

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

2014 JUN -4 PM 12: 44

SUPERIOR COURT DIVISION

14 CVS 1532

WAKE COUNTY, C.S.C.

FIFTH THIRD BANK,
Petitioner,

VS

ORDER

TOWN OF CARY,
Respondent.

THIS CAUSE coming on to be heard and being heard before the undersigned Superior Court Judge presiding at the regularly scheduled 27 May 2014 Wake County Civil session of Superior Court upon an appeal by the Petitioner, Fifth Third Bank, of Resolution No. 13-AA-03 ("Resolution") adopted by Respondent Town of Cary's Zoning Board of Adjustment ("Board") on January 6, 2014 after conduct of a quasi-judicial hearing. This matter is before the Court by way of certiorari pursuant to N.C. Gen. Stat. § 160A-393.

Petitioner sought certiorari on February 5, 2014, and a Writ of Certiorari was issued on that same day. The Record on Appeal was settled by the parties and filed with the Court on or about March 11, 2014.

This Court based upon the Record, memoranda of law and arguments offered by the parties, makes the following:

FINDINGS OF FACT

1. The Subject Property is located within Respondent's corporate limits with the address of 2374 Yates Store Road, Cary, North Carolina 27519, PIN # 0726716342 (formerly PIN # 0726715256).

2. The Subject Property is an approximately 27-acre parcel located within the Amberly Planned Development District ("PDD"), and more specifically within the PDD's Town Center subdistrict. The PDD is a specially designed zoning measure that controls development

for the approximately 1,123 acres within its boundaries. The Town Center subdistrict is comprised of approximately 76 acres generally located in the northeast sector of the PDD.

3. The PDD was first adopted by Respondent in 1995, and it has been amended three times since then: in 2003, 2004 and 2009. The Town Center subdistrict was added to the PDD in the 2003 amendment; the scope and type of residential units allowed in the Town Center was increased in the 2004 amendment; and additional acreage was added to the PDD in the 2009 amendment.

4. The PDD contains limits that govern the maximum amount -- but not the minimum amount -- of commercial, office and residential development that may occur in the Town Center subdistrict. In particular, under the PDD, the Town Center may contain up to 240,000 square feet of commercial space; up to 125,000 square feet of office space; and up to 800 residential units. The PDD does not require any corresponding minimum square footage or unit count of these development categories to be present in the Town Center.

5. The Record reflects that the Town chose not to include minimums for particular land uses in the Town Center because at the time the PDD was approved, the Town believed there was substantial demand for commercial and office uses in the area. The Planning Director testified, below, that “[t]here were more requests for commercial, probably, than could ever go around, and I think there’s probably no minimum specified on that because the expectation was everybody was asking for retail/commercial/office uses, and they probably were going to develop it to the maximum extent.”

6. The governing limit of 800 residential units in the Town Center is the product of the 2004 amendment to the PDD. Before the amendment, only 100 residential units were permitted in the Town Center. As part of the 2004 amendment, the Town also diversified the types of residential dwellings that could be utilized, allowing eleven (11) specific residential types instead of the original two (2).

7. In the 2004 amendment to the PDD, the Town did not, however, alter the existing allowances for up to 240,000 square feet of commercial space and up to 125,000 square feet of office space in the Town Center, nor did the Town introduce any minimums for commercial or office space.

8. The Record reflects that, at the time the 2004 amendment was enacted, the Town consulted the Town's Comprehensive Plan (and its Northwest Area Plan component) and concluded the 2004 amendment was consistent with them. The Town's Planning Director testified below, before the Board, that the 2004 increase in allowances for residential development in the Town Center "actually strengthened the mix and made the request, the zoning, more in line with the land use plan and the direction in the policies for community centers."

9. The 2004 amendment to the PDD was specific as to its purpose regarding the presence of residential development within its various subdistricts. The amendment states that it "provides for a reduction in residential units within the [single family], [multi-family] and [age-restricted] parcels and an increase in residential units in the Town Center parcel."

10. Prior to considering the Proposed Development for the Subject Property that underlies the Resolution and this appeal, the Town approved two other projects within the Town Center. One was for the Townes at Amberly, located on a parcel of approximately 66 acres immediately to the south of the Subject Property, for which Respondent approved an exclusively residential development that will contain 184 town homes at its completion. The second was for the Rex Wellness Center, a 60,000 square foot facility that is classified as an exclusively office use under the Town's rules. The Record reflects that an additional 20,000 square feet of office use has been approved for the Center, but not yet constructed.

