231 N.C.App. 318
Court of Appeals of North Carolina.

BLAIR INVESTMENTS, LLC, Petitioner,
v.
ROANOKE RAPIDS CITY COUNCIL, and City of Roanoke Rapids, Respondents.

No. COA13–690.
|
Dec. 17, 2013.

Synopsis
Background: Landowner petitioned for certiorari review of city council's denial of special use permit to construct cellular phone tower. The Superior Court, Halifax County, Alma L. Hinton, J., affirmed, and landowner appealed.

Holdings: The Court of Appeals, Steelman, J., held that:

[1] landowner made a prima facie showing through competent, material, and substantial evidence that it was entitled to a special use permit to construct a cellular phone tower, and

[2] there was no substantial, competent, and material evidence to support denial of landowner's application.

Reversed.

West Headnotes (17)

[1] **Zoning and Planning**
Nature and necessity in general

A "conditional use permit" 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.

1 Cases that cite this headnote

[2] **Zoning and Planning**
Evidence and fact questions
Zoning and Planning
Findings, reasons, conclusions, minutes or records

The city council is the finder of fact in its consideration of the application for a special use permit, and is required, as the finder of fact, to follow a two-step decision-making process in granting or denying an application for a special use permit; if an 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, prima facie he is entitled to it, and if a prima facie case is established, a denial of the permit then should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

2 Cases that cite this headnote

[3] **Zoning and Planning**
Permits, certificates, and approvals in general

The task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes: (1) reviewing the record for errors in law, (2) ensuring that procedures specified by law in both statute and ordinance are followed, (3) ensuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) ensuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and (5) ensuring that decisions are not arbitrary and capricious. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

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[4] **Zoning and Planning**
Scope and Extent of Review

When the Court of Appeals reviews a superior court's order regarding a zoning decision by a Board of Commissioners, it examines the order to: (1) determine whether the superior court exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly.

Cases that cite this headnote

[5] **Zoning and Planning**
Questions or errors of law
Zoning and Planning
Arbitrary, capricious, or unreasonable action
Zoning and Planning
Questions of fact; findings

There are two standards of review that may apply to special use permit decisions; whole record review, a deferential standard, applies where the Court of Appeals must determine if a decision was supported by the evidence or if it was arbitrary or capricious, but errors of law are reviewed de novo.

Cases that cite this headnote

[6] **Zoning and Planning**
Evidence and fact questions

When an applicant for a conditional use permit produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a prima facie showing of entitlement to a permit; "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.

Cases that cite this headnote

[7] **Administrative Law and Procedure**
Substantial evidence

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.

1 Cases that cite this headnote

[8] **Zoning and Planning**
De novo review in general

The appellate court reviews de novo the initial issue of whether the evidence presented by petitioner seeking a conditional use permit met the requirement of being competent, material, and substantial.

Cases that cite this headnote

[9] **Zoning and Planning**
Telecommunications towers and facilities

Landowner made a prima facie showing through competent, material, and substantial evidence that it was entitled to a special use permit to construct a cellular phone tower; planning department report noted that tower was a use permitted with a permit, that tower as designed was proper and would comply with land use ordinance requirements, and that it was "probably true" that ingress and egress to lot was safe, that tower's impact on neighboring properties would be similar to impact of other permitted uses, and that tower would be appropriately screened, permit application indicated that tower would comply with federal ruled concerning construction requirements and

technical standards, and planning department report also stated that landowner had "addressed the requisite questions" and that the permit request "satisfactorily meets the requirements" of the land use ordinance.

Cases that cite this headnote

[10] **Zoning and Planning**
Evidence and fact questions

Once an applicant makes a prima facie showing of entitlement to a special use permit, the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit.

1 Cases that cite this headnote

[11] **Zoning and Planning**
Evidence and fact questions

Denial of a conditional use permit following a prima facie showing of entitlement must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record.

2 Cases that cite this headnote

[12] **Zoning and Planning**
Grounds for grant or denial in general

A city council's denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible, as speculative assertions, mere expression of opinion, and generalized fears about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body.

