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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-515

Filed: 5 June 2018

Avery County, No. 14 CVS 297

ROUND BOYS, LLC, Petitioner,

v.

VILLAGE OF SUGAR MOUNTAIN, NORTH CAROLINA, Respondent,

And

SUGAR MOUNTAIN SKI RESORT, LLC, Intervenor.

Appeal by Petitioner from order entered 5 December 2016 by Judge Gary Gavenus in Avery County Superior Court. Heard in the Court of Appeals 23 October 2017.

*Gerald R. McKinney for Petitioner-Appellant.*

*Eggers, Eggers, Eggers, & Eggers, PLLC, by Stacy C. Eggers, IV, for Respondent-Appellee.*

*Roberts & Stevens, P.A., by Ann-Patton Hornthal and Wyatt S. Stevens, for Intervenor-Appellee.*

INMAN, Judge.

This is the second appeal from a dispute over proposed alterations to an octagonal house adjacent to a ski resort. At issue now is whether a municipal zoning board, following a remand order by the superior court, had the authority to rehear an earlier application for a variance and change its decision.

Round Boys, LLC, (the "Owner") appeals from a superior court order affirming a decision by the Village of Sugar Mountain Board of Adjustment (the "Board") denying an application for a zoning variance. The Board initially decided that no variance was needed for the Owner to proceed with planned construction. The Owner argues: (1) the Board was without authority to revisit the merits of the dispute beyond entering findings of fact and conclusions of law supporting the initial determination; (2) the Board, in denying the variance, misinterpreted the Village of Sugar Mountain Zoning Ordinance (the "Ordinance"); and (3) the Board's denial of the Owner's variance application was arbitrary and capricious.

Because the superior court did not affirm the Board's first decision, but remanded the matter to the Board to enter findings of fact and conclusions of law, we hold that the Board was acting within its authority when it reheard evidence and rendered a decision contrary to its initial decision that no variance was needed. We also hold that the Board did not misinterpret the Ordinance and did not act arbitrarily and capriciously in its decision making process. After careful review, we affirm the superior court's order.

## Factual and Procedural History

In October 2012, the Owner, a Georgia limited liability company, purchased residential property located at 648 Briarcliff Road, #11, Sugar Mountain, North Carolina (the "Property").[1] The Property is located within the boundaries of the Village of Sugar Mountain (the "Village"), a municipal corporation organized under the laws of North Carolina, and is in the neighborhood known as "Slopesider" because it is adjacent to a ski slope owned by Sugar Mountain Ski Resort, LLC (the "Resort") (collectively with the Board "Appellees"). The eight-sided house on the Property (the "Existing Structure") is the subject of this and a previous appeal.

The Property, including the Existing Structure, is subject to the Ordinance, which imposes on residential structures a minimum setback from the property lines. The Existing Structure, built before the Ordinance was enacted, included an exterior open-air deck that encroached on the setback limits along the property line between the Property and the Resort. The Existing Structure, with the deck, was considered a pre-existing non-conforming use structure, and was allowed to remain without requiring the Owner to make alterations to comply with the Ordinance.

By the end of July 2013, the Owner had removed the deck because the beams supporting it had rotted. The Owner then applied to the Board for a variance from

[1] The original order from the Board denying the Owner's application for a variance noted the Property's address as "641" rather than "648," as it was listed in the Owner's application. This error, however, appears to be typographical and is not material to our decision.

the Ordinance setback restrictions, seeking to expand the livable space within the Existing Structure by five feet, to replace portions of the deck, and to remove an exterior column. The Resort opposed the variance on grounds that the proposed alteration was not in harmony with the Ordinance and potentially posed a public safety hazard. During hearings in August and October 2013, the Owner agreed to amend the variance request to enclose the deck only and not to exceed the pre-existing non-conforming footprint of the Existing Structure. The Board determined "that enclosing a non-conforming deck would not constitute an expansion of a non conforming use[,]" and concluded that as long as the footprint of the Existing Structure was not altered, no variance was needed. The Board voted unanimously (the "October 2013 Decision") to allow the amended request. **[R p. 177-78]** On 23 October 2013, the Board, through member Nancy Bartlett, completed a form entitled "Findings of Fact," which included eight numbered lines for findings. **[R p. 22]** Instead of enumerated findings, Ms. Bartlett provided the following summary statement:

> The Board of Adjustment reviewed the facts and determined that enclosing the existing deck would not increase the footprint of the structure and therefore no variance was required by the homeowner.

