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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No: 2022-000092
Case No.: 2021-CP-10-04196

Crescent Homes, SC. LLC .....Appellant

v.

City of Charleston Board of Zoning Appeals-Zoning..... Respondent

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Did the Zoning Administrator and Board of Zoning Appeals correctly determine that a drive-under-the-home garage with a finished floor was a "story" within the meaning of the City of Charleston Zoning Code?

Did the Zoning Administrator and the Board of Zoning Appeals correctly determine that the word "floor" in the unrelated and inapplicable City of Charleston Stormwater Management Ordinance should not be conflated with the term "story" which is used in the City of Charleston Zoning Ordinance.

Does the Appellant have standing where its appeal was technically taken as to a property which the Board of Zoning Appeals granted a variance to allow the drive-under-the-home garage, where the Board of Zoning Appeals elected to deny a variance as to two other properties in the same development which the City contends are differently situated and where the denial of those variances has not been appealed to this Court.

STATEMENT OF THE CASE

The Respondent does not challenge the Appellant's Statement of the Case.

STATEMENT OF FACTS

Appellant Crescent Homes SC, LLC applied for a building permit to construct a home at 1012 Avenue of the Oaks with two stories of living space over a drive-under-the-home garage. The City of Charleston Zoning Administrator denied the building permit on the basis that the garage would be considered a "story" for the purposes of the 2 ½ story limit for SR-1 zoning. Crescent Homes appealed the decision of the Zoning Administrator to the Board of Zoning Appeals—Zoning. (R. p. 206). At the same time, the plaintiff sought a variance as it related to 1012 Avenue of the Oaks and multiple other properties in the same development. The Board of Zoning Appeals heard the matter of the appeal of the decision of the Zoning Administrator. It then went into executive session and came out and elected to hear a variance application at it related to Lots 1-7, 16, 42, which included 1012 Avenue of the Oaks. (R. p. 222-223) The Board of Zoning Appeals granted

a variance request as it related to Lots 1-7, 16 and 42 as requested. The Board then decided that it was not necessary to decide the appeal from the decision of the Zoning Administrator. The Board of Zoning Appeals member Morrison referenced it being moot, but formally moved to "defer." The motion passed. City Staff determined the motion to "defer" required the matter to be brought back to the Board of Zoning Appeals. (R. p. 232). That appeal from the decision of the Zoning Administrator was re-heard at the August 3, 2021, meeting of the Board of Zoning Appeals. The Board voted to affirm the decision of the Zoning Administrator. At that same meeting, Crescent Homes advanced a request for a variance as to two adjacent lots at 1029 and 1027 Avenue of the Oaks. Those variance requests were denied. It should be note that 1029 Avenue of the Oaks abuts the properties along San Juan Avenue, which is part of the Maryville Ashleyville neighborhood, an older community with modest sized single-family homes mainly built at grade level. (R. p. 193, 210). And 1027 Avenue of the Oaks abuts 1029 Avenue of the Oaks. The President of the Maryville Ashleyville neighborhood spoke in opposition to the variance requests for 1027 and 1029 Avenue of the Oaks. (R. p. 263, 286). In addition, the point was made that these properties already had plans approved for a design without a drive-under-garage and therefore could not meet the hardship test required for a variance. (R. p. 278). The Circuit Court affirmed the decision of the Board of Zoning Appeals. Crescent filed this appeal but does not appear to contest the denial of the variance.[1]

[1] See Rule 208(b)(1)(B) SCACR "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."

ARGUMENT

The Appellants requests this Court overturn the decision of the Zoning Administrator, Board of Zoning Appeals, and the Circuit Court so that a proposed drive-under-the-home garage does not count as a "story" for the purposes of the City of Charleston's Zoning Ordinance restriction that structures in SR-1 zoned areas not exceed two and a half stories. The word "story" is defined in the Zoning Code as "that portion of a building included between the surface of any floor and the surface of the next floor above." City of Charleston Zoning Code § 54-120.[2] The clear implication of those words is that the space between a cement garage floor and the surface of the next floor above it would be classified as a "story." The Appellant seeks to force the City to conflate the term "story" from the Zoning Ordinance with a part of a definition for "lowest floor" from the Stormwater Management Ordinance, an ordinance which is only applicable in special flood zones. The Appellant's property is not even in a special flood zone as defined in the City Stormwater Ordinance. This property is in the "X" flood zone which is not a special flood zone and which does not require any special flood protection elevation requirements.

