

Audubon Society designed the Island as an Important Bird Area in 2008. This Island is also within the Gullah Geechee Heritage Corridor as designated by the Gullah Geechee Cultural Heritage Act, as amended. The Beaufort County Community Development Code (“CDC”) provides that the Island is zoned T1-Natural Preserve (“T1-NP”) with numerous by-right permitted uses including single-family residential and several conditional uses and special uses. The intent of T1-NP is to “preserve areas that contain sensitive habitats, open space, and limited agricultural uses. This Zone typically does not contain buildings; however, single-family dwellings, small civic buildings or interpretive centers may be located within this zone.” Sec. 3.2.3(A) of the CDC. Ecotourism is allowed in T1-NP upon the approval of a special use permit for the use. The Island was subdivided into 1998 into fifty-one separate parcels. In 2019, nine of the lots were consolidated to create a single 50.55 acre parcel identified as PIN#R300 045 000 0009 0000 (“Property”), which is the subject property of this action. The remaining lots, with two exceptions, average about five acres per parcel for single-family development. The primary access to the Island is via boat; there are no road connections to or on the Island.

Appellant, through Josh K. Tiller as Applicant, filed a Beaufort County-Zoning Board of Appeals Application for Special Use Permit, dated April 30, 2020 (“Application”) for the special use of ecotourism.

Appellant desired to construct an ecotourism wellness retreat on the Property, the Bay Island Ecotourism Wellness Retreat (“Resort”). The Resort was to include wellness centers, fifty cabins for four persons per cabin, restaurants, a cooking school, earth lab, administrative offices, a reception lobby totaling 66,125 square feet (1.52 acres), outbuildings, and a 22,700 square foot (0.52 acre) solar farm. Water and sanitary sewer would be provided by wells, rainwater harvesting, wastewater reclamation, and nine septic systems. Emergency medical services were to be provided by on-site EMTs supported by a designated helicopter landing site for life threatening emergencies.

The Island is in the Lady's Island/St. Helena Fire District's Fire Response Area. The Application submitted to the Beaufort County Zoning Board of Appeals ("Board") was void of any reference to how calls for service for law enforcement were to be accommodated. Waste was to be composted on site or ferried off site for disposal in local landfills. Access to the Resort was proposed to be via ferry from Hilton Head Island for guests. Access to the Island for the approximately 175 staff members was to be proposed to be via ferries. The staff ferries would deliver and return staff three times daily by circulating the Beaufort County area at different locations. Other staff members such as EMTs would perform 24-hour shifts at the Resort.

On September 15, 2020, the Beaufort County Staff Review Team (SRT) recommended approval of the issuance of the Special Use Permit to the Board with conditions, including placing the remaining Island under a conservation easement.

A public hearing was held on September 24, 2020, by the Board regarding the Application for the ecotourism special use ("Public Hearing"). During the Public Hearing, the Board was presented with over 3000 pages of documents to include the application and its supporting documentation, letters, and emails; testimony from speakers present at the public hearing to include representatives of the applicant, and many individuals opposed to the issuance of the special use permit. Notably, the local Fire Chief and Queen Quet Marquette L. Goodwine, Chieftess of the Gullah/Geechee Nation.²

Upon presentations of Applicant's representatives and engineers, hearing the arguments of Counsel, reviewing the record provided, hearing presentations of Beaufort County Staff, and

² Queen Quet is the Chieftess of the Gullah/Geechee Nation, founding member of the Gullah/Geechee Fishing Association and the founder of the Gullah/Geechee Sea Island Coalition.

hearing the public, the Board on October 9, 2020, issued a written Decision and Order denying the Application for the special use of ecotourism (“ZBOA Order”) with the following findings of fact:

1. This is the written Decision and Order of the ZBOA entered, filed and provided to all parties as required by South Carolina Code of Laws (1976), as amended (the “S.C. Code”), Section 6-29-800(F).
2. Division 7.4, Sections 7.4.50(s)(3)(4) and 7.4.70 of the Community Development Code, as follows: (a) publication in the Island Packet/Beaufort Gazette, and newspaper of general circulation in Beaufort County, and (b) posing the requisite signs on the proposed site.
3. The property in question is situated within the Unincorporated boundaries of Beaufort County, South Carolina, and as such is subject to the Community Development Code, and jurisdiction in this matter is property.
4. The applicant failed to demonstrate the proposed *special use*:
 - A. Is consistent with the Comprehensive Plan’s purposes, goals, objectives, and policies, and applicable standards of this Development Code, including standards for building and structural intensities and densities and intensities of use;
 - B. Is compatible with the character of land in the immediate vicinity;
 - C. Is designed to minimize adverse effects, including visual impact of the proposed use on the adjacent lands; and
 - D. Is designed to minimize adverse impacts on the environment, traffic and congestion, infrastructure, or governmental services. (A Traffic Impact Analysis (TIA) may be required as determined by the Director.)
5. The applicant failed to prove the design incorporated the building, structures, and amenities into the natural and scenic qualities of the area in a complimentary fashion.
6. The applicant failed to prove that the operational plan adequately showed how this use will enhance the *ecotourism* experience of intended users in regard to the related wilderness setting, interpretive educational programs, wildlife viewing opportunities, outdoor activities, parks/protected areas, and /or cultural experiences.

