STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	C.A. No. 2023-CP-02-00412
	)	
David L. Lambert and Julia H. Beamish,	)	
	)	
Appellants,	)	**Order Denying Appeal**
	)	
vs.	)	
	)	
Aiken County Planning Commission, Aiken County Government, Pyramid Network Solutions for Verizon Wireless,	)	
	)	
Respondents.	)	

Appellants David L. Lambert and Julia H. Beamish appeal the Aiken County Planning Commission's decision to approve Verizon Wireless' Application for a permit for a wireless telecommunications facility (cell tower) on a rural tract of property located at Old 96 Indian Trail Road in Aiken County (the Indian Trail Property) (Tax Parcel No. 262-00-01-002).[1]

Underlying Facts

Verizon applied to the Commission for a permit to build a cell tower on the Indian Trail Property to address wireless coverage deficiencies that exist between Wagner and I-20. Record Ex. 2 at p. 48; Record Ex. 2 at p. 56. Appellants own property adjacent to the proposed tower location (the Bluffwood Road Property) (Tax Parcel No. 262-00-01-043) and opposed Verizon's Application.[2]

[1] The Indian Trail Property is over one hundred acres of vacant and wooded land with no structures on it. It is zoned for rural development. Verizon leases or plans to lease the Indian Trail Property for the purpose of constructing and operating the cell tower.

[2] A map of the proposed cell tower location on the Indian Trail Property indicates that it would sit approximately 1,600 feet away from Appellants' property line. Record Ex. 2 at pp. 59, 64-65.

The Commission considered Verizon's Application at multiple meetings. At the first meeting, on October 20, 2022, Appellants argued that the construction and operation of a cell tower on the Indian Trail Property are prohibited by the restrictive covenants attached to the Bluffwood Road Property Deed. Based on that objection, the Commission tabled Verizon's Application and requested additional information supporting the parties' respective positions on the issue. Verizon submitted detailed information explaining that the restrictive covenants do not apply to the Indian Trail Property and copies of the deeds for each property.

A second Commission meeting was held on November 17, 2022. Appellants again argued that restrictive covenants prohibit commercial activity on the Indian Trail Property. Appellants provided a copy of the restrictive covenants to the Commission but did not include a copy of the deed to which they were are attached. Verizon's Application was tabled a second time to allow Appellants an opportunity to produce the relevant deed.

A third and final meeting was held on January 19, 2023. Appellants did not present the Commission with any new information. Verizon reiterated its position that its Application meets county requirements for wireless telecommunication towers and that the restrictive covenants do not apply to the Indian Trail Property. The Commission verbally approved Verizon's Application with contingencies by a majority vote. Details of the vote and a summary of the arguments and evidence presented are found in the January 19, 2023 meeting minutes. Record Ex. 9 at p. 4. Finally, on January 25, 2023, the Aiken County Planning and Development Department issued a written notice of approval with conditions to Pyramid Network Services.[3] Record Ex. 1.

[3] The January 25, 2023 approval letter complies with LMR Section 24-3.5.16(2), which requires that, if the Commission "approves the permit for a wireless telecommunications facility, then the applicant shall be notified of such approval in writing within ten (10) calendar days of the Planning Commission's action."

On February 20, 2023, Appellants filed a Notice of Appeal in the circuit court, challenging the Commission's decision to approve Verizon's Application. Appellants generally contend that (1) the Commission's approval is legally insufficient because the Commission did not issue written findings and conclusions supporting its decision; (2) the Commission's decision is unsupported by the record because it failed to consider certain factors outlined in the Aiken County Land Management Regulations (LMR); and (3) the proposed cell tower would violate certain restrictive covenants applicable to the Indian Trail Property.[4]

A hearing was held on October 16, 2023. Clarke McCants III, Esq. appeared on behalf of Appellants, Brad Farrar, Esq. appeared on behalf of the Commission and the Aiken County Government, and Catherine Wrenn, Esq. appeared on behalf of Verizon. Having carefully considered the pleadings, briefings, record on appeal, and arguments of counsel, Appellants' appeal is DENIED.

