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NO. COA10-171

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

BLUEJACK ENTERPRISES,
LLC,

Petitioner,

v.

Chowan County
No. 08 CVS 378

TOWN OF EDENTON, acting by
and through it's [sic] planning
administrator and Board of
Adjustment,

Respondent.

Appeal by petitioner from order entered 14 September 2009 by Judge J. Richard Parker in Chowan County Superior Court. Heard in the Court of Appeals 2 September 2010.

Wills & Wills, P.C., by Gregory E. Wills, for petitioner-appellant.

Hornthal, Riley, Ellis & Maland, L.L.P., by M.H. Hood Ellis and Benjamin M. Gallop, for respondent-appellees.

JACKSON, Judge.

Bluejack Enterprises, LLC ("Bluejack") appeals an order and judgment entered on 14 September 2009 by the Superior Court of Chowan County, North Carolina, affirming a decision of the Town of Edenton Board of Adjustment ("Board") denying Bluejack's appeal from a decision of the Edenton-Chowan planning administrator. For

the reasons stated herein, we affirm the decision of the Chowan County Superior Court.

Bluejack is a North Carolina limited liability company with its principal office in Currituck County, North Carolina. The Town of Edenton, North Carolina ("Town") is a duly constituted municipal corporation of the State of North Carolina that acts through its various boards and departments, including its planning administrator and the Board.

Bluejack is the owner of eighty-five undeveloped lots in a subdivision known as Eden Heights, located within the Town's limits. The Eden Heights subdivision originated as a twenty-five and six-tenths acre tract of land owned by Sallie M. Boettcher ("Boettcher") and W.O. Saunders ("Saunders"). Boettcher and Saunders subdivided the land into lots pursuant to a duly recorded plat entitled "Eden Heights Property, Edenton, North Carolina Developed by W.O. Saunders and Mrs. Boettcher." Thereafter, Boettcher conveyed her one-half undivided interest to Saunders. The deed from Boettcher to Saunders conveyed various unsold lots in Eden Heights as well as "[a]ll right, title and interest . . . in and to the said streets and avenues shown on the said plat"

Upon the death of Saunders, his heirs at law conveyed their interest to Albemarle Peanut Company, making specific reference to the conveyance of the unsold lots in Eden Heights and the underlying fee to the roads. Albemarle Peanut Company then conveyed all of the property it had acquired from Saunders's heirs to A.C. Boyce ("Boyce"). Boyce then conveyed all of his interest,

consisting of unsold lots and the streets and avenues, to the Albemarle Peanut & Storage Company. Thereafter, Albemarle Peanut & Storage Company conveyed its interest in unsold lots only, but not the underlying fee to the streets, to William Black, Sr. ("Black"). Through a series of conveyances, Bluejack is the successor in interest to Black and acquired title to the eighty-five unsold lots by virtue of a duly recorded deed dated 26 August 2004.

In November 1989, the Town adopted a Unified Development Ordinance ("UDO"),¹ the declared purpose of which is to "serve as a land development regulatory document which combines traditional zoning provisions, subdivision regulations, flood damage prevention regulations, and street and utility standards." Town of Edenton, N.C., Unified Dev. Ordinance, art. I, § 1 (1999).

The entire subdivision of Eden Heights is zoned as R-5, which is intended "to allow primarily single-family, two-family and multi-family residences at a medium density of approximately 8.7 dwelling units per acre." Town of Edenton, N.C., Unified Dev. Ordinance, art. IX, § 135(f) (2000). Pursuant to the UDO, each lot located within an R-5 subdivision must have a minimum width of fifty feet. Town of Edenton, N.C., Unified Dev. Ordinance, art. XII, § 183(b) (2000). Each of the eighty-five undeveloped lots owned by Bluejack has a width of only twenty-five feet. Each lot

¹ The UDO is available in its entirety at http://www.townofedenton.com/index.asp?Type=B_LIST&SEC={7F25AFED-F9E6-44CB-8D8C-3AE5C676E4AD}.

is, therefore, a "nonconforming lot," defined in the UDO as, "[a] lot existing at the effective date² of this chapter . . . that does not meet the minimum area requirement of the district in which the lot is located." Town of Edenton, N.C., Unified Dev. Ordinance, art. VIII, § 121(4) (1999).

