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IN THE COURT OF APPEALS OF NORTH CAROLINA

2023-NCCOA-19

No. COA22-578

Filed 17 January 2023

Durham County, No. 21CVS2194

CAROLYN YOUNG, NEISHA REYNOLDS, TANYA EXUM COSTON, and GAIL PERRY, Petitioners,

v.

CITY OF DURHAM, a North Carolina municipal corporation, THE COUNTY OF DURHAM, a North Carolina County, THE DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION, a North Carolina local Board of Education, and CLH DESIGN, P.A., Respondents.

Appeal by petitioners from order entered 21 December 2021 by Judge Orlando Hudson in Durham County Superior Court. Heard in the Court of Appeals 15 November 2022.

The Brough Law Firm, by T.C. Morphis, Jr., for petitioners-appellants.

Tharrington Smith, LLP, by Lindsay V. Smith, for respondent-appellee Durham Public Schools Board of Education.

Deputy City Attorney Donald T. O'Toole for respondent-appellee City of Durham.

GORE, Judge.

This matter arises from the issuance of a minor special use permit by the Durham Board of Adjustment (“BOA”) for the construction of a new high school in a

residential zoning district. Petitioners-appellants are residents of the Old Farm neighborhood in Durham, North Carolina, which is adjacent to the subject property. On appeal, we must determine whether the trial court erred in affirming the 23 March 2021 decision of the BOA granting the minor special use permit to respondent-appellee Durham Public Schools Board of Education. Upon review, we affirm the trial court's Order.

I.

A.

¶ 2

On 2 July 2020, the Board of Education, through its site contractor CLH Design, P.A., applied for a minor special use permit related to the construction of a new school campus for Durham's Northern High School. The project is sited on 76.4 acres on North Roxboro Street between Monk Road and Chateau Road and backing up to Seven Oaks Road in the Old Farm neighborhood. A football field and soccer field will be located at the northeast side of the site. Because the subject property is in an RS-10 residential zoning district, the Board of Education was required under Durham's Unified Development Ordinance ("UDO") to seek a minor special use permit.

¶ 3

The Board of Education's application was heard by the BOA in a virtual quasi-judicial hearing over two sessions on 26 January 2021 and 23 February 2021. The Durham Planning Department submitted a staff report, which reviewed the

application and the site plan under the general findings and review factors required by the UDO and contained a proposed recommendation for approval of the application. The staff report included more than 400 pages of supporting documentation, including a complete site plan, Traffic Impact Analyses from the North Carolina Department of Transportation (“NC DOT”), addenda, and appendices.

¶ 4

During the hearing, the Board of Education presented the testimony of several individuals, all of whom were qualified as experts in their fields by the BOA: Keith Downing (Landscape Architect); Ken Loring (Professional Engineer); Jarvis Martin (Real Estate Appraiser); Joshua Reinke (Traffic Engineer); and Kyle Forrester (Electrical Engineer). The Board of Education also provided an 8 June 2020 report by NC DOT’s Municipal & School Transportation Assistance; an updated site plan; a neighborhood market appraisal report; and the curriculum vitae of experts who testified on behalf of the Board of Education.

¶ 5

Seven residents of the Old Farm neighborhood also presented lay testimony at the hearing regarding their concerns with the construction of the proposed high school, including specifically the routing of bus traffic through the Old Well Street entrance, the potential for noise and light pollution from the athletic fields, and the possibility of water run-off from the school site flooding neighboring homes. The Board of Education’s experts presented additional testimony and information in response to these concerns, as well as in response to related questions from members

of the BOA. Several non-expert community members, including David Harris and Mary Vickers, provided opinion testimony about their observations of existing conditions in the vicinity of the site, as well as other concerns.

¶ 6

Following the closure of the public portion of the hearing, the BOA reconvened on 23 February 2021. The city planning department reported that its concerns regarding reimbursement obligations for required roadway improvements had been addressed. The BOA requested that the Board of Education's experts provide additional information related to the height of the planned fence between the athletic fields and North Roxboro Road; the Traffic Impact Analysis; the impact of buses being routed through the Old Farm neighborhood; and the impact of bus emissions on the neighborhood. At the conclusion of the hearing, BOA approved the Board of Education's application for a minor special use permit by a 5-2 vote, subject to certain conditions.

B.

¶ 7

The BOA approved the written Order for the special use permit on 23 March 2021 and mailed the Order on 15 April 2021. The order set forth findings of fact and conclusions of law based on the evidence presented at the hearing. Specifically, the BOA summarized the testimony presented at the 26 January and 23 February meetings and adopted by reference the descriptions and statements of fact in the staff report. The BOA concluded, based on these findings, that the Board of Education's

application met the requirements of UDO § 3.9.

