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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Hon. G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2022-001301

Alliance to Preserve the Old White Horse Road Corridor, LLC and Mary Jean Horney, ... Appellants,

v.

RP&L, LLC and the Greenville County Planning Commission ..... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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I. The Planning Commission abused its discretion.

A. *The "any evidence" standard of review does not apply.*

The Planning Commission contends that the "any evidence" standard of review applies to the appeal of any Planning Commission decision. It relies upon Supreme Court cases *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008), and *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E.2d 161 (2013). However, a closer look at these cases and the statutory scheme reveals that the "any evidence" standard properly applies to decisions of a zoning board, and not to decisions of a planning commission.

In both *Kurschner* and *Floyd*, the court took the standard of review from S.C. Code Ann. § 6-29-840, which expressly provides that "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury." The "board of appeals" is the same as the "board of zoning appeals" in S.C. § 6-29-780, and it specifically is given the statutory power to hear appeals concerning zoning ordinances. *See id*. §§ 6-29-800. These appeals are subject to the provisions set forth in sections 6-29-820 to -850. Pursuant to section 6-29-840, "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury." It is this standard that courts have referred to as the "any evidence" standard.

However, the above procedure for appeals from the board of zoning appeals (set forth in Article 5 of Chapter 29 of Title 6) is completely different from appeals from the planning commission's decisions concerning land development regulation (set forth in Article 6 of Chapter 29 of Title 6). Article 5 does not address zoning but addresses land development, which includes the "procedure for the submission and approval or disapproval by the planning commission" of plats or plans. *Id*. § 6-29-1150. This statutory scheme has different

requirements than the ones governing zoning, including that appeals are governed by section 6-29-1150. Importantly, section 6-29-1150, in contrast to section 6-29-840, does not contain any language that the planning commission's findings "must be treated in the same manner as a finding of fact by a jury."

This distinction is important because the appeal at issue here is pursuant to Section 6-29-1150, whereas the case law relied upon by the Planning Commission interprets the completely different standard for zoning appeals set forth in Section 6-29-840. *See Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing to S.C. Code Ann. § 6-29-840), and *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E.2d 161 (2013) (citing to *Kurschner* and S.C. Code Ann. § 6-29-840). Under the more recent Supreme Court decision of *Grays Hill Baptist Church v. Beaufort County,* it was noted that the "any evidence" standard applies "[i]n the zoning context." *Grays Hill Baptist Church v. Beaufort Cty*., 431 S.C. 630, 637 & n.4, 850 S.E.2d 29, 31 & n.4 (2020) (internal quotations omitted). It is not disputed that the instant case is not in the zoning context, nor is it disputed that the instant appeal is pursuant to Section 6-29-1150 and not to Section 6-29-840.

The distinction that exists between these two standards has not been recognized or addressed by the Supreme Court.[1] But it is a reasonable conclusion that the "any evidence" standard that properly is applied to Section -840, which requires the findings of fact by the board of appeals to be treated in the same manner as a finding of fact by a jury, does not apply here in the context of section -1150, which does not similarly require any findings of fact by the planning commission to be treated as the findings of fact by a jury. For that reason, the standard

[1] Although the Supreme Court has applied the section -840 standard to appeals under section -1150, these opinions have not identified the distinction. This is an appropriate area for appellate review.

of review on appeal is less deferential to the Planning Commission, and Appellants submit that a higher standard of review is required. At the very least, the Planning Commission must be required to set forth the grounds for approval or disapproval.

B. ***The Planning Commission's failure to set forth "the grounds for approval or disapproval" prevents review by an appellate court and therefore requires reversal.***

"A local planning commission . . . shall adopt rules of organizational procedure and shall keep a record of its resolutions, findings, and determinations, which record must be a public record." *Id*. § 6-29-360 (emphasis added). Furthermore, when considering an application for a subdivision under the land development regulations, **the Planning Commission was required to set forth in writing "the grounds for its approval or disapproval"**:

> A record of all actions on all land development plans and subdivision plats with the grounds for approval or disapproval and any conditions attached to the action must be maintained as a public record. In addition, the developer must be notified in writing of the actions taken.

Id. § 6-29-1150 (B) (emphasis added).

