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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Walton J. McLeod, IV, Circuit Court Judge

Civil Action Nos. 2009-CP-40-01307, 2013-CP-40-02159

Appellate Case No. 2019-000868

Frieda H. Dortch, ...Appellant,

v.

City of Columbia, Planning & Development Services/Zoning Division a/k/a City of Columbia Board of Zoning Appeals,.....Respondent.

RESPONDENT'S RETURN IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING

This is a zoning appeal from Appellant's loss of the grandfather status of a duplex on a lot that is too small for a duplex. This is also an appeal from the denial of two variance requests. The hearings before the Board of Zoning Appeals (the "Board") consisted of a straightforward application of the City's ordinances regarding variances and nonconforming uses. The Board, in its quasi-judicial capacity, after hearing the facts and evidence, determined the property lost its grandfather status because it had been vacant for more than 12 months. This entire litigation saga began after Appellant admitted, on the record, that the property had been vacant for more than 12 months. The Board also decided that the facts and evidence did not support the granting of a

variance. A variance, in effect, would have re-established the grandfather status that had been lost. After losing the legal nonconforming status, Appellant was asking for a variance to the lot size requirements so that she could keep a duplex.

These matters have been fully developed in an extensive record. The issues have been fully briefed by both parties. This Court heard oral arguments. This Court issued an opinion on July 20, 2022, in which it affirmed the circuit court's decision to uphold the Board's denials of the variance requests and the Board's finding that the property had lost its legal nonconforming status.

Appellant filed a Petition for Rehearing on August 4, 2022. In the petition, Appellant requests the Court of Appeals to, first, re-issue a published decision addressing and ruling on all of the dispositive issues presented on appeal. Second, Appellant requests the Court to "review" all of the briefs in this matter, as if the Court has not already done so, and "change" the Court's rulings as issued in the opinion.

The Court's opinion succinctly and accurately recited and summarized the issues raised in the appeal by Appellant. Appellant claims that the Court should have separately identified and decided all twenty-nine of the distinctly numbered issues stated by Appellant. This argument is disingenuous. Appellant somehow creatively crafted twenty-nine issues on appeal but many of the issues are simply sub-parts of a larger issue. Moreover, even Appellant did not separately address all issues. Appellant lumped many of the issues together in the body of the briefs. The statement of issues on appeal "shall be concise and direct as to each issue . . . ." Rule 208(b)(1)(B), SCACR. Appellant is in violation of this rule but self-corrected by combining the distinctly-stated issues in the argument of the brief. Appellant separated her argument into main sections, and discussed the standard of review, vested rights, error preservation, and the denial of the variance requests. These are the same issues addressed in the Court's opinion.

Many of the issues listed by Appellant in the Statement of Issues on Appeal are clearly without merit and did not have to be addressed by the Court. For example, Appellant attempts to argue that the proceedings regarding the variance requests were infected with irregularities and procedural and evidentiary issues. (Issues 19-29) This Court has the entire record of the proceedings. Appellant was afforded a meaningful opportunity to make her case and there are no irregularities that affected the proceedings. *See Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 656 S.E.2d 346 (2008) (holding due process does not require local boards to adopt strict rules of procedure similar to those in circuit courts); *see also Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009) (holding property owner received due process when he was provided notice of hearing and was allowed to present arguments). There was no reason for the Court to separately address each point stated by Appellant. The Court combined and ruled on every issue that was necessary to the decision of the appeal and which fairly arose upon the record. *See* Rule 220(b), SCACR.

1. Standard of Review

The Court was absolutely correct in finding that no authority supports *de novo* review of the Board's decisions. The Board is a creature of statute. The Board has those powers and responsibilities as set forth in the statute. The same statute also provides the standard of review to be used in the appeal from a decision of a zoning board. There is **no authority** that the entire appeal be reviewed *de novo* simply because it is alleged the decision is incorrect as a matter of law. Appellant is so strenuously urging a *de novo* standard of review because there is no other way for Appellant to overcome the ample evidence in the record supporting the loss of grandfather status. To prevail, Appellant would need the Court to substitute its judgment for that of the fact-finder, which is not permitted under the well-established and oft-cited standard of review. This is

not to say that a reviewing court cannot correct an error of law. In fact, a reviewing court may overturn a board's decision if the board has abused its discretion. However, this does not mean that the entire proceeding should be reviewed under a *de novo* standard simply because a decision might be controlled by an error of law. There is, in fact, no authority to support the overarching principle advocated by Appellant that *de novo* review is required. The Court was correct to address the issue concerning the standard of review in the fashion stated in the opinion.

2. Statutory Grandfathering

Concerning statutory grandfathering, the issue was simply whether any evidence supported the Board's decision. The evidence was applied to whether there was vacancy, abandonment, or discontinuance of the nonconforming use for any period of 12 consecutive months. There was certainly evidence to support the Board's decision and this Court was not required to go any further after making this finding. Appellant did this to herself. The ordinances and requirements are there for all to see. Appellant admitted she did not comply with the ordinance regarding vacancy of a nonconforming use. This was nothing but a regular application of the ordinances by the Board.