I. THE CITY'S DEFINITION OF STORY IS NOT AMBIGUOUS AND IS CLEARLY APPLICABLE.

The City of Charleston zoning ordinance limits SR-1 residential to a maximum of

[2] The City of Charleston Zoning Code can be found at Municode.com https://library.municode.com/sc/charleston/codes/zoning or via the link https://www.charleston-sc.gov/295/Zoning

two and a half stories.[3] A "story" is defined in the Zoning Code as: "That portion of a building included between the surface of any floor and the surface of the next floor above, or if there be no floor above it, then the space between such and the ceiling next above it." Zoning Code § 54-120. In the present case, Crescent proposed a finished cement garage floor which is clearly a "surface of any floor." Therefore, the area between the surface of the garage floor and the next floor above it counts as a story per the definition. Contrary to the suggestion of the Appellants, this definition is not ambiguous. The definition is clear and should be applied as written.

Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581(2000) (citing In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998)). If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id.

Further, appellate courts should substantially defer "to the decisions of those charged with interpreting and applying local zoning ordinances," as they are in the best position to interpret, consider and apply those local rules. Arkay, LLC v. City of Charleston, 418 S.C. 86, 791 S.E.2d 305 (Ct. App. 2016); Clear Channel Outdoor v. City of Myrtle Beach, 602 S.E.2d 76 (S.C. Ct. App. 2004).

Appellant's references to cases or dictionaries that define a "story" as a habitable space miss the mark. Those cases and dictionary definitions are not construing the term

[3] A "half story" is defined as "The space under a gabled or hipped roof, where the wall plates, or knee walls, on at least two opposite exterior walls are not more than two feet above the finished floor of such story. The aggregate width of dormers on a half-story shall not exceed 50 percent of the width of the exterior wall below the dormer(s)."

"story" from a zoning code which has a definition that is not dependent on a habitable living space. If the City of Charleston had left the term "story" undefined, then perhaps resort to dictionary definitions would be proper, but it is clearly not warranted because the ordinance provides a definition.

However, reference to "living space" does provide an opportunity to address a concern of the City. In an area which is in a special flood zone, transforming drive-under-the-house garage space into living space is not allowed per federal FEMA flood standards. On the other hand, in an X flood zone, those rules do not apply. A homeowner is not prohibited by construction codes or flood codes from enclosing that kind of garage space, effectively creating the potential for another floor of living space.

Appellants also utilize this section of their brief to argue that some error exists from the fact that the circuit court asked no questions, asked for proposed orders, and then signed the order submitted by the City. There is never any requirement that a Judge ask questions during an appellate argument. Nor is there any prohibition asking for proposed orders from one or both parties and for the court to execute such orders as written if they find one is persuasive. Indeed, the volume of matters handled by a circuit court judge in this state would render the job impossible if the Court were not able to ask for proposed orders. Although the Order was signed without modification in this case, the judges of this state can and do modify proposed orders as they see fit.

II. THE CITY IS NOT REQUIRED TO HAVE A ZONING ORDINANCE DEFINITION OF "STORY" THAT NECESSARILY MATCHES THE STORMWATER ORDINANCE DEFINITION OF "FLOOR"

The Appellants argue that the Zoning Ordinance definition of "story" should match the Stormwater construction ordinance which utilizes and defines the word "floor" in

context of “lowest floor.” These two ordinances do not have to be read together. They are entirely different ordinances which operate independently of one another and are addressing distinctly different policy concerns. The “Stormwater Management Ordinance” is found at Section 27-1 et. seq. of the City of Charleston Code of Ordinances.https://library.municode.com/sc/charleston/codes/code_of_ordinances?nodeId=10245 The Zoning Ordinance is found at 54-101 et. seq. https://library.municode.com/sc/charleston/codes/zoning

“Floor” is defined in Division 3 of the Stormwater Management Ordinance and again as part of the term “lowest floor.” Section 27-103. “Floor” and “lowest floor” are defined for the purposes of the Stormwater Ordinance to exclude a garage used solely for parking. The definition of “floor” means “the top surface of an enclosed area in a building (including basement) i.e. top slab in concrete slab construction or top of wood flooring in wood frame construction. The term does not include the floor of a garage used solely for parking vehicles.” “Lowest floor” means “the lowest floor of the lowest enclosed area (including basement). An unfinished or flood resistant enclosure, useable solely for parking of vehicles, building access or storage in an area other than a basement area is not considered a building’s lowest floor, provided that such enclosure is not built so as to render the structure in violation of the applicable non-elevation design requirements of this article.” Stormwater Management Ordinance, Section 27-103

However, the purpose of the Stormwater Management Ordinance and the Zoning Ordinance are different. The Stormwater Management Ordinance exists to ensure that the City’s residents can continue to participate in federal flood insurance programs and to reduce damages from flooding. That the Stormwater Management Ordinance exists

to comply with federal standards is evident on many levels. For example, the definition immediately after “lowest floor” is the definition of “mangrove stand,” even though mangroves are not found further north than St. Augustine, Florida. Federal guidelines have to be followed if the City wishes to retain eligibility in the federal flood insurance program and therefore the City has adopted a Stormwater Management Ordinance with provisions that are consistent with those federal guidelines.

