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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

HON. MARVIN H. DUKES, III
MASTER IN EQUITY AND SPECIAL CIRCUIT JUDGE

CASE NUMBER 2023-000891

ERIC AND TRACY SHERRIER,

APPELLANTS,

VS.

THE TOWN OF HILTON HEAD ISLAND CONSTRUCTION BOARD OF ADJUSTMENT AND APPEALS AND THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA,

RESPONDENTS.

FINAL BRIEF OF THE RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. IN AN ADMINISTRATIVE APPEAL FROM A DECISION OF THE CONSTRUCTION BOARD OF ADJUSTMENTS AND APPEALS TO CIRCUIT COURT, WHERE THERE IS EVIDENCE IN THE RECORD SUPPORTING THE FINDINGS OF FACT MADE BY THE CONSTRUCTION BOARD OF ADJUSTMENT AND APPEALS, MUST THE COURT AFFIRM THE DECISION OF THE CONSTRUCTION BOARD OF ADJUSTMENTS AND APPEALS AND CIRCUIT COURT?

(A) THE ONLY EVIDENCE IN THE RECORD IS THAT THE ACCESSORY STRUCTURE WAS NOT USED AS A HABITABLE RESIDENTIAL LIVING SPACE PRIOR TO SEPTEMBER 30, 1977. ANY CHANGE IN USE OR MATERIAL IMPROVEMENT TO IT MUST COMPLY WITH THE FLOOD DAMAGE CONTROL REGULATIONS INCLUDING THE LOWEST FLOOR ELEVATION REQUIREMENT.

(B) THE ONLY EVIDENCE IN THE RECORD IS THAT THE ACCESSORY STRUCTURE AT 12 PARK ROAD WAS CONVERTED TO A HABITABLE RESIDENTIAL LIVING SPACE AFTER THE YEAR 1985, AND THE STRUCTURE DOES NOT COMPLY WITH THE FLOOD DAMAGE CONTROL REGULATIONS INCLUDING THE LOWEST FLOOR ELEVATION REQUIREMENT.

(C) THE ACCESSORY STRUCTURE AT 12 PARK ROAD IS IN FLOOD ZONE AE, AND THE ACCESSORY STRUCTURE DOES NOT MEET THE LOWEST FLOOR REQUIREMENTS OF *TOWN OF HILTON HEAD ISLAND, S. C. , MUN. CODE,* § 15-9-312(A).

2. IN AN ADMINISTRATIVE APPEAL FROM THE CONSTRUCTION BOARD OF ADJUSTMENT AND APPEALS TO CIRCUIT COURT, WHERE THE RECORD SHOWS THERE IS NO ERROR OF LAW, MUST THE COURT AFFIRM THE DECISION OF THE CONSTRUCTION BOARD OF ADJUSTMENTS AND APPEALS AND CIRCUIT COURT?

3. IS AN ISSUE REGARDING ADMISSION OF EVIDENCE PRESERVED FOR APPELLATE REVIEW WHEN NO CONTEMPORANEOUS OBJECTION TO THE ADMISSION OF THE EVIDENCE IS MADE, WHEN THE ISSUE IS NOT RAISED IN THE NOTICE OF APPEAL TO CIRCUIT COURT, AND WHEN THE ISSUE IS NOT RULED ON BY THE CIRCUIT COURT OR PRESENTED IN A RULE 59, SCRCP MOTION?

(A) THE SOUTH CAROLINA RULES OF EVIDENCE DO NOT APPLY TO HEARINGS BEFORE THE CONSTRUCTION BOARD OF ADJUSTMENTS AND APPEALS.

4. WHEN THERE IS NO EVIDENCE THAT A PARTY 1) POSSESSED THE LACK OF KNOWLEDGE OR THE MEANS OF KNOWLEDGE OF THE TRUTH OF THE FACTS IN

QUESTION; (2) JUSTIFIABLY RELIED UPON THE GOVERNMENT'S CONDUCT; AND (3) MADE A PREJUDICIAL CHANGE IN POSITION, HAS A VIABLE CLAIM OF ESTOPPEL BEEN MADE?