1 Cases that cite this headnote

[13] **Zoning and Planning**
Findings, reasons, conclusions, minutes or records

The denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

Cases that cite this headnote

[14] **Zoning and Planning**
Telecommunications towers and facilities

Substantial, competent, and material evidence did not support denial of landowner's application for a special use permit to construct a cellular phone tower; there was no evidence that the tower would not be in harmony with the area, nor any evidence about health or safety issues, and comments by local residents regarding their "concerns" constituted mere speculation insufficient to support a denial.

Cases that cite this headnote

[15] **Zoning and Planning**
Grounds for grant or denial in general

The inclusion of a particular use in a zoning ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district.

Cases that cite this headnote

[16] **Administrative Law and Procedure**
Arbitrary, unreasonable or capricious action; illegality
Administrative Law and Procedure
Substantial evidence

When a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary.

Cases that cite this headnote

[17] **Zoning and Planning**
Questions of fact; findings

Where the trial court affirms the denial of a conditional use permit application when the denial was not based on sufficient evidence, the trial court must be reversed.

Cases that cite this headnote

****526** Appeal by Petitioner from order entered 25 February 2012 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 4 November 2013.

Attorneys and Law Firms

Richard E. Jester, for petitioner-appellant.

Chichester Law Office, by Geoffrey P. Davis, and Gilbert W. Chichester, for respondent-appellees.

Opinion

STEELMAN, Judge.

***318** Where petitioner made a *prima facie* case that it was entitled to a special use permit to construct a cell tower and the city council's denial of petitioner's application was not supported by competent, material, and substantial evidence, the trial court erred by affirming the city council's decision.

I. Factual and Procedural Background

Blair Investors, LLC, (petitioner), a North Carolina limited liability corporation, leased a 100 square foot site in Roanoke Rapids to U.S. Cellular, which planned to install a cell phone tower. The property is zoned I–1 Industrial by the City of Roanoke Rapids, a zoning category that allows placement of a cellular phone tower upon granting of a special use permit.

Petitioner submitted an application to the Roanoke Rapids Planning and Development Department (the planning department) for a special use permit to construct the cell tower, and on 8 August 2012 the planning ***319** department submitted a report to the mayor of Roanoke Rapids and to the Roanoke Rapids City Council (the council) (respondent, with City of Roanoke Rapids, respondents) recommending approval of the application. On 14 August 2012 the council held a public hearing on petitioner's application. Sworn testimony was offered by the director of the planning department, who introduced the department's report, and by several area residents who commented on petitioner's application. At a subsequent meeting on 9 October 2012 the council denied the special use permit on the grounds that "more probably than not" the proposed tower would "endanger the public health or safety" and would "not be in harmony with the surrounding area."

On 14 November 2012, petitioner filed a petition for writ of *certiorari* in Superior Court, seeking review of respondent's decision. On 25 February 2012, the trial court entered an order affirming respondent's denial of petitioner's application for a special use permit.

Petitioner appealed.

II. Evidentiary Support for Denial of Special Use Permit

In its first argument, petitioner contends that the trial court erred in affirming the decision of the council, on the grounds that the council's ruling was "not supported by any relevant evidence." We agree.

A. Standard of Review

[1] "[T]he terms 'special use' and 'conditional use' are

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used interchangeably [.] ... [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.' " *Concrete Co. v. Board of Commissioners,* 299 N.C. 620, 623, 265 S.E.2d 379, 381 (1980) (quoting *Refining Co. v. Board of Aldermen,* 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974) (other citation omitted)).

[2] "A particular standard of review applies at each of the three levels of this proceeding—the [council], the superior court, and this Court." First, the [council] is the finder of fact in its consideration of the application for a special use permit. The [council] is required, as the finder of fact, to

> "follow a two-step decision-making process in granting or denying an application for a special use permit. If an 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, *prima facie* he is entitled to ***320** it. If a *prima facie* case is established, [a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, ****527** and substantial evidence appearing in the record."

