IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-108

Filed 31 December 2024

Pender County, No. 22-CVS-1029

COASTAL PINE SOLAR, LLC, Petitioner,

v.

PENDER COUNTY, Respondent.

Appeal by petitioner-appellant from order entered 2 October 2023 by Judge Dawn M. Layton in Pender County Superior Court. Heard in the Court of Appeals 11 June 2024.

Fox Rothschild, LLP, by Attorneys Kip D. Nelson, Thomas E. Terrell, Jr., and Sean T. Placey, for the petitioner-appellant.

Womble Bond Dickinson (US) LLP, by Attorney John C. Cooke and Pender County Attorney Carl W. Thurman, III, for the respondent-appellee.

Phillip Jacob Parker, Jr., Stephen A. Woodson, Meghan N. Cook, and Stacy Revels Sereno, for North Carolina Farm Bureau Federation, Inc., amici curiae.

STADING, Judge.

This matter arises from the trial court's order affirming the Pender County Board of Commissioner's ("the Board") denial of Coastal Pine Solar, LLC's

("Petitioner") requested special use permit ("SUP"). Petitioner sought an SUP to build a solar farm. For the reasons below, we affirm the trial court's order affirming the decision of the Board denying Petitioner's SUP.

I. Background

In 2022, Petitioner applied for an SUP to build a 2,360-acre solar farm in Pender County. For an SUP to be issued, Petitioner had to produce evidence tending to show compliance with the SUP standards in the Unified Development Ordinance ("UDO"). If certain standards are met, the UDO allows "Other Electric Power Generation" facilities in residential-agricultural zoning districts. Under the UDO, the following standards are required for approval:

> (1) the use requested is listed among the special uses in the district for which the application is made, or is similar in character to those listed in that district;
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> (2) the requested use will not impair the integrity or character of the surrounding or adjoining districts, nor adversely affect the safety, health, morals, or welfare of the community or the immediate neighbors of the property;
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> (3) the proposed use shall not constitute a nuisance or hazard;
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> (4) the requested use will be in conformity with the Pender County Land Use Plan and other official plans, or policies adopted by the Board of County Commissioners;
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> (5) adequate utilities, access roads, drainage, sanitation or other necessary facilities have been or are being provided;
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> (6) adequate measures have been or will be taken to provide ingress and egress to minimize traffic congestion on public roads;

> (7) the special use shall conform to the applicable regulations of the district in which is it located; and
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> (8) the proposed use shall not adversely affect surrounding uses and shall be placed on a lot of sufficient size to satisfy the space requirements of said use.

At the Board's 19 September 2022 meeting, an evidentiary hearing was held where Petitioner presented written material, expert opinions, and witness testimony consisting of reports, scientific studies, facts, photographs, and other evidence. Petitioner gave the Board a binder detailing the solar farm project and provided an overview of its contents. Petitioner also brought six consultants to present information on various aspects of the solar farm, including the project's site plan, the health and safety of the project, the project's impact on the property value, the project's environmental impact, and the project's harmonious and consistent fit within Pender County's Land Use Plan. Each consultant presented data and provided their professional opinion on the project; the consultants also answered the Board's questions on the UDO standards and concerns related to the project. At the hearing, consultants included a licensed civil engineer on regulatory compliance, a licensed electrical engineer on solar panel specifics, a licensed mechanical engineer on health and safety, an appraiser on market impact, a certified planner on land use consistency, and a witness with experience about living next to a solar farm.

After Petitioner presented evidence, eight long-time landowners and farmers from the community provided testimony. They expressed concerns over the intended

use for the land, aesthetics of the project, and the current condition of the land's potential for water runoff problems. These witnesses also testified about the inequality between the energy industries and local farmers regarding land use under the wetland conservation compliance provisions of the 1985 Farm Bill.