The statute expressly requires the Planning Commission to set forth its "findings," "determinations," and "grounds for approval or disapproval" of actions on land development plans and subdivision plats. S.C. Code Ann. §§ 6-29-360, -1150(B). Without such grounds, it is impossible to know the basis for the exercise of its discretion. This is particularly true in light of the fact that the Commission simply approves or disapproves with a majority vote and without any attempt to elicit and set forth the grounds behind each Commissioner's vote.

The Planning Commission cites to *Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007), for the contention that "not all situations require a detailed order, and the circuit court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal." However, the Planning Commission fails to

recognize that in *Porter*, the "Appellate Panel's findings of fact and conclusions of law, as incorporated by reference to the single commissioner's order, became those of the circuit court." *Id*. at 569, 643 S.E.2d at 101. Thus, there were nine findings of fact and two conclusions of law to be reviewed. *Id*. It follows that the *Porter* case does not support the Planning Commission's argument.

C. *Regardless of the precise standard of review, the Planning Commission must be reversed under the abuse of discretion standard.*

Regardless of whether the Planning Commission was required to set forth the grounds for its decision, whether such grounds required findings of fact and conclusions of law, or whether the "any evidence" standard applies, the Planning Commission's decision nonetheless must be overturned if its findings have no evidentiary support, if it is the result of an error of law, or if it is arbitrary and capricious or constitutes an abuse of discretion. *Grays Hill Baptist Church*, 431 S.C. at 637, 850 S.E.2d at 31.

The law is clear that the exercise of discretion requires a thought process evidenced by analysis that is explained:

> The exercise of discretion is not to simply make a decision. The *exercise* of discretion requires first that the trial court recognize it has the responsibility of discretion. The exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances. The trial court's recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process. Thus, when a trial court's—or the commission's—thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion, even when the judges on the appellate court might have made the decision differently.
>
> In this case, the commission's initial decision to dismiss the appeal required no explanation. The Form 31 set a clear due date for Proffitt's brief, and

> Proffitt clearly failed to file the brief in time. Regulation 67-705(H)(3) specifically permits the commission in that circumstance to "issu[e] an administrative order dismissing the appeal." The commission's decision first to refuse to reinstate the appeal, however, and then its decision to deny reconsideration, are different. Regulation 67-705(H)(4) requires the commission to soundly apply the principle of "good cause" to the facts and circumstances before it. This "thought process" requires analysis, and the "discretion" standard we employ for reviewing the commission's analysis requires the analysis be explained.
>
> Because the commission offered no explanation for its decision, we find the commission did not act within its discretion in refusing to reinstate Proffitt's appeal.

Morris v. BB&T Corp., 2023 S.C. LEXIS 11, *7 (S.C. Jan. 25, 2023) (citations omitted) (emphasis in original).

Here, there is no thought process, there is no analysis, and there is no explanation in the Planning Commission's approval of the subdivision plat. Instead, there is nothing more than an up-or-down majority vote with no attempt to elicit or set forth the reasoning behind the individual Commissioner's votes. It is impossible to divine the reasoning of the Planning Commission from a series of questions and answers without any analysis of what facts the Planning Commission deemed were established and how those facts applied to the Land Development Regulations and Zoning Ordinances at issue. It is unclear and unknown if the Planning Commission even reviewed the materials submitted by citizens prior to the hearing. A decision made without any "grounds"—and established solely by a majority up-or-down vote—is the epitome of an abuse of discretion because it constitutes merely *making* a decision without the accompanying thought process and analysis that demonstrates the exercise of discretion.

D. *No deference is due to the Planning Commission's interpretation of an ordinance.*

Moreover, the *Somers* opinion, relied upon by *Grays Hill Baptist Church*, makes it very clear that the interpretation of an ordinance, which is involved in the present case, is not given

deference:

> This Court will not reverse the Circuit Court's affirmance of the Board unless Board's findings of fact have no evidentiary support or Board commits an error of law. *Historic Charleston Foundation v. Krawcheck*, S.C. , 443 S.E.2d 401 (Ct. App. 1994); *Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach*, 294 S.C. 475, 366 S.E.2d 15 (Ct. App. 1988). Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, *Krawcheck*, *supra*, "a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *Sea Island Scenic Parkway Coalition v. Beaufort County Bd. of Adjustments and Appeals*, S.C., 449 S.E.2d 254, 256 (Ct. App. 1994).
>
> Board contends that its determination of Council's intent was a finding of fact which is binding on this Court unless there is no evidence to support it. We disagree. The determination of legislative intent is a matter of law. 73 Am. Jur. 2d Statutes § 142 (1974); *Sea Island Scenic Parkway*, *supra*. Board's determination that a park is not a municipal use under the Isle of Palms zoning ordinance is, therefore, reviewable. *See Townes Assoc. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).
>
> It is well settled that when interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used. *Fairfield Ocean Ridge, supra*. An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Spartanburg Co. D.S.S. v. Little*, 309 S.C. 122, 420 S.E.2d 499 (1992). In construing ordinances, the terms used must be taken in their ordinary and popular meaning. *Citizens for Lee County v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992).

