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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-638

Filed 20 August 2024

Orange County, No. 23 CVS 124

T. ANDREW DYKERS, Petitioner,

v.

TOWN OF CARRBORO, Respondent.

Appeal by Petitioner from order entered 2 May 2023 by Judge Alyson Adams Grine in Orange County Superior Court. Heard in the Court of Appeals 15 November 2023.

Attorney T. Andrew Dykers, Pro Se, for the petitioner-appellant.

Brough Law Firm, by Attorney G. Nicholas Herman, for the respondent-appellee.

STADING, Judge.

This matter arises from the trial court’s decision to affirm the Board of Adjustment (“BOA”) of the Town of Carrboro’s (“the Town”) denial of a variance request by Petitioner T. Andrew Dykers to change the permitted use of his property. Petitioner sought to convert his property from a single-family dwelling to a duplex under the Town’s Land Use Ordinance (“LUO”), which would have allowed him to

convert an auxiliary structure on his property to a second dwelling unit. For the reasons below, we affirm the trial court's order affirming the decision of the BOA.

I. Factual and Procedural History

Petitioner's property, located in Carrboro, North Carolina, contains two structures on a 10,018 square foot lot. The property is zoned "Residential-10" ("R-10") and is classified under the LUO as "1.110 Single Family Detached One Dwelling Unit Per Lot." Despite the presence of two structures, the property adheres to the single-family zoning classification because only one structure meets the LUO's definition of a "Dwelling Unit": a unit containing "sleeping, kitchen, and bathroom facilities designed for and used or held ready for use as a permanent residence by one family." While the property functions as a de facto duplex, with Petitioner occupying one portion and renting out the other, this arrangement does not violate the zoning classification. Although the secondary structure contains sleeping and bathroom facilities, it lacks a kitchen and is therefore considered an extension of the primary single-family dwelling rather than a separate dwelling unit under the LUO's definitions. Petitioner's desired reclassification would allow the secondary unit to function as a separate dwelling unit—thus permitting the installation of a kitchen and separate mailbox for the occupier's personal use.

For Petitioner's request to be granted, the LUO specifies that Petitioner's lot must consist of at least 10,000 square feet for each dwelling unit on the property. Due to the size of Petitioner's lot, Petitioner sought the Town's permission to

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reclassify his property. In October 2020, Petitioner attended a Town Council meeting to discuss his desired reclassification. At the meeting, Petitioner learned that the Town Planning Director viewed his requested change as impermissible.

On 3 May 2021, Petitioner filed a variance request with the BOA. The variance request, submitted via the Town's Form no. D-88-14, described the following motivations for changing the property's classification: (1) "[t]he ability to simultaneously rent and live on the property while maintaining privacy and dignity is currently being unreasonably and arbitrarily restricted," (2) "[d]enying me the ability to live and rent on my property while maintaining privacy between landlord and tenant creates the unnecessary hardship of living without a proper kitchen and private mail," (3) "[t]he hardship results from the size and location of the property as well as the peculiar structural layout," (4) "I knew when I purchased the property that circumstances exist to justify the granting of the variance," and (5) "[t]he purpose of the ordinance is to regulate density. If the requested variance is granted nothing with regard to density will change on the property. Meaning no new structures are being requested and the same number of people will reside on the property."

On 9 July 2021, in support of Petitioner's variance request, Petitioner submitted an appeal of the Town's October 2020 denial of Petitioner's request by challenging the BOA's authority under N.C. Gen. Stat. § 160D-705(d) (2023). Petitioner then requested to narrow the scope of the appeal solely to whether the BOA

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has the authority to decide his request under N.C. Gen. Stat. § 160D-705(d). The matter was scheduled for consideration by the BOA on 20 October 2021.