The commissioners unanimously voted to deny Petitioner's application. The Board found that SUP standards one, two, and three were not met; but the Board did not address standards four through eight. One commissioner reasoned that the solar farm was not similar in character to other endeavors listed in the district under the requested use, the clearing of trees would have a "devastating effect" on the surrounding districts and adjoining landholders, and it was unknown what would happen with the project in twenty-five or thirty years in terms of nuisance or hazards.

On 30 November 2022, Petitioner appealed to Pender County Superior Court via a writ of *certiorari* under N.C. Gen. Stat. § 160D-1402. Petitioner also filed an action for declaratory judgment under N.C. Gen. Stat. § 160D-1401 and moved for summary judgment on this claim. The trial court determined that Petitioner presented competent, material, and substantial evidence to establish a *prima facie* case on the three SUP standards addressed by the Board. The trial court also determined that the witnesses testifying against the project did not present sufficient evidence to overcome the Petitioner's *prima facie* case. Therefore, the trial court remanded the matter to the Board to address the remaining SUP standards—four through eight.

On remand, the Board considered Petitioner's SUP application for standards four through eight. On 24 July 2023, the Board once again denied Petitioner's application, reasoning those standards were not met. The Board found that standard four—conformity with the Pender County Land Use Plan—had not been met because the project was to be in a rural agricultural district rather than an industrial one. Concerning standard five, the Board declared that Petitioner did not establish that "adequate utilities, access roads, drainage or other necessary facilities" existed because none of the Petitioner's witnesses testified that nearby electrical transmission lines could handle the project's output or that efforts had been made to offset any potential water runoff resulting from clearing 2,300 acres of timberland. The Board also found that standard seven—conformity with applicable regulations of the district—had not been satisfied because an adjoining landowner testified about a nearby solar farm built in similar soil that required pouring cement to support the solar panels, which would prevent the land from future agricultural use. The Board last determined that standard eight—which related to the adverse effect on surrounding uses—had not been met because Petitioner's expert had not visited the project site, performed soil or water quality tests, or verified whether the surrounding residents relied on well water to confirm that the presence of lead in the solar panels would impact nearby land or residential homes. Therefore, the Board issued a written order stating that Petitioner had not made a *prima facie* case and thus denied

the SUP. However, the Board requested in its order that "should the Court determine to the contrary," certain terms and conditions be attached to the SUP.

Again, upon a writ of *certiorari*, the Board's decision to deny the SUP on standards four, five, seven, and eight was before the trial court on 25 August 2023. And once more, Petitioner moved for summary judgment. In its 28 September 2023 order, the trial court affirmed the Board's decision denying the SUP. Applying *de novo* review, the trial court found that Petitioner "provided, and the record contains competent, material, and substantial evidence sufficient to establish [a] *prima facie* case as to the special use permit standard four through eight." However, having found a *prima facie* case, the trial court "completed a whole record review" and found that the Board's decision to deny the SUP as to grounds four through eight was still "supported by competent, material and substantial evidence that is contrary to [Petitioner]'s evidence." The trial court specifically identified contrary evidence coming from six witnesses who spoke against Petitioner's plans. Since it was unclear whether the order was final as to all claims, the trial court entered a clarifying Final Judgment on all claims on 8 December 2023. Petitioner entered notice of appeal.

II. Jurisdiction

This Court has jurisdiction to consider this matter under N.C. Gen. Stat. §7A-27(b)(1) (2023) ("final judgment of a superior court").

III. Analysis

Petitioner presents three issues on appeal: (1) whether the trial court

improperly substituted its own rationale for denying the application and applied the correct standard of review; (2) whether the Board erred in denying the application by concluding that Petitioner's failed to meet its *prima facie* case of entitlement; and (3) whether the Board deprived Petitioner of its due process rights. We conclude that the trial court did not err and affirm its decision for the reasons outlined below.

