THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson

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SC Court of Appeals

Appellate Case No. 2019-001910
Common Pleas Case No. 2019-CP-10-1434

David Abdo, ... Appellant,

v.

City of Charleston and Board of Zoning Appeals-Zoning, ... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Through this brief, Appellant addresses three points raised by Respondent in its Initial Brief dated May 4, 2020. Appellant incorporates all previous arguments made in Appellant's Initial Brief herein.

In this reply, Appellant first addresses Respondent's argument that Appellant's interpretation of the height exception in Section 54-505 of the City of Charleston's (the "City") Zoning Ordinance ("the CZO") would create an absurd result. (Resp. Br. pp. 6-7). Respondent argues that because of the possibility that a successor-in-title at some undefined point in the future may not use the structure at issue as a monument that Appellant should not qualify for a permit based on the height exception in Section 54-505. (Resp. Br. p. 6). The subject of this appeal is Appellant's permit and the decisions of the City of Charleston Board of Zoning Appeals-Zoning (the "BZA-Z") and City of Charleston Zoning Administrator's ("Zoning Administrator") denying that permit. A concern about a hypothetical successor-in-title is unrelated to the issues in this case. Even if it were relevant to this appeal, the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. § 6-29-710, *et seq.* ("the Act") and the CZO contemplate procedures for the enforcing, limiting, or changing zoning approval of variances and special uses. Respondent's attempt to create an absurdity argument is without merit and should be denied.

Next, Appellant replies to the Respondent's argument pertaining to the standard of review for the limited purpose of reiterating the distinction between construing a statute versus construing a local ordinance, which Respondent does not address. (Resp. Br. pp. 9-10). While Respondent urges that the discretionary standard of review adopted by the circuit court is the correct standard in this case, the appropriate standard is de novo. Respondent fails to recognize the present appeal deals with the construction of an ordinance, not a statute, and that South Carolina courts have

concluded that courts review the construction of an ordinance as a matter of law. And, even applying the standard of review urged by Respondent and adopted by the circuit court, the circuit court should have reversed the BZA-Z decision denying Appellant's permit as arbitrary, capricious, and an abuse of discretion because the BZA-Z failed to base its conclusion on the language of the ordinance and on the common understanding of the term monument. (App. Br. pp. 12-13).

Finally, Respondent inaccurately characterizes the scope of the BZA-Z authority in reviewing an appeal from a decision of the Zoning Administrator. (Resp. Br. pp. 11-12). The BZA-Z may have broad authority to review appeals, but that power is not unlimited. As more fully described below, the BZA-Z is authorized by Section 6-29-800 of the Act to review the Zoning Administrator's decision. The CZO further defines that authority and describes the process the BZA-Z must follow. This process is consistent with the process employed by an appellate court. By issuing a decision on grounds not found in the record or in the CZO, the BZA-Z abused the authority granted to it by the Act and by the CZO.

ARGUMENT

I. Respondent's argument that Appellant's interpretation of the CZO height limitation exception would create an absurd result is without merit.

Respondent argues that Appellant's interpretation of the word "monument" creates an absurd result. (Resp. Br. p. 6). Specifically, Respondent suggests "a successor-in-title who does not subjectively intend for the *same* flag to commemorate anyone or anything would convert what Abdo characterizes as a monument back to a 'mere' flagpole." (Resp. Br. p. 7) (emphasis in original). Respondent's suggestion is only hypothetical and not based on any facts contained in the record. Further, Respondent's only support for the conclusion that permitting Appellant to

erect the structure would lead to an absurd result is a citation to Section 6-29-1550 of the Vested Rights Act (VRA). (Resp. Br. p. 6). This statute provides that a vested right attaches to and runs with the applicable real property. *See* S.C. Code Ann § 6-29-1550.

While it is true a court will attempt to construe a statute to avoid absurdity, "in so doing, the court should not concentrate on isolated phrases within the statute, but instead the court should read the statute as a whole and in a manner consonant and in harmony with its purpose." *See DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 804 S.E.2d 633 (Ct. App. 2017).

