

NORTH CAROLINA

WAKE COUNTY

LOUIS CHERRY and MARSHA GORDON,

Petitioners,

v.

GAIL WIESNER, CITY OF RALEIGH, and
RALEIGH BOARD OF ADJUSTMENT,

Respondents.

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IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

14 CVS 4003

ORDER

NORTH CAROLINA

WAKE COUNTY

CITY OF RALEIGH,
a municipal corporation

Petitioners,

v.

RALEIGH BOARD OF ADJUSTMENT
LOUIS W. CHERRY, III, MARSHA G.
GORDON, and GAIL P. WIESNER,

Respondents.

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

14 CVS 4307

ORDER

THIS MATTER was heard on review in the nature of certiorari on August 25 and 26, 2014, by the undersigned Superior Court Judge presiding during the August 25, 2014 civil session of Wake County Superior Court. The following matters were properly before the Court:

1. Petitioners Louis Cherry and Marsha Gordon's Petition for Writ of Certiorari and Judicial Review in 14 CVS 4003 filed on March 28, 2014;

2. Petitioner City of Raleigh's Petition for Writ of Certiorari in 14 CVS 4307 filed on April 2, 2014;

3. The City of Raleigh's Motion to Supplement the Record on Appeal filed August 15, 2014 and the City of Raleigh's Motion to Consolidate made orally on August 25, 2014, requesting that matters 14 CVS 4003 and 14 CVS 4307 be consolidated;

4. Respondent Gail Wiesner's Motion to Supplement the Record on Appeal, filed on August 7, 2014 and Petitioners Cherry and Gordon's Response filed on August 22, 2014;

5. Respondent Gail Wiesner's Answer and Motion to Strike matters filed by the Petitioners Cherry and Gordon, filed on August 14, 2014 in *Cherry v. Wiesner* (case number 14 CVS 4003) and Petitioners Cherry and Gordon's Response and Request to Supplement filed on August 22, 2014; and

6. Respondent Gail Wiesner's Answer filed on August 14, 2014 in *City v. Raleigh Board of Adjustment* (case number 14 CVS 4307).

At the commencement of arguments on August 25, 2014, the Court granted both of the Motions submitted by the City of Raleigh with the consent of the parties and a separate Order has been entered regarding those motions.

The Court considered all matters of record including the briefs of the parties, the Record on Appeal, the City of Raleigh's Supplement to Record on Appeal, including therein the Record from the Raleigh Historic Development Commission, a transcript containing excerpts from the meetings of the Raleigh Board of Adjustment on December 9, 2013, January 13, 2014, February 10, 2014, and March 10, 2014, and of meetings of the Raleigh Historic Development Commission's Certificate of Appropriateness Committee on September 9, 2013 and October 7, 2013; the Court also heard the arguments of counsel on August 25 and 26, 2014, and took the

matter under advisement. After careful consideration, the Court has made the following determination on its review:

1. This matter was commenced with the filing of an Application for Certificate of Appropriateness on August 23, 2013, wherein Petitioners Cherry and Gordon sought a determination from the Raleigh Historic Development Commission (“RHDC”) that their plan for construction of a dwelling on a vacant lot in the Oakwood Historic District of Raleigh, was not incongruous with the guidelines of the City of Raleigh.

2. The City of Raleigh, pursuant to State statute, has adopted a set of guidelines applicable to all historic districts within the City of Raleigh, and has, through a related essay, set forth a description of the nature of each of its historic districts sometimes called a Special Character Essay.

3. The RHDC, by law, is comprised of persons with special interest or expertise in architecture, history, or other relevant matters. The Certificate of Appropriateness (“COA”) Committee of the RHDC carried out a lengthy quasi-judicial hearing on September 9, 2013, including testimony from differing vantage points from many persons including Respondent Wiesner, and ultimately voted to approve the COA application in part and to consider certain remaining issues at a subsequent meeting. The COA Committee held a second quasi-judicial hearing on October 7, 2013 and voted to approve on those issues. In its decisions, the COA Committee placed conditions related to several components of the structure and property, compliance with which would be overseen by City staff.

