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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2016-CP-07-02712

APPELLATE CASE NO. 2020-000617

Beachwalk Hotel & Condominium Association, Inc.
and Beachwalk Hilton Head, LLC

Petitioners,

vs.

The Town of Hilton Head Island and/or The Town
of Hilton Head Island Board of Zoning Appeals and
SDC Properties, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

s/Kathleen McDaniel

Kathleen McDaniel, Esq.
BURNETTE SHUTT & McDANIEL, PA
912 Lady Street, Second Floor
PO Box 1929
Columbia, South Carolina 29202
T: 803.904.7913
F: 803.904.7910
KMcDaniel@BurnetteShutt.Law

ATTORNEY FOR PETITIONERS

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

Counsel for the Petitioner hereby certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on July 20, 2023.

Kathleen McDaniel

Kathleen McDaniel
BURNETTE SHUTT & McDANIEL, PA
ATTORNEYS FOR PETITIONER

Columbia, South Carolina
August 18, 2023

QUESTION PRESENTED

Whether the Court of Appeals erred in finding that the Town of Hilton Head Island Board of Zoning Appeals failed to properly consider the effect of density limitations on the proposed development of a Spinnaker Welcome Center?

STATEMENT OF THE CASE

This appeal arises from the proposed development of a piece of property by within the Town of Hilton Head located at 30 Waterside Drive and is identified as Parcel 202 on Beaufort County Tax Map 18. The property is zoned Resort Development (“RD”) and is located within both the Corridor Overlay District and the PD-2 Waterside (Town Center) Overlay District (“Waterside PD-2 District”).

In 2016, Petitioners learned that a property owner proposed to construct a Spinnaker Welcome Center on a vacant parcel of land within the Town of Hilton Head that is within the same planned unit development as certain of Petitioners’ property. Petitioners did not believe that the proposed Welcome Center was allowable under the Town of Hilton Head’s Land Management Ordinance. Petitioners requested a formal determination on what effect the applicable zoning district and overlay districts had on development of the property. (R.p. 1589.)

On August 23, 2016, Nicole Dixon, CFM, Senior Planner for the Town of Hilton Head Island, issued her Determination Letter that the Welcome Center was permitted to be constructed as proposed. (Determination Letter, R.p. 1589.) Petitioners appealed Ms. Dixon’s Determination Letter to the Town’s Board of Zoning Appeals (“BZA”). (Appeal Petition, R.p. 1569; Trans. of Hr’g, Nov. 28, 2016, R.p. 605.) The Board of Zoning Appeals denied the appeal by a Notice of Action issued on November 30, 2016. (Notice of Action, Nov. 30, 2016, R.p. 1566.)

On December 30, 2016, Petitioners appealed the BZA decision to the circuit court. (Notice of Appeal and Petition, dated Dec. 30, 2016, R.p. 1527.) On February 6, 2017, Respondent SDC Properties, Inc. (“SDC”) moved to intervene in the appeal to the circuit court as a necessary party to the proceedings. On March 28, 2017, the circuit court entered a Consent Order granting SDC’s motion to intervene and be joined as party defendant. (Consent Order, dated March 28, 2017, R.p. 17.)

On November 16, 2017, the circuit court held a hearing on the appeal. (Trans. of Hr’g, Nov. 16, 2017, R.p. 725.) At the conclusion of this hearing, the Special Circuit Judge remanded the matter to the BZA for rehearing and directed the BZA to answer three questions for the circuit court’s further consideration. (Order, dated April 20, 2018, R. p. 13.) On August 27, 2018, the BZA heard the remanded appeal and answered the Special Circuit Judge’s three questions. (Trans. of Hr’g on Aug. 27, 2018, R.p. 818.)

On March 12, 2019, the circuit court held a hearing on the merits of the appeal, taking into consideration the answers from the BZA. (Trans. of Hr’g on March 12, 2019, R.p. 1149.) On September 11, 2019, the circuit court issued its Order, concluding that the Town’s staff and BZA committed no error of law, no arbitrariness or unreasonableness, and no abuse of discretion and upheld the decision of the BZA that the proposed development would be permitted. (Order (Ending Case), dated Sept. 11, 2019, R.p. 4.)

On September 13, 2019, Petitioners filed a Motion to Alter or Amend Judgment in the circuit court. (Mtn. to Alter or Amend, filed Sept. 13, 2019, R.p. 586.) On March 17, 2020, the circuit court issued its Order denying Petitioners’ Motion to Alter or Amend

Judgment. (Order, dated March 17, 2020, R.p. 1.) Petitioners then sought review by the Court of Appeals.