Charleston County Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67-68 (1995).

It follows that this court may substitute its judgment for the Planning Commission in determining the construction of an ordinance.

E. *The circuit court cases cited in the Initial Brief of Appellants are not cited as binding precedent.*

The Planning Commission's brief takes issue with the Appellants' citation to circuit court cases as not being controlling precedent. These cases were not cited as controlling authority but as persuasive authority. The reasoning of those decisions may be considered by the appellate court.

II. Appellants have preserved issues on appeal concerning LDR Article 3.1.

The Planning Commission acknowledges that Appellants raised issues related to LDR Article 3.1 in their notice of appeal to the circuit court but nonetheless argues that these issues are not preserved for appeal in the Court of Appeals because the circuit court did not address them in its order filed August 17, 2022. This argument fails for three reasons.

First, the Planning Commission relies upon cases such as *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 102, 594 S.E.2d 485, 498 (Ct. App. 2004), for the proposition that error is not preserved unless raised and ruled upon by the trial court. However, the Planning Commission fails to offer the complete context of the holding: "It is well-settled that **an issue cannot be raised for the first time on appeal**, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Id*. Here, the circuit court was operating as an appellate court, and not a trial court. The issues concerning LDR Article 3.1 were raised in the statement of the issues on appeal before the circuit court, (Appeal from Greenville County Planning Commission, Record on Appeal at 336-41) (R. pp. 425-30), and so they were properly preserved. *Cf*. 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."). It follows that these issues were not raised for the first time on appeal and are properly preserved for review. In other words, the case law concerning preservation at the trial level is not applicable to the circuit court operating as an appellate court.

Second, the circuit court did address this issue in its order filed August 17, 2022. In part II.F of its Order, the circuit court addressed the Greenville County Comprehensive Plan, which was raised by Appellants solely in the context of LDR Article 3.1 and critically linked to that argument. (Order Affirming Decision of Greenville County Planning Commission at 9-10; Notice of Appeal at 13-14) (R. pp. 12-13, 469-70). In addition, the issues raised in the Order

Affirming Decision of Greenville County Planning Commission concerning LDR Article 11 (concerning cluster developments) were related to the density issues of LDR Article 3.1 (Order Affirming Decision of Greenville County Planning Commission at 8-9 (addressing LDR Article 11); Transcript of Record at 21 ("Counsel has argued that 3.1 was violated in a number of manners, particularly with regard to the open space requirements in a cluster development.")) (R. pp. 11-12, 84).

Third, the Form 4 Order entered by the circuit court on July 6, 2022, also addressed this issue:

> This matter is before the Court on Appellants Alliance to Preserve the Old White Horse Road Corridor and Mary Jean Horney's appeal from the Planning Commission. Based on review of the file and oral arguments of the parties, the decision of the Planning Commission is affirmed. Respondent's counsel to prepare order and submit to law clerk via email.

(Form 4 Order at 1). This order referred to the entirety of the file as well as the oral argument, which included all LDR Article 3.1 issues. (R. pp. 21-27, 54-56, 67-71, 82-88, 93-94, 425-30).

For these reasons, the issues on appeal concerning LDR Article 3.1 are preserved.

III. The Appellants' argument that the Planning Commission's decision was controlled by an error of law with respect to a traffic study was not inconsistent.

The Planning Commission contends that Appellants made an inconsistent argument concerning a traffic study by arguing that the Planning Commission had discretion to order a traffic study and also arguing that there is no prohibition in LDR Article 9 against ordering a traffic study for less than 90 homes. The point the Appellants were making is that the Planning Commission misinterpreted LDR Article 9 as denying it the discretion to order a traffic study for a development that was less than 90 homes. This misinterpretation was legal error because there is no such prohibition, and so the Planning Commission's decision was controlled by an error of law. This court need not give deference to the Planning Commission's misinterpretation of an

ordinance. It follows that the decision should be reversed on appeal for the reasons set forth in Appellant's Initial Brief.