4. The decisions of the COA Committee of the RHDC are contained in a lengthy set of minutes with numerous findings. The initial hearing was held in September 2013 and the

minutes of it were approved in October 2013. The second hearing was held in October 2013 and the minutes of it were approved in November 2013.

5. On September 17, 2013, Respondent Gail Wiesner gave notice of an intention to appeal the September 9, 2013 approval by the RHDC's COA Committee to the Raleigh Board of Adjustment.

6. On October 24, 2013, Respondent Gail Wiesner gave notice of an intention to appeal the October 7, 2013 approval by the RHDC's COA Committee to the Raleigh Board of Adjustment.

7. Also on October 24, 2013, Petitioners Cherry and Gordon purchased a building permit from the City of Raleigh and began construction of a residence pursuant to the COA.

8. Respondent Wiesner, a neighbor, submitted her appeal request concerning her first appeal to the Board of Adjustment on November 7, 2013, and her second appeal request to the Board of Adjustment on December 6, 2013.

9. The Raleigh Board of Adjustment considered the merits of the purported appeals of Gail Wiesner from the RHDC in January 2014. The Board of Adjustment heard argument from counsel for the RHDC and argument from counsel for Ms. Wiesner.

10. At the time of her appeal to the Board of Adjustment, Respondent Wiesner had the opportunity to demonstrate standing necessary to support her pursuit of her appeal. The RHDC filed with the Board of Adjustment a Motion to Dismiss the Appeal on grounds of lack of standing. The Board of Adjustment did not rule on the Motion at the time it was made, but when approving its minutes announced that denial of the Motion to Dismiss was implicit in its consideration of the merits of the appeal. The Board of Adjustment did not make findings of fact or conclusions of law concerning standing in its decision.

11. Neither of Respondent Wiesner's Applications for appeal to the Board of Adjustment sufficiently demonstrated that Respondent Wiesner had suffered or would suffer special damages, as required under N.C. Gen. Stat. § 160A-400.9(e) and § 160A-393(d). The Board of Adjustment had no evidence that Respondent Wiesner would suffer an immediate or threatened injury distinct from the general community. Counsel for RHDC moved to dismiss for lack of standing on January 13, 2014. Respondent Wiesner offered no additional evidence concerning standing at the Board of Adjustment's January 13, 2014 meeting. Respondent Wiesner asserted in her Reply Brief to the Board of Adjustment dated January 31, 2014, that the Record before the Board of Adjustment was sufficient to demonstrate special damages, but stated in the brief that, "should the Board need additional evidence as to special damages, Mrs. Wiesner requests that she be permitted to present such evidence to the Board." Respondent Wiesner never offered any additional evidence concerning standing to the Board of Adjustment at any time prior to entry of the Board of Adjustment's decision. While proximity to the subject property bears some weight on the issue of whether a party has suffered or will suffer special damages, this fact in and of itself, is insufficient to grant standing. As Respondent Wiesner did not sufficiently establish special damages, she did not have standing to challenge the decision of the Raleigh Historic Development Commission, and the decision of the Board of Adjustment should therefore be reversed.

12. Pursuant to N.C. Gen. Stat. § 160A-393(j)(1), Respondent Wiesner filed a Motion to Supplement the Record before this Court seeking to include the affidavits of Gail Wiesner and Michael R. Ogburn related to the standing issue. Petitioners Cherry and Gordon filed a Response in Opposition to the Motion, also including affidavits. The City of Raleigh objected to affidavits offered by Respondent Wiesner and contested their admissibility. N.C. Gen. Stat. §

160A-393(j)(1) provides that “the court may, in its discretion, allow the record to be supplemented . . . if, to the extent that, the record is not adequate to allow an appropriate determination of the following issues: . . . (1) Whether a petitioner or intervenor has standing.” The Court in its discretion denies Respondent Wiesner’s Motion to Supplement the Record. To the extent Petitioners Cherry and Gordon requested that the Record be supplemented with the affidavits contained in their Response to Respondent Wiesner’s Motion to Supplement, Petitioners’ request is denied.

