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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-566

No. COA21-605

Filed 16 August 2022

Guilford County, No. 20-CVS-4259

LORI HERRON, Petitioner,

v.

TOWN OF JAMESTOWN, Respondent.

Appeal by Petitioner from order entered 27 April 2021 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 26 April 2022.

Harvey W. Barbee, Jr., for Petitioner-Appellant.

Roberson Haworth & Reese, P.L.L.C., by Christopher C. Finan, Elizabeth M. Koonce, and Zachary W. Green, for Respondent-Appellee.

INMAN, Judge.

¶ 1 This appeal asks us to decide whether potbellied pigs kept as pets, and not for commercial use, are exempt from a local ordinance prohibiting residents from keeping livestock, including swine.

¶ 2 Petitioner-Appellant Lori Herron ("Ms. Herron") appeals from an order of the trial court affirming the Board of Adjustment's (the "Board") decision that keeping

several potbellied pigs on her residential property violated zoning ordinances adopted by Respondent-Appellee Town of Jamestown (the "Town"). She propounds three issues on appeal: (1) the trial court failed to acknowledge the ambiguity of the term "livestock" in the Town's ordinances; (2) the trial court failed to consider that the Town sought to prohibit only "agricultural production" activities within the residential district; and (3) the trial court failed to consider that her land use could have been permitted as an existing non-conforming use. After careful review of the applicable ordinances, the record, and our caselaw, we affirm the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 The record below discloses the following:

¶ 4 On 18 February 2000, Ms. Herron purchased a home in Jamestown and moved into the house with her partner, Michael Young ("Mr. Young"), her children, and their newly-adopted potbellied pig. Before purchasing the home, the couple sought to confirm that they could keep the pig in the house. Ms. Herron first reached out to the town planner over the phone to discuss the property's zoning and he told her it was "[n]o problem." A town official assured Mr. Young that the pig would not be a problem and "welcomed [the family] to the town."

¶ 5 Over the next twenty years, the couple continued living in their home and expanded their family of pigs to a total of ten as of February 2020. Ms. Herron and her family treated these pigs as pets, regularly providing them veterinary care,

creating a sleeping area for them to live in the primary bedroom's closet, and erecting a fence around their yard so the pigs had outdoor access. Ms. Herron claimed she had a strong emotional bond with these animals and cried during the hearing when she recounted one of her pig's deaths. On numerous occasions, the pigs alerted Ms. Herron or a family member of Ms. Herron's oncoming seizure.

¶ 6 Over the years, Ms. Herron and Mr. Young received several complaints about the pigs on their property. Ms. Herron and Mr. Young testified that they received their first complaint from the Town in 2005 when one of Ms. Herron's pigs wandered into a neighbor's yard and ate their flowers. The two recounted they received a call from the Town about the incident, requesting they ensure that the pigs did not trespass onto neighbors' property again. In 2013 and 2015, the Town received complaints about debris and other items in the couple's yard. In response, the Town sent notices of violation to Ms. Herron, ordering that the items be removed from the yard because they were a public nuisance. Neither letter mentioned pigs.[1] In December 2017, a complaint was filed with Guilford County Animal Control alleging the pigs were being kept in unsanitary conditions. Animal control officials conducted a welfare check and found that the house was clean and that the pigs looked "fine."

[1] Matthew Johnson ("Mr. Johnson"), the Assistant Town Manager and Planning Director, testified that in 2013 he drove past Ms. Herron's property in response to the complaint but did not see any pigs.

¶ 7 A final, anonymous complaint was filed with the Town on 26 February 2019, by a caller who bemoaned of rubbish in Ms. Herron's yard and odors emanating from the property. The same day, Mr. Johnson visited Ms. Herron's home to investigate the complaint and discovered debris, including "plumbing fixtures, water heaters, boxes, [and] trash," along with nine pigs in the yard. Mr. Johnson testified he had not previously seen pigs at the residence. He then determined that Ms. Herron's keeping of the pigs on her property violated the Town's Land Development Ordinances (the "ordinances").