IV. The R-S zoning designation is not evidence of compatibility with surrounding land use density.

The Planning Commission contends that there is evidence in the record of compatibility with the surrounding land use density under LDR Article 3.1. However, the only evidence cited is that the zoning designation of R-S allows 1.7 units per acre, which the Planning Commission asserts meets the requirements for a cluster development. But even if the proposed subdivision meets the R-S and cluster development requirements, those requirements are wholly independent from the LDR Article 3.1 requirements, which includes that the development must be compatible with surrounding land use density. There is no evidence of such compatibility, as there are no cluster developments in the surrounding land. Instead, there are agricultural, equestrian, and single-family homes on large tracts of land. In sum, the analysis under LDR Article 3.1 is independent from the analysis of whether the subdivision strictly complies with the zoning designation and the cluster development regulations, and compliance with the latter is not evidence of the former. If it were, then LDR Article 3.1 would have no utility or purpose.

V. The statements from Kevin Tumblin fail to serve as evidence of compatibility with environmental conditions.

The Planning Commission cites to "testimony" from Kevin Tumblin that flooding for a pond on the property should improve. Aside from the fact that Mr. Tumblin's statements were unsworn and not subject to cross examination (and therefore not properly characterized as "testimony"), the flooding at issue (as set forth in Appellants' Final Brief) was <u>not</u> the pond itself on the property but the areas downstream from the pond (i.e., a blue line stream flowing south from the pond and known as the "Branch"). Mr. Don Woodard's letter concerning flooding and

environmental concerns was adequately supported not only by his Zoology and Biochemistry degrees but also by his firsthand knowledge and photographs. (R. pp. 191-99110). Mr. Tumblin simply did not address these concerns. Moreover, Mr. Tumblin stated that he did not understand the flooding issue, that he was "not sure" about it, and that he had not yet reached a design phase for stormwater runoff. (R. p. 239). For these reasons, there was no evidence in the record addressing compatibility with environmental concerns.

VI. A single, conclusory statement from Kevin Tumblin failed to serve as evidence of fire safety and access.

The Planning Commission points to a single statement by Kevin Tumblin that there was no reason to believe there is a fire safety issue. (Resp. Br. at 11). This statement was conclusory and self-serving, and it failed to remedy the fact that the fire department had not commented on the proposed subdivision. It therefore does not meet the "any evidence" standard.

VII. The preliminary plan does not satisfy LDR Article 11.4 because the open space is not "directly accessible to the largest practical number of lots."

The Planning Commission contends that LDR Article 11.4's "directly accessible" requirement is met because there is access to the open space through a cul-de-sac. This argument proves the Appellants' point, as access through a cul-de-sac does not meet the ordinance's requirement for the open space to be "directly accessible to the largest practical number of lots." The Planning Commission's interpretation of "directly accessible" via cul-de-sac effectively eviscerates the requirement for access and renders it meaningless. As noted above, this court need not give deference to the Planning Commission's misinterpretation of an ordinance, and it follows that the Planning Commission's decision should be reversed as an abuse of discretion controlled by an error of law.

VIII. The maintenance of the correct plan in a file did not cure the due process violation of posting the incorrect plan on the internet.

The Planning Commission effectively represented to the public that the plan posted on its website was the correct plan, but it now contends that it was sufficient for the correct plan to be in its files—even while representing to the public that the correct plan could be reviewed online. Appellants respectfully disagree and rely on the points made in their Initial Brief.

CONCLUSION

For the reasons set forth above and in their Initial Brief, Appellants respectfully request that this Court reverse the circuit court's affirmance of the Planning Commission's decision and reverse the Planning Commission's approval of the Stables subdivision Application.

Respectfully submitted,

s/ William M. Wilson III

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants Alliance to Preserve the Old White Horse Road Corridor, LLC and Mary Jean Horney certified that the Final Reply Brief of Appellant complies with Rule 211(b), SCAR

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Legal Assistant/Paralegal of the law offices of Wyche, P.A., attorneys for Alliance to Preserve the Old White Horse Road Corridor, LLC and Mary jean Horney in the within action, do hereby certify that I have this date served upon opposing counsel and/or parties in this action the foregoing **FINAL REPLY BRIEF OF APPELLANT** by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

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April 24, 2023