On 31 October 2013, in case number 13 CVS 305, the Resort filed a Petition for Writ of Certiorari with the Avery County Superior Court, asking the court to reverse the Board's decision and remand the matter back to the Board for a new hearing. On

15 August 2014, Judge Phillip Ginn issued an order (the "Remand Order") remanding the matter and directing

> the Board of Adjustment to hold a hearing within thirty (30) days of the entry of this Order in order to adopt findings of fact and conclusions of law, after having determined whether or not the existing record before it contains substantial competent evidence that could support the findings of fact and conclusions of law in its written decision. [2]

On remand, the Board held two hearings, on 8 September 2014 and on 23 September 2014. The Board heard witness testimony and reviewed the evidence *de novo*.

On 10 November 2014, the Board entered an order (the "November 2014 Order") denying the Owner's request for a variance and finding that "the proposed expansion of the livable area of the dwelling would not be a continuation of the non-

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[2] After Judge Ginn's remand order, and after the Board's order on remand, the Owner moved to dismiss the Resort's petition for appeal to the superior court for lack of standing. The superior court, Judge Marvin Pope, on 22 January 2015 denied the Owner's motion to dismiss the appeal for lack of standing. The Owner appealed the superior court's denial of its motion to dismiss to this Court. Our Court affirmed the superior court's denial of the Owner's motion to dismiss the appeal, holding that:

> [T]he resort sufficiently alleged (1) that the improvements the Board allowed were unlawful in that they were located "within the prohibited [setback] area" as provided in the ordinance and (2) that the resort would suffer "special damages" in the form of interfering with skiing operations and reducing the safety of the resort's ski slopes for members of the public who were guests and patrons of the resort.

*Sugar Mountain Ski Resort, LLC v. Village of Sugar Mountain*, __ N.C. App. __, 782 S.E.2d 925, 2016 WL 791132, *1, *6 (2016) (unpublished). The decision did not address the merits of the Remand Order or the 10 November 2014 order from which the Owner now appeals.

conforming use, but an expansion thereof;" and "therefore, the proposed construction by [the Owner] would be contrary to the provisions of the Zoning Ordinance."

On 9 December 2014, in case number 14 CVS 297, the case now on appeal, the Owner filed a Petition for Writ of Certiorari with the superior court challenging the Board's November 2014 Order on the grounds that (1) the Board lacked authority to enter an order contrary to its initial determination that no permit was necessary, (2) the November 2014 Order was unsupported by competent evidence and failed to explain the Board's decision to alter its ruling, and (3) the Board acted arbitrarily and capriciously by denying the variance application. The Resort filed a Motion to Intervene in the matter, which the superior court granted on 8 April 2015. On 5 December 2016, the superior court, Judge Gary Gavenus, affirmed the Board's November 2014 Order.

Petitioner timely appealed to this Court.

**Analysis**

*1. Appellate Jurisdiction*

The Resort first argues that the Owner's appeal is subject to dismissal because it is untimely and the Owner should have asserted its arguments in the earlier appeal challenging the Resort's standing to appeal the Board's October 2013 Decision.[3] We disagree.

[3] The Board does not raise this issue on appeal.

In the first appeal to this Court, in case number 13 CVS 305, the Owner appealed from the superior court's order denying a Motion to Dismiss which asserted that the Resort lacked standing to challenge the Board's October 2013 Decision.[4] At that time and within that case, the November 2014 Order was not before this Court. Indeed, this Court had no jurisdiction to review the November 2014 Order in the first appeal. The superior court has exclusive jurisdiction to review a municipal board's zoning decision in the first instance. N.C. Gen. Stat. § 160A-393 (2015). At the time of the first appeal, the superior court had not issued a ruling on the November 2014 Order as it had not been challenged.

The Owner properly petitioned the superior court on 10 December 2014 to challenge the November 2014 Order. The superior court then stayed the case pending the resolution of the Motion to Dismiss. The superior court denied the Motion to Dismiss in January 2015, and this Court affirmed that ruling in March 2016. The superior court then heard the Owner's appeal from the Board's November 2014 Order and entered an order on 5 December 2016, from which the Owner properly appealed to this Court.

Because the Owner timely and properly appealed from the Board's November 2014 Order to the superior court and properly and timely appealed from the superior

[4] Although the Owner challenged the Resort's standing to seek superior court review of the October 2013 Decision, no party appealed Judge Ginn's order remanding the matter to the Board.

court's December 2016 order affirming the Board's November 2014 Order, the Owner's current appeal is properly before us.

*2. Standard of Review*

For the purposes of reviewing a board of adjustment's decision, the superior court sits as an appellate court, leaving the board as the finder of fact. *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 159 (2002) (citations omitted). When reviewing a decision from a board of adjustment, the superior court 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.

*Whiteco Outdoor Advert. v. Johnson Cty. Bd. of Adjustment*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999) (citations omitted). The superior court reviews any errors of law *de novo*, while it reviews the sufficiency of the evidence or whether the board acted arbitrarily and capriciously using the "whole record test." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000). "Moreover, a decision may be reversed as arbitrary and capricious only where the petitioner establishes that the decision was whimsical, made patently in bad faith, indicates a lack of fair and careful consideration, or fails to indicate any

course of reasoning and the exercise of judgment." *Whiteco*, 132 N.C. App. 468-69, 513 S.E.2d at 73 (internal quotation marks, alterations, and citations omitted).