STATEMENT OF THE CASE

This case commenced as an appeal of a "Notice of Violation" filed by Eric and Tracy Sherrier (hereinafter, the "Sherriers") to the Town of Hilton Head Island Construction Board of Adjustment and Appeals (hereinafter, the "CBAA").[1] The CBAA heard the Sherriers' appeal on May 24, 2022.[2] The CBAA denied the Sherriers' appeal in its "Notice of Action" dated June 7, 2022.[3] The Sherriers filed their Summons and Notice of Appeal on July 13, 2022. On July 29, 2022, the Sherriers filed a Summons and Amended Notice of Appeal.[4] In the Amended Notice of Appeal, the Sherriers state the issues on appeal as follows:

1. Whether the CBAA erred in determining that *Town of Hilton Head Island, S. C. , Mun. Code*, § 15-9-312(a), is applicable to the accessory structure.[5]
2. Whether the CBAA erred in determining that the accessory structure is not a valid non-conforming use pre-existing the enactment of *Town of Hilton Head Island, S. C. , Mun. Code*, § 15-9-312(a)?[6]
3. Whether The Town of Hilton Head Island, South Carolina (hereinafter, the "Town") is estopped from asserting a violation of *Town of Hilton Head Island, S. C. , Mun.*

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[1] Sherrier Appeal to CBAA. R. pp. 165-211.

[2] Transcript of hearing before CBAA, p. 1. R. p. 223.

[3] June 7, 2022, CBAA Notice of Action. R. pp. 312-313.

[4] Sherriers' Summons and Amended Notice of Appeal, R. pp. 58-113.

[5] Sherriers' Summons and Amended Notice of Appeal, p. 2, R. p. 59; May 5, 2022, Order Dismissing Appeal, p. 4, R. 5.

[6] Sherriers' Summons and Amended Notice of Appeal, p. 2, R. p. 59; May 5, 2022, Order Dismissing Appeal, p. 4, R. 5.

Code, § 15-9-312(a).[7]

The Town and CBAA filed their Return to the Amended Notice of Appeal and the Record on Appeal on August 25, 2022.[8] In the Return to the Amended Notice of Appeal, the Town and the CBAA re-stated the issues on appeal as follows:

1. Is there evidence in the record to support the CBAA's finding of fact that the accessory structure was converted to residential living space after the year 1985?[9]
2. Is there evidence in the record to support the CBAA's finding that the accessory structure is in flood zone AE, and the accessory structure does not meet the lowest floor requirements of *Town of Hilton Head Island, S. C. , Mun. Code*, § 15-9 312(a)?[10]
3. Is there any evidence in the record to support the CBAA's finding that the accessory structure was converted to a residential living space after September 30, 1977?[11]
4. Is there any error of law in the conclusion that 12 Park Road is governed by the requirements of *Town of Hilton Head Island, S. C. , Mun. Code*, § 15-9-312(a)?[12]

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[7] Sherriers' Summons and Amended Notice of Appeal, p. 3, R. p. 60; May 5, 2022, Order Dismissing Appeal, p. 4, R. 5.

[8] Town Return to Amended Notice of Appeal, R. pp. 114-123.

[9] Town Return to Amended Notice of Appeal, p. 6, R. p. 119; May 5, 2022, Order Dismissing Appeal, p. 4, R. p. 5.

[10] Town Return to Amended Notice of Appeal, p. 6, R. p. 119; May 5, 2022, Order Dismissing Appeal, pp. 4 - 5, R. pp. 5 - 6.

[11] Town Return to Amended Notice of Appeal, p. 6, R. p. 119; May 5, 2022, Order Dismissing Appeal, pp. 4-5, R. pp. 5 - 6.

[12] Town Return to Amended Notice of Appeal, p. 8; R. p. 121; May 5, 2022, Order Dismissing Appeal, p. 5, R. p. 6.

The Sherriers' appeal was heard by the Hon. Marvin H. Dukes, III, at 1:30 o'clock, P. M., on January 13, 2023, via Webex.[13] On May 5, 2023, Judge Dukes filed his Order Dismissing Appeal.[14] The Sherriers filed and served their Notice of Appeal to the South Carolina Court of Appeals on June 2, 2023.

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[13] May 5, 2022, Order Dismissing Appeal, p. 1, R. p. 2.

[14] May 5, 2022, Order Dismissing Appeal, R. pp. 2 - 17.

SCOPE OF REVIEW

In an appeal from an administrative board, the findings of fact made by the administrative board are binding on the Court unless the findings of fact have no evidentiary support in the record.[15] The decision of an administrative board will not be disturbed if there is any evidence in the record supporting it.[16] The Court may not substitute its judgment for that of the administrative board, even if the Court disagrees with the decision.[17]

The Court may correct errors of law.[18] An administrative board's decision should not be disturbed unless the board's findings resulted from action "which is arbitrary, an abuse of discretion, illegal, or in excess of lawfully delegated authority."[19] An administrative board's decision "is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards."[20] The party challenging an administrative body's decision bears the burden of proving the

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[15] *Charleston Cnty. Parks & Recreation Comm'n v. Somers*, 319 SC 65, 459 SE2d 841 (1995).

[16] *Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 SC 230, 489 SE2d 630 (1997).

[17] *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 72 SE2d 66 (1952).

[18] *Hodge v. Pollock*, 223 S.C. 342, 75 SE2d 752 (1953).