On June 7, 2023, the Court of Appeals issued its Unpublished Opinion No. 2023-UP-232, affirming the circuit court's decision. Petitioners filed a Petition for Rehearing on June 22, 2023, which the Court of Appeals denied by Order, dated July 20, 2023.

STATEMENT OF THE FACTS

The proposed development of the Spinnaker Welcome Center was submitted to the Town of Hilton Head Island for permitting through Development Plan Review Application DPR-001056-2016 (the "DPR Application" R.p. 1627). The subject property is a tract of land within a larger development commonly referred to as the Waterside PUD. The subject property consists of 1.068 acres and is designated as "Parcel E" on the plat of survey entitled "15.100 Acres Waterside P.U.D." recorded in Beaufort County Plat Book 35 at Page 79 (the "Waterside PUD Survey"). The Waterside PUD Survey shows a 15.100 acre tract subdivided into four separate parcels. Parcel E is the subject of the DPR Application, the Determination Letter, and this Appeal. The tract designated as "Parcel D" is the right-of-way of Waterside Drive. The tract designated as "Parcel F" is the site of the Waterside by Spinnaker interval occupancy (timeshare) development (the "Spinnaker Project"). The tract designated as "Parcel A&C" is the site of the Beachwalk Hotel. (Attachment A to the Appeal Application filed with BZA, R.p. 1592.)

Petitioner Beachwalk Hotel & Condominiums Association, Inc. is the owners' association for various condominium units in the Beachwalk Hotel. Petitioner Beachwalk Hilton Head, LLC is the owner of many of the condominium units in the Beachwalk Hotel.

Parcel E, the subject property, and the Waterside PUD as a whole are subject to several zoning designations. Per the Town of Hilton Head Land Management Ordinance (“LMO”), codified as Title 16 of the Municipal Code of the Town of Hilton Head Island, the base zoning district is Resort Development (“RD”). The Waterside PUD is also located within the PD-2 Waterside (Town Center) Overlay District (“Waterside PD-2 District”).

What is now the Waterside PD-2 District received preliminary approval on December 12, 1983 from the Joint Planning Commission under the provisions of the Town’s 1983 Development Standards Ordinance (the “DSO”) as the Town Center P.U.D. The November 5, 1984 Conceptual Master Plan for Town Center P.U.D. (the “1984 Master Plan”),¹ which Ms. Dixon refers to in the Determination Letter, was part and parcel of that approval. A copy of the 1984 Master Plan is attached to the original appeal to the BZA as Exhibit C. (R.p. 1593.)

It is undisputed that on May 6, 1987, the Town’s Planning Commission voted to approve a conditional use application to change the boundary of the Waterside PUD, which resulted in the current configuration of the Waterside PUD Tract, and also a special exception application to amend the 1984 Master Plan to (i) increase the number of hotel rooms permitted on the Waterside PUD Tract from 50 rooms to 94 rooms, (ii) reduce the permitted square footage for office and retail space, (iii) reduce the permitted residential dwelling units from 222 to 200, and (iv) require 1.3 acres of common open space. The files of the Town Planning Department no longer contain a copy of the 1987 Master Plan.

¹ What is now the Waterside PUD was originally named Town Center P.U.D.

Shortly after the Planning Commission's approval of the 1987 Master Plan, the structure that is now the Beachwalk Hotel was permitted on Parcels A & C of the Waterside PUD Tract, and thereafter construction was completed.

By way of a letter on March 3, 1995, to Robert L. Graves, Thomas P. Brechko, the then equivalent of the LMO Official, acknowledged the right of Pope Avenue Associates, then the owner of the Waterside PUD Tract, to develop the Waterside PUD Tract in conformance with the 1987 Master Plan, and he approved a certain Categorical Exemption for the Waterside PUD (the "Categorical Exemption"). (R.p. 1594.) Of particular importance to this Appeal, the Categorical Exemption expired on March 3, 2000. After that date, any future development on the Waterside PUD Tract "shall be subject to all relevant provisions of the then existing LMO."

The current LMO was adopted on October 7, 2014, after the original creation of the Waterside PD-2 District. However, LMO Section 16-1-108.F.2 recognizes the continuing validity of PD-2 Master Plans and the corresponding PD-2 Planned Development Overlay Districts, such as the Waterside PD-2 District following the adoption of the 2014 LMO.

