–01, 554 S.E.2d 634. In doing so, we first emphasized the importance of “ascertain[ing] and effectuat[ing] the *intention* of the municipal legislative body.” *Id.*, at 303–04, 554 S.E.2d 634 (emphasis added) (quoting *George v. Town of Edenton*, 294 N.C. 679, 684, 242 S.E.2d 877 (1978)); *see also Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235 (1967) (“[C]onstruction in favor of the ... unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.” (cleaned up)). We then achieved that goal by simply looking to the ordinance's plain language, which conveyed “a clear desire for privacy through a wide, comprehensive buffer.” *Westminster Homes*, 354 N.C. at 307, 554 S.E.2d 634. Because the ordinance's text and intent were clear, there was no need to resort to statutory construction and we concluded that the permit did not allow residents to install gates. *Id.*, at 308, 554 S.E.2d 634.

Here, the majority's conclusion contravenes the plain language of Section 3.7.5(B)(2). Under Section 3.7.5(B)(2), the applicant is “required” to provide “vehicular and pedestrian” “[c]onnectivity ... to surrounding residential areas.” UDO § 3.7.5(B)(2) (2013). In the event that “full vehicular connection is impractical,” the ordinance indicates that “a multi-use trail connection” is an adequate replacement. The majority takes issue with this provision because “it does not state that connectivity to *all* surrounding residential areas is necessary.” But that is, in fact, what this provision does.

The plain language of Section 3.7.5(B)(2) requires an applicant to connect to each residential area surrounding it. As explained earlier, the basic rule of ordinance interpretation “is to ascertain and effectuate the intention of the municipal

legislative body." *Westminster Homes*, 354 N.C. at 303–04, 554 S.E.2d 634 (cleaned up). This intent is determined "by examining [the] (i) language, (ii) spirit, and (iii) goal of the ordinance." *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 138, 431 S.E.2d 183 (1993). "When interpreting a municipal ordinance, we apply the same principles of construction used to interpret statutes." *Morris Commc'ns Corp.*, 365 N.C. at 157, 712 S.E.2d 868 (citing *Westminster Homes*, 354 N.C. at 303, 554 S.E.2d 634). "Undefined and ambiguous terms in an ordinance are given their ordinary meaning and significance." *Id.* (citing *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902 (2000)); *see also The Law of Zoning and Planning* § 5:11 ("Where a word or term is not defined for the purposes of the ordinance, it will usually be given its plain, ordinary, and usually understood meaning."). Thus, it is well accepted that "courts may appropriately consult dictionaries" to "ascertain the ordinary meaning of undefined and ambiguous terms." *Morris Commc'ns. Corp.*, 365 N.C. at 158, 712 S.E.2d 868 (citing *Perkins*, 351 N.C. at 638, 528 S.E.2d 902).

***12** According to several dictionaries, "surrounding" means "*all* around a particular place or thing," *New Oxford American Dictionary* 1751 (3d ed. 2010) (emphasis added), or "enclosing or encircling," *The Random House Dictionary of the English Language* 1916 (2d ed. 1987). Thus, the ordinary meaning of Section 3.7.5(B)(2) requires some type of effort to provide vehicular or bicycle connectivity to *all* residential areas encircling it. And this makes sense considering the plural tense of "residential areas"—the ordinance clearly requires applicants to connect the planned site with adjacent neighborhoods through streets and walkable pathways. But rather than conduct a simple dictionary check, the majority reads in an ambiguity.[1] The city ordinance writers did not include the word "all" in Section 3.7.5(B)(2) because "all" is necessarily implied by the word "surrounding."

Lastly, this reading of the ordinance comports with one of the listed purposes in the Town's Unified Development Ordinance. Section 1.4, entitled "Purpose and Intent," indicates that Section 3.7.5 was adopted to "[f]acilitate walking and biking in the community by providing a well-integrated network of streets, sidewalks, bikeways, walking trails, and greenway trails," among other purposes. UDO § 1.4 (2013). By requiring some sort of connectivity to each neighboring residential area, an applicant may satisfy this prerequisite. And this is no minor consideration—the level of connectivity in a neighborhood plays several roles in our everyday life, such as vehicular traffic, obesity, and happiness. *See* Kevin M. Leyden et al., *Walkable Neighborhoods: Linkages Between Place, Health, and Happiness in Younger and Older Adults*, 90 J. of Am. Planning Ass'n 101, 101 (2024) ("We found that the way neighborhoods are planned and maintained matter[ ] for happiness, health, and trust."); Milan Zlatkovic, et al., *Assessment of Effects of Street Connectivity on Traffic Performance and Sustainability Within Communities and Neighborhoods Through Traffic Simulation*, 46 Sustainable Cities & Soc'y 1, 1 (2019) ("People need to be able to travel within the community in a safe and efficient manner."); Arlie Adkins, et al., *Contextualizing Walkability: Do Relationships Between Built Environments and Walking Vary by Socioeconomic Context?*, 83 J. of Am. Planning Ass'n 296, 296 (2017) ("Supportive built environments for walking, bicycling, and transit use are predictive of a larger share of trips made by active travel modes and higher rates of walking or physical activity."). By reading in an ambiguity and invoking the free use of land canon, the majority disregards this plain reading of the UDO.

The majority also ignores the plain language of Section 3.7.5(A). Section 3.7.5(A) requires the applicant to "demonstrate how [walking and bicycle] accessibility can be achieved," given the residential district's "low density nature." UDO § 3.7.5(A) (2013). The ordinance further provides examples of how this accessibility may be accomplished: "Accommodations may include the construction of additional off-premise sidewalks, multi-use trails/paths or greenways to connect to existing networks." *Id.* Like with Section 3.7.5(B)(2), the majority also concluded this section was ambiguous because "it does not expressly declare that the applicant's plans must provide connectivity to *all* surrounding residential areas." But the majority misses the point: the plain language of Section 3.7.5(A) requires a demonstration of how the applicant plans to achieve accessibility for schoolchildren. It does not require the same proof that Section 3.7.5(B)(2) does. Because this ordinance is not ambiguous, the majority again wrongly invoked the free use of land canon.

II. Schooldev Failed to Meet Its Prima Facie Burden

***13** In one sentence, the majority addresses Schooldev's prima facie burden. Such brevity illuminates how thin Schooldev's argument is. Schooldev presented no affirmative evidence to meet its burden under Sections 3.7.5(A) and

3.7.5(B)(2), and thus, the Court of Appeals' judgment should have been affirmed.

When determining whether to grant or deny a land use permit, the trial court first places a burden on the applicant to establish a prima facie case of entitlement to a conditional use permit. *PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 149, 839 S.E.2d 755 (2020) (citing *Humble Oil & Refin. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129 (1974)). At this point, the applicant must produce "competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit." *Id.* (emphasis in original) (alteration in original) (quoting *Humble Oil*, 284 N.C. at 468, 202 S.E.2d 129). If this *prima facie* case is established, the agency may only deny the application "based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.* (quoting *Humble Oil*, 284 N.C. at 468, 202 S.E.2d 129). Those findings must contradict "grounds [ ] expressly stated in the ordinance." *Id.* (quoting *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 218, 261 S.E.2d 882 (1980)). Relevant here, the Town denied Schooldev's permit application because it failed to establish compliance with Sections 3.7.5(A) and 3.7.5(B)(2). Thus, on appeal, the question is whether Schooldev satisfied its prima facie burden to proffer evidence tending to prove compliance with these ordinances.

Schooldev argues that it met its prima facie burden by "presenting evidence that the campus would have a 10-foot-wide multi-use path that connects to a nearby residential neighborhood and an adjoining town park with a network [of] pedestrian paths." But Schooldev's site plan map tells a different story. To the east and west of the planned site lay undeveloped tracts of land. Residential homes along Walridge Road sit north of the school. Across Harris Road from the planned site is a 117-acre park. As the Town points out, the only accessibility or connectivity accommodation provided by Schooldev is a sidewalk that "connect[s] two of the school's driveways at the front of the school on Harris Road." Schooldev's claim that it provides connectivity is misleading, as the site plan does not include any connection to the homes to the north on Walridge Road. Schooldev incorporated no plans to connect those homes, and nothing prevented Schooldev from providing paths within its own property—the pathways did not need to be off-premises.