[19] *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 205, 516 S.E.2d 439, 440 (1999).

[20] *Deese v. S. C. State Bd. of Dentistry*, 286 S.C. 182, 184–5, 332 S.E.2d 539, 541 (Ct.App. 1985).

decision is arbitrary.[21]

"Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, [citation omitted], a broader and more independent review is permitted when the issue concerns the construction of an ordinance."[22] The decisions of those charged with interpreting and applying ordinances should be given some consideration and not overruled without cogent reason.[23]

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[21] *Rest. Row Associates v. Horry County*, 335 S.C. 209, 516 S.E.2d 442 (1999).

[22] *Charleston Cnty. Parks & Recreation Comm'n v. Somers, supra.*

[23] *Furr v. Horry County Zoning Board of Appeals*, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014).

STATEMENT OF FACTS

The facts relevant to the disposition of this appeal, as found by the CBAA and Judge Dukes, are supported by evidence in the record made before the CBAA.

Since the year 2020, the Sherriers have owned real property located at 12 Park Road, Hilton Head Island, South Carolina.[24] 12 Park Road is improved with tow structures, being a residence and an accessory structure.[25] The Sherriers' appeal to the CBAA, Circuit Court and this Court concerns the accessory structure.

The Town is a participant in the National Flood Insurance Program, and it must adopt and enforce an ordinance that is consistent with federal regulations.[26] 12 Park Road is located in flood zone AE on Hilton Head Island.[27] Prior to the incorporation of the Town, Beaufort County became a participant in the National Flood Insurance Program effective September 30, 1977.[28] From and after September 30, 1977, new construction or making substantial improvements to existing structures have been and continue to be subject to the requirements of the National Flood Insurance Program, including the minimum lowest floor requirements.[29] A change in use of a structure from non-residential to residential

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[24] Amended Notice of Appeal, p. 3, R. p. 60; CBAA Record on Appeal, p. 4, R. p. 169.

[25] Amended Notice of Appeal, p. 3, R. p. 60; CBAA Record on Appeal, p. 6, R. p. 167; p. 51, R. p. 212.

[26] CBAA Record on Appeal, p. 55, R. p. 216; p. 69, l. 2-9; R. p. 230, l. 2 - 9.

[27] CBAA Record on Appeal, p. 53, R. p. 214; p. 112, l. 25 to p. 113, l. 8, R. p. 273, l. 25 to p. 274, l. 8.

[28] CBAA Record on Appeal, p. 69, l. 10 - 21, R. p. 230, l. 10 - 21; p. 72, l. 16-21, R. p. 233, l. 16-21.

[29] CBAA Record on Appeal, p. 69, l. 7 to p. 70, l. 10, R. p. 230, l. 7 to p. 231 l. 10.

must be done in conformity with the both Town building code and the flood damage controls adopted as part of the Town building code, including *Town of Hilton Head Island, S. C. , Mun. Code,* § 15-9-312(a).[30]

The accessory structure at 12 Park Lane existed in some form prior to the year 1977, perhaps as early as 1969.[31] There is no evidence in the record that the accessory structure at 12 Park Lane was used as residential living space prior to September 30, 1977, when the flood regulations were adopted by Beaufort County, South Carolina. At some point on or after the year 1985, the accessory structure at 12 Park Lane was converted to residential living space.[32]

The accessory structure is slab on grade construction and it does not comply the flood damage controls adopted as part of the Town building code, including the minimum lowest floor requirements of *Town of Hilton Head Island, S. C. , Mun. Code,* § 15-9-312(a).[33]

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[30] CBAA Record on Appeal, pp. 55-57, R. pp. 216 - 218; p. 72, l. 16 - 25, R. 233, l. 16 - 25; p. 122, l. 18, to p. 123, l. 20, R. p. 283, l. 18 to p. 284, l. 20.

[31] CBAA Record on Appeal, p. 6, R. p. 167; pp. 42 - 43, R. pp. 203 - 204.

[32] CBAA Record on Appeal, p. 32, R. p. 193; pp. 46 - 47, R. pp. 203-204; p. 34, R. p. 195; pp. 35 - 36, R pp. 196 - 197; p. 54, R. p. 215.

[33] CBAA Record on Appeal, p. 53, R. p. 214; pp. 55 - 56, R. pp. 216-217; p. 113, l. 9 to p. 114, l. 8, R. p. 274, l. 9 to p. 275, l. 8.

RELEVANT ORDINANCES

The Flood Damage Control regulations apply to all properties in any special flood hazard zone in the Town. *Town of Hilton Head Island, S. C., Mun. Code*, § 15-9-113, reads, in relevant part:

> This chapter shall apply to:
>
> (1) All areas of special flood hazard within the jurisdiction of The Town of Hilton Head Island, SC, as identified by the Federal Emergency Management Agency (FEMA) in its Flood Insurance Study dated March 21, 2021 with accompanying maps and other supporting data that are hereby adopted by reference and declared to be a part of this chapter; and,
>
> (2) All other areas under the jurisdiction of The Town of Hilton Head Island.