¶ 8

On 14 May 2021, petitioners timely appealed the issuance of the special use permit by filing a petition for writ of certiorari in Durham County Superior Court. Specifically, petitioners contended: (1) the BOA’s decision was not supported by competent, material, and substantial evidence in the record regarding signs, environmental protection, and the effects of noise, odor, lighting, and traffic; (2) the BOA failed to make sufficient findings of fact to allow it to perform its function; and (3) the BOA improperly excluded certain witness testimony.

¶ 9

Respondents jointly filed a motion to dismiss on 5 August 2021. The superior court denied the motion to dismiss as to all petitioners by written Order entered 26 October 2021. On 30 August 2021, petitioners served notice that they had dismissed respondent County of Durham from the appeal and that petitioner Gail Perry had withdrawn from the appeal. While respondent CLH Design, P.A., has not made an appearance in this matter, CLH Design appeared as the applicant on behalf of the property owner Durham Public Schools, and was named as a respondent to comply with N.C. Gen. Stat. § 160D-1402(d).

¶ 10

On 6 December 2021, the Honorable Orlando F. Hudson, Jr., Senior Resident Superior Court Judge presiding, heard oral arguments from the parties. Judge Hudson affirmed the BOA’s decision by written Order filed 21 December 2021.

C.

¶ 11 On 20 January 2022, petitioners gave timely notice of appeal to this Court. Judge Hudson’s Order affirming the decision of the Durham BOA is a final judgment as to all claims pertaining to the special use permit. This Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(1).

II.

A.

¶ 12 When the BOA holds a public hearing on an application for a minor special use permit, “it acts in a quasi-judicial capacity.” *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 469, 202 S.E.2d 129, 136-37 (1974). It hears the evidence, operates as the finder of fact, and follows “a two-step decision-making process in granting or denying an application for a special use permit.” *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 16 (2002). First, the BOA must determine whether the “applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit” *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136 (emphasis added). If “the applicant satisfies this initial burden of production, then *prima facie* he is entitled to the issuance of the requested permit.” *PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 149, 839 S.E.2d 755, 766 (2020) (quotation marks and citation omitted). “At that point, any decision to deny the application should be based upon findings contra which are

supported by competent, material, and substantial evidence appearing in the record” *Id.* (quotation marks and citation omitted). The BOA may not, however, “deny a permit on grounds not expressly stated in the ordinance[,] and it must employ specific statutory criteria which are relevant.” *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 17 (quotation marks and citation omitted).

B.

¶ 13 “While the [BOA] operates as the finder of fact, a reviewing superior court ‘sits in the posture of an appellate court’ and ‘does not review the sufficiency of evidence presented to it but reviews that evidence presented to the [local quasi-judicial body].” *Id.* (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm’rs*, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383 (1980)). In reviewing the BOA’s decision, the superior court is charged with:

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

Coastal Ready-Mix, 299 N.C. at 626, 265 S.E.2d at 383; *see also* N.C. Gen. Stat. §

160D-1402(j) (2022).

¶ 14

The applicable standard of review for the superior court “depends upon the particular issues presented on appeal.” *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (quotation marks and citation omitted). “[I]f a petitioner contends the [decision of a quasi-judicial body] . . . was based on an error of law, de novo review is proper.” *Id.* (quotation marks and citation omitted). “Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.” N.C. Gen. Stat. § 160D-1402(j)(2). “When the petitioner questions (1) whether the agency’s decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the ‘whole record’ test.” *ACT-UP Triangle v. Comm’n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quotation marks and citations omitted). “The ‘whole record’ test requires the reviewing court to examine all competent evidence (the ‘whole record’) in order to determine whether the agency decision is supported by substantial evidence.” *Id.* (quotation marks and citation omitted). Based on the characterization of the alleged error on appeal, the trial court may apply both the “whole record” test and de novo review to resolve the issues before it. *In re Willis*, 129 N.C. App. 499, 502, 500 S.E.2d 723, 726 (1998).

C.

¶ 15

When this Court reviews

a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

ACT-UP Triangle, 345 N.C. at 706, 483 S.E.2d at 392 (quotation marks and citation omitted).

III.

