

NO. COA14-388

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

SIX AT 109, LCC, a North Carolina
limited liability company,

Petitioner,

v.

Brunswick County
No. 12 CVS 1986

TOWN OF HOLDEN BEACH, North
Carolina,

Respondent.

Appeal by petitioner from order entered 1 July 2013 by
Judge Gary E. Trawick in Brunswick County Superior Court. Heard
in the Court of Appeals 8 October 2014.

*Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew
A. Nichols, for petitioner-appellant.*

*Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Clay
Allen Collier and Jarrett W. McGowan, and H. Mac Tyson II,
for respondent-appellee Town of Holden Beach.*

BRYANT, Judge.

Because the Superior Court utilized the appropriate
standard of review applicable to an appeal from an order of the
Town of Holden Beach Board of Commissioners and did not err in
affirming the order of the Board which affirmed an order

condemning petitioner's ocean-side motel and authorizing its demolition, we affirm the Superior Court's order.

Petitioner Six at 109, LLC ("petitioner"), owns a building known as Captain Jack's Motel ("the motel"), located in the Town of Holden Beach ("the Town"). The structure is an oceanfront, four-unit motel built in 1989.

In 2008, petitioner received a building permit from the Town authorizing the making of non-structural improvements to the interior of the motel, including replacing exterior doors, door trim, baseboards, windows, cabinets, plumbing, an HVAC system, and electric wiring. Petitioner also received a Coastal Area Management Act ("CAMA") permit authorizing the making of the proposed improvements.¹ Work commenced pursuant to the building permit. On 8 December 2009, the Town Building Inspector issued a Certificate of Compliance relating to the work completed on the motel up to that time. The Certificate of

¹ "CAMA" or "Coastal Area Management Act of 1974" is codified within Article 7 of Chapter 113A of our General Statutes and governs "the development and adoption of State guidelines for the coastal area and the development and adoption of a land-use plan for each county within the coastal area." N.C. Gen. Stat. §§ 113A-100, -106 (2013). "'Coastal area' means the counties that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean" *Id.* § 113A-103(2). "[E]very person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part." *Id.* § 113A-118(a).

Compliance stated that three of the four units in the motel were in compliance with the Town Building Code and that occupancy would be permitted.

On 3 August 2010, a new town building inspector, Timothy Evans, issued a stop work order relating to petitioner's motel property in response to a report that work was taking place on the motel that was not authorized by the building permit. The stop work order remained in place until the end of the year when Inspector Evans determined that all work done on the property had been performed in compliance with the building permit.

In early 2011, petitioner submitted an application for another building permit authorizing continued work on the motel, including: demolition and replacement of exterior siding, existing plumbing, electrical and heating fixtures, and non-load bearing walls. In August 2011, Inspector Evans notified petitioner that because the motel met the criteria for an unsafe building pursuant to North Carolina General Statutes, section 160A-426, it had been condemned.² On 17 November 2011,

² Pursuant to General Statutes, section 160A-426, "[e]very building that shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, shall be held to be unsafe" N.C. Gen. Stat. § 160A-426(a) (2013).

petitioner's permit application was denied and a condemnation notice was posted at the building site.³ Afterwards, Inspector Evans provided petitioner with a memorandum outlining the basis for the notice and condemnation (citing violations of specific provisions of the N.C. Building Code) and advised petitioner that a hearing on the matter would be conducted before him as the Town Building Inspector.

In January 2012, a hearing was conducted before Inspector Evans in his capacity as Director of the Inspections Department for the Town of Holden Beach. Petitioner submitted documentary evidence in the form of exhibits and offered testimonial evidence through witnesses. Furthermore, Inspector Evans granted petitioner's request for additional time to supplement the record with further evidence, exhibits, arguments and authorities. On 12 March 2012, following the January hearing, Inspector Evans, on behalf of the Inspections Department, entered an order making the following ultimate findings of fact:

[T]he structure is a hazard to the surrounding properties, that its current condition constitutes (among other things) a

³ Petitioner did not appeal the denial of its building permit application to the North Carolina Department of Insurance as allowed pursuant to N.C. Gen. Stat. §160A-434, and petitioner failed to submit an application for a CAMA permit or request an exemption.