12 Park Road is located in Flood Zone AE.[34] The relevant ordinance in this appeal is *Town of Hilton Head Island, S. C., Mun. Code*, § 15-9-312(a), which reads:

> In all areas within zones AE, AO, Shaded X, and X, the following provisions are required:
>
> (a) Residential construction. New construction and substantial improvement of any residential structure (including manufactured homes) must be constructed so that the lowest floor, is elevated no lower than three (3) feet above the base flood elevation or thirteen (13) feet above mean sea level using NAVD88, whichever is higher. No environmentally conditioned space shall be allowed below the lowest floor. No basements are permitted. Should solid foundation perimeter walls be used to elevate a structure, flood openings sufficient to automatically equalize hydrostatic flood forces, shall be provided in accordance with the elevated buildings requirements in section 15-9-312(f). Residential structures may not be floodproofed in lieu of elevation.[35]

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[34] CBAA Record on Appeal, p. 53, R. p. 214; p. 113, l. 6 - 8, R. p. 274, l. 6 - 8; p. 112. l. 25 to p. 113, l. 18, R. p. 273, l 25 to p. 274, l. 18.

[35] This text is not ambiguous. In addition, the testimony of Eric Sherrier is that the use of accessory structure is residential. See CBAA Record on Appeal, p. 76, l. 21 - 25, R. p. 237, l. 21 - 25.

ARGUMENT NUMBER 1

THE ONLY EVIDENCE IN THE RECORD IS: (1) THE ACCESSORY STRUCTURE WAS NOT USED AS HABITABLE RESIDENTIAL LIVING SPACE AT ANY TIME PRIOR TO SEPTEMBER 30, 1977; (2) THE USE OF THE ACCESSORY STRUCTURE AT 12 PARK ROAD WAS CHANGED TO HABITABLE RESIDENTIAL LIVING SPACE AFTER THE YEAR 1985; (3) THE ACCESSORY STRUCTURE AT 12 PARK ROAD IS IN FLOOD ZONE AE; AND, (4) THE ACCESSORY STRUCTURE DOES NOT MEET THE LOWEST FLOOR REQUIREMENTS OF *TOWN OF HILTON HEAD ISLAND, S.C. , MUN. CODE* § 15-9 312(A). BECAUSE THE FINDINGS OF THE CBAA AND CIRCUIT COURT ARE SUPPORTED BY EVIDENCE IN THE RECORD, THE CIRCUIT COURT MUST BE AFFIRMED. [Statement of Issues Presented 1, 1(a), 1(b) and 1(c)]

Both the CBAA and Judge Dukes found as matters of fact that:

(a) 12 Park Road is located in Flood Zone AE;

(b) the accessory structure at 12 Park Road was improved and converted to habitable residential living space after September 30, 1977;

(c) the conversion of the accessory structure to habitable residential living space was not and is not in conformity with the lowest floor requirements of *Town of Hilton Head Island, S. C. , Mun. Code,* § 15-9 312(a).

There is evidence in the record that supports each of these findings, which will be shown below.

(a) 12 Park Road is in Flood Zone AE.

The only evidence in the record is that 12 Park Road is in Flood Zone AE.[36] There is no evidence to the contrary.

(b) The accessory structure at 12 Park Road was improved and converted to

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[36] CBAA Record on Appeal, p. 53, R. p. 214; p. 113, l. 6 - 8, R. p. 274, l. 6 - 8; p. 112. l. 25 to p. 113, l. 18, R. p. 273, l 25 to p. 274, l. 18.

habitable living space after September 30, 1977.

There is no evidence in the record that the accessory structure existed as residential living space prior to September 30, 1977. No evidence in the record shows otherwise. The evidence introduced by the Sherriers themselves shows:

(a) The Beaufort County Tax record offered by the Sherriers shows a date of February 19, 2021. The record shows the accessory structure was built in 1969, and it is described as a "utility room," with no square footage assigned to it. The second page is a line drawing that is reflective of the condition of the property as of February 19, 2021, not 1969.[37]

(b) The statement from Mark Piper, the previous owner of 12 Park Road who sold it to the Sherriers, speaks to the condition of the property in the year 1985. The statement of Mark Piper was that he bought 12 Park Road in 1985, and that he first used the accessory structure as a home office, and later as living quarters.[38]

(c) The statement of Mr. and Ms. Trenary speaks to the condition of the property from and after the year 1987 through on or about 2016.[39]

(d) There is a second statement from Mr. Trenary to the effect that there was "an office or something" in the back structure." Mr. Trenary's

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[37] CBAA Record on Appeal, pp. 42-43, R. pp. 203 - 204.