Statements made during the Town's planning board meeting further supports the conclusion that Schooldev did not meet its prima facie burden. During that meeting, Schooldev's counsel testified about possible conflicts with the ordinance. Everything its counsel addressed concerned the single ten-foot-wide sidewalk at the property's frontage. For biking, Schooldev's counsel asserted that the development plan was "consistent with the policy for bike ways" because it provides a multi-use path for a community currently lacking "any pedestrian or bike way facilities." That "multi-use path" is the one sidewalk to Harris Road and the only connectivity on any of the four sides of the school. Aside from that sidewalk, Schooldev's counsel argued vaguely that "[s]tem streets ... offer some connectivity to the adjacent undeveloped parcels if there is future development and the connectivity is possible." To Schooldev's counsel, "[t]he project *seeds* Harris Road with the multi-use pathway ... for a walkable and bikeable community." (Emphasis added.) Because no sidewalk currently exists from the property to Harris Road, Schooldev's counsel essentially argued its plan was better than nothing and that it "begins the connection." But that is not what the ordinance plainly requires.

***14** It is worth reiterating that ordinances are products of our political processes. Like any other legislation, a zoning ordinance "may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public." *Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325 (1968) (citing *In re Markham*, 259 N.C. 566, 131 S.E.2d 329 (1963)). It "is not a contract with the property owners of the city and confers upon them no vested right ... to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance." *Id.*, at 434, 160 S.E.2d 325 (citing *McKinney v. City of High Point*, 239 N.C. 232, 79 S.E.2d 730 (1954)). In other words, if a property owner is upset with an existing ordinance, they may engage with their local legislative body. Like with many laws, any necessary fix should be primarily legislative, not judicial.

III. Conclusion

It is worth reiterating that ordinances are products of our political processes. Like any other legislation, a zoning ordinance "may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public." *Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325 (1968) (citing *In re Markham*, 259 N.C. 566, 131 S.E.2d 329 (1963)). It "is not a contract with the property owners of the city and confers upon

them no vested right ... to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance." *Id.*, at 434, 160 S.E.2d 325 (citing *McKinney v. City of High Point*, 239 N.C. 232, 79 S.E.2d 730 (1954)). In other words, if a property owner is upset with an existing ordinance, they may engage with their local legislative body. Like with many laws, any necessary fix should be primarily legislative, not judicial.

In sum, because the ordinance is not ambiguous and because Schooldev failed to meet its burden of production, I respectfully dissent from majority's decision to reverse the judgment of the Court of Appeals.

Justice EARLS joins in this dissenting opinion.

All Citations

--- S.E.2d ----, 2024 WL 5101073

Footnotes

1 As defined by the UDO, "[a] site plan is an architectural and/or engineering drawing of proposed improvements for a specific location that depicts such elements as building footprints, driveways, parking areas, drainage, utilities, lighting, and landscaping." Town of Wake Forest UDO, § 6.2.1(D). A "major site plan" refers to permit applications that "include 100 or more residential dwelling units and to all development applications which require an Enhanced Transportation Impact Analysis." *Id.* § 15.8.2(A). A "major subdivision plan" involves permit applications requiring "divisions of land into [four] or more lots, or which require dedication of public utilities and/or public streets." *Id.* § 15.9.2(A).

2 "RD" refers to the Town's "rural holding district." A rural holding district is a district where "the principal uses of the land are restricted due to lack of available utilities, unsuitable soil types[,] or steep slopes." It is "intended for low density with the maximum density for residential developments within" the district being "1 unit per acre." The campus lot was in the Town's rural holding district.

3 The commissioner also moved to deny the site plan application for noncompliance with Standard 4. However, the superior court later ruled that petitioner presented sufficient evidence of compliance with Standard 4, and the Town did not appeal that ruling. Accordingly, this issue is not before us.

4 When petitioner filed its applications, the relevant enabling legislation was codified in Chapter 160A. In 2019, the General Assembly consolidated and recodified the land use enabling laws into Chapter 160D. This recodification has no bearing on our disposition.

5 The BOC had also concluded that petitioner's plans failed to satisfy the comprehensive plan's policy that school locations "should serve to reinforce desirable growth patterns rather than promoting sprawl." *Schooldev,* 284 N.C. App. at 437, 876 S.E.2d 607. However, because the BOC had not adopted a zoning regulation to implement this policy, the Court of Appeals majority held that the policy was "solely advisory" and thus "was not a proper basis for the [BOC] to deny the [s]ite [p]lan [a]pplication." *Id.* at 450, 876 S.E.2d 607. The Town did not seek our review of this issue.

6 In its petition for discretionary review, petitioner asked this Court to consider whether the Town had "the statutory authority to require a school to provide off-site sidewalk improvements under the power granted by N.C.G.S. § 160A-372 (now N.C.G.S. § 160D-804)." The Town's petition requested that we determine whether the decision of the Court of Appeals majority "equate[d] to a finding ... that the Town could require sidewalk improvements on land outside of the subdivision." We conclude at the end of this opinion that there is no need for us to decide these additional issues.

1 The majority offers a dictionary definition for Section 3.7.5(B)(2). But rather than define "surrounding" (the adjective in the ordinance's text), the majority defines "surround"—a verb. The difference is significant here. Using the actual word in the text, it remains the case that there is no need to state "all surrounding residential areas" because "surrounding residential areas" necessarily implies that the ordinance requires connectivity to residential areas "all around [the subdivision]." The majority's reading neither relies on the plain language nor the ordinance's purpose. *See Lanvale Properties, LLC*, 366 N.C. 142, 155–56, 731 S.E.2d 800 (2012) (rejecting the proposition that "an [alleged] lack of specificity" is fatal in light of the legislation's "clear guidance").

End of Document

264 N.C.App. 134
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
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.
Court of Appeals of North Carolina.

Mark E. FUNDERBURK, Plaintiff,

v.

CITY OF GREENSBORO, NC, Defendant.

No. COA 18-632
|
Filed: February 19, 2019

Appeal by Plaintiff from order entered 12 April 2018 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in ***166** the Court of Appeals 15 November 2018. Guilford County, No. 17CVS5607

Attorneys and Law Firms

SMITH JAMES ROWLETT & COHEN LLP, Greensboro, by Norman B. Smith, for Plaintiff-Appellant

John Roseboro, Durham, for Defendant-Appellee

Opinion

INMAN, Judge.

****1** When a landowner fails timely to appeal a notice of zoning ordinance violation to a local board of adjustment as provided in the zoning ordinance, he fails to exhaust the available administrative remedy, depriving the courts of subject matter jurisdiction to address the dispute.

Plaintiff Mark E. Funderburk ("Plaintiff") appeals from an order dismissing his claims against Defendant City of Greensboro arising from a zoning dispute because Plaintiff failed to exhaust administrative remedies. Plaintiff argues that the trial court erred because the parties entered into an enforceable agreement resolving the dispute, thereby creating a justiciable cause of action within the subject matter jurisdiction of the superior court. After careful review, we affirm the order of the trial court.

FACTUAL AND PROCEDURAL HISTORY

The record reveals the following facts:

Plaintiff owns contiguous parcels of real property ("the Property") located within Greensboro and subject to the city's zoning jurisdiction. Plaintiff and his family have operated a commercial contracting business on the Property since 1948. The Property was outside the city limits until it was annexed in 1957. Following the annexation and until January 2015, Plaintiff operated his business on the property without significant interruption. Plaintiff also maintains a house on the Property.

On 20 January 2015, following the receipt of a zoning complaint, Greensboro Zoning Enforcement Officer Jeff McClintock ("McClintock") inspected the Property. McClintock found several large tractor trailer cabs, dump trucks, and a dump truck bed that was not attached to a truck on the Property. McClintock determined that the Property was located within a residential, single-family zoning district and that Plaintiff's use violated the Greensboro Land Development Ordinance. McClintock issued and delivered a Notice of Violation to Plaintiff on 27 January 2015.

The Notice of Violation asserted that the Property was in violation of section 30-8-1 of the Greensboro Development Ordinance because "[a] trucking storage and repair business is not a permitted use in resident (R-5) zoning" and directed Plaintiff to "[c]ease business operations and remove all trucking equipment and accessory supplies." The Notice of Violation also stated that Plaintiff "may appeal this decision of the Zoning Enforcement Officer to the Board of Adjustment within thirty (30) days from the receipt of this notice.... In the absence of an appeal, the decision of the Zoning Enforcement Officer *shall be final*." (emphasis added.)

Plaintiff did not, within thirty days or at any time, appeal the Notice of Violation to the Board of Adjustment.

Over the next several months, McClintock re-inspected the Property multiple times, finding continuing zoning violations and issuing citations imposing civil penalties. Each citation noted that the Property was in violation because a trucking

storage and repair business was not a permitted use. The last of these citations was issued on 18 November 2015.