The minutes from the BOA's 20 October 2021 vote on Petitioner's appeal revealed that the BOA believed it had no authority to grant Petitioner's request. The BOA ultimately concluded that the original determination made by the Town Council to deny Petitioner was "the proper decision that was made." The BOA's minutes added that "the language in the Land Use Ordinance to reach [the Town Planning Director's] decision . . . was an appropriate finding even if portions of the ordinance change in the future in a way that may accommodate the appellant's desire to have a second dwelling unit on this property."

In response to the BOA's 20 October 2021 denial of Petitioner's request, he petitioned the superior court for a writ of certiorari on 1 November 2021. The matter was heard in Orange County Superior Court on 25 April 2022 and remanded to the BOA.¹ Following the superior court's decision, on 21 September 2022, the BOA again heard and denied Petitioner's request, affirmed the Town's Zoning Administrator's determination, and denied the variance request. The BOA reasoned that since Petitioner's "variance request was a 'use variance' request, the BOA ha[d] no authority to grant such a variance and it [was] denied."

¹ The superior court found that it was "unable to review the decision-making board and the Writ was improvidently issued" because the BOA "did not make a decision regarding Petitioner's request." Therefore, the matter was remanded to the BOA "for a decision regarding Petitioner's request for a variance."

On 28 April 2023, the superior court issued an order captioned “Order Affirming Decision of Board of Adjustment.” This order contained a conclusion of law that: “[t]he BOA did commit an error of law when it decided that reclassifying the property from a single-family dwelling to a duplex is a change in permitted use that the BOA is prohibited from making under N.C. Gen. Stat. § 160D-705(d) and denied Petitioner’s variance request.” On 2 May 2023, the superior court issued another order with the same caption, which altered the language of the same conclusion of law to state “[t]he BOA did not commit an error of law. . . .” Petitioner then filed his notice of appeal of the superior court’s decision on 24 May 2023.

II. Jurisdiction

The trial court’s affirmation of the BOA’s decision is a final judgment. This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, Petitioner argues that the wording of N.C. Gen. Stat. § 160D-705(d) (2023) permits his request for reclassification, and that conformity with his request would not amount to a “change in permitted use” as statutorily defined. “Our review is limited to determining whether the superior court applied the correct standard of review, and to determining whether the superior court correctly applied that standard.” *Starlites Tech Corp. v. Rockingham Cnty.*, 270 N.C. App. 71, 75, 840 S.E.2d 231, 235 (2020) (cleaned up). When reviewing a variance request, a county board of adjustment acts in a quasi-judicial capacity. N.C. Gen. Stat. § 160D-705(d).

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“Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160D-1402.” N.C. Gen. Stat. § 160D-406(k) (2023). “If the board’s decision is challenged as resting on an error of law, the proper standard of review for the superior court is de novo.” *Frazier v. Town of Blowing Rock*, 286 N.C. App. 570, 573, 882 S.E.2d 91, 94 (2022) (quoting *Bailey & Assocs. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 586 (2010)). “An appellate court’s review of the trial court’s zoning board determination is limited to determining whether the superior court applied the correct standard of review, and . . . whether the superior court correctly applied that standard.” *Id.* at 574, 882 S.E.2d at 95 (citation and quotation marks omitted).

N.C. Gen. Stat. §160D-705(d) states “[n]o change in permitted uses may be authorized by variance.” In considering whether to grant or deny variance permits, the BOA “is not left free to make any determination whatever that appeals to its sense of justice.” *Lee v. Bd. of Adjustment*, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (1946) (reversing a board of adjustment’s award of a permit for the construction of a business in a district zoned for residential use, stating the board effectively “rezoned” the lot and “amended the ordinance,” which it had no authority to do). A use variance is “a variance permitting deviation from zoning requirements about use.” *Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Matthews*, 213 N.C. App. 364, 371, 713 S.E.2d 511, 516 (2011) (quoting *Black’s Law Dictionary* 1693 (9th ed. 2009)) (internal quotation marks omitted). “A ‘use variance’ generally permits a land use

other than the uses permitted in the particular zoning ordinance; it essentially is a license to use property in a way not permitted under an ordinance.” *Id.* (quoting 83 Am. Jur. *Zoning and Planning* § 756)) (internal quotation marks omitted).