Standard of Review

This Court reviews the Commission's decision to approve Verizon's Application for an abuse of discretion. Grays Hill Baptist Church v. Beaufort Cnty., 431 S.C. 630, 637, 850 S.E.2d 29, 33 (2020). In other words, the Court may not reverse the Commission's decision "unless [the Commission's] findings have no evidentiary support or [the Commission] has committed an error of law." Id. (internal citation omitted). Furthermore, an appellate court "will not substitute [its] judgment for that of the reviewing body, even if [it] disagree[s] with the decision." Id.

[4] Appellants did not raise the restrictive covenants issue in their Notice of Appeal but maintained that the issue remained "alive" at the hearing.

Analysis

A. The Commission maintained a sufficient record of its decision to approve Verizon's Application in compliance with Section 6-29-360(B).

Appellants contend that the Commission did not maintain a sufficient record of its decision as required by Section 6-29-360(B) of the South Carolina Local Government Comprehensive Planning Enabling Act (the Act) and seek to reverse the decision or remand the matter to the Commission for further findings of fact and conclusions of law. Specifically, Appellants complain that the Commission did not issue written findings of fact and conclusions of law setting forth the basis for the Commission's approval.

Appellants' argument proves too much. The Act mandates only that "a record of [the Commissions] resolutions, findings, and determinations" be kept—it does not specify what form the record must take or require the Commission to explain its decision.[5] S.C. Code Ann. § 6-29-360(B). Here, the Commission's staff investigated and prepared a report in which it determined that Verizon's proposed cell tower "has met and/or exceeded County adopted IBC and ANSI codes," "does not conflict with any designated historical site," and does not pose an "unacceptable risk or unreasonable probability of" risk to residents, the public, employees, and agents of the County or employees of service providers," which the Commission considered and made a part of the record. Record Exhibit 2 at pp.45-46. The Commission recorded and transcribed each meeting in addition to maintaining meeting agendas and detailed meeting minutes. And, as noted earlier,

[5] The absence of conditional language in Section 6-29-360(B) is also noteworthy when read in the context of other similar provisions within the Act. For example, a provision in Article 5 permits approval of a zoning variance in an individual case of unnecessary hardship "*if the board makes and explains in writing*" certain enumerated findings. S.C. Code § 6-29-800(A)(2) (emphasis added). The specificity of the language in Section 6-29-800(A)(2) suggests that the legislature did not intend to impose similar written formalities in Section 6-29-360(B). See 82 C.J.S. Statutes § 418 ("When the legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acts intentionally and purposely in such disparate inclusion or exclusion and that the legislature intended different results.").

the Commission's vote approving Verizon's Application is recorded in the January 19, 2023 meeting minutes. Record Ex. 9 at p. 4. See Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 149, 735 S.E.2d 659, 662 (Ct. App. 2012) (noting that a zoning appeal board's "minutes normally constitute" its "final findings").

The record is robust, and there is simply no cause for this Court to undo the work of the Commission or delay finality by imposing additional formalities to effectuate the Commission's vote that do not exist in the statute or county regulations. See, e.g., State v. Cty. of Florence, 406 S.C. 169, 180, 749 S.E.2d 516, 522 (2013) (declining to "augment the statutory language" to include a requirement that is not contained in the statute at issue); Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012) (noting "when a statute is clear on its face, it is 'improvident to judicially engraft extra requirements to legislation'"); Smith v. Georgetown Cnty. Council, 292 S.C. 235, 238, 355 S.E.2d 864, 865 (Ct. App. 1987) (holding that the circuit court improperly invalidated county council's decision to amend a zoning ordinance because it did not make a specific finding that the amendment was in the public interest where no such requirement existed by statute). Therefore, I find the Commission not only met, but well exceeded its modest obligation under Section 6-29-360(B) of the Act and deny Appellants' appeal on this ground.

B. The Commission's decision was made in accordance with all applicable regulations and is supported by the record.

Next, Appellants contend that the Commission's approval is unsupported by the record because it failed to consider factors outlined in the Aiken County regulations applicable to permit applications for wireless communication towers.[6] The regulations provide that the Commission

[6] Appellants' Notice of Appeal does not identify which portion of the Commission's decision is unsupported by evidence or specify the regulatory factors that the Commission failed to consider. See S.C. Code Ann. § 6-29-1155 (requiring Appellants to file a "petition in writing setting forth plainly, fully, and distinctly *why* the decision is contrary to law") (emphasis added).