Section 123 of article VIII of the UDO addresses the treatment of nonconforming lots. See Town of Edenton, N.C., Unified Dev. Ordinance, art. VIII, § 123 (1999). Section 123(e) permits the continued use and development of nonconforming lots if "a majority of the developed lots located on either side of the street where such lot is located and within 500 feet of such lot are also nonconforming." Town of Edenton, N.C., Unified Dev. Ordinance, art. VIII, § 123(e) (1999). The declared purpose of section 123(e) "is to require nonconforming lots to be combined with other undeveloped lots to create conforming lots under the circumstances specified herein, but not to require such combination when that would be out of character with the way the neighborhood has previously been developed." *Id.*

In anticipation of developing the eighty-five undeveloped lots, Bluejack sought an opinion from the Edenton-Chowan Planning and Inspections Department ("P&ID") to determine whether the recombination requirements of section 123(e) applied to some, all, or none of Bluejack's lots. The P&ID issued an "official determination" regarding Bluejack's inquiry by letter dated

² Article I, section 4 specifies that the Town's UDO originally became effective on 27 May 1969. Town of Edenton, N.C., Unified Dev. Ordinance, art. I, § 4 (1999).

7 August 2007. In that letter, the P&ID articulated its decision that seventeen of Bluejack's eighty-five lots could be developed as lots twenty-five feet wide and would not require recombination since they fell within the exception established by section 123(e). The 7 August 2007 letter further specified that, notwithstanding Bluejack's ability to develop seventeen lots as nonconforming lots, Bluejack "has to otherwise comply with UDO and secure any and all permits required before initiating work on any given lot." (Original emphasis removed).

On 22 May 2008, the P&ID issued a "new official determination," modifying the opinion contained in its 7 August 2007 letter and stating that none of Bluejack's eighty-five lots fell within the exception provided by section 123(e), article VIII of the UDO. (Emphasis in original). Specifically, the P&ID opined that the undeveloped, nonconforming lots owned by Bluejack did not qualify for the exemption contained in section 123(e) of the UDO for two reasons: (1) because the majority of developed lots within Eden Heights are improved with structures that cross lot lines, credit was given for development of one nonconforming lot in such instances which did not result in a majority of nonconforming developed lots on any street within Eden Heights; and (2) applying the exemption test by recognizing all lots on which structures crossed lot lines as nonconforming developed lots resulted in only one street containing a majority of nonconforming developed lots. In light of these circumstances, the P&ID opined, permitting Bluejack to develop the seventeen lots as nonconforming lots would

be contrary to the intent of section 123(e) of article VIII, which is to require recombination of lots consistent "with the way the neighborhood has previously been developed."

Both the 7 August 2007 and 22 May 2008 letters set forth the procedure for appealing a decision of the P&ID: "If you disagree with staff's determination you may appeal this decision to the Edenton Board of Adjustment pursuant to UDO Article V, Section 91 *within thirty (30) days after the date of this letter.*" (Emphasis in original). The letter further indicates that the UDO may be examined on the Town's website.

Section 91(a), article V of the UDO specifies the procedure for an appeal:

An appeal from any final order or decision of the administrator may be taken to the Board of Adjustment by any person aggrieved. An appeal is taken by filing with the administrator and the Board of Adjustment a written notice of appeal specifying the grounds therefor. A notice of appeal shall be considered filed with the administrator and the Board of Adjustment when delivered to the administrator's office, and the date and time of filing shall be entered on the notice by the administrator.

Town of Edenton, N.C., Unified Dev. Ordinance, art. V, § 91(a) (1999). An appeal to the Board, if taken, "must be taken within thirty days after the date of the decision or order appealed from."

Town of Edenton, N.C., Unified Dev. Ordinance, art. V, § 91(b) (1999).

On 20 June 2008, Bluejack sent an electronic mail message to the planning administrator who rendered the 22 May 2008 opinion, indicating its "intention to appeal the staff's opinion regarding

Eden Heights.” The planning administrator acknowledged receipt of the electronic mail message. That same day, Bluejack sent a letter addressed to the planning administrator, reiterating its intent to appeal the decision and requesting the forms necessary to initiate the appeal process.

On 14 August 2008, Bluejack sent a letter to P&ID, expressing a desire to clarify the following issues related to the Eden Heights subdivision: (1) ownership of the rights of way; (2) access to the lots it currently owns; and (3) whether building permits would be issued to homes constructed along dirt roads. With regard to ownership of the rights of way in Eden Heights, Bluejack inquired whether, in light of the Town’s prior use of grant funds to improve several streets within the subdivision, the Town would be willing either to take responsibility for improving the remainder of the rights of way or to seek additional grant funds in order to complete the improvements. On 15 August 2008, Bluejack sent another electronic mail message to P&ID, reiterating its intent to appeal P&ID’s decision set forth in the 22 May 2008 letter.