Davidson Cty. Broadcasting Inc. v. Rowan Cty. Bd. of Comm'rs, 186 N.C.App. 81, 86, 649 S.E.2d 904, 909 (2007) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.,* 356 N.C. 1, 12, 565 S.E.2d 9, 16–17 (2002) (internal quotation omitted), *disc. review denied,* 362 N.C. 470, 666 S.E.2d 119 (2008)).

[3] "Judicial review of town decisions to grant or deny conditional use permits is provided for in G.S. 160A–388(e) which states, *inter alia,* 'Every decision of the board shall be subject to review by the superior court by proceedings in the nature of *certiorari.*' " *Concrete Co.,* 299 N.C. at 623, 265 S.E.2d at 381. "[T]he task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes: (1) [r]eviewing the record for errors in law, (2) [i]nsuring that procedures specified by law in both statute and ordinance are followed, (3) [i]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) [i]nsuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and (5) [i]nsuring that decisions are not arbitrary and capricious." *Concrete Co.* at 626, 265 S.E.2d at 383.

[4] "When this Court reviews a superior court's order regarding a zoning decision by a Board of Commissioners, we examine the order to: '(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.' " *Davidson Cty.,* 186 N.C.App. at 87, 649 S.E.2d at 910 (quoting *Mann Media,* 356 N.C. at 14, 565 S.E.2d at 18 (citations and quotations omitted)).

[5] "There are two standards of review that may apply to special use permit decisions. Whole record review, a deferential standard, applies where we must determine if a decision was supported by the evidence or if it was arbitrary or capricious. However, errors of law are reviewed *de novo.*" *American Towers v. Town of Morrisville,* ––– N.C.App. ––––, ––––, 731 S.E.2d 698, 701 (2012) ((citing *Mann Media* at 13, 565 S.E.2d at 17), *disc. review denied,* ––– N.C. ––––, 743 S.E.2d 189 (2013)).

B. Analysis

[6] [7] [8] "When an applicant for a conditional use permit 'produces competent, material, and substantial evidence of compliance with all ordinance ***321** requirements, the applicant has made a *prima facie* showing of entitlement to a permit.' " *Howard v. City of Kinston,* 148 N.C.App. 238, 246, 558 S.E.2d 221, 227 (2002) (quoting *SBA, Inc. v. City of Asheville City Council,* 141 N.C.App. 19, 27, 539 S.E.2d 18, 22 (2000) (internal citation omitted)). "Substantial evidence is defined as 'that which a reasonable mind would regard as sufficiently supporting a specific result.' " *Baker v. Town of Rose Hill,* 126 N.C.App. 338, 341, 485 S.E.2d 78, 80 (1997) (quoting *CG & T Corp. v. Bd. of Adjustment of Wilmington,* 105 N.C.App. 32, 40, 411 S.E.2d 655, 660 (1992) (internal citation omitted)). Material evidence is evidence "[h]aving some logical connection with the consequential facts," BLACK'S LAW DICTIONARY 998 (8th ed.2004), and competent evidence is generally defined as synonymous with admissible evidence, BLACK'S LAW DICTIONARY 595 (8th ed.2004). Thus, substantial, competent, material evidence is evidence that is admissible, relevant to the issues in dispute, and sufficient

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to support the decision of a reasonable fact-finder. "[W]e review *de novo* the initial issue of whether the evidence presented by petitioner met the requirement of being competent, material, and substantial." *American Towers,* ––– N.C.App. at ––––, 731 S.E.2d at 701 (citing *SBA,* 141 N.C.App. at 23–29, 539 S.E.2d at 20–24).

[9] We first consider whether petitioner made a *prima facie* case of entitlement to a special use permit. According to the minutes of the public hearing, the director of the planning department, Ms. Lasky, offered sworn testimony and introduced the planning department's report finding in part that (1) a wireless communication tower is "a use that is permitted with the approval of a Special Use Permit"; (2) the tower had been "designed by a North Carolina Professional Engineer" ****528** and its design and construction "will comply with all applicable structural engineering requirements"; (3) the permit was within the planning department's jurisdiction; (4) the application was complete; and (5) the tower would "comply with all of the requirements of The Land Use Ordinance if completed as proposed in the application."