A. Standard of Review

When the Board holds a hearing to consider an SUP application, "it acts in a quasi-judicial capacity." *Humble Oil & Refin. Co. v. Bd. of Aldermen*, 284 N.C. 458, 469, 202 S.E.2d 129, 136–37 (1974). "Governing bodies sitting in a quasi-judicial capacity are performing as judges and must be neutral, impartial, and base their decisions solely upon the evidence submitted." *PHG Asheville, LLC v. City of Asheville*, 262 N.C. App. 231, 239, 822 S.E.2d 79, 85 (2018). The Board members "sitting in a quasi-judicial capacity must base their decision to grant or deny a [SUP] on objective factors, which are based upon the evidence presented, and not upon their subjective preferences or idea." *Morris Commc'ns v. City of Bessemer Zoning Bd. of Adjustment*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

"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). When reviewing a quasi-judicial decision via a petition for writ of *certiorari*, "the superior court sits as an appellate court, and not as a trier of facts." *Tate Terrace Realty Invs., Inc. v. Currituck Cnty.*, 127 N.C. App. 212, 217,

488 S.E.2d 845, 848 (1997). Upon appeal to the superior court:

> [T]he task of a court reviewing a decision on an application for a [supplemental] use permit made by a town board sitting as a quasi-judicial body includes:
> (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 Concrete Co. v. Bd. of Comm'rs, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). The superior court's task is to review the evidence presented to the Board while acting in its quasi-judicial capacity. *Id.* In doing so, its standard of review "depends upon the particular issues presented on appeal." *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (cleaned up).

"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) (2023). "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) (cleaned up). "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).

"The reviewing court should not replace the council's judgment as between two reasonably conflicting views; 'while the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 27, 539 S.E.2d 18, 22 (2002) (citations omitted). We "examine[] 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).

B. Special Use Permit

1. The Trial Court's Applied Standard of Review

We first address whether the trial court applied the correct standard of review. Petitioner argues that the trial court was requested to "address the basis for the County's decision," but in doing so, it instead impermissibly determined whether competent, material, and substantial evidence existed adverse to them. We disagree. When reviewing a legal conclusion, the trial court must do so *de novo*; though, a review of whether the evidence was competent, material, and substantial must be weighed by the whole record. N.C. Gen. Stat. § 160D-1402(j)(2); *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392.

Upholding Respondent's denial of Petitioner's SUP request, the trial court found and concluded that:

> 4. [A]fter completing a de novo review the Court finds that Coastal Pines Solar, LLC provided, and the record contains competent, material and substantial evidence sufficient to establish [a] *prima facie* case as to the special use permit standards four through eight of the Pender County Unified Development Ordinance. Specifically, Coastal Pine Solar LLC presented evidence in the form of voluminous written materials, expert reports, and testimony of five expert witnesses.
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> 5. After completing a whole record review and not superseding the Pender County Board of Commissioners' judgment with the Court's, find that Pender County's decision to deny the special use permit application as to standards four, five, seven and eight is supported by competent, material and substantial evidence that is contrary to Coastal Pine Solar LLC's evidence.

The trial court also determined that the Board's decision was neither arbitrary and capricious nor in violation of Petitioner's due process rights.

Paragraph four of the trial court's order provides that the following determinations were reviewed *de novo*: (1) whether Petitioner adduced sufficient evidence to make a *prima facie* showing of entitlement; and (2) whether Petitioner proposed use conformed with the UDO. Paragraph five specifically discerns that the trial court weighed the sufficiency of Petitioner's evidence by the whole record. *See Sun Suites Holdings, LLC v. Bd. of Alderman of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 528 (2000) (brackets in original) ("[T]he trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient

information in its order to reveal the scope of review utilized and the application of that review."). We discern no error in the trial court's wielding of these standards. *See Mann Media*, 365 N.C. at 19, 565 S.E.2d at 20–21; *see also ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392.

2. The Trial Court's Review of Petitioner's Prima Facie Case of Entitlement

Our analysis next turns to whether the trial court correctly applied its standards of review upon affirming the Board's denial of Petitioner's SUP. Petitioner contends that the trial court erroneously affirmed the Board's denial because they made a *prima facie* case of entitlement. Although the trial court concluded that Petitioner adduced sufficient evidence to otherwise be awarded its SUP, the trial court reasoned that the denial was proper because sufficient evidence existed contrary to Petitioner's entitlement.