¶ 8 The Town's ordinances define "Limited Agriculture" as:

> The keeping of gardens and animals for non-commercial domestic use. Such agriculture generally refers to, but is not limited to, domestic fowl such as chickens, turkeys, ducks and geese, bees, and other small animals (ex–rabbits). *Limited agriculture does not permit livestock such as horses, cows, llamas, sheep, swine or the like.*

(Emphasis added). The ordinances include a "Table of Permitted Uses" (the "Table"), which dictates permissible uses by zoning. At the time of the investigation, Ms. Herron's property was zoned as "R-15"—for residential single-family homes. The Table provided that "Agricultural Production," including livestock, is prohibited in single-family residential districts.

¶ 9 The day after Mr. Johnson visited Ms. Herron's yard, on 27 February 2019, the Town sent a letter to Ms. Herron notifying her that she was in violation of the Town

ordinances prohibiting the keeping of livestock on her residentially-zoned property and requesting that she relocate the pigs from the property within 30 days. Ms. Herron requested additional time to find a new home for her pigs and, by letter, the Town allowed an extension through 27 May 2019, 90 days after the initial notice.

¶ 10 Ms. Herron did not remove the pigs by the deadline but instead, at the Town Council's direction, filed an application to amend the Town's ordinances to alter the definition of "Limited Agriculture" to provide: "Limited agriculture does not permit livestock, *animals used for food or fiber*, such as horses, cows, llamas, sheep, swine *over 300 pounds*, or the like, *not to include miniature or potbellied pigs that are kept as and considered to be pets*." (Suggested amendments noted). Following a public hearing, on 20 August 2019, the Town Council unanimously voted to deny Ms. Herron's application.

¶ 11 On 18 November 2019, the Town sent Ms. Herron a notice of civil penalties because she had failed to comply with the Town's ordinances. Ms. Herron appealed the Town's decision to the Board. The Board received witness testimony and other evidence in a hearing on 4 February 2020.

¶ 12 In the hearing, Mr. Johnson testified about the zoning ordinances in effect when Ms. Herron first bought her property. Though he could not locate any official zoning maps prior to 2006, including one from 2000, the year in which Ms. Herron purchased her property, Mr. Johnson testified that, based upon the minutes of the

Town records, the land had been annexed in 1988 and all annexed land had been designated single-family residential.

¶ 13 On 5 February 2020, the Board affirmed the Town's decision to impose civil penalties. A week later, Ms. Herron filed for Chapter 13 Bankruptcy relief in the Middle District of North Carolina; the case was ultimately dismissed for failure to make planned payment. She also filed suit against the Town, seeking declaratory judgment and an injunction against the enforcement of the ordinances; that case was dismissed for lack of subject matter jurisdiction and failure to state a claim. On 19 March 2020, Ms. Herron filed a writ of certiorari, appealing the Board decision to the Superior Court. Over one year later, following a hearing, on 27 April 2021, the trial court affirmed the Board's decision denying her appeal of several notices of zoning violations and determining Ms. Herron failed to comply with the Town's ordinances by keeping swine at her residentially-zoned property. The trial court ordered Ms. Herron remove and relocate her pigs from the property by 23 May 2021. Ms. Herron appealed to this Court. The Town moved to dismiss her appeal because Ms. Herron had not timely served the proposed record on appeal in violation of our Rules of Appellate Procedure. The trial court denied the Town's motion.

II. ANALYSIS

A. Standard of Review

¶ 14 Our review of a decision of a board of adjustment is governed by Section 160D-1402 of our General Statutes. That statute provides:

> (1) [T]he 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 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.
>
> f. Arbitrary or capricious.