It should be pointed out again that out of the litany of issues listed by Appellant and discussed in the brief, Appellant failed to argue that the evidence did not support the finding by the Board of loss of grandfather status. Appellant did not present an argument that the evidence was not sufficient for this finding by the Board; instead, Appellant argued only that she should keep the use as a duplex by operation of law. Therefore, concerning the vested rights issue, as the Board has pointed out and argued, this Court could either find the vested rights issue was not preserved, as it properly did, or find that the issue was abandoned because Appellant failed to raise and address the existence of evidence regarding the loss of the legal nonconforming use. Appellant should not be permitted to bypass the actual decision by the Board and move straight into a purely

legal argument concerning vested rights. In other words, the decision can be affirmed because it was not challenged on evidentiary grounds.

3. Denial of the Variance

The same can be said for the Court's treatment of the Board's decision to deny the variance requests. As discussed above, this question, like the question of loss of grandfathering, was fact-specific and the Board correctly found the facts did not support the granting of a variance. The undersigned counsel is at a loss as to how to explain this any other way. Keep in mind, Appellant had lost the legal nonconforming use. That was the starting point for the variance requests. Appellant would not have needed a variance had she not lost the legal nonconforming use. The Court of Appeals' opinion cited the ordinance requiring the Board to find "extraordinary and exceptional conditions pertaining to [a] piece of property" before granting a variance. On this point, in the tribunal below, Appellant simply argued that her structure had been a duplex for a long time. The Board was not required to find that a thing which Appellant lost, i.e., the legal nonconforming use, was now something that would entitle Appellant to a variance. The Board was not required to find that long-time use as a duplex created extraordinary and exceptional conditions. In the grand scheme of things, this is certainly not extraordinary or exceptional. Many buildings are used in one way for a while, and then transformed or renovated into another use. Even if a nonconforming use legally could be an exceptional condition, it does not mean that the Board was required to come to this conclusion. There is no compelling legal or factual reason for this Court to substitute its judgment for the Board and the circuit court.

Appellant apparently wants to nit-pick over whether the Court of Appeals made a direct finding of Appellant's failure to meet her burden of proof, or whether the Court was sustaining the decision below by applying a standard of review. This argument is a distinction without a

difference. An applicant bears the burden of proving her entitlement to a variance and a board's decision will not be reversed if there is evidence to support it. These propositions of law are not mutually exclusive. The Court of Appeals clearly and correctly found that Appellant did not meet her burden of proof to establish the elements of a variance. It is not error to make a finding that an applicant did not meet its burden of proof. *See Rest. Row. Assocs. v. Horry County*, 335 S.C. 209, 516 S.E.2d 442 (1999) (finding the applicant did not meet its burden to show an unnecessary hardship).

4. Vested Rights Issue Not Preserved

The issue of vested rights, which Appellant argues would upend any attempt by towns and counties to amortize nonconforming uses out of existence, was not preserved. Appellant claims in this appeal that any statutory attempt to terminate a vested right is unconstitutional. The closest Appellant came to specifically raising this issue to any lower tribunal was the language in the first petition for appeal in which she claimed that "the actions and prohibitions to which she had been subjected . . . were 'fundamentally unfair and denial of due process.'" *See* Petition for Rehearing, p. 10; R. p. 192. What does this mean? Appellant asserts numerous meritless claims now about the record of the appeal and the manner in which the Board hearings were held. Are these the due process concerns alluded to in the petition for appeal? The petition for appeal to the circuit court also stated that the property had been family property for many years before any change in the zoning code. *See* Appellant's Brief, p. 23; R. p. 191. This was simply a restatement of the same factual argument that Appellant had made to the Board in the recent hearings, and does not sufficiently raise the specific legal issue that Appellant possessed a vested right to continue the use as a duplex forever and ever. It certainly does not put any tribunal on notice that Appellant contended that she had a vested right as a matter of constitutional law, regardless of the objective

facts of vacancy. Appellant's amended petition of appeal similarly does not sufficiently raise the issue. In any event, amended petitions for appeal and additional materials are "expressly forbidden." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004).

5. Unpublished Opinion

Finally, Appellant contends that the Court of Appeals is not authorized to issue unpublished opinions. Rule 220(a) states: "The appellate court shall make its decisions in writing by published opinions or memorandum opinions . . . ." Rule 220(a), SCACR. On its very face, then, the Rule authorizes the appellate courts, including the Court of Appeals, to issue unpublished, memorandum decisions, as has been the practice for decades. So long as the decision rendered by the Court of Appeals addresses "every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record," the Court of Appeals need not issue a published opinion. Rule 220(b), SCACR. Whether published or not, "[t]he Court of Appeals need not address a point which is manifestly without merit." Rule 220(b)(2), SCACR. Appellant's arguments regarding the form of the subject opinion are without merit.

For the reasons stated herein, and in all of the Board's other filings in this matter, the Board respectfully requests that the Petition for Rehearing be denied.

RILEY POPE & LANEY, LLC

s/Peter M. Balthazor

Peter M. Balthazor
P.O. Box 11412
Columbia, South Carolina 29211
(803) 799-9993 – Office
(803) 239-1414 – Facsimile
peteb@rplfirm.com

Attorneys for Respondent/Defendant

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CERTIFICATE OF SERVICE

This is to certify that I, Monique W. Trifos, an employee with the law firm of Riley Pope & Laney, LLC, have this day caused to be served upon the person named below the attached **RESPONDENT'S RETURN IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING** in the above-captioned matter via electronic mail to the AIS e-mail address of the following attorneys:

M. Baron Stanton, Esquire
Stanton Law Offices, P.A.
1728 Main Street
Columbia, SC 29201
bstanton@stantonlaw.com

s/Monique W. Trifos
Monique Trifos

Columbia, South Carolina
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