The purpose of the PD-2 Overlay District is to encourage creativity in design and planning in the development of parcels by allowing greater design flexibility than the underlying base zoning district so that natural features may be protected and development concentrated in more suitable or less environmentally sensitive areas. LMO Section 16-3-106.G.1. Any use permitted in the underlying base district is permitted in a PD-2 Overlay District. LMO Section 16-3-106.G.3.

To allow for the encouraged design flexibility, concentration of development, and protection of natural features, a section or phase of a PD-2 planned development may be built at a density which is greater than the site-specific density allowed by the underlying base zoning district, provided that any such concentration of density is offset by an area of lower density in another section or phase of the PD-2 planned development, or by an appropriate reservation of common open space elsewhere in the PD-2 planned development. LMO Section 16-3-106.G.4.a. Of particular importance to this appeal, LMO Section 16-3-106.G.4.a provides that the average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district. (Emphasis added.)

When the appeal came before the circuit court, the key issues came down to the effect of the RD zoning and the PD-2 Overlay District on what could and could not be constructed on Parcel E. The Special Circuit Judge remanded the matter to the BZA to answer three questions. The questions and the BZA's answers² are as follows:

Question 1:

Is Parcel E in a PD-2 Overlay District established by the LMO?

Answer: The BZA unanimously voted to "affirm that Parcel E is in a PD-2 Overlay District established by the LMO."

Question 2:

If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?

Answer: The BZA unanimously voted "that Parcel is subject to the LMO's PD-2 Overlay District regulations."

² Trans. of Hr'g on remand on Aug. 27, 2018 (R.p. 992); Notice of Action by the BZA on the remand of this appeal (R.pp. 527-30.)

Question 3:

If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?

Answer: The BZA unanimously voted "that because we've determined Parcel E is subject to the LMO's PD-2 Overlay District, we need to take into consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E"; and "that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with any proposed development for Parcel E."

Upon return to the circuit court for consideration, the Special Circuit Judge issued his decision affirming the BZA's determination. Petitioners sought review by the Court of Appeals, which also affirmed the BZA determination. Petitioners now seek review by this Court.

ARGUMENT

The Court of Appeals erred in holding that there is sufficient evidence in the record before the BZA to support its decision to permit the proposed development. Such determination is in conflict with prior holdings of this Court stating the applicable standard of review. This court has recently set forth the standard of review on appeal from a decision of a zoning board in *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018).

On appeal, we apply the same standard of review as the circuit court below In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [b]oard is correct as a matter of law." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.* (quoting *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "An

abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *Cty. of Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

Id. at 182-83, 813 S.E.2d at 880-81.

In this case, the Court of Appeals' decision hinges on the following statement in its Opinion that "[t]he record suggests the local planning official reasoned that the Town considered average density when it approved the 1987 documents and that the approval established the average densities that would be allowed in this district." A "suggestion in the record" is not sufficient to support affirming the BZA's decision, and, therefore, the Court of Appeals erred in finding that the BZA's decision was supported by evidence in the record.

Instead, the evidence as explained below, demonstrates that the BZA erred in finding that sufficient density remained in Parcel E of the PUD for the construction of the proposed Spinnaker welcome center.

The main issue in this appeal is whether there is sufficient acreage remaining in the Waterside PD-2 District for the construction of a new welcome center without exceeding density limitations. The parties appear to agree on the existing acreage and existing development of the Waterside PD-2 District. The size of the entire Waterside PD-2 District, including Parcel E where the welcome center is proposed, is 15.100 acres. Within that 15.100 acres, there currently exist 198 dwelling units, one nonresidential structure consisting of 5,262 square feet, and 91 hotel rooms.

Where the parties disagree is how to calculate the existing density of use and thereby determine if there is any remaining density for the construction of a welcome

center. Petitioners' calculation of density leaves no remaining density for the construction of Respondent SDC Properties, Inc.'s proposed welcome center. Respondents' calculate the existing density so as to find sufficient remaining density for the construction of a new welcome center.

The underlying base zoning district for the subject development area is RD (Resort Development District). The density guidelines for the RD district (LMO Section LMO 16-3-105.L.3) permit the following maximum densities:

Residential	16 dwelling units per acre
Bed and Breakfasts	10 rooms per acre
Interval Occupancy	16 dwelling units per acre
Hotel	35 rooms per acre
Nonresidential	8,000 gross floor area per acre

The subject property is also controlled by the existence of the PD-2 Overlay District. The Density and Development Standards for the PD-2 Overlay District provide:

A section or phase of the planned development may be built at a density which is greater than the site-specific density allowed by the underlying base zoning district, provided that any such concentration of density is offset by an area of lower density in another section or phase of the planned development or by an appropriate reservation of common open space elsewhere in the planned development. **The average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district.**

LMO Section 16-3-105.G.4.a. (emphasis added).