"*may disapprove* an application" if there is "substantial evidence in the record" that any one of four criteria are met. LMR § 24-3.5.7(1) (emphasis added). The record reflects that the Commission considered those factors: The Commission's staff prepared a report separately addressing each and concluded that the Application does not meet any of the regulatory grounds for rejection.[7] Notably, Appellants do not contend that the Commission failed to consider substantial evidence proving any one or more grounds for denial actually exist, nor could they.[8] Appellants did not present any evidence to dispute the staff report, which the Commission was entitled to consider and made a part of the record.

At the hearing, Appellants indicated that the proposed cell tower location would negatively affect the equestrian character of the surrounding property, including Appellants' Bluffwood Road Property. Appellants appear to suggest that the Commission's approval violates the County's "desired goals" for wireless telecommunications facilities—specifically that it "regula[te] the location of wireless telecommunications facilities in such a manner as to minimize adverse, aesthetic and visual impacts on the land, property, buildings, and other facilities located in the area of wireless telecommunications facilities." LMR Section 24-3.5.2. But that concern alone, even if true, is not legally sufficient to limit the Commission's discretionary authority and overturn its approval of Verizon's Application.

[7] LMR 24-3.5.7(1) provides as follows: "The planning commission may disapprove an application for any of the following reasons based upon substantial evidence in the record before it: (a) Conflict with safety and safety-related codes and requirements; (b) Conflict with a designated historical site; (c) The placement and location of wireless telecommunications facilities which would create an unacceptable risk, or the reasonable probability of such, to residents, the public, employees and agents of the county, or employees of the service provider or other service providers; (d) Conflicts with the provisions of this section 24-3.5."

[8] Even if there was substantial evidence before the Commission that would permit denial of Verizon's Application, the Aiken County regulations do not require it. LMR § 24-3.5.7(1) (The Commission "*may* disapprove an application" if there is "substantial evidence in the record" that any one of four criteria are met.) (emphasis added).

Appellants' objections appear to be grounded in their argument that they do not know why the Commission approved the Application because it chose not to issue written findings and conclusions, which the Court has rejected. Nevertheless, the nearly three-hundred-page record indicates that the Commission considered Verizon's Application, the relevant property records and deeds, the Commission's staff report, and the arguments presented at the hearings. I find the Commission's decision was made in accordance with all applicable regulations and is supported by sufficient evidence. For these reasons, the Commission acted well within its discretion when it approved Verizon's Application with contingencies.

C. There are no restrictive covenants that prohibit the proposed cell tower on the Indian Trail Property and Appellants failed to preserve the issue on appeal.

Appellants final argument that the proposed cell tower would violate certain restrictive covenants applicable to the Indian Trail Property is forfeited and fails as a matter of law. Appellants to provide arguments or supporting authority for their position even after Verizon argued extensively that the restrictive covenants do not apply at the hearing. Therefore, I find the question of whether restrictive covenants apply to the Indian Trail property and is not properly before the Court in this appeal. Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned and therefore not presented for review.") (internal citations omitted).

Nevertheless, even if the issue were properly presented, I find in the restrictive covenants attached to and referenced in the Bluffwood Road Property Deed (including the covenant prohibiting commercial activity) do not–either by express language or unmistakable implication—apply to the Indian Trail Property or prohibit the construction or operation of the proposed cell tower and deny Appellant's appeal on this ground. See Record Exhibit 13. I further find that no

restrictive covenants are attached to or referenced in the Indian Trail Property Deed that would prohibit the construction or operation of the proposed telecommunications tower on the that property. See Kinard v. Richardson, 407 S.C. 247, 257-58, 754 S.E.2d 888, 894 (Ct. App. 2014) (quoting Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998) ("A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.")); See also Buffington v. T.O.E. Enterprises, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009) (noting that "courts tend to strictly interpret restrictive covenants, and to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain and unmistakable implication").

For the reasons set forth above, Appellants' Appeal of the Aiken County Planning Commission's decision to approve Verizon's Application for a permit for a telecommunications facility is DENIED.

This ____ day of December 2023

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The Honorable Judge Clifton Newman

Aiken Common Pleas

Case Caption: David Lambert , plaintiff, et al VS Aiken County Planning And Development Commission , defendant, et al

Case Number: 2023CP0200412

Type: Order/Other

So Ordered

s/ Clifton B. Newman, 2127