**2 On 7 July 2015, Greensboro Zoning Administrator Mike Kirkman sent a letter to Plaintiff ("the July 2015 Letter") reiterating that the Property was in violation of city ordinance, but communicating city zoning staff's decision that Plaintiff would be allowed to continue operating a commercial contracting business on the Property as a nonconforming use, subject to certain restrictions and on the condition that Plaintiff relocate large industrial size vehicles and equipment within 60 days of receipt of the letter.

Plaintiff did not remove the large vehicles and equipment from the Property or otherwise respond to the July 2015 Letter within 60 days.

In April 2016, more than a year after Plaintiff received the Notice of Violation and eight months after the July 2015 Letter, the city attorney's office sent a letter to Plaintiff ("the April 2016 Letter") noting that the continued presence of industrial scale equipment, junk, and debris on the Property was in violation of the zoning ordinance.[1] The April 2016 Letter reviewed efforts by city staff to help Plaintiff achieve compliance, including offering to help Plaintiff apply to have a nearby parcel rezoned for light industrial use in order to provide a suitable place for the storage of Plaintiff's trucks.

Plaintiff did not send a response to the April 2016 Letter but continued to engage in discussions with city zoning staff regarding the Property.

More than six months later, on 23 November 2016, the city attorney's office sent a letter to Plaintiff ("the November 2016 Letter") attempting to collect the civil penalties assessed in the citations for Plaintiff's violations of the zoning ordinance.

On 20 December 2016, counsel for Plaintiff responded to the November 2016 Letter, asserting that all issues regarding Plaintiff's use of the Property had been resolved and disputing the City's collection attempts. The letter specifically asserted that Plaintiff and city staff had reached agreement for Plaintiff to continue to store up to two vehicles, having no more than 12 wheels each, on the Property.

In March 2017, Plaintiff visited the City's Collections Department regarding the civil penalties assessed against him and asserted that the penalties were issued in error. The Collections Department staff had no authority to adjust the penalties or address the zoning issue.

In May 2017, Plaintiff filed suit in Guilford County Superior Court, seeking a declaratory judgment that he was not in violation of Greensboro's zoning ordinances and additional relief.[2]

The city filed motions to dismiss Plaintiff's complaint based on lack of subject matter jurisdiction and for summary judgment. The trial court granted the city's motions and entered an order dismissing Plaintiff's action. Plaintiff appeals.

ANALYSIS

If an effective administrative remedy exists, it is the exclusive remedy available and must be exhausted before a party may turn to the courts for relief. *See* *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). "An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Shell Island Homeowners Ass'n v. Tomlinson,* 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999).

**3 We review *de novo* the trial court's conclusions of law in an order dismissing an action for lack of subject matter jurisdiction. *Johnson v. Univ. of N. Carolina,* 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010). When employing *de novo* review, the appellate court considers the matter anew and substitutes its judgment for that of the trial court. *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009).

The legislature has created an administrative remedy in municipal zoning disputes by allowing aggrieved parties to appeal to local boards of adjustment. Section 160A-388(b1) of the General Statutes provides that zoning decisions made by municipal administrative officials may be appealed to the city board of adjustment by filing notice with the city clerk within 30 days of receipt of written notice of the decision. N.C. Gen. Stat. § 160A-388(b1) (2018). The statute provides that "[a]s used in this section, the term 'decision' includes any final and binding order, requirement, or determination." *Id.* § 160A-388(a1). A property owner who fails to appeal within 30 days of receiving a notice of violation or other zoning decision waives his right to dispute the decision before the

local board of adjustment and in court. *Grandfather Village v. Worsley,* 111 N.C. App. 686, 689, 433 S.E.2d 13, 15 (1993).

The Greensboro Land Development Ordinance is consistent with Section 160A-388(b1). Section 30-5-3 of the Ordinance provides that Notices of Violation may be appealed to the Greensboro Board of Adjustment within 30 days of receipt of notice.

Plaintiff never appealed either the 27 January 2015 Notice of Violation or the July 2015 Letter. Plaintiff's failure to exhaust his administrative remedies deprived the trial court of subject matter jurisdiction in this matter.

Rather than attempting to appeal the Notice of Violation or the assessment of civil penalties, Plaintiff disputes enforcement by the City inconsistent with the Notice. Plaintiff argues that the City's July 2015 Letter stating its decision to allow him to continue a nonconforming use including storing no more than two commercial trucks upon the Property, as well as the April 2016 letter and discussions with City staff, precluded the City's assertion that dump trucks are impermissible and bar the City's collection efforts based on the doctrine of quasi-estoppel.

Plaintiff, by failing to appeal from the Notice of Violation, waived his right to contest that his commercial use of the Property is in violation of the City's zoning ordinances. By the time the City transmitted the July Letter, Plaintiff had lost his right to appeal by waiver.

The July 2015 Letter offered a compromise independent of Greensboro's enforcement rights against Plaintiff: if Plaintiff would remove the specified industrial vehicles – *i.e.*, the dump trucks – from the Property within 60 days, Greensboro would allow the nonconforming commercial business to continue. More than eight months later, when the city attorney's office sent the April 2016 Letter, Plaintiff still had not removed all "industrial scale equipment." Because Plaintiff failed to appeal the Notice of Violation to the Board of Adjustment, he waived his right to dispute the decision – including the classification of his dump trucks as violating the zoning ordinance – in the courts.

****4** Plaintiff also argues that the doctrine of quasi-estoppel precluded the trial court from dismissing his claim. Plaintiff contends that city staff allowed him to store "commercial" scale dump trucks, as opposed to "industrial" scale dump trucks, on the Property. Plaintiff's argument is without merit because he waived his right to appeal the Notice of Violation prior to any further communications from city staff and because the trial court made no finding that the parties had agreed to distinguish between "industrial" and "commercial" vehicles.

The July 2015 Letter specified that Plaintiff was violating the zoning ordinance because "there are currently a number of large industrial size vehicles (dump trucks, large semis, and truck trailers, etc.) being stored at this location[.]" The April 2016 Letter again described "prohibited industrial scale vehicles (dump trucks, large tractor trailers)" that Plaintiff had relocated from the Property to another prohibited location. The correspondence consistently asserted that dump truck storage violated the zoning ordinance and did not fall within the nonconforming use that city staff offered to allow Plaintiff to continue on the Property.

The doctrine of quasi-estoppel applies when an opposing party has taken clearly inconsistent positions. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870, 888 (2004). In this case, as detailed above, Greensboro took a consistent position regarding the storage of dump trucks in all notices, citations, and correspondence with Plaintiff. Plaintiff's quasi-estoppel argument therefore fails.

By failing to timely appeal the Notice of Violation or any other decision by City administrative staff to the Board of Adjustment, Plaintiff failed to exhaust his administrative remedies and deprived the superior court of subject matter jurisdiction regarding this matter.

AFFIRMED.

Report per Rule 30(e).

Judges TYSON and ARROWOOD concur.

All Citations

264 N.C.App. 134, 823 S.E.2d 165 (Table), 2019 WL 661527

Footnotes

1 The April 2016 Letter noted that although Plaintiff had removed industrial scale vehicles from the Property, he had relocated the vehicles to other properties in Greensboro where their storage was prohibited.

2 Plaintiff's complaint also asserted claims for tortious interference with employment and for inverse condemnation. Plaintiff does not appeal the trial court's dismissal of those claims.

216 N.C.App. 182
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

BOJANGLES' RESTAURANTS, INC., Plaintiff
v.
The TOWN OF PINEVILLE, Defendant.

No. COA11–202.
|
Oct. 4, 2011.

***1** Appeal by Plaintiff from Order entered 22 November 2010 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 August 2011.

Attorneys and Law Firms

K & L Gates LLP, by John H. Carmichael, for Plaintiff-appellant.

Currin & Currin, Attorneys at Law, by Robin T. Currin, for Defendant-appellee.

Opinion

HUNTER, JR., ROBERT N., Judge.

Bojangles' Restaurants, Inc. ("Plaintiff") ("Bojangles") appeals the trial court's Order affirming the decision of the Town of Pineville ("Pineville") Board of Adjustment (the "Board"), which cited Plaintiff for violations of the Pineville Zoning Ordinance (the "Ordinance"). Plaintiff contends the trial court erred in determining that the Board's decision was not based upon errors of law. Plaintiff further argues the trial court erred in determining that the Board's decision was supported by competent, material, and substantial evidence. We disagree and therefore affirm the trial court's order.