"Vested right" is defined by the VRA as "the right to undertake and complete the development of property under the terms and conditions of a site specific development plan or a phased development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter." S.C. Code Ann. § 6-29-1520(10). The VRA defines a "site specific plan" as a "development plan submitted to a local governing body by a landowner. . ." *Id.* § 6-29-1520(10). The term is defined to include plans or approvals related to zoning. *Id.* Nothing in the language of the VRA indicates that it has any application to this dispute. The VRA speaks to the rights of a landowner to "undertake and complete the development of property." S.C. Code Ann. § 6-29-1520(10). This case does not present a development question or any issue under the VRA. Here the Court is asked only to decide whether a structure that has already been constructed should be permitted because it is a monument and therefore qualifies as an exception from the height limitation on structures pursuant to Section 54-505 of the City's Ordinance.

Also, the Respondent's argument ignores the broad powers of local offices to address the result that Respondent deems as absurd. The Act allows a governing authority of a municipality

or county to provide in the zoning ordinance or resolution for the continuance, restoration, reconstruction, extension, or substitution of nonconformities and for the termination of a nonconformity. *See* S.C. Code Ann. § 6-29-730. The section titled "Enforcement of zoning ordinances; remedies for violations" states as follows:

> In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation. . .
>
> *Id*. § 6-29-950

Additionally, the CZO contains provisions specific to vested rights and states the provisions are intended to implement the VRA. *See* Sec. 54-960, CZO. Within the CZO, Section 54-950 provides:

> To enforce this chapter, the administrative officer is authorized to withhold building or zoning permits, or both, and issue stop orders against any work undertaken by an entity not having a proper building or zoning permit, or both. It is unlawful to construct, reconstruct, alter, demolish, change the use of or occupy any land, building, or other structure without first obtaining the appropriate permit or permit approval. No permit may be issued or approved unless the requirement of this chapter or any ordinance adopted pursuant to it are complied with. It is unlawful for other officials to issue any permit for the use of any land, building, or structure, or the construction, conversion, demolition, enlargement, movement, or structural alteration of a building or structure without the approval of the administrative officer. A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor. In case a building, structure, or land is used, or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land. Each day the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use continues is considered a separate offense. In case a building, structure, or land is

> or is proposed to be used in violation of an ordinance adopted pursuant to this chapter, administrative officer or other designated official may in addition to other remedies issue and serve upon a person pursuing the activity or activities a stop order requiring that entity stop all activities in violation of the Zoning Ordinance.

In other words, a successor-in-title would not automatically receive a vested right to use the structure for some purpose other than a monument. Like the State statutes, the local ordinances provide broad enforcement powers to prevent that possibility from becoming a reality.

Finally, Respondent states Appellant "intends to attach the same flag to the flagpole in perpetuity and ignores that the flag is interchangeable." (Resp. Br. p. 6). Appellant has not made any assertion consistent with this statement. Moreover, this case is about Appellant's rights to erect a structure on his property under the special exceptions for height requirements in Section 54-505 of the CZO, not about what might happen following a change in title or change to the structure. And, as explained above, Respondent's hypothetical concern fails to address the procedures already in place that give enforcement power to the local governing body to monitor, place limits, and even direct the removal of a structure that no longer qualifies under a special zoning exception.

II. Regarding the appropriate standard of review, Respondent fails to acknowledge the distinction between interpreting a statute versus an ordinance.

Respondent relies on *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) to assert that the "deference doctrine" applies to the interpretation and application of the term "monument" in the context of the exceptions to height limitations in Section 54-505.a of the CZO. (Resp. Br. p. 9). The *Kiawah Dev. Partners, II* case predates the South Carolina Court of Appeals decision in *Helicopter Solutions* cited throughout Appellant's Initial Brief. That Court of Appeals decision relies on Supreme Court decisions as early as 2008 in evaluating the standard of review applied to interpretation of local zoning

ordinances as compared to the discretionary standard applies to interpretation of statutes and regulations. *See Helicopter Sols., Inc. v. Hinde,* 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015). Importantly, the *Kiawah Dev. Partners, II* decision does not reference interpretation of local zoning ordinances and does not affect the reasoning or rulings of the prior Supreme Court decisions cited by the excerpt below.