By letter dated 25 August 2008, P&ID responded to Bluejack’s 14 August 2008 letter, addressing each of Bluejack’s questions as well as Bluejack’s intent to appeal the decision contained in P&ID’s 22 May 2008 letter. First, with regard to Bluejack’s intent to appeal, P&ID stated that, because section 91, article V of the UDO specifies the time within which an appeal of its decisions could be taken is limited to thirty days, and because no appeal had

been received by the Town within that time, "the time to appeal the determination set forth in my letter of May 22, 2008 has expired." Second, with respect to ownership of the rights of way in Eden Heights, P&ID responded that

[t]he original owner of the development or said owner's successor in title is the owner of the fee simple title underlying the rights of way shown on the subdivision plat whether opened and improved or not, but subject to the easement of the Town for use by the public as to those rights of way the Town has accepted expressly by opening, improving or maintaining all or a portion thereof and rights of lot owners in the subdivision. The Town is not obligated to improve any unimproved rights of way in the subdivision.

Third, concerning Bluejack's question related to access, P&ID responded by referring to its response related to ownership of the rights of way and reiterating that it is the responsibility of the successor owner or developer initially to construct any roads or streets which the Town may accept for maintenance into its system. Fourth, with regard to Bluejack's question related to the issuance of building permits for lots located along dirt roads, P&ID responded, "There is no provision [in the UDO] permitting unimproved or dirt roads for lot access."

On 5 September 2008, Bluejack submitted an "Application for an Appeal to the Board of Adjustment," accompanied by a three-page letter — specifically declaring that Bluejack was appealing the decisions set forth in P&ID's letter dated 25 August 2008 — and specifying the grounds for the appeal. On 18 November 2008,³ the

³ In the record on appeal, the minutes of the Board reflect that the hearing took place at 5:30 p.m. on Monday, 18 November

Board, with seven members present, held a hearing on Bluejack's appeal. At the conclusion of the hearing, five votes cast in favor of denying Bluejack's appeal were recorded and no votes were cast in favor of granting the appeal. The decision of the Board, affirming in part the interpretation of the UDO and the decision of the P&ID administrator, is as follows:

While the time to appeal the Administrator's May 22, 2008 decision and interpretation expired prior to any appeal, the lots owned by Bluejack Enterprises, LLC in the Eden Heights Subdivision are subject to the recombination requirements of Section 123(e) of the UDO; the Town has no obligation to put in the infrastructure and the developer or its successor bears the burden and expense of installing required infrastructure (water, sewer, electric service, roads) prior to the recording of a final plat and sale of any recombined lots; and that no building or zoning permits for construction on the property will be issued without installation of said infrastructure and improvements according to UDO requirements and payment of any applicable development and tap fees.

(Original emphasis removed). The Board's decision was memorialized as a Record of Decision, filed with the administrator and P&ID on 26 November 2008.

On 29 December 2008, Bluejack filed a petition for writ of *certiorari* and complaint for declaratory judgment with the Superior Court of Chowan County, seeking review of the Board's Record of Decision. On 20 January 2009, the Chowan County Superior Court issued the writ, requiring the Town to file with the superior court

2008. Notwithstanding, in other places in the record, reference is made to the hearing as having been held on 17 November 2008. For clarity, we refer to the meeting as having been held on 18 November 2008.

certified copies of the documents related to the hearing held by the Board. After receiving an extension of time, the Town timely filed its response to Bluejack's petition and complaint. A hearing was held on Bluejack's petition for writ of *certiorari* and complaint for declaratory judgment on 20 July 2009. On 14 September 2009, the Chowan County Superior Court filed an order affirming the Board's decision. On 14 October 2009, Bluejack gave notice of appeal from the trial court's 14 September 2009 order.

Bluejack's appeal is from an order of the Chowan County Superior Court, reviewing the decision of the Board.

With respect to our review of the trial court's judgment upon Bluejack's complaint for declaratory judgment, we previously have explained that

[d]eclaratory judgments may be reviewed in the same manner as other judgments. See *Hobson Const. Co., Inc. v. Great American Ins. Co.*, 71 N.C. App. 586, 589, 322 S.E.2d 632, 634 (1984). "In all actions tried upon the facts without a jury . . . the [trial] court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2001); see also *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985) (trial court, when sitting as finder of fact, is required to "(1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly"). Where a trial court fails to make the required findings or conclusions, "the appellate court may order a new trial or allow additional evidence to be heard by the trial court or leave it to the trial court to decide whether further findings should be on the basis of the existing record or on the record as supplemented." *Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370

S.E.2d 700, 702 (1988) (citation omitted) (internal quotations omitted). Remand is unnecessary, however, where the facts of the case are undisputed and those facts lead to only one inference. *Id.*

Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n, 158 N.C. App. 518, 520-21, 581 S.E.2d 94, 96 (2003) (reviewing a trial court's declaratory judgment that lacked findings of fact and conclusions of law because "the record provide[d] a sufficient basis for our review on the merits"). Similarly, in *Dockside Discotheque v. Bd. of Adjustment of Southern Pines*, 115 N.C. App. 303, 307-08, 444 S.E.2d 451, 454, *disc. rev. denied*, 338 N.C. 309, 451 S.E.2d 634 (1994), we explained that,