Our review of the superior court's order is limited to determining "whether the superior court applied the correct standard of review, and . . . whether the superior court correctly applied that standard." *Overton*, 155 N.C. App. at 394, 574 S.E.2d at 160 (citing *Westminster*, 140 N.C. App. at 102-103, 535 S.E.2d at 417-18). The Owner does not argue that the superior court applied the wrong standard of review, and in reviewing the superior court's order, we conclude that it properly evaluated the Board's decision using the *de novo* standard for the issues of law and the whole record test for the issue of whether the Board acted arbitrarily and capriciously. As a result, we will evaluate the propriety of the superior court's application of these standards.

*3. The Board's Authority*

The Owner argues that the superior court erred by not concluding that the Board exceeded its authority following the Remand Order when it held a hearing, took additional evidence, and issued an order contrary to its initial determination. We disagree.

Section 160A-393 of the North Carolina General Statutes governs appeals from quasi-judicial decision-making boards, *e.g.*, a board of adjustment, when a decision by such a board is appealed to a superior court by way of certiorari. N.C. Gen. Stat. § 160A-393(a) & (b). In addition to delineating the requirements for standing and the

scope of review for a superior court, Section 160A-393 provides guidance for how courts are to proceed following the review of a board's decision. N.C. Gen. Stat. § 160A-393(l). Section 160A-393 explains, among other things, that "[f]ollowing its review of the decision-making board[,] . . . the court may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." *Id.* The statute also provides that when the superior court does not affirm a board's decision in its entirety, but rather concludes that the board failed to make findings of fact necessary to enable a proper review of the decision, "the court *may* remand the case *with appropriate instructions* so long as the record contains substantial competent evidence that *could* support the decision below with appropriate findings of fact." *Id.* (emphasis added).

Judge Ginn in the Remand Order concluded that the Board failed to make findings of fact and conclusions of law necessary to enable the superior court to "properly perform its function." The Remand Order remanded the case with instructions for the Board "to hold a hearing within thirty (30) days of the entry of this Order in order to adopt findings of fact and conclusions of law, after having determined whether or not the existing record before it contains substantial competent evidence that could support the findings of fact and conclusions of law in its written decision."

Inherent in this order, in which the Board was specifically mandated to "hold a hearing" if it deemed so necessary, is the Board's authority to rehear and reweigh the evidence presented before it. While the Board may not have explicitly determined "whether or not the existing record before it contains substantial competent evidence[,] . . ." it may be implied from the Board's decision to hold a new hearing that it made the determination that the record did not contain substantial competent evidence to support findings of fact and conclusions of law consistent with its initial October 2013 Decision. To interpret the Remand Order as limiting the Board's ability to engage in a proper review of the evidence after determining the record is insufficient would be contrary to notions of judicial economy and common sense.

The Owner's argument asserts—without citing any statutory or case authority—that only the superior court has the authority to reconsider the merits of the Board's previous decision. This argument conflicts with the long-established rule that when reviewing a municipal board decision, the superior court has no authority to determine issues of fact and must remand to the municipal board to determine any factual issues necessary to a decision. *See, e.g., Nale v. Ethan Allen*, 199 N.C. App. 511, 521, 682 S.E.2d 231, 238 (2009) ("It is not the role of the appellate courts to make findings of fact."). Here, the Board determined, based on the evidence before it, that it was unable to make findings of fact and conclusions of law supporting its earlier determination that a variance was not needed. Because the Remand Order directed

the Board to hold a new hearing, the Board was within its authority under the Remand Order when it reheard the evidence and denied the Owner's variance application, contrary to its initial decision.

*4. Expansion of Non-Conforming Use*

The Owner next argues that the superior court erred by upholding the Board's interpretation of the Ordinance and concluding that the proposed construction amounted to an impermissible expansion of a non-conforming use. We disagree.

"Where the evidence is not in conflict, the question of whether a particular activity will be deemed a permissible continuation, or an impermissible expansion, of a nonconforming use is a question of law." *Stegall v. Zoning Bd. of Adjustment of New Hanover Cty.*, 87 N.C. App. 359, 363, 361 S.E.2d 309, 312 (1987) (citation omitted). "Questions involving the interpretation of ordinances are questions of law." *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (citation omitted). "[I]n reviewing the judgment of the superior court, this Court applies a *de novo* standard of review in determining whether an error of law exists and we may freely substitute our judgment for that of the superior court." *Id.* at 531-32, 439 S.E.2d at 201 (citation omitted). Here, the parties do not dispute that the proposed changes would expand the livable area of the Existing Structure, while remaining within the footprint of the previously existing deck. As a

result, we will proceed to consider whether this proposed construction constitutes an impermissible expansion of a non-conforming use as defined in the Ordinance.