N.C. Gen. Stat. § 160D-1402(j)(1) (2021).[2]

¶ 15 When an appellant asserts the trial court committed an error of law, we review the matter *de novo*. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000). Interpretation of an ordinance is also a question of law which we review *de novo*. *Capricorn Equity Corp.*

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[2] At the time Ms. Herron petitioned the Superior Court for review, N.C. Gen. Stat. § 160A-393 governed. This Section was recodified as N.C. Gen. Stat. § 160D-1402. Sess. Law. 2019-111, Part II.

v. Town of Chapel Hill, 334 N.C. 132, 136-37, 431 S.E.2d 183, 186-87 (1993); *MNC Holdings, L.L.C. v. Town of Matthews*, 223 N.C. App. 442, 447, 735 S.E.2d 364, 367 (2012).

¶ 16 If, on the other hand, an appellant asserts the trial court's decision was unsupported by the evidence, we apply the "whole record" test. *Hopkins v. Nash Cnty.*, 149 N.C. App. 446, 448, 560 S.E.2d 592, 594 (2002). "[W]hether the specific actions of a property owner fit within [an] interpretation is a question of fact[,]" subject to the whole record standard of review. *Hampton v. Cumberland Cnty.,* 256 N.C. App. 656, 667, 808 S.E.2d 763, 771 (2017). The "whole record test" requires us to determine whether there is substantial and competent evidence to support the decision-making body's decision. *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17-18 (2002).

B. "Limited Agriculture" Provision

¶ 17 Ms. Herron argues that because the term "livestock" was not defined within the ordinances it is ambiguous and should be assigned the plain and ordinary meaning of the word. Ms. Herron further contends that her use of the pigs in a non-commercial manner excludes the animals from the category of "livestock" and, therefore, they are permissible on her land. We disagree.

¶ 18 The ordinance provision in dispute, "Limited Agriculture," delineates which agricultural activities are permissible and impermissible within residential single-

family homes. This provision allows:

> The keeping of gardens and animals for non-commercial domestic use. Such agriculture generally refers to, but is not limited to, domestic fowl such as chickens, turkeys, ducks and geese, bees, and other small animals (ex – rabbits). Limited agriculture does not permit *livestock* such as horses, cows, llamas, sheep, *swine* or the like.

(Emphasis added). While the ordinance does not expressly define the term "livestock," it lists swine as an example of livestock prohibited from being kept on single-family residentially zoned property.

¶ 19 Ms. Herron relies on our decision in *Steiner v. Windrow Estates Home Owners Ass'n*, 213 N.C. App. 454, 713 S.E.2d 518 (2011), for the proposition that the absence of a definition warrants the use of a plain meaning interpretation. That case is distinguishable. In *Steiner*, the homeowners kept two Nigerian Dwarf goats as pets on their property. *Id.* at 455, 713 S.E.2d at 520. The homeowners' association sought to have the goats removed because they violated the association's restrictive covenants. *Id.* at 455-56, 713 S.E.2d at 520. The restrictive covenant provided:

> No animals, *livestock* or poultry of any kind shall be raised, bred or kept on any lot except that horses, dogs, cats or *other pets* may be kept *provided they are not kept, bred or maintained for any commercial purposes*, unless allowed by Windrow Estates Property Owners' Association, and provided that such household pets do not attack horses or horsemen.

Id. at 458-59, 713 S.E.2d at 522 (emphasis added). As here, the covenant did not

define the term "livestock." *Id.* at 459, 713 S.E.2d at 523.

¶ 20 Unlike the ordinance at issue in this case, the covenant in *Steiner* restricted the housing of "livestock" but included qualifying language allowing for "horses, dogs, cats or *other pets*" so long as they were not "kept, bred, or maintained for any commercial purposes."[3] *Id.* at 458-59, 713 S.E.2d at 522. Since the covenant did not define either "livestock" or "pet," the Court employed the ordinary meaning of the two words to determine the goats were permissible pets, as opposed to prohibited livestock, because they had no commercial purpose, the family purchased them as pets, and they had a strong bond with the goats. *Id.* at 459, 461-62, 464-65, 713 S.E.2d at 522-24, 526.