The Board hears evidence, acts as a finder of fact, and follows "a two-step decision-making process in granting or denying an application for a special use permit." *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 16. This process requires the Board to first 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. "Substantial evidence is defined as 'that which a reasonable mind would regard as sufficiently supporting a specific result.'" *Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d

524, 527 (2013) (citations omitted). "Material evidence is evidence having some logical connection with the consequential facts, and competent evidence is generally defined as synonymous with admissible evidence." *Id.* (cleaned up). "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." *Id.* 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*, 374 N.C. at 149, 839 S.E.2d at 766 (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).

A p*rima facie* showing of entitlement is met upon compliance with the requirements outlined in the UDO; applied here, Petitioner must satisfy all eight standards. *See Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136. "Accordingly, an applicant for a special use permit who has met its burden of *production* automatically wins if no contrary evidence is offered." *Pope v. Davidson Cnty.*, 288 N.C. App. 35, 42, 885 S.E2d 119, 123 (2023) (cleaned up). And although sufficient evidence favorable to approval can create a *prima facie* entitlement, "a municipality may deny the permit if it makes contrary findings which are also supported by competent, material and substantial evidence." *Petersilie v. Boone Bd. of Adjustment*¸ 94 N.C. App. 764, 776, 381 S.E.2d 349, 350 (1989).

Under the UDO, section 3.12 defines the SUP and its requirements. Pursuant to section 3.12.2(B), each application shall contain the following as stipulated by the County Commissioners and Administrator:

> Structures. Location of all structures within fifty (50) feet of the property; location and depth, if known, of any existing utility lines in the property or along any adjacent road.
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> Other requirements. Location of property boundaries, location of any easements for utility lines or passage which cross or occupy any portion of the property for proposed lines;
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> . . . .
>
> 5) Location and status of utilities: water, sewer, well, septic system, method of solid waste disposal, electrical service and natural gas if available;
>
> 6) Existing topography and all proposed changes. Include calculations to show total acreage of area to be graded or disturbed;
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> 7) Existing and proposed streams, drainage ways, ponds, lagoons, wetlands, flood plains, berms, etc.

Relevant here, under section 3.12.3(G), the UDO further specifies that, in order to obtain an SUP, Petitioner must establish the following standards were met:

> 4) The requested use will be in conformity with the Pender County Land Use Plan and other official plans, or policies adopted by the Board of County Commissioners;
>
> 5) Adequate utilities, access roads, drainage, sanitation or other necessary facilities have been or are being provided;
>
> . . . .

> 7) That the special use shall, in all other respects, conform to the applicable regulations of the district in which it is located; and
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> 8) The proposed use shall not adversely affect surrounding uses and shall be placed on a lot of sufficient size to satisfy the space requirements of said use.

The Board concluded—and the trial court affirmed—that Petitioner met its burden of production for standards one through three. Yet, despite the trial court's conclusion that it would have otherwise granted Petitioner's SUP for standards four through eight, its review under the whole record test prohibited the trial court from substituting its own judgment for that of the Board. *See, e.g.*, *Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013) (citation omitted and brackets in original) ("The 'whole record' test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*."). Our review then turns on whether sufficient evidence was presented for the remaining standards.

a. SUP Standards Four and Seven

As for standard four, Petitioner contends that "conformity is not really in dispute" and that its unobjected-to expert testimony sustains a *prima facie* showing. But the grant of an SUP requires production of competent, substantial, and material evidence demonstrating compliance with the UDO. *See PHG Asheville*, 374 N.C. at 149, 839 S.E.2d at 766. Specifically, the UDO mandates that the proposed use be in

"conformity with the Pender County Land Use Plan and other official plans, or policies adopted by the [Board] . . . [and] [t]hat the special use shall . . . conform to the applicable regulations of the district in which it is located." Though Petitioner presented expert testimony, the Board found this testimony inadequate due to the witnesses' lack of personal knowledge of the specific site conditions.