I. Factual and Procedural History

This dispute arises out of the issuance of a notice of violation to Bojangles, requiring Bojangles to remove a nonconforming sign abutting an awning in violation of the Ordinance. Bojangles leases approximately .86 acres of property located at 8720 Pineville–Matthews Road in Pineville (the "Property"). The Property is zoned in the B–4 district and contains a single building from which Bojangles operates a fast food restaurant (the "Restaurant") with a drive-through window.

Signage in the B–4 zoning district is regulated by Section 5.4.4 of the Ordinance. Under that provision, a business may have a wall sign on the front of the building that totals two square feet for each linear foot of the building's wall frontage. Section 5.4.4 also allows one ground or monument sign that cannot exceed fifty square feet, cannot be over seven feet tall, and cannot exceed fifty percent of the business's total allowable signage. The combined square footage of all signs on a single business in the B–4 zoning district cannot exceed the allowable wall signage or 300 feet, whichever is smaller.

The width of the Bojangles Restaurant building façade is 35.1 square feet. Therefore, under Section 5.4.4 of the Ordinance, Bojangles is entitled to seventy square feet of signage for the front of the Restaurant. Bojangles has a pole sign, measuring 8 feet 6 inches by 11 feet and containing a total of 93.5 square feet of signage (the "Pole Sign"). Bojangles also has a wall sign, measuring 4 feet 9 inches by 14 feet 7 inches and containing a total of 70 square feet of signage. Thus, Bojangles currently has 163.5 square feet of combined signage, exceeding the maximum allotment of signage by 93.5 square feet.

The wall sign is at issue in this case. It is undisputed by the parties that the wall sign does not comply with the sign regulations in the Ordinance. However, the Ordinance allows a sign which existed before the Ordinance's effective date[1] to remain as a legally permitted nonconforming sign, so long as the sign complies with Section 2.8 of the Ordinance, which is entitled "Nonconformities." Both Pineville and Bojangles considered the attached wall sign to be a legal nonconforming sign under the Ordinance.

***2** The wall sign was initially installed on the Restaurant in 1993 and was attached to the building by two metal poles that extended through a fabric awning and connected to the sign. In October 2009, Bojangles decided to replace the fabric awning. To do so, Bojangles removed the wall sign from the two poles, removed the fabric awning, and installed a metal

awning.[2] Once the metal awning was in place, Bojangles re-attached the wall sign in November 2009. The two metal poles were not removed or altered in connection with this entire process. Furthermore, the wall sign itself was not altered, converted, or changed in any manner during this process. The wall sign that was reattached in November 2009 is the same sign that was originally installed in 1993.

Prior to the removal of the wall sign, Pineville zoning officials informed Bojangles' local management several times that if the wall sign was removed, it could not be put back up under the terms of the Ordinance. Despite the warnings, Bojangles removed the wall sign in October 2009, stored it off-site, and returned it unchanged to its original spot in November 2009.

On 1 December 2009, Town Planner Travis Morgan issued a notice of violation to Bojangles for replacing the wall sign in violation of the Ordinance. The notice provides in pertinent part that Bojangles

> re-installed a non-conforming sign on the front awning despite being advised numerous times not to do so through both a corporate representative and the sign contractor Mr. David Stevens. Our zoning ordinance does not permit non-conforming signage to be replaced once it has been enlarged, altered, or removed in any way.

According to section 2.8.8(A) of the Ordinance, "[w]henever any nonconforming sign or part thereof (including the copy) is altered, *replaced[ ],* converted or changed, the entire sign must immediately comply with the provisions of this Chapter." Pineville Zoning Ordinance § 2.8.8(A) (emphasis added).[3] Pineville instructed Bojangles to remove the wall sign pursuant to Section 2.8 .8(A) of the Ordinance.

On 11 December 2009, Bojangles timely appealed the notice of violation to the Board, claiming that its actions did not violate the Ordinance because it did not alter, replace, convert, or change the wall sign within the meaning of the Ordinance. Following a hearing on the matter on 11 February 2010, the Board found that Bojangles had replaced the wall sign within the meaning of Section 2 .8.8(A) of the Ordinance.

On 12 March 2010, Petitioner filed for *writ of certiorari* to the Mecklenburg County Superior Court pursuant to N.C. Gen.Stat. § 160A–388. In its petition, Bojangles alleged the Board's determination that Bojangles replaced the wall sign within the meaning of the Ordinance was an error of law subject to *de novo* review and was not supported by substantial, competent evidence. Bojangles further alleged that the Board's determination that Bojangles, as a result of its conduct with respect to the wall sign, is required to bring the wall sign into compliance with the Ordinance is an error of law and arbitrary and capricious. Judge Boner affirmed the Board's determination that Bojangles had replaced the wall sign in violation of the Ordinance in an Order filed 22 November 2010. In its Order, the trial court concluded: the decision was not based upon errors of law; Pineville followed the procedures specified by law; Bojangles' due process rights were protected; the decision was supported by competent, material, and substantial evidence in the whole record; and the decision was not arbitrary and capricious. Bojangles timely entered notice of appeal from this Order.

II. Jurisdiction and Standard of Review

***3** Jurisdiction in this Court is proper pursuant to N.C. Gen.Stat. § 7A–27(b) (2009) (stating a right of appeal lies with this Court from the final judgment of a superior court "entered upon review of a decision of an administrative agency"). "[T]his Court examines the trial court's order for error[s] of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Turik v. Town of Surf City,* 182 N.C.App. 427, 429, 642 S.E.2d 251, 253 (2007) (second alteration in original) (quoting *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjustment,* 148 N.C.App. 52, 55, 557 S.E.2d 631, 634 (2001)). If a petitioner appeals an administrative decision "on the basis of an error of law, the trial court applies *de novo* review; if the petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test." *Blue Ridge Co. v. Town of Pineville,* 188 N.C.App. 466, 469, 655 S.E.2d 843, 845–46, *disc. review denied,* 362 N.C. 679, 669 S.E.2d 742 (2008). "[A]n appellate court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjustment,* 146 N.C.App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting) (citation omitted), *rev'd for reasons stated in the dissent,* 355 N.C. 269, 559 S.E.2d 547 (2002).

III. Analysis

A. The Board's Interpretation of the Ordinance

Bojangles contends the trial court made an error of law in denying the writ because the wall sign was not "replaced" within the plain meaning of the Ordinance. We disagree.

The dispositive issue in this case is the meaning of "replaced" under the terms of Section 2.8.8(A) of the Ordinance. The Ordinance provides in pertinent part that: "[w]henever any nonconforming sign or part thereof (including the copy) is altered, *replaced[ ],* converted or changed, the entire sign must immediately comply with the provisions of this Chapter." Pineville Zoning Ordinance § 2.8.8(A) (emphasis added). **[R. 35]** Thus, if Bojangles is deemed to have "replaced" the nonconforming wall sign under the Ordinance, it will have to remove the wall sign in its entirety. Unfortunately, the Ordinance does not define the term "replaced."

In interpreting a term of an ordinance, " '[t]he basic rule is to ascertain and effectuate the intent of the legislative body.' " *Capricorn Equity Corp. v. Town of Chapel Hill,* 334 N.C. 132, 138, 431 S.E.2d 183, 187 (1993) (quoting *Concrete Co. v. Board of Commissioners,* 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)) (alteration in original). "Intent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance ." *Id.* at 138, 431 S.E.2d at 188.

***4** Applying this principle, we first turn to the language of the Ordinance. "Zoning restrictions should be interpreted according to the language used in the ordinance." *Jirtle v. Bd. of Adjustment for the Town of Biscoe,* 175 N.C.App. 178, 180, 622 S.E.2d 713, 715 (2005). Section 1.6.1 of the Ordinance is entitled "Meaning and Intent" and states, "All provisions, terms, phases [sic] and expressions contained in this Ordinance shall be construed according to this Ordinance's stated purpose and intent." Pineville Zoning Ordinance § 1.6.1. Section 1.6.7 of the Ordinance applies to the interpretation of Ordinance terms and states, "Words and phases [sic] not otherwise defined in this Ordinance shall be construed according to the common and approved usage of the language." Pineville Zoning Ordinance § 1.6.7. *See also Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach,* 205 N.C.App. 65, ——, 695 S.E.2d 456, 463 (2010) (An undefined term in an ordinance should be given " 'its plain and ordinary meaning.' ") (citation omitted). To determine the plain and ordinary meaning of a term in a zoning ordinance, courts often refer to definitions from well-known dictionaries. *MMR Holdings, LLC v. City of Charlotte,* 174 N.C.App. 540, 543 n. 2, 621 S.E.2d 210, 212 n. 2 (2005).