[38] CBAA Record on Appeal, p. 32, R. p. 193.

[39] CBAA Record on Appeal, p. 33, R. p. 194.

second statement does not address the conversion to residential living space.[40]

(e) The statement of Mr. Lance Buntin speaks to the condition of the property from 2000.[41]

(f) The statement of Tiffany Marshall speaks to the condition of the property from 2017.[42]

(g) The tax record showing ownership of 12 Park Road by Mark D. Piper is from 2009, and it has no detail regarding the accessory structure.[43]

In addition, there is evidence in the record that the Sherriers made substantial improvements to the accessory structure. The Sherriers added climate control and cooking facilities to the accessory structure without securing any permits to do so.[44] There is evidence in the record that the accessory structure was a pole barn type structure in the years 1983 through 1985.[45]

The only evidence in the record is that the use of the accessory structure changed to habitable residential living space after the year 1985, and there is evidence that the

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[40] CBAA Record on Appeal, pp. 46 - 47, R. pp. 207 - 208.

[41] CBAA Record on Appeal, p. 34, R. p. 195.

[42] CBAA Record on Appeal, pp. 35-36, R. pp. 196 - 197.

[43] CBAA Record on Appeal, p. 50, R. p. 211.

[44] CBAA Record on Appeal, pp. 51-52, R. pp. 212 - 213; p. 70, l. 13 to p. 71, l. 19.

[45] CBAA Record on Appeal, p. 54, R. p. 215. The evidence is conflicting on this point. But, under the applicable scope of review, the only question is whether the record includes evidence that supports the decision of the CBAA and Judge Dukes. This evidence is in the record. The Sherriers object to this evidence, but the objection unfounded as shown in Argument 3, *infra*.

Sherriers themselves made substantial un-permitted improvements to the accessory structure when they became the owners in 2020.

In their Amended Notice of Appeal, in their argument at the January 13, 2023, hearing, and in their Brief, the Sherriers point to email correspondence by and between members of the Town's staff regarding the issue of whether the accessory structure and the use of it violated the Town's Land Management Ordinance.[46] This is an argument that the CBAA and Judge Dukes relied on the wrong evidence in making their findings. This argument is unavailing because under the governing scope of review, the question is whether there is any evidence in the record supporting the findings of fact of the CBAA and Judge Dukes. The existence of other or different evidence does not change the result, because a reviewing Court cannot substitute its judgment for that of the administrative board.[47]

(c) The conversion of the accessory structure to a habitable residential living space was not and is not in conformity with the lowest floor requirements of Town of Hilton Head Island, S. C., Mun. Code, § 15-9 312(a).

The accessory structure at 12 Park Lane does not meet the lowest floor requirements of *Town of Hilton Head Island, S. C., Mun. Code,* § 15-9 312(a). The only evidence in the record supports this finding and is:

(i) *Town of Hilton Head Island, S. C., Mun. Code,* § 15-9-312(a), reads:

> In all areas within zones AE, AO, Shaded X, and X, the following provisions are required:

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[46] The Land Management Ordinance is codified as *Town of Hilton Head Island, S. C., Mun. Code,* § 16-1-101, et seq.

[47] *Peterson Outdoor Advertising v. City of Myrtle Beach, supra.; Talbot v. Myrtle Beach Board of Adjustment, supra,*

> (a) Residential construction. New construction and substantial improvement of any residential structure (including manufactured homes) must be constructed so that the lowest floor, is elevated no lower than three (3) feet above the base flood elevation or thirteen (13) feet above mean sea level using NAVD88, whichever is higher. No environmentally conditioned space shall be allowed below the lowest floor. No basements are permitted. Should solid foundation perimeter walls be used to elevate a structure, flood openings sufficient to automatically equalize hydrostatic flood forces, shall be provided in accordance with the elevated buildings requirements in section 15-9-312(f). Residential structures may not be floodproofed in lieu of elevation.

(ii) The staff report shows that 12 Park Road is in flood zone AE.[48] Under the plain text of the ordinance, 12 Park Road is in Flood Zone AE, and must be in compliance with the requirements of the ordinance.

(iii) Shari Mendrick testified that 12 Park Road is in the special flood hazard area and the accessory structure was converted to habitable residential living space without a permit.[49]

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[48] CBAA Record on Appeal, p. 53, R. p. 214.