Considering all of Petitioner's evidence—its experts, their testimony and submissions—it remains insufficient to establish a *prima facie* case of conformity. For instance, UDO § 3.12.2(B)(6) requires detailed evidence of "[e]xisting topography and all proposed changes" along with "calculations to show total acreage of area to be graded or disturbed." *Id.* The record contains no competent, site-specific engineering or technical data fulfilling these criteria. *See Sun Suites Holdings*, 139 N.C. App. at 276, 533 S.E.2d at 530. While Petitioner's appraiser mentioned topography, his report addressed only the potential effect on adjoining property values rather than providing the mandated calculations of acreage disturbance. Petitioner identifies no other record evidence—and our review reveals no other record evidence—establishing the essential, technical details required by the UDO.

Petitioner cannot demonstrate that it satisfied the underlying zoning standards without showing these foundational prerequisites. In other words, failing to produce the information required under section 3.12.2(B) means Petitioner did not carry its initial burden of production. Consequently, Petitioner's assertion that "conformity is not really in dispute" is unsupported, as the record lacks the

substantive evidence necessary to prove conformity mandated by the UDO. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980) (quoting *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136) (internal quotation marks omitted) ("When an applicant has produced competent, material, and substantial evidence tending to establish the existence of facts and conditions which the ordinance requires for the issuance of a [SUP]" then, he is "*prima facie* . . . entitled to it.").

b. SUP Standard Five

Petitioner next asserts that it presented competent evidence sufficient to satisfy the requirements of UDO § 3.12.2(B)(5), which mandates demonstrating the adequacy of utilities, access roads, drainage, sanitation, and other necessary facilities. To meet its burden under standard five, Petitioner needed to show—through competent, material, and substantial evidence—that such facilities either already exist or will be provided to support the proposed use.

Although Petitioner repeatedly asserted that it would comply with "all statutory and local requirements," it offered no specific, competent evidence explaining how these requirements would be met. Rather than presenting definitive drainage plans, engineering reports, or other concrete documentation, Petitioner merely stated that it "will" ensure compliance at some future point. Such conclusory statements fall short of the evidentiary standard imposed by the UDO and do not satisfy the burden of production required for a *prima facie* case. *See PHG Asheville,*

LLC, 374 N.C. at 149, 839 S.E.2d at 766.

Since Petitioner failed to establish a *prima facie* case under standards four, five, and seven, the Board's denial of the SUP was supported by the record, and the trial court correctly affirmed the Board's decision; consequently, we need not consider standard eight. *See Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (holding that the reviewing court need not address other requirements when one essential element is not met). We therefore conclude that the Board's denial of Petitioner's SUP rested on competent, material, and substantial evidence, reflecting that Petitioner failed to establish a *prima facie* entitlement under the UDO. As a result, the decision was neither arbitrary nor capricious, and the trial court properly affirmed the Board. *See generally MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796 (2005).

C. Due Process

Petitioner asserts that the Board violated established law and deprived it of due process. Petitioner's due process argument points to an alleged bias of the Board and its representatives throughout the application. These claims, however, were not presented to the Board. As a result, they are not preserved for appellate review. *See Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 191–92, 689 S.E.2d 576, 587 (2010) ("The superior court's scope of review on certiorari is limited to errors alleged to have occurred before the local board . . . ."). Since Petitioner failed to properly preserve its due process challenge, we decline to consider

it. *See* N.C. R. App. P. 10(a)(1) (2023); *see also Sherrill v. Wrightsville Beach*, 76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985).

IV. Conclusion

The record shows that Petitioner failed to meet the mandatory standards to establish a *prima facie* entitlement to the requested SUP. The Board properly denied the SUP based on these deficiencies in its quasi-judicial capacity. The superior court did not err in affirming the Board's decision. And since Petitioner failed to raise his due process argument to the Board, such is waived on appeal.

AFFIRMED.

Judge THOMPSON concurs.

Judge STROUD concurs in result only.

Report per Rule 30(e).