On November 4, 2020, Appellant filed a Summons and Notice of Appeal and Request for Pre-Litigation Mediation pursuant to Sections 6-29-820 and 6-29-825, Code of Laws of South Carolina, 1976, as amended.

On May 5, 2022, the Court issued an order granting the Coastal Conservation League’s and the Gullah/Geechee Fishing Association’s motions to intervene. On May 13, 2022, Appellant

filed a motion to reconsider the Court's order granting intervention. On June 10, 2022, a hearing was held on Appellant's motion to reconsider. On June 15, 2022, the Court issued an order denying the motion to reconsider.

STANDARD OF REVIEW

The Court of Appeals of South Carolina clearly has set forth the standard of review in zoning appeals. *Newton v. Zoning Board of Appeals for Beaufort County*, 396 S.C. 112, 719 S.E.2d 282 (Ct.App.2011). "Even if a court disagrees with a zoning board's decision, the court will refrain from substituting its judgment for that of the zoning board unless the decision 'is arbitrary, capricious, has no reasonable relation to a lawful purpose, or in the [zoning] board has abused its discretion.'" *Id.* at 116, 719 S.E.2d at 284 (quoting *Rest. Row Assocs. V. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "[T]he decision of the zoning board will not be upheld where it is based on errors of law, ... or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, ... or where, in general, the board has abused its discretion" *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997)(quoting *Hodge v. Pollock*, 223 S.C. 342, 348, 75 S.E.2d 752, 755 (1953)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* (quoting *Cnty. Of Richland v. Simpkins*, 348 S.C. 64, 668, 560 S.E.2d 902, 904 (Ct.App.202)). "The factual findings of the Board must be affirmed by the Circuit Court if they are supported by any evidence and not influenced by an error of law." *Stanton v. Town of Pawleys Island*, 317 S.C. 498, 502, 455 S.E.2d 171, 172 (1995). "The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." SC Code Section 6-29- 840. " '[T]he factual findings of the jury will not be disturbed unless a review of the record discloses that there is **no evidence** which reasonably

supports the jury's findings.'" *Vulcan Materials Co. v. Greenville County Bd. Of Zoning Appeals*, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000) (quoting *Sterling Dev. Co. v. Collins*, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992) (emphasis added). "A reviewing court in a zoning case may rely on uncontroverted facts which appear in the record, but not in a zoning board's findings" *Vulcan*, at 491, 536 S.E.2d at 898 (citing *Stanton v. Town of Pawleys Island*, 317 S.C. 498, 455 S.E.2d 171 (1994)). "[T]he court must determine only whether the decision of the board is correct as a matter of law." Section 6- 29-840

In *Rest. Row Assocs. v. Horry Cnty*, the Supreme Court of South Carolina clearly stated the standard of review in zoning appeals:

It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (quotation marks omitted).

This Court's review is limited to the certified record before the Board, which has been filed in this case pursuant to S.C. Code Ann. § 6-29-830. No additional evidence can be considered. *Id.*

LAW

The CDC provides for the approval process and standards for approval of a special use permit under Section 7.2.130 of the CDC: Planning Director's recommendation, a public hearing, and the approval of the special use application by the Board. The Special Use Permit Review Standards the Board must consider are:

A Special Use Permit shall be approved on a finding the applicant demonstrates the proposed special use:

1. Is consistent with the Comprehensive Plan's purposes, goals, objectives, and policies, and applicable standards of this Development Code, including standards for building and structural intensities and densities and intensities of use;
2. Is compatible with the character of land in the immediate vicinity;
3. Is designed to minimize adverse effects, including visual impact of the proposed use on the adjacent lands; and
4. Is designed to minimize adverse impacts on the environment, traffic and congestion, infrastructure, or governmental services.

ANALYSIS

The sole issue in this appeal is whether the Board's denial of the Appellant's special use Application was arbitrary, capricious, and without any supporting evidence.

Although the Board's finding of fact in the ZBOA Order did not list every piece of evidence considered by the Board, upon review of the Record, a substantial amount of evidence supporting the Board's denial of the Application was present, considered, and uncontroverted.

A reviewing court "may rely on uncontroverted facts [that] appear in the record, but not in a zoning board's findings." *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 491, 536 S.E.2d 892, 898 (Ct. App. 2000). "Generally, the format of a final decision is immaterial as long as the substance of the decision is sufficiently detailed so as to allow a reviewing court to determine if the decision is supported by the facts of the case." *Id.* at 494; 536 S.E.2d at 899; *see also, Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004) (affirming *Vulcan Materials* and holding that the board of zoning appeals transcript and record on appeal may be considered by a circuit court on appeal).