13. The appeals of Ms. Wiesner to the Board of Adjustment and her arguments before the Board of Adjustment specifically set forth her contention that the findings of RHDC’s COA Committee were not supported by substantial evidence and that such ruling was therefore arbitrary. The appropriate standard of review to be applied by the Board of Adjustment was the whole record test as to whether the action of the COA Committee was or was not supported by substantial competent evidence in view of the entire record. Under such a review, the Board may not substitute its judgment for the decision-making body as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter de novo. In reversing the COA Committee’s decisions, the Board of Adjustment improperly reweighed the evidence and substituted its own judgment for that of the Raleigh Historic Development Commission.

14. This Court has carried out its review of the Record before the RHDC and concludes the decision was supported by substantial competent evidence such that the decision was not arbitrary or capricious. The review by this Court has been carried out based upon the whole record test. The COA Committee considered the special character of the Oakwood Historic District and whether the new construction proposed was incongruous with that special

character. The COA Committee conducted a comprehensive and methodical analysis of the evidence presented with respect to each design guideline in the chapter of the guidelines providing for new construction. Based on the evidence before the Raleigh Historic Development Commission's COA Committee there was substantial evidence and a rational basis for the issuance of the Certificates of Appropriateness to Petitioners Cherry and Gordon. The Decisions of the RHDC's COA Committee were not whimsical, willful, or without consideration of facts or law or without determining principle.

15. The Court has also determined that the COA Committee did not commit error in its interpretation of the standards applicable to its decisions.

16. Given the Court's determination, the Court need not reach the arguments of Petitioners Cherry and Gordon concerning voting requirements applicable to the Board of Adjustment, mootness, or whether any constitutional rights of these Petitioners were violated by the Board of Adjustment. Given that the Court did not reach these arguments, Respondent Wiesner's Motion to Strike and Petitioners Cherry and Gordon's Request to Supplement the Record are denied as moot.

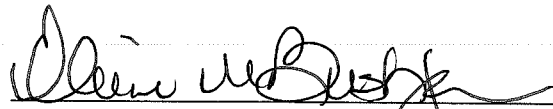
17. In reviewing the petitions of Petitioners Cherry and Gordon and of the City of Raleigh, the Court has applied a *de novo* standard to consideration of the constitutional deprivation claims as well as the contentions regarding construction of statutes, ordinances, and the Design Guidelines for Raleigh Historic Districts, vote requirements and other matters not arising out of the substantial evidence review. The Court has also applied a *de novo* standard of review in deciding that the evidence considered by the COA Committee rose to the level of competent, material, substantial evidence under applicable law.

18. This Court concludes that the Raleigh Board of Adjustment committed reversible error in failing to dismiss the Wiesner appeal on grounds of lack of standing and in failing to apply the appropriate standard of review when the Board of Adjustment conducted a *de novo* review rather than the appropriate review based upon the whole record test.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that:

1. The decision of the Raleigh Board of Adjustment is reversed;
2. The grant and issuance of Certificates of Appropriateness to Louis Cherry and Marsha Gordon by the Raleigh Historic Development Commission's Certificate of Appropriateness Committee is sustained;
3. The Certificates of Appropriateness granted to Louis Cherry and Marsha Gordon are hereby affirmed and construction of the property at issue in this proceeding may proceed in accordance with law;
4. The Motion to Supplement the Record filed by Respondent Wiesner is denied;
5. The Motion to Strike filed by Respondent Wiesner and the Request to Supplement the Record filed by Petitioners Cherry and Gordon are denied as moot;
6. The costs of this action shall be taxed to the Respondents Gail Wiesner and Raleigh Board of Adjustment, pro rata;

This the 15th day of September, 2014.



Honorable Elaine M. O'Neal Bushfan
Superior Court Judge Presiding