On remand, the BZA interpreted the PD-2 Overlay District regulations as follows:

Question 3:

If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?

Answer: The BZA unanimously voted "that because we've determined Parcel E is subject to the LMO's PD-2 Overlay District, we need to take into

consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E"; and "that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with any proposed development for Parcel E."

(Trans. of Hr'g on remand on Aug. 27, 2018 (R.p. 1125-1132); Notice of Action by the BZA on the remand of appeal (R.p. 527-30).) Thus, the BZA determined that the PD-2 Overlay District must be viewed as a whole when considering development of Parcel E. This would include consideration of density. This determination is consistent with the requirement in LMO Section 16-3-105.G.4.a. that the average density for the PD-2 Overlay District **shall not** exceed the maximum density permitted in the base zoning district. Parcel E cannot be developed in a vacuum separate from the rest of the PD-2 Overlay District.

To determine if there is any density remaining within the Waterside PD-2 District, including Parcel E, for the construction of a new welcome center, we first must determine the density requirements for the existing uses. At a maximum density of 16 dwelling units per acre, the Town requires at least 12.375 acres to support the exist 198 dwelling units. At a maximum density of 8,000 gross floor area per acre, the Town requires at least 0.658 acres to support the existing 5,262 gross floor area of nonresidential development. At a maximum density of 35 rooms per acre, the Town requires 2.600 acres to support the 91 existing hotel rooms. That adds up to an acreage requirement under the current LMO of 15.633 acres to support the current development. This already exceeds the 15.100 acres within the Waterside PD-2 District; therefore, there is no remaining density for the development of the proposed welcome center, and the development of the Spinnaker Welcome Center cannot be permitted.

Respondents contend that it is only necessary to consider Parcel E by itself to determine if the density requirement is met. Parcel E is 1.068 acres in size. The proposed welcome center is 7,500 square feet. Dividing 7,500 square feet by 1.068 acres yields a density of 7,022.47 square feet per acre, which is less than the maximum for the RD district. Accordingly, Respondents contend that that there is sufficient density and the welcome center should be permitted.

Respondents' calculation fails to take into consideration that LMO Section 16-3-105.G.4.a. requires that the "average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district." Parcel E is just one acre of the whole PD-2 Overlay District. Density must be evaluated across the PD-2 Overlay District as a whole—not merely on an acre by acre basis. Respondents' evaluation of density for Parcel E without consideration of the existing development on the other parcels within the PD-2 Overlay District contradicts the BZA's response to the Special Circuit Judge's very targeted question.

In support of their position, Respondents cite the first sentence of LMO Section 16-3-105.G.4.a., which states that a "section or phase of the planned development may be built at a density which is greater than the site-specific density allowed by the underlying base zoning district, provided that any such concentration of density is offset by an area of lower density in another section or phase of the planned development or by an appropriate reservation of common open space elsewhere in the planned development." However, Respondents fail to cite or acknowledge the second, very important, sentence of that code section, which provides the mandatory limitation that the "average density for

the PD-2 Overlay District **shall not** exceed the maximum density permitted in the base zoning district.” LMO Section 16-3-105.G.4.a. (emphasis added).

Respondents also argue that the definition of density found at LMO Section 16-10-102.B.1 permits a parcel by parcel, use by use calculation of density. This interpretation runs afoul of Section 16-3-105.G.4, which requires a density analysis across the entire PD-2 Overlay District. Respondents’ interpretation also contradicts the BZA’s determination that development of Parcel E must consider the existing development within the PD-2 Overlay District.

CONCLUSION

Petitioners request that this Court grant the request for certiorari and reverse the decision of the Court of Appeals to find that Respondent SDC Properties, Inc. is precluded from developing Parcel E as proposed for a Spinnaker Welcome Center.

s/Kathleen McDaniel

Kathleen McDaniel, Esq.
BURNETTE SHUTT & McDANIEL, PA
912 Lady Street, Second Floor
PO Box 1929
Columbia, South Carolina 29202
T: 803.904.7913
F: 803.904.7910
KMcDaniel@BurnetteShutt.Law

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