The term "replaced" is not defined in the Ordinance. Thus, in determining its plain and ordinary meaning, both parties refer the Court to Merriam–Webster dictionary definitions that support *each* of their positions with respect to the meaning of "replaced" in the context of Section 2.8.8(A) of the Ordinance. Bojangles contends that the proper definition of "replaced" is "to put something new in the place of," such as replacing a sign with a new sign, or "to take the place of." Meanwhile, Pineville contends that the proper definition of "replaced" is "to restore to a former place or position," such as replacing cards back to their original file. Because "replaced" has alternative definitions supporting both Bojangles and Pineville, we must determine which specific meaning applies in the context of Section 2 .8.8(A) of the Ordinance.[4]

Bojangles correctly argues that this Court may examine how "replaced" is used in other portions of the Ordinance to determine its meaning. A court " 'does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia,* giving effect, if possible, to every provision.' " *MMR Holdings,* 174 N.C.App. at 545, 621 S.E.2d at 213 (quoting *Rhyne v. K–Mart Corp.,* 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004)). However, the difficulty lies in the fact that "replaced" is used in the Ordinance under both Bojangles' and Pineville's definitions of the term. Thus, this analysis does not provide much clarity.

The meaning of a word may also be derived by " 'reference to the meaning of words with which it is associated.' " *H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Education,* 122 N.C.App. 49, 54, 468 S.E.2d 517, 521 (1996) (quoting *Morecock v. Hood,* 202 N.C. 321, 323, 162 S.E. 730, 731 (1932)). " 'A word of a statute may not be interpreted out of context but must be [read] as ... part of the composite whole....' " *Id.* (quoting *Myrtle Desk Co. v. Clayton, Comm'r of Revenue,* 8 N.C.App. 452, 456, 174 S.E.2d 619, 622 (1970)).

***5** Section 2.8.8(A) of the Ordinance groups "replaced" with three other words.[5] Bojangles argues that these words, "altered," "converted," and "changed," mean substantially the same thing and so its interpretation of "replaced" is consistent with the other terms in Section 2.8.8(A) of the Ordinance because its interpretation also involves an alteration, conversion, or change to the Restaurant's signage. Bojangles argues it did not violate the Ordinance because

Bojangles removed the wall sign without changing or altering it in any way.

However, Pineville correctly asserts that "[t]he presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms." *Domestic Elec. Serv., Inc. v. City of Rocky Mount,* 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974). As Pineville points out, Section 2.8.8(A) says, "altered, replaced[ ], converted *or* changed." (Emphasis added). The word "or" makes clear that "replaced" is independent and separate from "altered," "converted," and "changed." Thus, the term "replaced" must be construed as meaning something different than "altered," "converted," or "changed." Under Pineville's definition of "replaced," the word "adds something which would not otherwise be included in its terms." Pineville submits, and we agree, that a sign can be removed and "replaced" with no change, conversion, or alteration whatsoever. Thus, under the presumption that no part of a statute is mere surplusage, Pineville's interpretation of "replaced" is proper.

Next, we turn to the spirit and goal of the Ordinance. The "General Intent" of the "NONCONFORMITIES" Section set forth at Section 2.8.1 states:

> Nonconforming uses, which are uses of buildings or of land existing at the time of the adoption of this Ordinance, or any amendment thereto but which do not comply with the provisions of this Ordinance, are declared by this Ordinance to be incompatible with permitted uses in the various districts. The intent of this Article is to permit the continued use of a structure, or portion thereof, or of the use of land legally existing prior to the effective date of this Ordinance or any amendment subsequent thereto, *but not to encourage its survival.* Such nonconformities shall not be expanded or extended or changed in any manner, except as provided for in this Article.

Pineville Zoning Ordinance § 2.8.1 (emphasis added). **[R. 97]** This intent not to encourage the nonconforming use's survival is consistent with this State's policy that zoning ordinances are to be "construed against indefinite continuation of a nonconforming use" and that nonconforming uses are "not favored." *Jirtle,* 175 N.C.App. at 181, 622 S.E.2d at 715.[6]

Bojangles argues its definition is consistent with the intent of the Ordinance because allowing a new sign to replace an existing nonconforming sign could permit the perpetual existence of a nonconforming sign, but putting the same exact sign back in its place does not extend the life of the sign. Bojangles fails, however, to recognize that even the replacement of the wall sign with the exact same wall sign extends its life because its life ended once it was removed. Therefore, the action of putting the wall sign back in its place effectively gives the sign new life, conflicting with the Board's intent in drafting the Ordinance as well as with this State's policy disfavoring nonconforming uses.

***6** Bojangles further argues that applying Pineville's interpretation will result in absurd or illogical results with regard to the interpretation of the entire Ordinance. *See Ayers v. Bd. of Adjustment for the Town of Robersonville,* 113 N.C.App. 528, 531, 439 S.E.2d 199, 201 (1994) (It is a principle of statutory construction that a court "avoid interpretations that create absurd or illogical results"). Bojangles asserts Pineville's interpretation is illogical because it allows maintenance, repairs, and rebuilding of nonconforming signs under Sections 2.8.8(A) and (B), yet does not allow the temporary removal of a nonconforming sign for the purpose of performing building maintenance.

However, the "ordinary maintenance and repairs" permitted by the Board include actions like polishing a sign, not replacing an awning that is not even a part of the sign. Additionally, Pineville stated at oral argument that any maintenance that requires removal and replacement of a sign is not permitted under the Ordinance, even under this exception. Pineville also stated at oral argument that the section allowing the rebuilding of nonconforming signs applies only in extreme cases, such as destruction due to natural events like a hurricane. We agree with Pineville that these exceptions permitting changes to nonconforming signs are few and narrow, and, as a result, there is nothing illogical or absurd about Pineville's interpretation of "replaced" under Section 2.8.8(A) of the Ordinance.

Therefore, based on our analysis of the language, spirit, and goal of the Ordinance, we hold the Board's intent supports Pineville's definition of "replaced" to mean "to restore to a former place or position." Thus, we conclude that Bojangles did replace the wall sign and is therefore in violation of the Ordinance.

B. The Board's Findings of Fact

Bojangles next contends the trial court erred in determining that the Board's decision to affirm the notice of violation was supported by competent, material, and substantial evidence. We disagree.

In making its findings of fact, the Board is required "to state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision." *Deffet Rentals, Inc. v. City of Burlington,* 27 N.C.App. 361, 365, 219 S.E.2d 223, 226–27 (1975). "Findings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which this Court can review the Board's decision." *Crist v. City of Jacksonville,* 131 N.C.App. 404, 405, 507 S.E.2d 899, 900 (1998).

Under whole record review, "the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency." *Bellsouth Carolinas PCS, L.P. v. Henderson Cty. Zoning Bd. of Adjustment,* 174 N.C.App. 574, 576, 621 S.E.2d 270, 272 (2005). The trial court's review is limited to determining " 'whether the Board's findings are supported by substantial evidence contained in the whole record.' " *Malloy v. Zoning Bd. of Adjustment of City of Asheville,* 155 N.C.App. 628, 630, 573 S.E.2d 760, 762 (2002) (quoting *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.,* 132 N.C.App. 465, 468, 513 S.E.2d 70, 73 (1999)).

***7** Upon our review of the whole record in this case, we find substantial evidence to support the Board's findings of fact. The record of the Board's findings of fact is based on minutes to the Board's 11 February 2010 meeting. These minutes at least establish that in October 2009 Bojangles removed the wall sign and placed it in storage while the underlying awning was changed from fabric to metal. Thereafter, Bojangles put the wall sign back in its place once the metal awning was installed. Thus, we conclude that competent, material, and substantial evidence supported the Superior Court's decision to affirm the Board's decision.

IV. Conclusion

For the foregoing reasons, the trial court Order is

Affirmed.

Judges McGEE and ELMORE concur.
Report per Rule 30(e).

All Citations

216 N.C.App. 182, 716 S.E.2d 441 (Table), 2011 WL 4553145

Footnotes

1 We were unable to locate the effective date of the Ordinance either in the record or within the Ordinance, however, we do not address this issue because the parties did not raise it as a concern.

2 Bojangles did not make clear in its brief or during oral argument whether this was the only method to remove the fabric awning.

3 Section 2.8.8(A) permits ordinary maintenance and repairs to a nonconforming sign, and Section 2.8.8(B) permits rebuilding up to forty-nine percent of a nonconforming sign that has been damaged or destroyed. However, neither exception applies in this case.

4 Neither party submits that "replaced" could mean both definitions in the context of the Ordinance, and, thus, we do not address this possibility.