Section 605 of the Ordinance provides in part:

> 1.) A [n]on-conforming use shall not be changed to another non-conforming use.
>
> 2.) When a non-conforming use has been changed to a conforming use, it shall not thereafter revert to any non-conforming use.
>
> 3.) *A non-conforming use may not be extended or enlarged, nor shall a non-conforming structure be altered except as follows*:
>
>> (a.) Structural alterations as required by law or ordinance to secure the safety of the structure are permissible.
>>
>> (b.) Maintenance and repair necessary to keep a non-conforming structure in sound condition are permissible.
>>
>> (c.) *Expansion of a non-conforming use of a building or structure into portions of the structure which, at the time the use became non-conforming, were already erected and arranged or designed for such non-conforming use is permissible*.
>>
>> (d.) *In cases where the enlargement or extension shall result in bringing the structure up to the minimum square footage requirement for the district in which it is located, or otherwise change the structure to a conforming use*.

Village of Sugar Mountain, N.C., Ordinance ch. I art.VI, § 605 (1986) (emphasis added). The Owner asserts that the proposed construction could qualify under either

Section 605(3)(c) or 605(3)(d) as permissible, and that the Board erred in its interpretation of Section 605(3)(c) and by not considering Section 605(3)(d) in its November 2014 Order.

We hold that the Board did not improperly interpret Section 605(3)(c). The Owner argues that 605(3)(c) allows a property owner to expand a non-conforming use of a structure into a different portion of the structure that was already non-conforming. This interpretation conflicts with the language of 605(3). Section 605(3)(c) applies to changes that have begun or been designed "*at the time the use became non-conforming*"—in other words, at the time the Ordinance was enacted. Village of Sugar Mountain, N.C., Ordinance ch. I art.VI, § 605 (emphasis added). The proposed construction would qualify under the exception delineated in Section 605(3)(c) only if the Owner had purchased the Existing Structure and planned the proposed construction *prior* to the enactment of the Ordinance. *Id.* The interpretation asserted by the Owner would permit any alteration of a non-conforming use structure so long as it remains within the intended use and does not expand beyond the original footprint. This is inconsistent with Section 605(3)'s mandate that non-conforming use structures may not be "altered" except as provided by the exceptions in (a) through (d). *Id.* Here, the proposed construction was not conceived of or planned until after the Ordinance was enacted, rendering the use non-

conforming. Therefore, the superior court did not err in upholding the Board's decision to not apply Section 605(3)(c).

We likewise agree with the superior court that the Board did not err in failing to apply Section 605(3)(d), which permits an alteration that brings a property within the minimum square footage requirement of the Ordinance. The Owner presented no evidence that the proposed construction would comply with the minimum square footage requirements under the Ordinance. Nor did the Owner present any evidence that the proposed construction would otherwise bring the Existing Structure within the setback requirements that make it a pre-existing non-conforming use structure. As there was no evidence to support applying Section 605(3)(d), it was not error for the Board to not consider the proposed construction as falling within its protection.

The Owner also argues that the Board erred by failing to make certain findings regarding requirements that Section 1205 provides are necessary for the issuance of a variance. This argument is without merit. Section 1205.3 of the Ordinance allows the Board to grant a variance if it finds eight enumerated conditions related to hardship, and provides that "[i]n granting a variance, the Board of Adjustment shall make findings that the requirements of this section have been met." Village of Sugar Mountain, N.C., Ordinance ch. I art. XII, § 1205.3 (1985). No provision in Section 1205.3 or any other provision in the Ordinance requires the Board to make findings as to a lack of conditions necessary for the issuance of a variance. The Board found,

and the superior court likewise affirmed after examining the whole record, that the owner "has presented no evidence of unnecessary hardship resulting from a strict application of the Zoning Ordinance of the Village of Sugar Mountain and from a denial of the variance." The Board properly interpreted Section 1205 as not requiring findings to be made unless a variance is issued.

The Owner contends that the Board's failure to make findings regarding hardship rendered its decision arbitrary and capricious. Because the Board was under no duty to make such findings unless it awarded a variance, and it denied the Owner's request for a variance, we therefore overrule the Owner's argument.

**Conclusion**

For the foregoing reasons, we agree with the superior court's ruling that Board acted within its authority in hearing additional evidence and ultimately denying the Owner's application. We further agree with the superior court's ruling that the Board did not err in its interpretation of the Ordinance. Accordingly, we affirm the superior court's order affirming the Board's decision.

AFFIRMED.

Judges MCGEE and ZACHARY concur.

Report per Rule 30(e).