The planning department's report also concluded that it was "probably true" that ingress and egress to the lot was safe and convenient; that the effect of signs, lights, parking, noise, and refuse disposal on neighboring properties would be similar to other uses permitted in the zoning district; that utilities were available; and that the tower would be appropriately screened and would preserve the natural features of the property.

Petitioner's application for a special use permit, which is over 100 pages, included the sworn affidavit of radiofrequency engineer Xiyang Liu averring that the tower would "comply with FCC and FAA rules ***322** concerning construction requirements, safety standards, interference protection, power and height limitations, and radio frequency standards," and that it would "not interfere with any other radio devices such as TV's, radios or other cellular phones" and would "not interfere with any household products such as microwave ovens." Other documents in the application established that the tower met the requirements of the National Environmental Policy Act in that it would not adversely affect any endangered species, critical habitats, or historic properties; would not affect American Indian religious sites; would not involve any significant change in wetland fill, deforestation, or water diversion; was not located in a 100 year flood plain; and would not threaten human exposure to levels of radiofrequency radiation. Based on its assessment of these and other relevant factors, the planning department's report concluded that if completed as proposed the tower "more probably than not"

> (a) *Will not materially endanger the public health or safety[.]*
>
> The staff has determined that this is probably true: the proposed use will be located within an existing industrial facility [and] ... will be required to meet all governmental and industry safety guidelines.... An assessment of the previously referenced seven items ... indicates no specific endangerment to the public health or safety that is not adequately addressed.
>
> (b) *Will not substantially injure the value of the adjoining or abutting property[.]*
>
> The staff has determined that this is probably true....
>
> (c) *Will be in harmony with the area in which it is to be located[.]*
>
> The staff has determined that this is probably true: its use as proposed will be in harmony with the existing surrounding uses in the area based on [the] previously referenced seven items[.] ...
>
> (d) *The use will be in general conformity with the Comprehensive Development Plan, Thoroughfare Plan, or other plan officially adopted by the City Council.*
>
> The staff has determined that this is probably true.

The planning department's report also stated that petitioner had "addressed the requisite questions, which must be answered by the ***323** City Council in the application" and that "it is the Staff's opinion that the request satisfactorily meets the requirements of ... [the] Land Use Ordinance."

We hold 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." *Mann Media,* 356 N.C. at 12, 565 S.E.2d at 16. We agree with petitioner that it made a *prima facie* showing that it was entitled to a special use permit.

[10] [11] [12] [13] Once an applicant makes a *prima facie* showing of entitlement to a special use permit, "the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit. Denial of a conditional use permit must be based upon findings which are supported by competent, material, and ****529** substantial evidence appearing in the

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record." *Howard,* 148 N.C.App. at 246, 558 S.E.2d at 227 (citing *Woodhouse v. Board of Commissioners,* 299 N.C. 211, 219, 261 S.E.2d 882, 888 (1980) (internal quotation omitted)).

> Moreover, a city council's denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. Speculative assertions, mere expression of opinion, and generalized fears "about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body." In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

Howard at 246, 558 S.E.2d at 227 (citing *Gregory v. County of Harnett,* 128 N.C.App. 161, 165, 493 S.E.2d 786, 789 (1997), quoting *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner,* 139 N.C.App. 269, 276, 533 S.E.2d 525, 530 (internal citation omitted), *disc. review denied,* 353 N.C. 280, 546 S.E.2d 397 (2000), and citing *Woodhouse,* 299 N.C. at 220, 261 S.E.2d at 888).