[49] CBAA Record on Appeal, p. 112, l. 25 to p. 114, l. 8, R. p. 273, l 25 to p. 275, l. 8. The Sherriers argue that the accessory structure does not qualify as a "dwelling unit" under the Town's Land Management Ordinance [*Town of Hilton Head Island, S. C., Mun. Code*, § 16-10-105], and argue that the terms "habitable" and "residential" are not defined in the Flood Damage Control ordinance. These arguments miss the point for two reasons:

> (a) *Town of Hilton Head Island, S. C., Mun. Code*, § 15-9-312(a), is in a different chapter of the Town's municipal code (Title 15 as opposed to Title 16); and,
>
> (b) The Sherriers admit that the use of accessory structure is residential. Mr. Sherrier testified: "I will only be referring to the rear structure as a bedroom and a rec room as these are the words that were used by the town officials and neighbors . . ." CBAA Record on Appeal, p. 76, l. 21-25, R. p. 237, l. 21-25. The Sherriers do not claim that the use of the accessory structure is anything other than residential.

(iv) The staff report shows that the accessory structure is slab on grade and does not meet the lowest floor requirements of *Town of Hilton Head Island, S. C., Mun. Code,* § 15-9-312(a).[50]

Any or all of this evidence in the record supports the finding that the accessory structure does not meet the lowest floor requirements of *Town of Hilton Head Island, S. C., Mun. Code,* § 15-9 312(a). The decision of an administrative board will not be disturbed if there is any evidence in the record supporting it.[51] There is no evidence in the record that the accessory structure complies with the requirements of *Town of Hilton Head Island, S. C., Mun. Code,* § 15-9-312(a).

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[50] CBAA Record on Appeal, p. 53, R. p. 214.

[51] *Peterson Outdoor Advertising v. City of Myrtle Beach, supra.*

ARGUMENT NUMBER 2

THE PLAIN TEXT OF THE TOWN'S FLOOD DAMAGE CONTROLS ORDINANCE SHOWS THAT IT APPLIES TO 12 PARK ROAD. (Statement of Issues Presented Number 2).

On appeal, the Circuit Court can correct errors of law. In this case, there is no error of law. The plain text of *Town of Hilton Head Island, S. C., Mun. Code,* § 15-9-113, is that it applies to all areas in the Town. The plain text of *Town of Hilton Head Island, S. C., Mun. Code,* § 15-9-312(a), is that it applies to all areas in Flood Zone AE, and 12 Park Road is in Flood Zone AE.

The Sherriers argue that this ordinance is inapplicable to 12 Park Road for a variety of reasons, all of which ignore the plain language of the ordinances, which is that they apply to: ". . . all areas in the Town," and to ". . . all areas within zones AE . . ." The Sherriers do not argue that 12 Park Road is not in flood zone AE, and the Sherriers presented no evidence to show that 12 Park Road is not in flood zone AE. There is no error of law because the plain text of the ordinances is that they apply in "all areas" of the Town and flood zone AE.[52]

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[52] In Argument Number 1 in their Brief, the Sherriers argue that the conclusion of the CBAA and Judge Dukes that *Town of Hilton Head Island, S. C. , Mun. Code,* § 15-9-312(a), applies to 12 Park Road is erroneous because the words "residential living space" and habitation do not appear in the ordinance and that the ordinance only applies to "residential construction." This argument misses the point, which is that the use of the accessory structure changed after September 30, 1977. The only evidence in the record is that the use of the structure changed from storage and office uses to residential use sometime after the year 1985 and there is evidence that the Sherriers themselves made material improvements to the accessory structure after 2020. The ordinance applies when the use of a structure is changed or material improvements are made to a structure, which is precisely what happened to the accessory structure at 12 Park Road. (See Argument Number 1).

The only evidence in the record is that the use of the accessory structure changed after September 30, 1977, and that substantial improvements were made to it after that time.

ARGUMENT NUMBER 3

THE SHERRIERS ARGUMENT NUMBER II IS NOT PRESERVED FOR APPELLATE REVIEW AND THE SOUTH CAROLINA RULES OF EVIDENCE DO NOT APPLY TO HEARINGS BEFORE THE CBAA. [Statement of Issues Presented 3 and 3(a)]

(a) This issue is not preserved for appellate review.

The Sherriers did not raise any issue regarding the admissibility of the evidence before the CBAA in their Amended Notice of Appeal to Circuit Court.[53] There is no ruling

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[53] The Sherriers did not make any contemporaneous objection to any of the evidence that was presented at the CBAA hearing. See Transcript of Hearing, R. pp. 223-289. The evidence at issue is a statement from Maryanne Perri Jackson. In their Amended Notice of Appeal, the only issue raised about it is that there was other contradictory evidence. Amended Notice of Appeal, p. 11, R. p. 68.