In contrast, the purposes of the Zoning Ordinance are far more broad than flood protection. Zoning ordinances attempt to set rules for harmonious use of adjacent and nearby properties. Zoning ordinances attempt to dictate what kinds of structures will be available in certain areas. Many aspects of land use, including types of use (commercial, single family, multi-family, etc.) sizes of structures, setbacks, parking space requirements, density of development in an area, number of floors, height limitations, and other aspects of development.

In light of different purposes, it is not reasonable for the Appellant to argue that the definition of “story” in the Zoning Ordinance should have to be read in harmony with the definition of “floor” or “lowest floor” from the Stormwater Management Ordinance.

III. THE COURT WAS NOT REQUIRED TO CONSTRUE THE ZONING CODE TO ALLOW “HIGHEST AND BEST USE”

The appellant suggest that the Circuit Court was under an obligation to construe the Zoning Ordinance to allow highest and best use of property. This is an incorrect standard. While a zoning ordinance should not be extended by implication to situations clearly not within the scope of the ordinance, there is no requirement that every provision be construed to allow the highest and best use of property. Case law is clear that a zoning

code is not required to provide a landowner the highest and best use of property. Whaley v. Dorchester Cty. Zoning Bd. of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999) "A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property. McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 505, 719 S.E.2d 660, 663 (2011).

IV. THE APPLICATION OF THE TERM "STORY" IN THE ZONING ORDINANCE IS NOT ARBITRARY AND CAPRICIOUS AND IS CONSISTENT WITH THE PURPOSES OF THE ZONING ORDINANCE.

The Appellant maintains that the application of the two and a half "story" limit is arbitrary and capricious and has no rational relationship to any lawful purpose.

"A classification is constitutional if some intrinsic reason exists why the law should operate upon some and not upon all, or should affect some differently than others, or the special law best meet[s] the exigencies of a particular situation. Put another way, "[t]he classification must bear some reasonable relation to the object sought to be obtained by the law." U.S. Fid. & Guar. Co. v. City of Columbia, 252 S.C. 55, 61, 165 S.E.2d 272, 274 (1969). As always, statutes are presumed constitutional, and the party challenging them must prove their infirmity beyond a reasonable doubt. . . The mere fact that a law may be irrational does not automatically make it unconstitutional. Such arguments must be made at the ballot box, not to the bench."

Cabiness v. Town of James Island, 393 S.C. 176, 189, 712 S.E.2d 416, 423 (2011)(some internal citations deleted).

The Appellant argues the limit on stories is entirely irrelevant and that a maximum height limit should set the only meaningful limit on construction. However, a limit on the number of stories and also the total height is not unique to Charleston. Cities with height

and story limits in some areas include: Raleigh, North Carolina, Unified Development Ordinances Chapter 2 Article 2 Section 2.2.1 (tables – 40'/3 stories for R-1, R-2, R-4, R-6, R-10); City of Spartanburg, SC., Section IV §403.1(A) (35 feet base plus additional feet for extra setbacks) and Downtown Code 3.3, 3.4, 3.5 (pages 320, 321, 322) (three stories) (Single Family Residential assorted zoning restrictions on height)

Limiting the number of stories while at the same time limiting the absolute height of a structure serves rational purposes from a zoning perspective. For example, the total height limit around this particular property is 35 feet, with some modest technical allowances. It is very easy to understand potential use and design differences that might result if a home were allowed to have three stories of 10-12 feet each (or four stories of 7.5 feet each) versus a two and a half story home. Likely the number of rooms would be different and potentially the number of occupants who could enjoy the space at the same time would change between the two designs. The exterior would also likely be very different at two and a half stories versus three or four stories. Further, the half-story aspect of a two and a half-story limit encourages roof designs that break up the roof lines and avoid a row house look which may be appropriate in a more urban setting, but would be less aesthetic in a suburban area.

Careful examination of the purpose of the limit on stories makes clear why it is not unreasonable to treat homes that are in a special flood zone differently. As noted, a three or even four-story home fit within the 35 foot maximum height limit would have much more square footage of living space and might support higher densities and intensity of use. On the other hand, a home in a special flood zone cannot use the area under the base flood elevation for living space. Therefore, the drive-under-the-home garages in

special flood areas cannot ever be used for living space. On the other hand, nothing would prevent a homeowner from enclosing a drive under the home garage that is in an X flood zone and creating three and a half stories of living space within the height limit of 35 feet.