fire hazard, that the structure has attracted a criminal activity and other activities which constitutes a nuisance, that the structure is likely to contribute to vagrancy and presents a threat of disease and is a danger to children and that the only option available under N.C.G.S. § 160A-429 is to order the demolition of the structure

Accordingly, Inspector Evans ordered that the motel be demolished, pursuant to N.C. Gen. Stat. § 160A-429.⁴

Petitioner appealed the inspector's order to the Town of Holden Beach Board of Commissioners pursuant to N.C. Gen. Stat. § 160A-430.⁵ A hearing before the Board of Commissioners was conducted on 11-13 June 2012. Petitioner presented evidence by way of exhibits and witnesses and made arguments supported by authorities submitted to the Commissioners. The Commissioners also conducted a site visit as part of the hearing. By order

⁴ "If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall make an order in writing, directed to the owner of such building or structure, . . . demolishing the building or structure" N.C. Gen. Stat. § 160A-429 (2013).

⁵ "Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order. In the absence of an appeal, the order of the inspector shall be final." N.C. Gen. Stat. § 160A-430 (2013).

dated 7 September 2012, the Board of Commissioners found that, viewed in the light most favorable to petitioner, the evidence supported the following factual finding:

[T]he ocean side structure of the property is a hazard; that the structure has attracted criminal activity and other activities which constitute a nuisance; and, that the structure is likely to contribute to vagrancy and presents a threat of disease and is a danger to children

In accordance with these findings, the Board of Commissioners affirmed the order of the Inspections Department. Petitioner then petitioned the Brunswick County Superior Court to issue a writ of certiorari for the purpose of reviewing the proceedings below.

On 25 April 2013, in Brunswick County Superior Court, the Honorable Gary E. Trawick heard arguments from petitioner and the Town and, on 3 July 2013, entered an order upholding the 7 September 2012 order of the Board of Commissioners. Petitioner appeals.

On appeal, petitioner argues that (I) the Town lacked subject matter jurisdiction to condemn the property; (II) the Board of Commissioners used an improper standard of review in considering petitioner's June 2012 appeal; and (III) the Board

of Commissioners' decision to condemn the property and order its demolition was arbitrary and capricious.

I

Petitioner contends the Town did not have subject matter jurisdiction to condemn the ocean-side motel because the motel is located in a public trust area of Holden Beach and this Court has held that only the State has standing to enforce the public's claims in the public trust lands of the State. We disagree.

Whether a court has subject matter jurisdiction is a question of law that is reviewed de novo. *In re Thompson*, ___ N.C. App. ___, ___, 754 S.E.2d 168, 172 (2014).

In *Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66, 723 S.E.2d 156, *appeal dismissed*, 366 N.C. 386, 732 S.E.2d 580, and *review denied*, 366 N.C. 386, 733 S.E.2d 580 (2012), the plaintiff Town was granted summary judgment against the defendant homeowner with respect to a nuisance claim, resulting in the condemnation of the defendant homeowner's dwelling. The dwelling was reported to have been located "in its entirety on the wet sand beach," to be in a deteriorated and damaged condition, and to have restricted pedestrian access along the public trust beach area. *Id.* at 67-68, 723 S.E.2d at 157. In

its motion for summary judgment, the plaintiff Town provided two bases for its nuisance claim: (1) the damaged structure or debris from it was likely to cause injury to persons or property; and (2) the structure "[was] located in whole or in part in a public trust area or on public land." *Id.* at 68–69, 723 S.E.2d at 157–58. On appeal, this Court considered the argument that the trial court erred in failing to grant the defendant's motion to dismiss because the plaintiff Town lacked jurisdiction to enforce the State's sovereign right to protect land held pursuant to the public trust doctrine. In pertinent part, we agreed, reasoning that "this is a case where [the Town of Nags Head] [was] attempting to take private property from an individual, destroy the dwelling, and claim the land on the basis that it currently lies within a public trust area." *Id.* at 74, 723 S.E.2d at 160. Acknowledging that our case law "heavily emphasizes the sovereignty of the State as being the only body which can affirmatively bring an action to assert rights under the public trust doctrine[,]" this Court reversed the trial court's decision to deny the defendant's motion to dismiss the plaintiff Town's nuisance claim since the ruling was premised on protecting land in the public trust. *Id.* at 74–75, 723 S.E.2d at 161 (citing *Fabrikant v. Currituck Cnty.*, 174 N.C.