¶ 21 By contrast, the ordinance provision in this case does not include an exception for the keeping of "other pets." In fact, the definition of "Limited Agriculture" expressly states that it does not permit "livestock such as horses, cows, llamas, sheep, *swine* or the like[,]" to be kept on residentially-zoned real property. (Emphasis added). Further, although Ms. Herron may treat her pigs as pets, the ordinance

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[3] Our Court more recently interpreted a similar ordinance in *Bryan v. Kittinger*, 2022-NCCOA-201. Similar to *Steiner*, *Bryan* interpreted an ordinance forbidding "livestock" but allowing for "other household pets." *Id.* ¶ 10. We concluded that under the covenant's language it "[did] not prevent a homeowner in Sleepy Hollow to keep hens as 'household pets' . . . ." *Id.* ¶ 31. Nonetheless, we held the trial court erred in granting summary judgment on this issue because the fact finder could have disbelieved the hen-owners when they claimed the hens were pets. *Id.* ¶¶ 15, 31. *Bryan* is distinguishable from this case on the same grounds as *Steiner* because the covenant provided for the keeping of "other pets."

provision does not distinguish between commercial and non-commercial, domestic uses.

C. "Agricultural Production" Provision

¶ 22 Ms. Herron next contends that her keeping of non-commercial and non-productive pet pigs does not constitute the type of "Agricultural Production" the Town sought to prohibit in residential districts under the ordinance's Table of Permitted Uses. For the reasons explained below, we disagree.

¶ 23 "The primary rule of statutory construction is that the intent of the Legislature controls." *Campbell v. First Baptist Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

¶ 24 In addition to the "Limited Agriculture" provision, the Table included in the Town ordinance restricts where livestock may be kept. The Table indicates what activities may occur in each zoning class. In particular, the Table provides "Agricultural Production (Crops and Livestock)" is not permitted on "R-15" zoned properties. The ordinance does not define the term "Agricultural Production."

¶ 25 The parties rely on different canons of statutory construction to justify their interpretations of the terms "Agricultural Production" in the Table. Ms. Herron contends the trial court's decision renders the term "production" in the Table

redundant in violation of our rule of statutory construction that "words of a statute are not to be deemed merely redundant if they can reasonably be construed so as to add something to the statute which is in harmony with its purpose." *In re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 6-7 (1968). On the other hand, the Town argues that reading "production" literally would lead to absurd results, such as allowing households to "keep" thousands of heads of livestock, so long as they were not being used commercially. *See In re Mitchell-Carolina Corp.*, 67 N.C. App. 450, 452-53, 313 S.E.2d 816, 818 (1984) ("Where a literal reading of a statute 'will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.'" (citations omitted)).

¶ 26 The Town further argues against a literal reading of "production" because it would cause other ordinance provisions to come into conflict with each other. For example, the Town contends Ms. Herron's reading would create an "unintended gap" in permitted activities. The use of the term "livestock" would neither prohibit nor permit the keeping of livestock for non-commercial use because it is not included in the "Limited Agriculture" designation, and the "Agricultural Production" provision would not prohibit it, because the mere "keeping" of livestock, under Ms. Herron's interpretation, would not qualify as "production."

¶ 27 Ms. Herron's argument overlooks another canon of statutory construction—

that provisions must be read *in pari materia*, harmonizing a statute's subsections to give them their full effect. *See Town of Pinebluff v. Moore Cnty.*, 374 N.C. 254, 257, 839 S.E.2d 833, 835 (2020); *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) ("Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." (citations omitted)); *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) ("In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible.").

¶ 28 Construing and harmonizing the disputed provisions together, the Table "Agricultural Production (Crops and Livestock)" allows for crops and livestock only in certain zoned land and the "Limited Agriculture" provision of the ordinance plainly prohibits the keeping of swine on residential land. We conclude that, considering these provisions *in pari materia*, there is no room for judicial construction of the term "production."