11. Petitioner, which acquired the Subject Property in foreclosure approximately five years ago, brought forth a Proposed Development to the Town that included approximately 41,000 square feet of commercial space and 240 apartment homes. It is undisputed that the amount of commercial space and number of apartment homes proposed would not make the

Town Center totals exceed the maximum limits contained in the PDD, nor would the proposal violate any other numerical metric provided in the PDD.

12. After receiving initial, written feedback from the Town's Planning Department that the Proposed Development did not meet "the tract's designation as a non-residential 'Town Center' with residential units," on August 5, 2013 Petitioner sought a formal interpretation from the Town to seek clarity on why its proposal was disallowed under the PDD.

13. On September 20, 2013, the Town's Planning Director issued a written Interpretation which confirmed the Town's position that the Proposed Development for the Subject Property "is not permitted in the Amberly PDD." The Interpretation stated that the Subject Property "must be developed in [a] manner that is predominantly non-residential." The Interpretation also found that, after earlier approvals of the Townes at Amberly residential project, and the Wellness Center tract, the Subject Property was considered by the Town as "ample vacant property to provide expected nonresidential land uses in an amount and at a sufficient intensity" that would account for what the Town believed were "missing land uses" in the Town Center.

14. The PDD does not contain a requirement that the Town Center as a whole, or that any particular parcel within it, be developed as "predominantly non-residential." At argument and on brief, the Town contended this standard applied to development of the Subject Property consistent with the Town's intent and vision for the Town Center and by reference to policy guidance contained in elements of its Comprehensive Plan.

15. In response to the Interpretation, Petitioner filed a quasi-judicial appeal to the Board that sought a determination that the Proposed Development was permitted under the governing terms of the PDD.

16. The Board conducted a quasi-judicial hearing on December 18, 2013, during which it received testimony and documents submitted on behalf of Petitioner and the Town. At the close of the December 18, 2013 hearing, the Board voted 5-0 to affirm the underlying Interpretation and

to deny the appeal. The Resolution was then prepared to reflect the Board's decision, and it was adopted by the Board on January 6, 2014 and mailed to Petitioner's counsel by First Class Mail, with a cover letter dated January 17, 2014.

Based upon the foregoing FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. The Petition for Writ of Certiorari was timely filed by Petitioner on February 5, 2014 pursuant to N.C. Gen. Stat. § 160A-388(e2).
2. Petitioner has proper standing to bring this action pursuant to N.C. Gen. Stat. § 160A-393(d)(1)(a) and (c) as the Subject Property's owner and as the applicant, below, in appealing the Interpretation to the Board.
3. This Court has jurisdiction of the parties and of the subject matter.
4. Petitioner contends that the Board's determination, as set forth in the Resolution, is not supported by substantial competent evidence in view of the entire record. In reviewing such a claim, the Court uses a "whole record" analysis.
5. Under well-settled principles of statutory construction, the terms of the PDD are to be accorded their ordinary and natural meanings.
6. In defining the mix of commercial, office and residential uses that are permitted in the Town Center subdistrict, the Town elected to employ standards that afforded maximum amounts of each of those categories without specifying any minimum amounts for a particular use. Thus, the PDD allows in the Town Center up to 240,000 square feet of commercial uses, up to 125,000 square feet of office uses and up to 800 residential units.
7. Petitioner's proposal complies with these standards. First, as to the commercial uses, Petitioner's approximate 41,000 square feet of

commercial space fits within the applicable 125,000 square feet maximum because neither of the other two developments in the Town Center has depleted that allocation. Second, Petitioner's proposed 240 apartment homes, in combination with the 184 town homes approved in the Townes at Amberly development, fits well within the maximum of 800 residential units permitted in the Town Center.