[14] We next consider whether the record contains substantial, competent, and material evidence to support denial of petitioner's application for a permit. The only evidence offered in opposition to issuance of the special use permit consisted of comments by several local residents:

> ***324** 1. Mr. Steve Hill stated that his "main concerns" were with David King's maintenance of the lot which, in his opinion, had been "an eyesore to the City and neighborhood for many years[.]" He said that the tower would be visible from his house and that he did "not believe this would be good for his property value."
>
> 2. Mrs. Connie Hill stated that her "concerns" were "the same as her husband's" and that when she looked outside she saw "a building falling down [.]" Mrs. Hill said that she is not opposed to a cell tower but "does not want to look at one."
>
> 3. Mr. Jessie Bass stated "one of his major concerns is whether or not the cell tower will interfere with the wireless devices he has in his home" and that the city should have taken action to address maintenance of the property before now.
>
> 4. Dr. Hashmat Chaudhry stated his office was "across the street from this property," that some of his patients had complained about an unpleasant smell from the lot, and that "Mr. King's garbage blows onto his property during storms." He asked whether items stored on the property constituted a fire hazard, and stated that he was "concerned about the danger to the public" from the property. He also said that he did "not see a need for the cell tower."
>
> 5. Mr. Craig Moseley "stated this proposed tower will almost be in his backyard" and "asked if Mr. King would maintain the tower as he does the rest of the property."
>
> 6. Mr. Dennis Blackmon "stated his main concern is with the existing building."
> 7. Ms. Evelyn Dawson "stated she would like to know the possible negative health and environmental side effects of such a structure" and that "she feels the tower might be a blight on a well-traveled area of the community."[1]

The comments from area residents were primarily concerned with the condition of a building on the property. To the extent that these ***325** speakers addressed the cell tower, their comments consisted entirely of speculative opinions, unsupported by any documentary or testimonial evidence, or of statements informing the council that the speaker had a question or a "concern" about a particular issue.

[15] Respondent denied petitioner's application for a special use permit on the grounds that the tower would more probably than not "materially endanger the public health or safety" and that it was "not in harmony with the area in which it is to be located." However, no evidence was introduced ****530** that was competent or material on either the health and safety implications of the tower or whether it would be in harmony with the surrounding area. "The inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district." *Woodhouse,* 299 N.C. at 216, 261 S.E.2d at 886. Respondents cite no evidence that the tower would not be in harmony with the area, nor any evidence about health or safety issues. We hold that respondents' denial of petitioner's application was not supported by substantial, material, and competent evidence.

Respondents allege on appeal that the "concerns" of local residents constituted substantial, material, and competent evidence. However, respondents neither acknowledge nor attempt to distinguish precedent holding that a board's decision to deny a permit request may not be based on speculative opinions:

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> The evidence relied upon by the respondent Board to support its finding is incompetent as opinion testimony and is highly speculative in nature. "The denial of a special exception permit may not be founded upon conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the use requested."

Woodhouse, 299 N.C. at 220–21, 261 S.E.2d at 888 (quoting *Baxter v. Gillispie,* 60 Misc.2d 349, 354, 303 N.Y.S.2d 290, 296 (1969)).

[16] [17] We hold that the council's denial of petitioner's application for a special use permit was not supported by substantial, competent, and material evidence. "When a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary." *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs,* 169 N.C.App. 809, 811, 610 S.E.2d 794, 796 (citing *Refining Co.,* 284 N.C. at 468, 202 S.E.2d at 135–36), *disc. review denied,* 359 N.C. 634, 616 S.E.2d 540 (2005). Where the trial court affirms the denial of a permit application when the denial was not based on sufficient evidence, the trial court ***326** must be reversed. *MCC Outdoor,* 169 N.C.App. at 815, 610 S.E.2d at 798. We hold that the trial court's order must be reversed.

Petitioner has also argued that the trial court's order should be reversed on the grounds that the council's decision was internally inconsistent because it found both that the proposed cell tower complied with the town's planning ordinance and also that it was not in harmony with the surrounding area, and because the council's ruling violated the federal Telecommunications Act. However, having reversed the trial court on the grounds discussed above, we need not address these alternative bases for reversal.

Conclusion

We conclude that the trial court erred by affirming the decision of the council to deny petitioner's application for a special use permit and that its order should be reversed and the case remanded to Halifax County Superior Court for remand to the city council with instructions to grant petitioner's application for a special use permit.

REVERSED.

Chief Judge MARTIN and Judge DILLON concur.

All Citations

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Footnotes

1 According to the minutes of the public hearing, these comments constitute the entire extent of evidence in opposition to the proposed cell tower. No transcript was made of the hearing.

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