5 Section 2. 8. 8(A) again provides: "[w]henever any nonconforming sign or part thereof (including the copy) is altered, *replaced [ ],* converted or changed, the entire sign must immediately comply with the provisions of this Chapter." Pineville Zoning Ordinance § 2.8.8(A) (emphasis added).

6 Bojangles urges this Court to follow the policy that a zoning ordinance "is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use." *See In re Application of Rea Constr. Co.,* 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968). As discussed, however, there is clear

precedent disfavoring nonconforming uses, and, whenever there is general and specific policy applicable to a situation, the more specific policy applies.

End of Document

264 N.C.App. 641
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
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.
Court of Appeals of North Carolina.

TUCKER CHASE, LLC, Petitioner,

v.

TOWN OF MIDLAND, a North Carolina body politic and corporate entity, and The Midland Board of Adjustment, a North Carolina body politic and corporate entity, Respondents.

No. COA18-847
|
Filed: March 19, 2019

Appeal by petitioner from order entered 19 March 2018 by Judge Joseph N. Crosswhite in Cabarrus County Superior Court. Heard in the Court of Appeals 13 February 2019. Cabarrus County, No. 17 CVS 1590

Attorneys and Law Firms

Scarbrough & Scarbrough, PLLC, Concord, by James E. Scarbrough and Madeline J. Trilling, for petitioner.

Parker Poe Adams & Bernstein LLP, by Anthony Fox, Charlotte, and E. Bahati Mutisya, Raleigh, for respondents.

Opinion

ARROWOOD, Judge.

***1** Tucker Chase, LLC ("Tucker Chase" or "petitioner") appeals from an order affirming the Midland Board of Adjustment's decision. For the reasons stated herein, we affirm.

I. Background

The Town of Midland ("Midland")'s Planning and Zoning Board voted to approve petitioner's project, the Tucker Chase subdivision, on 1 June 2004. The subdivision was to be developed in accordance with six plats recorded by petitioner. The plats include road maintenance certifications providing that petitioner, or a successor in interest, will maintain the subdivision's roads according to "the standards set forth by the North Carolina Department of Transportation" ("DOT") until the respective government agency accepts the responsibility. Neither Midland nor the DOT ever accepted this obligation.

At some point after petitioner recorded the fifth plat in 2013, but before the sixth plat was recorded in 2016, Jupiter Land, LLC ("Jupiter Land") purchased the remaining undeveloped land in the Tucker Chase subdivision from petitioner. Pursuant to the sales agreement, petitioner retained a buy-back agreement from Jupiter Land, allowing petitioner to complete the construction of the residential portion of the subdivision that remained undeveloped.

In 2014, Midland began to receive complaints from the subdivision's residents that the subdivision's streets were in poor condition. Midland investigated, and agreed the streets "were in poor condition" and determined they "were not being maintained as required by the [Midland Development Ordinance]" (the "development ordinance"). Midland notified petitioner of its findings. Petitioner proposed a plan to repair the streets, but Midland's planning and zoning administrator rejected the plan as inadequate. Petitioner did not propose another plan, and made no repairs.

The residents of the subdivision continued to file complaints about the condition of the streets. In June 2016, a town engineer reported the streets remained in poor condition, including cracking in the curbs and pavement, sidewalk deterioration and shrinking, and potholes. Midland notified petitioner of this finding, and also that it had not maintained the required bonds or irrevocable letters of credit required for guaranties in lieu of construction. Although petitioner submitted another proposal for repairs on 2 September 2016, proposing to make repairs to streets as lots within the subdivision sold, Midland found this proposal unacceptable.

On 14 October 2016, the planning and zoning administrator issued a notice of violation ("NOV") to petitioner pursuant to Article 23, Section 23.5 of the development ordinance. The NOV notified petitioner that it was in violation of the road compliance certifications contained within the plats, and Article 16, Sections 16.1 and 16.2 of the development

ordinance because of the inadequate condition of the subdivision's streets. The NOV requested petitioner contact the planning and zoning administrator with a plan to remedy the violations by 21 October 2016, and cautioned that, if corrective action had not begun by 21 November 2016 and completed within three months thereafter, Midland planned to pursue any or all available remedies to compel petitioner's compliance.

***2** Petitioner appealed to the Board of Adjustment (the "Board"), arguing Midland should have accepted one of its previously proposed plans to repair the roads, and that it was improper for the town to apply its current development ordinance when the streets were platted before that ordinance was adopted. The Board held quasi-judicial hearings on the matter on 15 December 2016, 24 January 2017, and 28 February 2017, and affirmed the NOV pursuant to a decision entered on 25 April 2017.

Petitioner appealed the Board's decision to Cabarrus County Superior Court on 25 May 2017. The court issued a *writ of certiorari* that same day. On 13 November 2017, Jupiter Land filed a motion to intervene in the appeal. Petitioner moved to supplement the record with a 2004 consent agreement between petitioner and Cabarrus County on 4 December 2017. The matter came on for hearing before the Honorable Joseph N. Crosswhite on 11 December 2017 in Cabarrus County Superior Court.

On 19 March 2018, the court entered orders granting Jupiter Land's motion to intervene and petitioner's motion to supplement the record, and affirming the Board's decision.

Petitioner appeals.

II. Discussion

Petitioner argues the superior court erred because it failed: (1) to identify the standards of review applied to each issue raised in the petition for *writ of certiorari*; (2) to determine the Board violated petitioner's substantive and procedural due process rights; (3) to determine Midland's requirements for performance guaranties exceeded statutory authority; and (4) to conclude the Board's decision was not supported by competent, material, and substantial evidence, and was arbitrary.

A. Standards of Review

First, petitioner argues the superior court's order is erroneous as a matter of law because it failed to properly identify the standards of review the court applied to each of the issues raised in its petition for *writ of certiorari*.

"On review of a superior court order regarding a board's decision, this Court examines the trial court's order for error[s] of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Turik v. Town of Surf City*, 182 N.C. App. 427, 429, 642 S.E.2d 251, 253 (2007) (citation and internal quotation marks omitted) (alteration in original).

In accord with N.C. Gen. Stat. § 160A-393(k) (2017), a superior court reviewing a decision from a Board of Adjustment sits as an appellate court, not as a trier of facts, and should:

> (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Turik, 182 N.C. App. at 430, 642 S.E.2d at 253 (citation and internal quotation marks omitted). A "petitioner's asserted errors dictate the scope of judicial review." *NCJS, LLC v. City of Charlotte*, ___ N.C. App. ____, ____, 803 S.E.2d 684, 688 (2017).

When a petitioner alleges an error of law, the superior court conducts *de novo* review. *Turik*, 182 N.C. App. at 430, 642 S.E.2d at 253. "Under a *de novo* review, the superior court considers the matter anew and freely substitutes its own judgment for the agency's judgment." *Id.* (citation and internal quotation marks omitted). However, if a petitioner contends a board's decision was not supported by evidence or was arbitrary or capricious, the reviewing court applies the whole record test. *Id.* To conduct a whole record review, the "[c]ourt is to inspect all of the competent 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 adequately supporting a particular conclusion." *Id.* (citations and internal quotation marks omitted).

***3** [T]he standards are to be applied separately to discrete issues, and the reviewing superior court must identify which standard(s) it applied to which issues. To secure meaningful appellate review, the trial court ... must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

NCJS, LLC, —— N.C. App. at ——, 803 S.E.2d at 689 (alteration, citations and internal quotation marks omitted).

Here, petitioner's petition raised the following issues:

3. In view of the entire record, the Board's decision to affirm the administrative decision was *unsupported by the competent, substantial evidence* and was *arbitrary and capricious*.

4. The Board *did not follow proper procedure* and the Board's decision was *affected by error of law*....

4. [*sic*] The Board acted in *excess of statutory authority* and in violation of *substantive and procedural due process*....[1]

5. The following conclusions of law are not supported by adequate findings of fact:

   i. Conclusions nos. 5 and 6 for the reason that the findings do not support them and the Town required a bond that contained an automatic renewal provision and such a requirement *violates statutory law*;

   ii. Conclusion no. 3 for the reason that the streets were certified and accepted as being constructed to NCDOT standards;

   iii. Conclusions nos. 2, 3, 4, 5, 6, and 7[.]

(Emphasis added). The first paragraph (4) included three sub-issues, all relating to findings of fact. The second paragraph (4) also included sub-issues, each relating to whether the Board applied the ordinance in excess of statutory authority and violated petitioner's substantive and procedural due process rights.