App. 30, 41, 621 S.E.2d 19, 27 (2005), and *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118-19, 574 S.E.2d 48, 54 (2002)); see also N.C. Gen. Stat. § 113-131 (2013) (recognizing public trust rights). However, while this Court held that the plaintiff Town could not assert its claim "based solely on public trust rights," the condemnation of property as a nuisance if the property created a "reasonable likelihood of personal or property injury" was held to be allowable. *Town of Nags Head*, 219 N.C. App. at 80, 723 S.E.2d at 164 (citing *TOWN OF NAGS HEAD*, N.C., CODE § 16-31(6)(b) (2007)). The matter was remanded in part to the trial court for further proceedings.

Petitioner contends that an examination of findings of fact 1,⁶ 7,⁷ 18,⁸ 19,⁹ 20,¹⁰ and 21,¹¹ contained in Inspector Evan's 12

⁶ Finding of fact number 1 states that "[t]he loss of the frontal dune on the ocean side of the property has resulted in erosion of the foundation and caused pilings to list as much as 24%. This movement along with weathering of fasteners and bolts has caused the structure to sag and has resulted in floor level variations of as much as ¾ inch per 8 feet."

⁷ Finding of fact number 7 states that "[t]idal action regularly encroaches upon and under the structure, negatively affecting the pilings and structural support, and in such a manner as to require extensive modification of the existing electrical service to the property."

⁸ Finding of fact number 18 states that "[t]he location of the structure beyond the existing frontal dune allows for access to persons involved in unacceptable, illegal and unsafe activities which have been documented by local law enforcement and

March 2012 order, which mention "tidal action" and "proximity to the Atlantic Ocean," indicate that the Town's action was impermissibly premised on enforcing the public trust doctrine. We note that findings 1, 7, 19, and 21 contained in Inspector Evans' order relate to structural defects in the building and petitioner's failure to establish that repairs would decrease the danger of further damage due to the proximity of the structure to the ocean. Finding of fact 18 relates to the accessibility of the structure to persons involved in unacceptable, unsafe, and illegal activities as documented by

complaints of citizens."

⁹ Finding of fact number 18 states that "[t]he extent of damage and weathering suffered by the structure and sustained, at least in part, through mother nature, makes permitting any repair, remediation or reconstruction of the structure legally impossible under current local, state and federal rules, codes, guidelines, ordinances and statutes."

¹⁰ Finding of fact number 20 states that "[w]hile this (or arguably any) structure can be engineered back to compliance with the applicable state building code, Petitioner has failed to present sufficient evidence that the repair, renovation and reconstruction of this structure as proposed would comply with the applicable requirements of the local, state and federal rules, regulations, guidelines, ordinances, codes and statutes, including, by not necessarily limited to, the regulations of FEMA and CAMA."

¹¹ Finding of fact number 21 states that "[p]etitioners have failed to establish that any repair, renovation or reconstruction of the structure would decrease the danger of further severe damage and failure due to its proximity to the Atlantic Ocean."

law enforcement officers. Based on these findings of fact, Inspector Evans ordered the demolition of the ocean-side structure. Petitioner appealed the order to the Town of Holden Beach Board of Commissioners.

The Board of Commissioners' 7 September 2012 order to condemn the ocean-side structure was, like Inspector Evans' 12 March 2012 order, based on findings that the structure was a hazard and that it had been the site of criminal conduct and other activities which constituted a nuisance. Furthermore, the Commissioners found that the structure was likely to contribute to vagrancy, presented a threat of disease, and was a danger to children.

We note that neither Inspector Evans, in his 12 March 2012 order; the Board of Commissioners, in its 7 September 2012 order; nor the Superior Court, in its 3 July 2013 order, reference the structure's location within the public trust area as a basis for its condemnation.