¶ 16

We first consider whether the superior court applied the appropriate standard of review. The superior court's written Order contains the following conclusions of law, relevant to the first prong of our analysis:

4. Petitioners have made the following contentions of error: (1) the BOA's decision was not supported by competent, material, and substantial evidence in the record, particularly with respect to certain review factors required by the Durham UDO; (2) the BOA failed to make sufficient findings of fact to allow the Court to perform its function; and (3) the BOA improperly excluded certain witness testimony.

...

6. Petitioners contend only that the Board of Education failed to produce competent, material, and substantial evidence sufficient to make a *prima facie* showing that it was entitled to the minor special use permit. As a result, this Court need not review whether the Administrative Record contains competent, material, and substantial evidence rebutting the Board of Education's evidence, nor need it review any weighing of the evidence conducted by the BOA. Rather, this Court's review is limited merely to review of the legal conclusion that the Board of Education

produced sufficient evidence to support its *prima facie* entitlement to the permit—a question that the Court must review *de novo*. See also N.C. Gen. Stat. § 160D-1402(j)(2).

¶ 17 Petitioners offer no argument that the superior court utilized an improper standard of review; all three issues raised by petitioners are questions of law. As our Supreme Court noted in *PHG Asheville*, “the extent to which an applicant has presented competent, material, and substantial evidence tending to satisfy the standards set out in the applicable ordinance for the issuance of a conditional¹ use permit is a question” of law. 374 N.C. at 152, 839 S.E.2d at 767.

As a result, the issue of whether the applicant for a conditional [or special] use permit made out the necessary *prima facie* case does not involve determining whether the applicant met a burden of persuasion, as compared to a burden of production, and is subject to *de novo*, rather than whole record, review during the judicial review process.

374 N.C. at 153 n.5, 839 S.E.2d at 768 n.5. Thus, we determine that the superior court correctly characterized the issues before it as questions of law and applied the appropriate *de novo* standard of review. We now proceed to the second prong of our analysis.

IV.

¹ “[T]he terms ‘special use’ and ‘conditional use’ are used interchangeably, . . . and a conditional use or a special use permit ‘is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.’” *Coastal Ready-Mix*, 299 N.C. at 623, 265 S.E.2d at 381 (citations omitted).

¶ 18 Durham’s UDO § 3.9 governs the issuance of the special use permit in this case. Under the UDO, “[t]he applicant seeking the special use permit shall have the burden of presenting evidence sufficient to allow the approving authority to reach the conclusions set forth below, as well as the burden of persuasion on those issues.” UDO § 3.9.6(B). “The procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public.” *Humble Oil*, 284 N.C. at 467, 202 S.E.2d at 135. Whether an application for special use permit is to be allowed or denied, the BOA “must proceed under standards, rules, and regulations uniformly applicable to all who apply for permit.” *Id.* (quotation marks and citation omitted); *see also* N.C. Gen. Stat. § 160D-705(c) (2022) (The BOA is authorized to “hear and decide special use permits in accordance with principles, conditions, safeguards, and procedures specified in the [local] regulations.”).

¶ 19 In accordance with procedural guidelines, “[e]very quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record.” N.C. Gen. Stat. § 160D-406(j) (2022). “Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.” N.C. Gen. Stat. § 160D-1402(j)(2).

Substantial evidence is defined as “that which a reasonable mind would regard as sufficiently supporting a specific result.” Material evidence is evidence “having some logical connection with the consequential facts,” and competent evidence is generally defined as synonymous with

admissible evidence. Thus, substantial, competent, material evidence is evidence that is admissible, relevant to the issues in dispute, and sufficient to support the decision of a reasonable fact-finder.

Blair Invs., LLC v. Roanoke Rapids City Council, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013) (*purgandum*).

¶ 20 The applicant for a special use permit must present competent, material, and substantial evidence to support each of the required “general findings” and thirteen additional “review factors” as set forth in UDO § 3.9.8. Here, petitioners contend that the Board of Education failed to produce competent, material, and substantial evidence of any kind for at least three “review factors” enumerated in UDO § 3.9.8(B), specifically: signage, environmental protection, and effect on nearby properties.

A.

¶ 21 The Durham UDO requires the applicant to present evidence regarding the “[a]ppropriateness of signs considering location, color, height, size, and design within the context of other property in the area.” UDO § 3.9.8(B)(5). On its “Minor and Major Special Use Permit (SUP) Application,” the Board of Education asserted, “A school monument sign will be provided and will abide by City of Durham and North Carolina Department of Transportation standards. The monument sign will complement the new building and surrounding developments in the area. All other signs on the site will abide by NCDOT and City of Durham Standards.”