In identifying the standard of review applied to each of these issues, the superior court's order provides:

1. Because this Court has jurisdiction by Writ of Certiorari, it sits as an appellate court to review the Board's quasi-judicial Decision. This Court reviewed the Board's decision *de novo* for procedural violations, due process violations, and other errors of law. This Court used "whole record" review to determine whether the Boards Decision was supported by competent material and substantial evidence and whether the Board's Decision was arbitrary or capricious.

2. Applying the *de novo standard of review*, the rights of Petitioner have not been prejudiced because the findings, inferences, conclusions and decisions contained within the Board's Decision are not: (a) in *violation of any constitutional provisions*, including those protecting *substantive and procedural due process rights*, (b) in *excess of statutory authority* conferred upon the Board and the Town by ordinance, (c) *inconsistent with the applicable procedures* specified in the Midland Development Ordinance and statutes, or (d) *affected by any other error of law*.

3. Applying the *whole record standard of review*, the rights of Petitioner have not been prejudiced because the findings, inferences, conclusions, and decisions contained within the Board's Decision are *supported by competent, material, and substantial evidence* in the whole record. Thus, the Board's Decision: (i) affirming the October 14, 2016 NOV issued to Petitioner by the Town, and (ii) determining that Petitioner failed to comply with the requirements of the Midland Development Ordinance by inadequately constructing and maintaining the streets within the Tucker Chase Subdivision and by not maintaining the required performance guarantees was not *arbitrary or capricious*.

***4** (Emphasis added). Petitioner only discusses paragraph (1) of the order in its brief, and maintains that this paragraph alone is insufficient to secure meaningful appellate review. Thus, petitioner fails to consider paragraphs (2) and (3), and how these portions of the order address the issues as raised in the petition for *writ of certiorari*. Although each sub-issue is not specifically listed in the order's discussion of the standards of review applied by the superior court, the court correctly identified which standard of review applied to each of the six statutory issues as addressed by the petition to allow for meaningful appellate review. Accordingly, we hold petitioner's first argument is without merit.

B. Substantive and Procedural Due Process Rights

Next, we consider petitioner's argument that the superior court's order is erroneous as a matter of law and should be reversed because it did not find that the Board's decision violated petitioner's substantive and procedural due process rights by: (1) entering its decision without Jupiter Land as a party; (2) applying the current development ordinance instead of the 2001 version; (3) finding the NOV gave adequate notice of the violations; (4) denying petitioner the opportunity to present evidence related to the consent agreement; (5) failing to determine contested matters; (6) the Chairman of the Board failing to summarize the evidence presented at the hearings; (7) rendering its decision more than thirty days after the time the public hearing closed; and (8) failing to include a summary of the evidence introduced by petitioner in the decision.

1. Jupiter Land

First, we consider petitioner's argument that Jupiter Land's absence as a party during the hearings before the Board violated petitioner's due process rights. However, the record contains no indication petitioner raised this argument before the Board or the superior court.

In reviewing the decision of a Board of Adjustment, a superior court sits in the "posture of an appellate court" and "may not consider a matter not addressed by the Board[.]" *Tate Terrace Realty Inv'rs, Inc. v. Currituck Cty.*, 127 N.C. App. 212, 224, 488 S.E.2d 845, 852 (1997) (citations and internal quotation marks omitted). Similarly, our court "through our derivative appellate jurisdiction" may not "consider matters not raised below." *Id.* (citations omitted). Therefore, we decline to consider this argument because it is outside the scope of our review. Plaintiff's argument is dismissed.

2. Application of the Current Ordinance

Next, petitioner contends the Board violated its due process rights by ignoring its vested right to develop the subdivision in accordance with the 2001 version of the development ordinance.

Our Court previously determined, in an unpublished decision, that the application of an ordinance to a development built before the effective date of the ordinance is not improper because there is "an ongoing obligation to maintain ... subdivision streets pursuant to the ordinance." *In re Harrell v. Midland Bd. of Adjustment*, —— N.C. App. ——, ——, 796 S.E.2d. 340, ——, 2016 WL 7984233, at *5 (2016) (unpublished). Petitioner argues the facts before this court are distinguishable from *In re Harrell* because the consent agreement entered into by petitioner and Cabarrus County provides that present and future developers of the Tucker Chase subdivision have "the vested right to have subdivision plats approved and to develop and construct the Project in accordance with the ... land use plans, laws and regulations in existence and effective on 6-01-04[.]" We disagree. This section of the consent agreement also provides that it is "[s]ubject to Section 2.2.2" of the consent agreement, which reserves legislative powers as follows:

> ***5** Future Changes of Laws and Plans; Compelling Countervailing Public Interest. Nothing in this Agreement shall limit the future exercise of the police power of the County in enacting zoning, subdivision, development, growth management, platting, environmental, open space, transportation and other land use plans, policies, *ordinances* and regulations after the date of this Agreement. ...

(Emphasis added). Therefore, petitioner was subject to ordinances the town enacted after 2004, and, just as in *In re Harrell*, petitioner had an ongoing obligation to maintain the subdivision's streets pursuant to current ordinances prior to assumption of maintenance by the town or DOT.

Accordingly, we hold petitioner's argument that the 2001 ordinance controlled the development and maintenance of the subdivision's streets to be without merit. We also note that, regardless of petitioner's ongoing obligation to maintain the streets pursuant to the ordinance, the petitioner also had an "ongoing obligation" to properly construct and maintain the streets through the plats recording the subdivision, which contain road maintenance certifications providing that petitioner, or a successor in interest, will maintain the subdivision's roads according to "the standards set forth by the [DOT]" until a government agency accepts the responsibility.

3. Notice

Petitioner argues the Board erred by failing to determine Midland did not provide adequate notice of violations, violating petitioner's right to procedural due process and causing the Board to enter a decision in excess of its authority. We disagree.

The ordinance requires that a NOV include: (1) the land, building, sign, structure, or use in violation; (2) the nature of violation and sections of ordinance violated; (3) the measures necessary to remedy the violation; and (4) an opportunity to cure the violation within a prescribed period of time. Midland Development Ordinance § 23.5-1. Midland's NOV to petitioner met these requirements, notifying petitioner: (1) the Tucker Chase subdivision's streets were in violation; (2) the streets were not properly constructed or maintained in accord with Midland or the DOT's standards, specifying the streets were in violation of Article 16, Sections 16.1, 16.2, and subsections 16.2-6 and 16-2.7 of the ordinance; (3) corrective measures would include meeting with Midland to form a plan to repair the streets, and the execution of that plan; (4) petitioner was given until 21 November 2016 to take action, and three months from that date to complete the project. This information provided petitioner with adequate notice of the violations. We are unconvinced by petitioner's unsupported claim that the development ordinance requires greater specificity.

We note petitioner's specific contention that the NOV failed to give notice that performance bonds would be at issue before the Board. We disagree this issue was not within the scope of matters before the Board. Performance guaranties are addressed under Section 16.1 of the town's ordinance, which the NOV identified as a section of the ordinance at issue. Additionally, the town notified petitioner by letter in September 2016 that it had not maintained the required bonds or irrevocable letters of credit required for guaranties in lieu of construction. The town referenced this letter in the NOV, and also included this letter on its exhibit list, which was shared with petitioner prior to the hearing before the Board. Therefore, petitioner had sufficient notice that performance bonds were within the scope of matters before the Board.

4. Additional Procedural Due Process Arguments

***6** Petitioner argues the Board failed to follow its own rules of procedure, thereby violating petitioner's due process rights, in five additional ways: (1) denying petitioner the opportunity to present evidence relating to the consent agreement; (2) failing to decide contested matters; (3) failing to require the Board's Chairman to summarize the evidence; (4) failing to render its decision within thirty days; and (5) failing to summarize the evidence introduced by petitioner in the decision.

The first two arguments involve the consent agreement. First, petitioner argues it was deprived of due process when it did not have the opportunity to present evidence relating to the agreement, and again when the Board failed to decide contested matters, specifically, "the applicable law, the vested rights provision of the Consent Agreement, the construction and maintenance standards to which the Subdivision is subject, and other similar matters. ..."

Even assuming *arguendo* it was error to exclude the consent agreement and to decide its impact on the applicable law, for the reasons discussed *supra*, the admission of the agreement would not have changed the outcome of the case, or the applicable law. Therefore, petitioner was not prejudiced by the exclusion of this evidence, and this allegation of error cannot constitute reversible error. *See* Forsyth Cty. v. Shelton, 74 N.C. App. 674, 678, 329 S.E.2d 730, 734 (1985) ("The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred.") (citation omitted).