Although not mentioned by the Sherriers in their Brief, on September 6, 2023, the Sherriers filed a Reply to the Return of the CBAA and the Town. In the Reply, the Sherriers attempted to raise an issue regarding a statement from Maryanne Perri Jackson, but the issue made out is authenticity, not hearsay. Reply, pp. 5-7, R. pp. 128-130. The issue regarding the statement of Ms. Perri Jackson was not properly before Judge Dukes because the Reply, in which this issue was raised, was filed more than thirty days from the receipt of the Notice of Action. S. C. Code Ann. § 18-7-20 (Supp. 2023) reads:

> The appellant, within thirty days after written notice of judgment has been given him or his attorney by the magistrate, recorder, or judge of the municipal court, except when the judgment is announced at the trial in the presence of the appellant or his attorney then no written notice is necessary, shall serve a notice of appeal, stating the grounds upon which the appeal is founded. (emphasis added)

This situation is indistinguishable from that in *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 37, 606 S.E.2d 209, 213 (Ct. App. 2004). The procedures governing appeals are set out in S. C. Code Ann. § 18-7-20 (Supp. 2023). The statute requires that the grounds for the appeal be stated in a notice of appeal filed within thirty days, and there is no provision for amendment of the grounds.

The Sherriers do point to text in the argument before Judge Dukes, where the Sherriers' counsel makes mention of the one item, however, there is no specific objection based on hearsay, and counsel for the Sherriers did not ask for a ruling on the hearsay question. See Circuit Court Hearing Transcript, p. 9, l. 3-16, R. p. 323, l. 16 to p. 324, l. 7. Indeed, Counsel appears to state: "Again, ultimately, that does not seem today. A critical

in the May 5, 2022, Order Dismissing Appeal on any question related to hearsay evidence or the use of it by the CBAA. The Sherriers did not file a Rule 59, SCRCP, motion seeking a ruling on this issue.

When an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.[54] It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review.[55]

Because the Sherriers did not present this issue to Judge Dukes and have it ruled on by him, the issue is not preserved for appellate review.

(b) The South Carolina rules of Evidence do not apply to hearings before the CBAA.

In their argument number "II" the Sherriers argue that the CBAA relied on inadmissible hearsay evidence in reaching its decision on the Sherriers' appeal. The Sherriers point to Rule 802, SCRE, in support of their argument. The Sherriers admit on page 15 of their brief that there is no law supporting their position. There is, however, law that refutes it. Rule 101, SCRE reads:

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point for us." (See Circuit Court Hearing Transcript, p. 9, l. 14, R. p. 324, l. 4 - 5. The May 5, 2023, Order does not include a ruling on the hearsay question, and no Rule 59, SCRCP, motion seeking a ruling was made.

[54] *Ness v. Eckerd Corp.*, 350 S.C. 399, 403-04, 566 S.E.2d 193, 196 (Ct. App. 2002).

[55] *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

> Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101.[56]

The CBAA is not a "court of South Carolina," and the Sherriers show no support for their argument that the South Carolina Rules of Evidence apply to hearings of the CBAA.

In addition, both the CBAA and Judge Dukes relied on other evidence as well as that

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[56] There is nothing in Rule 1101, SCRE, making it applicable to hearings before the CBAA. Rule 1101(a), SCRE, reads:

> a) Courts and Judges. Except as otherwise provided by rule or statute, these rules apply to the courts of South Carolina. The term "judge" in these rules includes justices of the Supreme Court; judges of the Court of Appeals; judges of the circuit, family, probate and municipal courts; magistrates; masters-in-equity; and special referees.
>
> (b) Proceedings Generally. These rules apply generally to civil actions and proceedings, to criminal cases and proceedings, and to contempt proceedings except those in which the court may act summarily.
>
> (c) Rule of Privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.
>
> (d) Rules Inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:
>
> (1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.
>
> (2) Grand Jury. Proceedings before grand juries.
>
> (3) Miscellaneous Proceedings. Proceedings for extradition; preliminary hearings in criminal cases; sentencing (except in the penalty phase of capital trials as required by statute), dispositional hearings in juvenile delinquency matters, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

which is challenged in this argument, most of which was presented by the Sherriers' themselves. Even if the CBAA and Judge Dukes had excluded the evidence which is complained of, there is still evidence in the record that supports the decision of the CBAA and Judge Dukes.[57] Where there is evidence in the record that supports the findings, there is no basis for reversal.[58]

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[57] See Argument 1, *supra*.

[58] *Charleston Cnty. Parks & Recreation Comm'n v. Somers, supra.*

ARGUMENT NUMBER 4

THE SHERRIERS FAILED TO DEMONSTRATE THAT THEY (1) LACKED KNOWLEDGE OR THE MEANS OF KNOWLEDGE THAT *TOWN OF HILTON HEAD ISLAND, S. C. , MUN. CODE*, § 15-9-312(A) APPLIED TO 12 PARK ROAD; (2) CONDUCT OF THE GOVERNMENT INDUCED THEM TO BELIEVE THAT *TOWN OF HILTON HEAD ISLAND, S. C. , MUN. CODE*, § 15-9-312(A) DID NOT APPLY TO 12 PARK ROAD; AND, THE SHERRIERS MADE A PREJUDICIAL CHANGE IN POSITION ON SUCH RELIANCE. (Statement of Issues Presented Number 4).