Pursuant to North Carolina General Statutes, section 160A-426, a municipality has jurisdiction to condemn a structure if it is unsafe. See N.C.G.S. §§ 160A-426 ("Every building that shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of

walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, shall be held to be unsafe"), -432(b) ("[A] city may . . . cause the building or structure to be removed or demolished."). The respective orders of Inspector Evans and the Board of Commissioners make clear that the ocean-side structure was condemned because it was determined to be unsafe. These orders were proper based on General Statutes, section 160A-205(a) ("A city may enforce any ordinance adopted pursuant to this section or any other provision of law upon the State's ocean beaches located within or adjacent to the city's jurisdictional boundaries to the same extent that a city may enforce ordinances within the city's jurisdictional boundaries."). Accordingly, we overrule petitioner's argument to the effect that the Board's action was based on an impermissible premise.

Petitioner also contends that because the 7 September 2012 order of the Board of Commissioners states that the order of the Town's Inspection Department "should be affirmed and/or the factual findings thereof adopted and incorporated herein[,]" the Board of Commissioners reviewed petitioner's appeal by seeking only to determine if the evidence supported Inspector Evans'

findings rather than by granting petitioner a de novo hearing. We disagree, since the record establishes that the Commission engaged in de novo review.

At the outset of its 7 September 2012 order, the Board of Commissioners stated that the 12 March 2012 order of the Chief Building Inspector for the Town was before them pursuant to N.C.G.S. § 160A-430 "upon appeal de novo." By the consent of the parties and the permission of the Commissioners, both petitioner and the Inspection Department presented supplemental information, materials, arguments and authorities which were adopted as part of the record. *See generally, Morris v. Se. Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 440, 681 S.E.2d 840, 850 (2009) (granting the plaintiff's petition to supplement the record with material submitted to but not considered by the trial court for de novo review on the issue of whether the complaint met the Rule 9(j) compliance standard for allegations of medical malpractice). After a two-day hearing, which included a site visit, the Commission made an independent finding of fact (based on its de novo review) that the structure was a hazard, had attracted criminal activity, had attracted other activities which constituted a nuisance, was likely to contribute to vagrancy, presented a threat of disease, and was a

danger to children. Thereafter, the Board of Commissioners affirmed the order of the Town of Holden Beach Planning and Inspection Department with modifications. See N.C.G.S. § 160A-430 ("The city council shall hear and render a decision in an appeal within a reasonable time. The city council may affirm, modify and affirm, or revoke the order [of the inspector]."). Therefore, the order of the Board of Commissioners was entered within its statutory authority and after a de novo hearing. See *id.* Accordingly, petitioner's argument is overruled.

II & III

Next, petitioner argues that the Superior Court erred in affirming the 7 September 2012 order of the Board of Commissioners condemning petitioner's ocean-side building and ordering the demolition of the property based on an arbitrary and capricious standard. Specifically, petitioner contends the conclusions in the Building Inspector's order, as adopted by the Board of Commissioners, were "overwhelmingly refuted by evidence to the contrary"; that the Certificate of Compliance issued for the work completed on the first three units of the ocean-side building indicated the prior Town building inspector's conclusion that the building was not a hazard or unsafe; and petitioner has a vested right to continue with the project. We

disagree.

When reviewing the decision of a decision-making board under the provisions of this section, the [superior] court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:

- a. In violation of constitutional provisions, including those protecting procedural due process rights.
- b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
- c. Inconsistent with applicable procedures specified by statute or ordinance.
- d. Affected by other error of law.
- e. Unsupported by substantial competent evidence in view of the entire record.
- f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k) (2013). "On appeal to this Court, our review of a [superior] court's [review of a town board's] determination is limited to determining (1) whether the superior court applied the correct standard of review, and to determining (2) whether the superior court correctly applied that standard." *Myers Park Homeowners Ass'n, Inc. v. City of Charlotte*, ___ N.C. App. ___, ___, 747 S.E.2d 338, 342 (2013) (citation and quotations omitted).

Petitioner first contends that in adopting the conclusions of Inspector Evans, as stated in his 12 March 2012 order, the Board of Commissioners acted in an arbitrary and capricious manner.

"If the petitioner complains that the [decision-making board's] decision was not supported by the evidence or was arbitrary and capricious, the superior court should apply the whole record test." *Id.* at ___, 747 S.E.2d at 342 (citation omitted).

[When a applying the whole record test] reasonable but conflicting views [may] emerge from the evidence[.] [T]he Court cannot substitute its judgment for the administrative body's decision. The Court, however, must take into account whatever in the record fairly detracts from the weight of the evidence which supports the decision. The Court must ultimately decide whether the decision has a rational basis in the evidence.