The remaining arguments similarly involve non-prejudicial procedural issues. First, petitioner argues that, although the Chairman of the Board permitted both parties to summarize the evidence, the Board erred when the Board's Chairman failed to summarize the evidence at the close of the hearing. Despite this allegation, petitioner fails to demonstrate how this alleged error, to which petitioner did not object, constitutes prejudicial error. Petitioner also fails to show how its next allegation of error, that the Board did not render its written decision within thirty days from the close of the hearing, prejudiced it, as the Board announced its decision, and the underlying reasoning, immediately following the hearing. Nor does petitioner show how it was prejudiced by the purported failure of the Board to summarize certain evidence introduced by petitioner in the decision.

Therefore, even assuming *arguendo* that each alleged procedural deficiency constitutes error, petitioner has failed to show prejudice. Accordingly, we decline to hold these errors constitute reversible error. *See* Richardson v. Union Cty. Bd. of Adjustment, 136 N.C. App. 134, 142, 523 S.E.2d 432, 438 (1999) ("[E]ven where the trial court has committed error, if that error is not prejudicial, then it is harmless.") (citation omitted); *Forsyth Cty.*, 74 N.C. App. at 678, 329 S.E.2d at 734.

C. Performance Guaranties

Petitioner argues the superior court erred by failing to determine Midland's requirements for performance guaranties exceeded its statutory authority and are preempted by N.C. Gen. Stat. § 160A-372 (2017) in three ways.

First, petitioner argues Midland demanded a bond in excess of the amount it was permitted to require by both statute and the development ordinance.

N.C. Gen. Stat. § 160A-372 and Section 16.1-9(B) of Midland's development ordinance both provide the amount of a "performance guarantee shall not exceed one hundred twenty-five percent (125%) of the reasonably estimated cost of completion at the time the performance guarantee is issued." N.C. Gen. Stat. § 160 A-372(g)(3). Petitioner contends Midland violated these provisions because the town's 8 September 2016 letter demanding petitioner provide the requisite performance guaranties stated petitioner would be required to provide a guarantee in an amount "between 125% and 150% of the estimated amount."

***7** We disagree. Although the town could not require a guarantee greater than one hundred twenty-five percent (125%) of the estimated amount, the letter's error did not relieve petitioner of its burden to maintain performance guaranties. Furthermore, the town is permitted to require a guarantee up to one hundred twenty-five percent (125%) of the reasonably estimated cost of completion, which the town was willing to accept from petitioner as sufficient to meet this burden. Thus, petitioner's argument is without merit.

Second, petitioner contends Midland was not permitted to apply performance guarantees to the repair or maintenance of the streets. We disagree. Pursuant to N.C. Gen. Stat. § 160A-372(g)(4), "[t]he performance guarantee shall only be used for completion of the required improvements and not for repairs or maintenance *after completion*." (Emphasis added). Thus, it was appropriate for petitioner to require a performance guarantee because the streets in the subdivision had not been maintained or completed in accordance with the DOT's standards and the development ordinance.

Third, petitioner argues Midland's refusal to accept the developer's election of guarantee violates N.C. Gen. Stat. § 160A-372(c), which provides:

> (c) The ordinance may provide for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with municipal plans, policies, and standards. To assure compliance with these and other ordinance requirements, the ordinance may provide for performance guarantees to assure successful completion of required improvements at the time the plat is recorded as provided in subsection (b) of this section. For any specific development, the type of performance guarantee shall be at the election of the developer.

N.C. Gen. Stat. § 160A-372(c). Under N.C. Gen. Stat. § 160A-372,

> [t]he term "performance guarantee" shall mean any of the following forms of guarantee:
>
> a. Surety bond issued by any company authorized to do business in this State.
>
> b. Letter of credit issued by any financial institution licensed to do business in this State.
>
> c. Other form of guarantee that provides equivalent security to a surety bond or letter of credit.

N.C. Gen. Stat. § 160A-372(g)(1). Petitioner contends it met this standard because it was willing to place the net proceeds from the sale of the remaining lots in the subdivision in escrow to fund the costs of completion of the required improvements. However, these funds did not exist, and petitioner's expression of a conditional *willingness* to place funds in escrow, should they come into being, is insufficient to provide the security required to constitute a performance guarantee under N.C. Gen. Stat. § 160A-372. Therefore, petitioner's argument is without merit.

D. Evidence in the Record

Finally, petitioner argues the superior court erred by concluding the Board decision was supported by competent material and substantial evidence in the record and was not arbitrary. We disagree.

"When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test." *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). To apply the whole record test, the reviewing court inspects all competent evidence that "comprises the 'whole record' so as to determine whether there was indeed substantial evidence to support the Board's decision." *Turik*, 182 N.C. App. at 430, 642 S.E.2d at 253 (citation and internal quotation marks omitted). Substantial evidence exists if there is such evidence that "a reasonable mind would regard as adequately supporting a particular conclusion." *Id.* (citation and internal quotation marks omitted).

***8** Petitioner contends the Board's decision is not supported by the evidence in the record because neither the Town Manual nor the DOT's standards were admitted into evidence, even though the Board found the subdivision's roads were required to comply with the DOT's standards and "applicable plans and manuals adopted by the Town of Midland," and that the roads failed to satisfy these requirements.

After a careful review of the whole record, we hold that the superior court did not err in holding the Board decision was supported by substantial evidence because the written manual and standards were not included in the record. There was other evidence in the record that the roads did not comply with these standards.

Town engineer, Richard McMillan, testified as an expert about the DOT's standards, the condition of the streets, and the failure of the streets to meet the DOT's standards and the Town's standards. Mr. McMillan authored a report detailing this failure on 29 November 2016, which is included in the record. The record also includes a memorandum authored by another town engineer, which concludes the subdivision's streets did not meet the DOT and Town standards. Therefore, we hold the Board's decision is supported by the evidence in the record.

We now turn to petitioner's contention that the Board's decision is arbitrary because the Board's findings of fact relating to performance bonds were: (1) not supported by substantial evidence; and (2) insufficient to support the Board's conclusion of law that petitioner failed to maintain the required performance guarantee in violation of Midland's ordinance. We disagree.

The Board made the following findings of fact related to performance bonds:

> 15. Section 16.1-9(B) of the Current Ordinance provides in part:
>
> (B) Guarantee in Lieu of Construction of Improvements. In lieu of completion of construction of the required improvements and utilities prior to final plat approval, the property owner may provide a performance guarantee in accordance with North Carolina General Statute 160(A)-372.
>
> The performance guarantee shall be in an amount equal to 125% of the estimated cost of the installation of the required improvements as determined by the Town. The performance guarantee shall secure the completion of construction of the improvements shown in the approved preliminary plat and as detailed within the improved construction plans. The performance guarantee shall remain in full force and effect until such time as the construction of improvements and installation of utilities are completed and accepted by the Town of Midland. Failure to maintain the required performance guarantees shall result in the revocation of the approval of the preliminary plat and permits issued as a result of the preliminary plat approval. ...
>
> ....
>
> 24. The Town responded by letter dated September 8, 2016, that Tucker Chase, LLC's proposed maintenance of the ... streets ... was not acceptable. ... The Town also notified Tucker Chase, LLC that it had not maintained the required bonds or irrevocable letters of credit required for guaranties in lieu of construction, which was a continuing obligation under the Current Ordinance. The letter requested that Tucker Chase, LLC provide the guaranties for completion of the required repairs to the streets immediately.

Both the development ordinance and the September 2016 letter are included in the record, and the Town Administrator testified that petitioner failed to maintain the required bond. Therefore, the above findings of fact, which are contested by petitioner, are supported by substantial record evidence. Based on these findings of fact, the Board concluded:

> ***9** 5. Tucker Chase, LLC's failure ... to maintain a required performance guarantee in lieu of construction of the streets, [was a] continuing violation[ ] of the Initial and Current Ordinances.
>
> 6. Tucker Chase has failed to comply with the requirements of Section 16.1-9(B) of the Town of Midland's Current Ordinance in that it has failed to maintain a required

performance guarantee in lieu of construction of the streets shown on Maps 2-5 of the Tucker Chase Subdivision.

As the findings of fact were sufficient to establish that petitioner violated the ordinance's requirement that it maintain the required performance guarantee, the Board's findings support conclusions of law 5 and 6. Therefore, the Superior Court properly concluded the Board's decision was not arbitrary.

III. Conclusion

For the forgoing reasons, we affirm the superior court's order.

AFFIRMED.

Report per Rule 30(e).

Judges STROUD and TYSON concur.

All Citations

264 N.C.App. 641, 825 S.E.2d 276 (Table), 2019 WL 1283840

Footnotes

1 The petition numbered two different allegations as paragraph (4).

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