Petitioner’s request for a variance permitting him to deviate from the LUO’s requirement of a 20,000-square-foot minimum lot size for a duplex use and giving him a license to use his property for a duplex on 10,018 square-foot lot is a “use variance.” *See id.* For example, the LUO provides that a “change in use” occurs whenever “[t]he change involves a change from one principal use category to another.” Based on the LUO, Petitioner’s request that the BOA grant him a variance to reclassify his lot from the “Single Family Detached One Dwelling Unit Per Lot” category to the “Duplex” category constitutes a “use variance” because it asks for a change in the “principal use” of his lot from the “1.100 Single Family Residence” use category to the “1.200 Two-Family Residence” use category. It also asks the BOA to exempt Petitioner from the duplex requirement that his 10,018 square-foot lot be at least 20,000 square feet.

In *Sherrill v. Town of Wrightsville Beach*, this Court rejected the contention that a board of adjustment had the authority to grant a use variance to build duplexes on lots zoned and regulated for single-family residences. 76 N.C. App. 646, 334 S.E.2d 103 (1985). The *Sherrill* Court reasoned:

A nonconforming building or use that conflicts with the general purpose or spirit of the zoning ordinance can only be authorized by the board of aldermen acting in their

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legislative capacity to rezone, not under the guise of a variance permit. . . . The purpose and effect of a duplex is to increase density. Consequently, the requested variance is directly contrary to the zoning ordinance. In these circumstances the board of adjustment had no legal authority . . . to grant the requested variance. . . .

Id. at 648, 334 S.E.2d at 104 (emphasis added). Moreover, here, as in *Sherrill*, the LUO's separate zoning classifications for single-family dwelling and duplex use are intended to regulate residential density. *Id.* The use variance sought by Petitioner from the BOA in its quasi-judicial capacity runs "directly contrary" to the LUO's purpose of regulating single-family and duplex residential densities within the Town. *Id.* Petitioner's variance request amounts to a rezoning accomplishable only by "a legislative act" in accordance with "power conferred by the General Assembly." *Carroll v. City of Kings Mtn.*, 193 N.C. App. 165, 170, 666 S.E.2d 814, 818 (2008) (citations and ellipses omitted). The lower court properly upheld the BOA's denial as the BOA is without legal authority to grant the use variance here under N.C. Gen. Stat. § 160D-705(d). *Id.* at 169, 666 S.E.2d at 817.

As mentioned above, this duplex dilemma is not without a diagnosis, but the remedy does not lie with the judicial branch. "The courts do not possess the power to amend the zoning regulations." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 58, 344 S.E.2d 272, 276 (1986) (quoting 1 R. Anderson, *American Law of Zoning 2d* § 4.26 (1976)). "While the courts possess the authority to pass upon the validity of a zoning ordinance, this authority does not include the power to determine the ultimate

zoning classification.” *Id.* (quoting *La Salle Nat’l Bank v. Chicago*, 130 Ill. App. 2d 457, 460, 264 N.E.2d 799, 801 (1970)) (internal quotation marks omitted). “Zoning is properly a legislative function, and courts are prevented by the doctrine of separation of powers from invasions of this field.” *Id.* (citing *City of Miami Beach v. Weiss*, 217 So.2d 836, 837 (Fla. 1969); *Bd. of Supervisors of Fairfax Cnty. v. Allman*, 215 Va. 434, 445, 211 S.E.2d 48, 55, *cert. denied*, 423 U.S. 940, 96 S.Ct. 300, 46 L.Ed.2d 272 (1975)). Accordingly, if Petitioner wishes to convert his single-family dwelling use to a duplex use and do so with nearly half the required square footage, he may do so through the Town’s legislative body, not a quasi-judicial process via the BOA.

IV. Conclusion

Based on the foregoing reasons, we affirm the trial court’s affirmation of the BOA’s denial of Petitioner’s variance request.

AFFIRMED.

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).