¶ 22 At the 26 January 2021 BOA meeting held on this matter, lead landscape architect Keith Downing provided sworn expert testimony on behalf of the applicant and was specifically asked whether the signage was appropriate. Downing described “two signs . . . proposed, the main monument sign . . . and then secondary signage that [identifies athletic student parking].” Downing further stated that, in his professional opinion, the signage “meets the UDO requirements.” This expert testimony was competent evidence from which the BOA could find this review factor had been met. Where no contradictory evidence was presented to the BOA on this factor, “the presumption is that the permitted use is compatible with the zoning scheme.” *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm’rs*, 169 N.C. App. 809, 814, 610 S.E.2d 794, 798 (2005) (citation omitted).

B.

¶ 23 The Durham UDO § 3.9.8(B)(8) specifies the applicant must present evidence of compliance with environmental protection requirements, including “[p]reservation of tree cover, Durham Inventory Sites, floodplain, stream buffers, wetlands, steep slopes, open space and other natural features, and protection of water quality.” UDO § 3.9.8(B)(8). Downing offered some testimony regarding UDO § 3.9.8(B)(8), and civil engineering expert Ken Loring also offered extensive testimony regarding full compliance with UDO environmental protection considerations.

¶ 24 Petitioners contend there was no competent evidence regarding Inventory

Sites or steep slopes before the BOA necessary to carry the applicant's burden of production on this factor. However, petitioners fail to cite to record evidence that suggests the subject property is listed in Durham Inventory of Important Natural Area, Plants and Wildlife, *see* UDO § 8.10, or that the subject property contains steep slopes of any kind. The applicant's expert testimony on the environmental protection review factor was uncontested at the hearing. In the absence of any competent rebuttal evidence appearing in the record, the superior court correctly concluded that the Board of Education met its burden of production on this review factor.

C.

¶ 25 Under the Durham UDO, the applicant is required to present evidence regarding “[e]ffects of the proposed use on nearby properties, including, but not limited to, the effects of noise, odor, lighting, and traffic.” UDO § 3.9.8(B)(10). Petitioners’ broadly assert “neither the staff report nor the applicant’s evidence provide competent, material, and substantial evidence regarding these factors.”

¶ 26 Here, planning department staff member Eliza Monroe was present at the hearing. She commented on the staff report and recommended the minor special use permit be approved. The BOA also considered testimony from experts regarding noise, traffic, and lighting, which tended to establish that the Board of Education complied with all UDO requirements.

¶ 27 This evidence is similar to *Blair*, where the city planning department

submitted a report recommending approval of the applicant's application for special use permit to construct a cellular phone tower. 231 N.C. App. at 318-19, 752 S.E.2d at 526. The director of the planning department also offered sworn testimony commenting on the petitioner's application. *Id.* at 319, 752 S.E.2d at 526. We held that "the information in the planning department's report in conjunction with the director's testimony, constituted 'competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit.'" *Id.* at 323, 752 S.E.2d at 528 (citation omitted).

¶ 28 Thus, we conclude there was competent, material, and substantial evidence before the BOA to support this additional review factor as well.

V.

¶ 29 Next, petitioners contend the BOA failed to make findings of fact sufficient for the superior court to properly perform its function. Specifically, petitioners assert the BOA merely summarizes witness testimony and makes unsupported conclusory statements in its decision. We disagree.

¶ 30 This case is unlike previous decisions where this Court has determined that a local quasi-judicial board failed to "state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision." *Humble Oil*, 284 N.C. at 471, 202 S.E.2d at 138; *see Shoney's v. Bd. of*

Adjustment, 119 N.C. App. 420, 423, 458 S.E.2d 510, 512 (1995) (holding that the board of adjustment’s findings of fact were “conclusory at best” when they merely cited the “relevant section of the City’s zoning ordinance.”); *see also Deffet Rentals, Inc. v. Burlington*, 27 N.C. App. 361, 365, 219 S.E.2d 223, 227 (1975) (holding that findings of fact by the board of adjustment were insufficient to enable the reviewing court to perform its function where the board merely recited the zoning classification for the subject property and failed to make specific findings regarding the petitioner’s contention that it acquired a vested right to construct apartments on the subject property).

¶ 31 Here, the BOA specifies the substantial expert testimony and documentary evidence upon which it relied in reaching its decision. The BOA provided the parties, and reviewing courts, with sufficient basis for its decision that the Board of Education demonstrated compliance with the criteria for approval of the minor special use permit.

VI.

¶ 32 Petitioners contend the BOA improperly excluded witness testimony about: (i) existing and likely dangers posed by increased traffic in the neighborhood; and (ii) environmental inequality. This argument also lacks merit.