The Sherriers also argue that the Town is estopped to enforce *Town of Hilton Head Island, S. C. , Mun. Code*, § 15-9-312(a), against 12 Park Road. The Sherriers' estoppel argument is based on the following facts:

1. The Sherriers completed un-permitted work at 12 Park Road for which they received citations.[59]
2. Among other things, the un-permitted work by Sherriers included the installation of heating and air conditioning units (mini splits) and a stove in the accessory structure.[60]
3. The installation of the stove meant that the accessory structure would be counted as a separate dwelling unit on a single family lot which was a violation of the Town's Land Management Ordinance [*Town of Hilton Head Island, S. C. , Mun. Code*, § 16-1-101, *et seq.*].[61]

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[59] CBAA Record on Appeal, pp. 51 - 52, R. pp. 212 - 213.

[60] CBAA Record on Appeal, pp. 51 - 52, R. pp. 212 - 213.

[61] CBAA Record on Appeal, pp. 51 - 52, R. pp. 212 - 213.

4. The Sherriers rectified the violations by taking steps to obtain permits for the un-permitted heating and air work, plead guilty on the citations, and removed the stove to resolve the zoning violation.[62]

The Sherriers' claim is that they changed their position to their detriment by resolving the zoning violations. The resolution of the Sherriers' citations is not a detrimental change in position, and the Sherriers cite no authority for this proposition. Second, the Sherriers do not contend that they either bought 12 Park Road or made the substantial improvements to 12 Park Road because anyone connected with the Town advised them that *Town of Hilton Head Island, S. C. , Mun. Code*, § 15-9-312(a), does not apply to 12 Park Road or the accessory structure.

As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy. To prove estoppel against the government, the relying party must prove: (1) the lack of knowledge and of the means of knowledge of the truth of the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position.[63]

The Sherriers cannot prove an estoppel because they cannot show any detrimental reliance on any statement that made by the Town that the Flood Damage Control ordinance did not apply to 12 Park Road.[60] Also, the Sherriers cannot demonstrate a lack of means of

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[62] CBAA Record on Appeal, pp. 51 - 52, R. pp. 212 - 213.

[63] *S. C. Department of Transportation v. Horry County*, 391 S.C. 76, 83, 705 S.E.2d 21, 25 (2011).

[60] In addition to showing that a Town official made such a statement (which they have not), the Sherriers would also have to show that the person making the statement had the authority to make it. *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 238, 692

knowledge as to the Town's flood ordinance because the Town code is a matter of public record.[61] Ignorance of the law cannot operate as the basis of an estoppel.[62]

S.E.2d 499, 507 (2010).

[61] See also: *Grant v. City of Folly Beach*, 346 S.C. 74, 82, 551 S.E.2d 229, 233 (2001), where the Supreme Court reviewed an argument similar to that made by the Sherriers, and held that the City of Folly Beach was not estopped from enforcing its flood ordinance, even though building permits were issued. The Supreme Court held:

> In this case, City issued a building permit for work in "Downstairs Apt. # 1." Assuming the permit's reference to an "apartment" misled Grant into believing residential use was permitted in Unit A, issuance of the permit does not estop City from enforcing its zoning/flood ordinance which precludes residential use of the downstairs floor. Grant could have easily ascertained the flood limitations on his building by reviewing the zoning/flood ordinance.

[62] *Bradley v. Rodelsperger*, 17 S.C. 9 (1882).

CONCLUSION

The CBAA and Judge Dukes both found as matters of fact that the accessory structure at 12 Park Road was converted to habitable residential living space after September 30, 1977, and that the conversion was not in compliance with the Town's Flood Damage Control ordinance. There is evidence in the record supporting the findings. The CBAA and Judge Dukes both concluded that the Town's Flood Damage Control ordinance applied to 12 Park Road, and there is no error of law in this conclusion. The Sherriers failed to demonstrate that any basis for an estoppel against the Town exists. The Sherriers' argument regarding hearsay evidence relied on by the CBAA and Judge Dukes is not preserved, and there is other evidence in the record supporting the decision of the CBAA and Judge Dukes. For these reasons, The Town of Hilton Head Island, South Carolina, and The Town of Hilton Head Island, South Carolina, Board of Zoning Appeals urge this Court to affirm the May 5, 2023, Order of the Hon. Marvin H. Dukes, III.

Respectfully Submitted:

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