8. Respondent's contention that the Subject Property must be developed in a manner that is "predominantly non-residential" is not supported by the Record. That development limitation is not contained in the PDD. The Court notes Respondent's position that minimum requirements for commercial and office uses in the Town Center were not originally included in the PDD because of then-existing market conditions that essentially assured abundant proposals for uses of that nature. However, Respondent's election not to include such minimum standards originally, or to add them in either of two subsequent rezoning actions concerning the PDD, affords property owners the ability to pursue uses that comply with the "maximum" standards that are set forth in the PDD.
9. Respondent contends that its intent and vision for the Town Center was for it to be the non-residential focal point of the PDD's area. It further contends that it is appropriate to interpret the PDD's terms to include the "predominantly non-residential" standard by reference to its Comprehensive Plan. This contention fails for two reasons.
10. First, Respondent's position is contrary to its own use of its Comprehensive Plan to rezone the Town Center subdistrict to significantly increase its focus on residential development. In approving the 2004 amendment to the PDD, the Record reflects that Respondent consulted its Comprehensive Plan,

and its Northwest Area Plan component, and found the 700 percent increase in allowable residential units in the Town Center consistent with these Town policy guides. Moreover, in that amendment, Respondent increased the dwelling types which are allowed to constitute the 800-unit maximum from two (2) unit types to eleven (11). Those steps comported with Respondent's obligation under N.C. Gen. Stat. § 160A-383 that its "zoning regulations shall be made in accordance with a comprehensive plan" However, Respondent may not then effectively reverse its prior rezoning by purporting to interpret the PDD in a manner that denies Petitioner the ability to take advantage of the residential unit allowance the Town already has found consistent with its Comprehensive Plan.

11. Respondent also contends that the Proposed Development is at odds with another facet of the Comprehensive Plan: the Town Center's inclusion in a larger map designation as part of a Community Activity Center ("CAC"). However, the Record reflects that Respondent considered the CAC standard in approving the 2004 amendment and found that the increase from 100 to 800 allowable residential units "further strengthen[ed] the expected scale and intensity of this Community Activity Center." It would thus be improper for Respondent to deny Petitioner access to the 800-unit maximum allowance by reference to a CAC standard it already evaluated, and found satisfied, when it approved the 2004 amendment.
12. Second, the Court finds that the natural and ordinary meaning of the standards contained in the PDD indicate that Petitioner should be allowed to construct a project that includes elements which comply with the specified maximums for commercial, office and residential uses. However, even if it could be argued there is ambiguity in the PDD's standards that

require reference to evidence that would help discern Respondent's intent in approving them, the 2004 amendment would resolve any such ambiguity in favor of Petitioner.

13. The 2004 amendment to the PDD reflected the Town's intent to increase the emphasis on residential development in the Town Center, while decreasing such emphasis in other PDD subdistricts. Moreover, the amendment greatly increased the residential units and types allowed to be constructed in the Town Center. The Town concedes that the "use tables" which embody these standards give definition to the Town Center zoning designation. Thus, Respondent's affirmative, zoning actions reflect an intent to provide robust development options within the Town Center that by no means would necessarily produce the "predominantly non-residential" outcome it now claims has been its consistent aim.
14. Petitioner also contends that the Board's determination, as set forth in the Resolution, is arbitrary and capricious in view of the entire record. In reviewing such a claim, the Court uses a "whole record" analysis.
15. The core of Petitioner's claims on this point relates to the Respondent's treatment of the Proposed Development in comparison to how the Town handled the approvals of the Townes at Amberly and Wellness Center projects for other parcels in the Town Center.
16. Petitioner contends that Respondent approved exclusively residential and office projects for the other Town Center parcels because they complied with the "maximum" standards laid out in the PDD, but then denied the benefit of that same interpretation to the Proposed Development. Respondent seeks to apply to Petitioner's project a standard that does not appear in the PDD, and which it did not require the Townes at Amberly's

residential developer to participate in meeting. The Court agrees this reflects an arbitrary and capricious interpretation, and application, of the PDD.