[a]s a general rule, when findings and conclusions are required and not entered, the appellate court "may vacate the judgment and remand the case for findings." 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2577, at 697 (1971) (discussing civil procedure Rule 52(a)) [*Wright*]. Because, however, "findings are not jurisdictional, . . . the appellate court may decide the appeal without further findings if it feels that it is in a position to do so." *Wright* at 699-700. For example, "the appellate court will determine the appeal without more if the record sufficiently informs it of the basis of decision of the material issues . . . or if the facts are undisputed [and different inferences are not permissible]." *Id.* at 700-02; see *Withrow v. Larkin*, 421 U.S. 35, 45, 43 L. Ed. 2d 712, 722 (1975) (remand for findings and conclusions not ordered where it was unlikely to "add anything essential to the determination of the merits").

Furthermore, "[t]he superior court judge sits as an appellate court on review pursuant to writ of certiorari of an administrative decision." *Blue Ridge Co., L.L.C. v. Town of Pineville*, 188 N.C.

App. 466, 469, 655 S.E.2d 843, 845 (citations omitted), *disc. rev. denied and appeal dismissed*, 362 N.C. 679, 669 S.E.2d 742 (2008). When the superior court is called upon to review a decision of such a board upon a petition for writ of *certiorari*, the superior court's role is to:

- (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.

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999) (citing *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980)). The appropriate standard of review of a superior court's order entered after a review of a board decision is "(1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review." *Id.* (citing *Appeal of Willis*, 129 N.C. App. 499, 502, 500 S.E.2d 723, 726 (1998)).

Bluejack first argues that the superior court erred by upholding the Board's treatment of Bluejack as a developer of a new subdivision instead of a lot owner within an existing subdivision. Specifically, Bluejack contends that the Board's treatment of Bluejack as a developer is "arbitrary and capricious" and, since it

"clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decision making[,]" *Vulcan Materials Co. v. Guilford County Bd. of Comrs.*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (citation and internal quotation marks omitted), *disc. rev. denied*, 337 N.C. 807, 449 S.E.2d 758 (1994), it should be reversed. We disagree.

When the decision of a board of adjustment is challenged as being arbitrary and capricious, the reviewing court conducts a "whole record test" to determine whether the board's findings are supported by substantial evidence contained in the whole record. *Whiteco Outdoor Adver.*, 132 N.C. App. at 468, 513 S.E.2d at 73 (citation omitted). On appeal from the reviewing court's order, the appellate court's role is to ensure that the proper scope of review was exercised and applied. *Id.* Our task here, then, is to determine whether the superior court exercised the proper scope of review and then correctly applied this scope of review. *Id.*

In the case *sub judice*, we thoroughly have examined the record on appeal and have determined that it is sufficiently well-developed to enable our review of the merits with respect to the trial court's declaratory judgment. See *Dockside Discotheque*, 115 N.C. App. at 307-08, 444 S.E.2d at 454. Because the exact same underlying facts also support Bluejack's petition for writ of *certiorari*, we also have reviewed the superior court's order with respect to Bluejack's petition. After thorough review, we are satisfied that the superior court reached the correct result after applying the appropriate scope of review in relation to both the

complaint for declaratory judgment and the petition for writ of *certiorari*.

Bluejack's second argument on appeal is that the superior court erred by failing to remand that portion of the decree concerning section 123(e), article VIII of the UDO because the decree does not resolve the issue in dispute. Specifically, Bluejack argues that the question before P&ID was whether the express exception within section 123(e), article VIII of the UDO applied to some, all, or none of the eighty-five lots owned by Bluejack. P&ID's "new official determination" regarding application of the exception for recombination of nonconforming lots set forth in section 123(e) of article VIII of the UDO is set forth in its letter dated 22 May 2008. Bluejack's third argument on appeal is that it did, in fact, provide timely notice of appeal from the 22 May 2008 opinion of P&ID. We disagree with both contentions, and, because they are interdependent, we have reviewed them together.

Upon review, we are satisfied that the Chowan County Superior Court, reviewing the decision of the Board and ensuring that the procedures specified by law in both statute and ordinance, *Whiteco Outdoor Adver.*, 132 N.C. App. at 468, 513 S.E.2d at 73, properly affirmed the decision of the Board with respect to Bluejack's failure to timely appeal the planning administrator's new official determination dated 22 May 2008. Bluejack's second and third arguments on appeal, therefore, are overruled.

Accordingly, the 14 September 2009 order and judgment of the Chowan County Superior Court affirming the decision of the Town's Board is hereby affirmed.

Affirmed.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).