¶ 33 Old Farm neighborhood residents David Harris and Mary Vickers provided the following lay opinion testimony at the hearing:

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Opinion of the Court

MR. HARRIS: I vehemently oppose opening Old Wells Street to any Northern High School traffic due to safety concerns about 56 bus trips daily through the neighborhood with also bicycle and pedestrian traffic. Our neighborhood does not have sidewalks so the walking, the biking, and pedestrians would be walking in the street with 56 bus trips daily through our neighborhood.

...

[BOA CHAIR]: Mr. Harris, let me stop you. I have to be fair to the applicant and I understand exactly what you're talking about, you're concerned about the traffic. Are you a transportation engineer by trade or by expertise?

MR. HARRIS: I am not a transportation engineer, I am a resident.

[BOA CHAIRMAN]: Understood. Understood. . . . Please try to limit your testimony. If you're not an expert in traffic – I mean, I understand that's the concern but try to avoid making analysis or conclusion that's not an expertise area.

...

[ATTORNEY FOR DURHAM PUBLIC SCHOOLS]: Just for the record, Durham Public Schools would like to object to Mr. Harris's testimony to the extent that he purported to provide on the impacts of traffic to the Old Wells – to the Old Farm neighborhood.

[BOA CHAIRMAN]: Understood. Thank you.

MS. VICKERS: I will discuss health and safety concerns as well as health disparities found in minority communities to support this opposition. The – opening Old Well Street and routing traffic through our neighborhood will have a detrimental safety impact on neighbors who use our streets for daily physical activities. It will also pose an additional safety hazard to the residents of the JFK Towers Housing

for the Elderly and Disabled. Some of these residents use motorized wheelchairs to access [sic] services offered in the business portion of our neighborhood. These residents already face significant challenges as they try to navigate busy roads in wheelchairs.

...

There's also some evidence of a positive association between diesel exhausts and bladder cancer. Light pollution has been associated with migraine headaches and seizures. As stated in the article, 5 Things to Know About Communities of Color and Environmental Justice by Jasmine Bell, April 25th, 2016, communities of color have higher exposure to air pollution than their white, non-Hispanic counterparts. Therefore, introducing and increasing the release of toxins into our neighborhood is not in the best interest of our residents.

Old Farm is a neighborhood comprised of predominantly black and brown people. It is of extreme [sic] to us that the residents of our community be given equitable consideration as policy makers, boards, and planning committees make decisions that will impact the health and safety of our community.

...

[ATTORNEY FOR DURHAM PUBLIC SCHOOLS]: The Durham Public Schools wants to object to Ms. Vickers's testimony to the extent that she is attempting to opine on the environmental impacts of environmental toxins and air pollution. She's not an expert on those issues and also there's no evidence that she's presented that the school will, in fact, have any kind of – deleterious environmental impact on surrounding residents.

[BOA CHAIRMAN]: Thank you.

about existing traffic hazards. Lay opinion testimony based upon “personal knowledge and observations . . . [ar]e valid and not the result of speculative assertions, mere expression of opinion, or . . . generalized fears.” *Howard v. City of Kinston*, 148 N.C. App. 238, 247, 558 S.E.2d 221, 228 (2002). To the extent Harris and Vickers opined about the effects of increased vehicular traffic as “a danger to the public safety[,]” this evidence is permissibly deemed incompetent and excluded under N.C. Gen. Stat. § 160D-1402(j)(3)(b).

¶ 35 Further, Vickers was not tendered as an expert witness. Her testimony regarding vehicle emissions, air pollution, and associated health effects is properly excluded under N.C. Gen. Stat. § 160D-1402(j)(3)(c). Vickers generally relies upon information obtained from the United States Environmental Protection Agency to substantiate her concerns about environmental toxins and air pollution but presents no “quantitative data” or “other evidence” necessary to rebut the applicant’s evidence. *Cumulus Broad., LLC v. Hoke Cnty. Bd. of Comm’rs*, 180 N.C. App. 424, 430, 638 S.E.2d 12, 17 (2006). Similarly, Vickers’s general concern about environmental injustice is not backed by “other evidence” necessary to rebut the applicant’s prima facie showing and substantiate her claim that issuance of the minor special use permit would have the stated adverse effect upon the Old Farm neighborhood. *Id.*

VII.

¶ 36 For the foregoing reasons, we conclude that the superior court did not err in

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Opinion of the Court

affirming the 23 March 2021 decision of the Durham BOA.

AFFIRMED.

Chief Judge STROUD and Judge DILLON concur.

Report per Rule 30(e).