D. Legal Non-conforming Use of Property

1. Prior conforming use

¶ 29 Assuming Ms. Herron's current use of her land violates the Town's ordinances, Ms. Herron argues that the Town may not enforce the current ordinances against her because her use of the land conformed to the ordinance in effect at the time of purchase. We are precluded from considering Ms. Herron's argument.

¶ 30 "[W]e cannot take notice of municipal ordinances not in the record" and "[f]or the purposes of appellate review, we must consider only the evidence and ordinances in the record." *Thompson v. Union Cnty.*, 2022-NCCOA-382, ¶¶ 24, 27 (citing *High Point Surplus Co. v. Pleasants*, 263 N.C. 587, 591, 139 S.E.2d 892, 895 (1965)). Ms. Herron's counsel has appended the pertinent grandfather provision in the ordinance to her brief on appeal but has failed to include the provision in our record pursuant to our Rules of Appellate Procedure. Because we cannot take notice of the provision, *id.*, we are unable to assess Ms. Herron's argument about whether her keeping of pigs is a legal non-conforming use.

2. Substantial Evidence of Zoning

¶ 31 Ms. Herron further contends that the Town failed to present reasonable evidence she was engaged in a non-conforming use at the time she bought her property because Mr. Johnson's testimony concerning the property's zoning was insufficient without the official zoning map. We hold there was substantial evidence to support the Board's determination about zoning.

¶ 32 Pursuant to our General Statutes, each municipality is required to file and keep with the town clerk a copy of all official zoning maps adopted on or after 1 January 1972. N.C. Gen. Stat. § 160A-78 (2021). The Town could not locate copies of the ordinances before 2006, and the record reveals the Town had amended its ordinances in 1999, the year before Ms. Herron purchased her property.

¶ 33 However, we review a board of adjustment decision concerning applicable zoning "to see if it is supported by substantial evidence in view of the whole record." *Shearl v. Town of Highlands*, 236 N.C. App. 113, 116, 762 S.E.2d 877, 881 (2014); *see also Hampton*, 256 N.C. App. at 667, 808 S.E.2d at 771. Our Supreme Court has held:

> In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported the court's order but whether the evidence before the town board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board.

Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383 (1980).

¶ 34 Ms. Herron's reliance on *Shearl v. Town of Highlands* is misguided. In that case, we vacated the trial court order affirming the board of adjustment decision that the petitioner was in violation of a zoning ordinance because the trial court had improperly placed the burden of proving prior conforming use on the petitioner when the town "fail[ed] to comply with its obligations under local ordinances and state law by failing to keep official zoning maps on record for public inspection." 236 N.C. App. at 118-19, 762 S.E.2d at 881-82. Despite Ms. Herron's broad characterization of the decision, this Court did not hold that testimonial evidence based upon prior town meeting notes or unofficial plat maps are inherently insufficient or inadmissible evidence of zoning; instead, we held that a subdivision plat map was insufficient

weighed against official zoning maps from two years prior to the year of purchase. *Id.* at 119-20, 762 S.E.2d at 883.

¶ 35 Here, unlike in *Shearl*, the burden was properly placed upon the Town to prove the applicable zoning at the time of purchase. The Board then determined Mr. Johnson's testimony was sufficient to establish the zoning at the time Ms. Herron purchased her property despite the absence of any official zoning map before 2006. Upon review of the whole record, we hold there was substantial and competent evidence, namely Mr. Johnson's testimony about Town minutes, land annexation and designation before Ms. Herron purchased the property, and an official zoning map from 2006, to support the Board's determination that Ms. Herron's use violated the Town's zoning. *See id.* at 116, 762 S.E.2d at 881; *see also Mann Media, Inc.*, 356 N.C. at 13-14, 565 S.E.2d at 17-18; *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626-27, 265 S.E.2d at 383.

III. CONCLUSION

¶ 36 For the reasons set forth above, we affirm the order of the trial court.

AFFIRMED.

Judges TYSON and WOOD concur.

Report per Rule 30(e).