Here the appellant also argues that it is arbitrary and capricious if the City has given some homes in special flood zones a pass on counting unfinished drive-under-the-home garages as a story in areas that are in special flood zones that do not allow anyone to enclose (except with special breakaway construction) or create habitable space on the ground. First, the appellant should not be given standing or be heard to complain that some other property owners have gotten some different treatment that is potentially more beneficial to them. ATC South, Inc. v. Charleston County, 380 S.C. 191, 200, 669 S.E.2d 337 (2008). The X flood zone is not a "special flood zone" within the meaning of federal guidelines or the City of Charleston Stormwater Management Ordinance. The X flood zone (or shaded X) is the designation given to properties that are most likely not subject to regular flooding. Therefore, per federal guidelines those properties cannot have livable space at ground level. Properties that are in a "special flood zone" are those subject to federal restrictions as to the level of the "lowest floor." Thus, the City believes it is reasonable to treat properties subject to that restriction differently. Secondly, such differences do not make the City's actions unreasonable or illegal. As noted, different treatment does not invalidate an ordinance or statute. If the properties are differently situated and there is a logical reason for a difference, then it does not invalidate an ordinance. Further, if different persons or properties are treated differently, particularly without reference to any kind of protected class, then such ordinances are not necessarily invalid.

V. THE APPELLANT LACKS STANDING TO CHALLENGE A DECISION AS TO 1012 AVENUE OF THE OAKS WHEN THE BOARD OF ZONING APPEALS GRANTED A VARIANCE AS TO THAT PROPERTY.

The original appeal of the Zoning Administrator's decision related to 1021 Avenue of the Oaks. That property was granted a variance along with multiple other lots owned by the appellant. (R. p. 152-158). The Board of Zoning Appeals correctly determined that Crescent's appeal was "moot" and voted to "defer." Because that motion was understood by City staff as a request to have the matter heard again at the next meeting, the matter again came before the Board. The board should have made a decision that the appeal as to 1021 Avenue of the Oaks was moot and should not be heard as it related to that property. The Board made a decision. However, mootness is a jurisdictional concern that this Court must address. "An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

Crescent Homes has argued and will argue that the matter is something which is capable of repetition and that they have a stake in a decision on the issue as it may apply to other properties. Admittedly, the issue is present at 1027 and 1029 Avenue of the Oaks. However, the issue no longer applies to 1021 Avenue of the Oaks and that is the decision which Crescent Homes appealed to the Board of Zoning Appeals, which was then appealed to the Circuit Court, and which is now on appeal to this Court. The denial of the variance at 1027 and 1029 Avenue of the Oaks was not appealed to this Court given the issues raised in the Appellant's initial brief and statement of issues on appeal. See Rule 208(b)(1)(B) SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.")

The Appellant could have taken an appeal from the decision of the Zoning Administrator's application of the two-and-a-half story rule as applied to drive-under-the-home garages with regards to 1027 and 1029 Avenue of the Oaks where the determination of the zoning administrator was the same, but chose to only purse a variance which was denied as to those properties.

By asking this Court to rule in the context of the Zoning Administrator's decision as to 1021 Avenue of the Oaks, where it received a variance, the Appellant asks this Court to render a decision in the abstract and without reference to a specific property. Property is generally thought of as being unique and different considerations may apply to different properties. This makes it inappropriate to ask the Court to decide the issue because relief as to 1021 Avenue of the Oaks is rendered moot by the variance that the BZA granted the same night it first voted on this matter.

CONCLUSION

The City of Charleston through its duly elected leaders set a two and a half "story" limit in the SR-1 zoning areas as part of its zoning code and provided a definition of "story." The City's Zoning Administrator is simply following the letter of the zoning ordinance per the definition used in the zoning ordinance. The Appellant's position would essentially allow every single property, inside or outside any special flood zone, to be elevated above a drive under garage with two and a half stories above that. Such a change in zoning should come from City Council. The Appellant makes valid points that the City of Charleston is at risk of increased flooding due to sea level rise. And the City of Charleston is already engaged in an extensive effort to try to adapt to sea level rise. Certainly, if City Council wants to allow any citizen to have two and a half floors

above a drive-under-the-house garage, then City Council could easily vote to do. However, those changes should come from the legislative body which in this case is City Council, not the court.

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RULE 211(b) CERTIFICATE

The undersigned certifies the final brief complies with Rule 211(b) in that the only changes are revision to the Record on Appeal, typographical errors and/or misspellings.

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PROOF OF SERVICE

I, Timothy A. Domin, Counsel for, City of Charleston Board of Zoning Appeals - Zoning, hereby certify that on June 10, 2022, I have served the within Final Brief of Respondent and by depositing a copy of the same in the United States Mail, postage prepaid, addressed to the following:

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