The court in *Helicopter Solutions* reiterated the difference between review of a statute versus review of an ordinance: "[a]lthough great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *Id.* (citing *Mikell v. Cty. of Charleston,* 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) (citing *Eagle Container, LLC v. Cty of Newberry,* 359 S.C. 564, 568, 666 S.E.2d 892, 894 (2008). Issues involving the construction of an ordinance are review as a matter of law under a broader standard of review than is applied in reviewing issues of fact. *Id.*

Kiawah Dev. Partners, II focuses only on interpreting statutes and regulations. South Carolina courts have drawn a distinction between the standard of review in construing a statute versus construing a local zoning ordinance, and that distinction cannot be ignored.

III. The power of the BZA-Z is not so broad as to permit the BZA-Z to "step into the shoes" of the Zoning Administrator without limitation.

Section 6-29-800 of the Act grants the BZA the authority to review decisions of administrative officials such as the Zoning Administrator's decision to deny the Appellant's application for a permit. The CZO states the BZA-Z has the power "to hear and decide appeals when it is alleged that there is error in any order, requirement, decision or determination made by the administrative officer in the enforcement of the Zoning Ordinance of the City of Charleston." Sec. 54-923a.1, CZO. A notice of appeal to the BZA-Z must specify the grounds

of the appeal, and the officer from whom the appeal is taken must submit to the BZA-Z "all papers constituting the record upon which the action appeal was taken." Sec. 54-926, CZO. The CZO clearly describes the review of a decision of the Zoning Administrator as an appellate process. It does not indicate that the BZA-Z may make a new decision.

At the December 4, 2018 hearing, the BZA-Z did not address the grounds on which the Zoning Administrator denied the application and instead considered its own reasoning and reached a conclusion after considering photographs returned by an internet search based on images of monuments. (App. Br. p. 11). Significantly, the BZA-Z denied Appellant's permit on grounds not supported by the language of the ordinance. (App. Br. p. 11).

Respondent's reliance on the *Clear Channel Outdoor v. City of Myrtle Beach* case is misplaced. (Resp. Br. p. 11-12). In that case, the Court of Appeals addressed whether the trial court erred in holding that the Board of Zoning Appeals was precluded from considering additional provisions of an ordinance outside of the single provision that was the subject of the appeal before the Board of Zoning Appeals. *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 464, 602 S.E.2d 76, 79 (Ct. App. 2004), *aff'd,* 372 S.C. 230, 642 S.E.2d 565 (2007). The Court of Appeals concluded it was permissible for the Board of Zoning Appeals to consider other provisions surrounding the specific ordinance considered by the zoning administrator. *Id.*

In reaching this conclusion, the Court noted that in addition to Section 6-29-800(E) of the Act, the City of Myrtle Beach had a local ordinance that "further empowers" the Board to "make such order, requirement, decision, or determination as ought to be made." *Id.* at 465, 602 S.E.2d at 79. "Rather than binding the Board to the conclusion or reasoning of the zoning administrator, the forgoing statute and ordinance authorizes the Board to review the basis of the zoning administrator's decision, consider the basis of the appeal, and apply the appropriate provisions of

the zoning ordinance as dictated by the facts before it. Accordingly, the circuit court erred in limiting the Zoning Board's review to one section of the City's zoning ordinance." *Id*.

Respondent attempts to extend this reasoning to allow the BZA-Z to consider reasoning and evidence unrelated to the Zoning Administrator's decision and wholly outside the scope of the CZO language. Unlike the present case, the Board in *Clear Channel Outdoor* had authority under a local ordinance to expand the scope of its power. The CZO does not contain a provision similar to the Myrtle Beach ordinance. Instead, the provisions cited above make clear that reviewing the Zoning Administrator's decision is as an appellate process.

In *Clear Channel Outdoor*, the Board still was required to review and consider the basis of the zoning administrator's decision. This reasoning does not support Respondent's view that the BZA-Z has absolute discretion to disregard the basis of the Zoning Administrator's decision entirely and to make a determination unrelated to the language of the ordinance itself. Respondent misconstrues the reasoning in the *Clear Channel Outdoor* case and therefore miscalculates the scope of the BZA-Z's authority to review decisions by a zoning administrator

CONCLUSION

Based on the foregoing reasons, Appellant respectfully concludes that (1) Respondent's argument that Appellant's interpretation creates an absurd result is unfounded, (2) the construction of a local zoning ordinance is subject to de novo review, and (3) the BZA-Z exceeded the scope of its authority and thus abused its discretion by failing to consider the Zoning Administrator's reasoning and the language of the CZO.

July 2, 2020

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