17. Petitioner's Proposed Development, in combination with the uses approved for the other Town Center parcels, does comply with the "maximum" standards contained in the PDD. Respondent articulates the position that it can treat Petitioner's land as "vacant property" it can use to balance out "missing land uses" in the Town Center that exist after approving the Townes at Amberly and Wellness Center projects. Thus, Respondent approved an exclusively residential project to the south of the Subject Property that covers land more than twice the size of Petitioner's, but then denied Petitioner's proposed mix of residential and commercial uses because it was deemed insufficient to balance out the already approved uses. Yet, the ordinance before the Court does not require minimum amounts of non-residential uses that Petitioner would be on notice to understand it must provide as the last Town Center parcel to be developed. Based on an analysis of the whole record, there is not substantial, competent evidence to support the propriety of this arbitrary approach.
18. Petitioner also contends that the Board's determination, as set forth in the Resolution, reflects an error of law arising from Respondent's interpretation of the PDD. The Court reviews such claims on a *de novo* basis.
19. As set forth previously, the Court finds that Respondent is seeking to enforce a standard that is not contained within the PDD's terms. The "predominantly non-residential" requirement that Respondent claims Petitioner must meet in developing its parcel is not contained in the PDD. Instead, that zoning measure provides that a developer may select from a

mix of “maximum” allowances for commercial, office and residential uses. The way in which other parcels in the Town Center have developed can impact what remains of those “maximum” allowances when a later developer, such as Petitioner, comes along. However, there is no basis in the ordinance to apply a *different* standard to Petitioner that does not rely on the “maximums,” but instead on the Town’s purported “vision” for Town Center subdistrict.

20. Respondent’s effort to use its Comprehensive Plan as an aid to avoid the 800-unit residential allowance in the 2004 amendment that it approved by reference to that very same Comprehensive Plan is circular, and misplaced. A formal rezoning of the parcel might ultimately include “minimum” use allocations and requirements for inclusion of specific commercial uses, whether they are grocers or other retail uses deemed important for the subdistrict. However, Respondent cannot undertake a *sub rosa* rezoning of the Subject Property that adopts new standards and seeks to apply them under the guise of an interpretation of whether the Proposed Development complies with the PDD as it currently stands.
21. The Court finds that, pursuant to N.C. Gen. Stat. §160A-393, the Resolution (i) is not supported by substantial competent evidence based on consideration of the “whole record;” (ii) is arbitrary and capricious based on consideration of the “whole record;” and (iii) relies on an error of law in its interpretation of the PDD based on the Court’s *de novo* review. Any one of these three deficiencies would be sufficient to support the Court’s judgment that the Resolution, and its rejection of the Proposed Development, should be reversed.

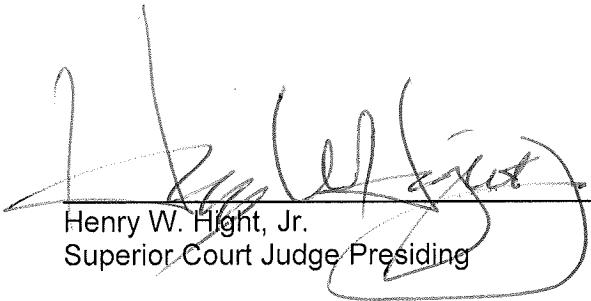
IT IS NOW, THEREFORE, ORDERED:

1. Respondent's decision – as reflected in Resolution No. 13-AA-03 – to reject the Proposed Development as not in compliance with the PDD is reversed. This Order constitutes the Final Order and Judgment of the Court on this appeal.

2. This matter is remanded to the Town of Cary, pursuant to N.C. Gen. Stat. § 160A-393(l)(3)(a), and the Town is ordered to enter and/or approve such measures or resolutions as may be necessary to approve Petitioner's Proposed Development.

3. The costs of this action, including the costs of transcript and record production, shall be taxed against the Town.

This the 4th day of June, 2014.


Henry W. Hight, Jr.
Superior Court Judge Presiding

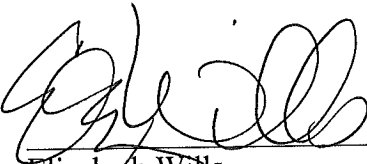
CERTIFICATE OF SERVICE

The undersigned Assistant Clerk of Court of Wake County hereby certifies that a copy of the forgoing Judgment was served on the following parties to this action by:
 facsimile hand delivery by depositing a copy of the same in the United States Mail postage prepaid and addressed to:

Bradley M. Risinger
Smith Moore Leatherwood LLP
P.O. Box 27525
Raleigh, NC 27611

Robert E. Hornik
The Brough Law Firm
1829 E. Franklin St., Suite 800-A
Chapel Hill, NC 27514

This the 5th day of June, 2014.



Elizabeth Wills
Assistant Clerk of Court
Wake County