The Board received and considered evidence that the proposed ecotourism use did not meet the Special Use Permit Review Standards of Section 7.2.130(D) of the CDC. The evidence presented to the Board included, but was not limited to, the special use Application and its

supporting documents, testimony from the Applicant's representatives and engineers, letters and emails to the Board from many individuals and groups to include Chief Cline of the Lady's Island/St. Helena Fire District and the Audubon Society, and testimony during the public hearing Chief Cline and Queen Quet and many others. The return of the Board included over 3000 pages of documents.

In considering whether the special use was consistent with the 2010 Beaufort County Comprehensive Plan's ("Comp Plan") purposes, goals, objectives, and policies, and applicable standards of the CDC, including standards for building and structural intensities and densities and intensities of use, the Board received and considered evidence that the intensity of the Resort was not consistent with the Land Use Element of the Comp Plan. The Application and supporting documentation evidenced the Resort was to include over fifty cottage units, nine septic tanks, cisterns, restaurants, a canteen and a myriad of other supporting building including housing for the on-site EMTs, 175 staff members, multiple boats and ferries with some ferries traveling to and from the Island three times a day. Furthermore, the Board took evidence regarding cultural and historic resources and the negative impact the Resort would have on these resources. In speaking to the Board during the public hearing, Queen Quet described the Gullah Geechee culture and how the Gullah Geechee culture is rooted and entwined in the lands of Beaufort County, particularly St. Helena Island and its surrounding waterways, to include Bay Point Island. Queen Quet spoke directly about the incompatibility of the Resort and its operations in relation to the protection of cultural and historic resources of the area, specifically the Gullah Geechee culture. Furthermore, the Board considered evidence of the incompatibility of the Resort in relation to the local culture. Applicant's Counsel in response to questioning by the Board, verified the Applicant's failure to make any partnership agreements with local fishermen or local gardeners to provide cultural

experiences and/or the provision of locally sourced fish and vegetables for the Resort. The Board was presented with documentary and testimonial evidence that the Resort was not compatible with the Community Services Element of the Comp Plan. Chief Kline of the Lady's Island - St. Helena Fire District expressed his grave reservations of the Resort's plan for emergency services both in a letter written to the Appellant's and while speaking at the public hearing.

The Board was presented with evidence that the proposed ecotourism special use was not compatible with the character of the land in the immediate vicinity. Evidence was presented that the Island is an uninhabited barrier island teeming with flora and fauna both on its interior, the marsh inland, the beaches, and the surrounding waters. A letter from the Audubon Society to the Board spoke of several species of birds on the Island that are federally listed as threatened or endangered species and the impact the Resort would have on these species.

The Board was presented with evidence that the special use was not designed to minimize adverse impacts on the environment, traffic and congestion, infrastructure, or governmental services. The Application included discussion of the use of septic systems which septic tank failure is identified in the Comp Plan one of the greatest threats to Beaufort County's estuarine environment. The Board was also presented with Chief Kline's letter and testimony expressing his grave concerns regarding the burden the Resort would have had on governmental services specifically the amount of time that would be required to respond to emergencies due to the Resort's remote location.

The Appellant bore the burden of convincing the Board that its application satisfied each and every one of the special use permit criteria. Section 7.2.130(D), CDC; *see also, Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. at 216 (holding a board of zoning appeals applicant bears the burden of proof in establishing its entitlement to relief). The Board carefully considered the record

before it and concluded the Appellant failed to satisfy the special use permit criteria. The Appellant has failed to convince this Court that the Board's decision was arbitrary, capricious, or motivated by an abuse of discretion. *Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001) ("The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary."). On the contrary, the record reveals that the Board properly considered the evidence presented and correctly denied the Application.

CONCLUSION

This Court finds that there was sufficient evidence in the record of this appeal to support the decision of the Board denying the special use permit application, and the decision of the Board is correct as a matter of law.

This Court may not substitute its judgment for that of the Board's – even if it disagrees with the decision. *Austin v. Bd. of Zoning Appeals*, 362 S.C. at 33, 606 S.E.2d at 211. So long as there is any evidence in the record supporting the Board's decision, it must be affirmed by this Court. *Id.* The record clearly contains ample evidence supporting the Board's decision.

The Court finds that the Board's decision was neither arbitrary nor capricious, and that the Board did not abuse its discretion in the denial of the special use permit application decision. It is therefore ordered that the Appellant's appeal is denied, and this action is dismissed with prejudice.

AND IT IS SO ORDERED!

Marvin H. Dukes III
MASTER IN EQUITY

Beaufort, South Carolina
July , 2022



Beaufort Common Pleas

Case Caption: Bay Point Island Llc VS Beaufort County Of , defendant, et al

Case Number: 2020CP0702160

Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069