Id. at ___, 747 S.E.2d at 343 (citation omitted).

In its 1 July 2013 order, the Superior Court stated that in drawing its conclusions, the "whole record test" was applied. We note the following conclusions:

a) The 7 September 2012 decision of the Board of Commissioners of the Town of Holden Beach was in conformity with applicable law;

. . . .

d) The 7 September 2012 decision of the Board of Commissioners was based upon competent material and substantial evidence in the record;

e) The 7 September 2012 decision of the Board of Commissioners was fair, reasonable and not arbitrary and capricious; and

f) The 7 September 2012 decision was within the statutory authority conferred upon the Town and the Board of Commissioners.

Upon review of the record before us, we conclude the trial court did not err by determining that the decision of the Board of Commissioners was supported by substantial evidence. The evidence of record received at the hearing before the Board of Commissioners showed that storms, erosion, tidal action and/or other natural events materially changed the real property upon which the ocean-side structure was located; that these changes to the real property and the resulting impact on the structure created a hazard; and that the structure had attracted criminal activity. Therefore, we overrule petitioner's argument that the conclusion of the Board of Commissioners was arbitrary and capricious.

Next, petitioner contends that the Certificate of Compliance issued on 8 December 2009 by building inspector David Eakins with respect to the first three units of the four unit

complex "is tantamount to a finding by the Town that the completed work complies with all applicable State and local laws and the terms of the [building] permit [issued to rehabilitate the property]." Petitioner does not cite any authority in support of its assertion that the certificate of compliance issued on 8 December 2009 by the former building inspector precluded Inspector Evans from making a determination that the structure was unsafe on 3 August 2010, and we find none. Therefore, we overrule this argument.

Lastly, petitioner contends that it has a vested right to continue with the project due to its investment in the property and the issuance of building permits and a CAMA permit in 2008. In its argument before the Superior Court and in its brief to this Court, petitioner contends that the rehabilitation of its property was to take place in phases. The evidence presented to the Board of Commissioners indicates that petitioner's 2008 building permit authorized non-structural improvements to the interior of the structure, including: replacement of exterior doors; door trim; baseboards; windows; cabinets; plumbing; an HVAC system; and electric wiring. On the other hand, the findings of Inspector Evans' 12 March 2012 order described major structural defects in the building, including: movement of the

pilings supporting the structure; movement of fasteners and bolts which have caused the structure to sag, resulting in floor level variations within the structure; egress components described as structurally unsound; rotted girders and structural members unable to support uniform loading conditions; tidal action encroaching upon and under the structure, negatively affecting the pilings and structural support; rotted exterior siding that allowed water to seep into the interior of the structure; a buckled roof (likely due to the effect of the tidal action on the pilings); interior attic space containing extensive animal waste; weathered and corroded structural elements of the egress overhang; and deteriorated fascia members.

In its 7 September 2012 order, the Town of Holden Beach Board of Commissioners, like Inspector Evans, ordered the demolition of the structure. However, the Commission gave petitioner an opportunity to bring his motel into compliance prior to demolition. The Commission noted that it would allow petitioner to complete any work necessary to comply with the building inspector's 12 March 2012 order, provided such work could be "completed and inspected/approved by the Holden Beach Building Inspector by or before 1 April 2013."

Thus, petitioner has not been deprived of its right to

rehabilitate the property. Rather, this right has simply been limited by the condemnation of the property as unsafe and the Board of Commissioners' authority to demolish the structure should petitioner fail to act. See *Warner v. W & O, Inc.*, 263 N.C. 37, 41, 138 S.E.2d 782, 785 (1964) ("The permit created no vested right; it merely authorized [the] permittee to act. If he, at a time when it was lawful, exercised the privilege granted him, he thereby acquired a property right which would be protected; but he could not remain inactive and thereby deny to the municipality the right to make needed changes"). Accordingly, we overrule petitioner's argument and, thus, affirm the Superior Court's 3 July 2013 order upholding the 7 September 2012 order of the Town of Holden Beach Board of Commissioners.

Affirmed.

Judges ELMORE and ERVIN concur.