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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. D. Morgan, Judge

Appellate Case No. 2024-000727

Letchworth Properties, LLC ……... Appellant,

v.

City of Greer and City of Greer
Board of Zoning Appeals ……..... Respondents.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The City of Greer is bisected by two active rail lines, one of which abuts Appellant's property. Issues of liability and insurance coverage arising from unrestricted access to the rail line prompted Appellant to construct what it believed to be a compliant and aesthetically pleasing security fence along its property line with CSX railway.

On the final day of construction, City planning staff notified Appellant the fence failed to comply with its fence code and would have to be removed. The notice prompted Appellant's application to the Greer Board of Zoning Appeals ("Board") for a variance. After a hearing in which Appellant was repeatedly denied its constitutional right to rebut planning staff's erroneous factual and legal arguments, the request was denied. The denial was upheld by the Greenville County circuit court, resulting in appeal to this Court.

The South Carolina Local Government Comprehensive Planning and Enabling Act of 1994 allows a variance from zoning laws where a property owner can show unnecessary hardship.[1] Appellant maintains it satisfied each of the four elements required to prevail on a hardship variance under the Act and the Board's denial was arbitrary and capricious. Without restating the issues or making redundant arguments which have been thoroughly set forth in Appellant's Initial Brief, Appellant offers the following points of clarification and rebuttal to Respondents' arguments.

I. PROHIBITION OF FENCING IN THE PUBLIC PARKING LOT.

One of Respondents' key arguments and one made repeatedly throughout this litigation, is the demonstrably false claim Appellant enjoyed the right to construct a compliant fence anywhere on its property.[2] Respondent made the claim five times in their Initial Brief, alone, arguing, *inter*

[1] Appellant's Initial Brief p. 8, ll. 17-18 (citing The Local Government Comprehensive Planning and Enabling act of 1994, S.C. Code Ann. § 6-29-310, et seq.).

[2] Board Transcript, p. 28, ll. 8-10 ("That is not saying they cannot have a fence."); Order, p. 8, ll.

alia:

> "[t]he deed restriction does not preclude fencing. Rather, it requires public spaces on the property to be available to the public."[3]

This contradictory statement simply confirms Appellant's argument the restrictive covenant on Appellant's property precluded Appellant from constructing any type of fencing in the critical section between the public parking lot and the CSX rail line.[4] Fencing in the public parking lot would have taken a parking space and one of the two lanes of ingress and egress. Respondents' vague and superficial intimation of a willingness to allow such an encroachment is belied by the City's rejection of Appellant's offer of a compromise solution to the issue prior to fence construction.[5]

Section 6-29-1145 of the South Carolina Local Government Comprehensive Planning and Enabling Act of 1994, which Respondents studiously avoid addressing, precludes a local planning agency from issuing a permit that would violate a private restrictive covenant which the agency has actual knowledge of.[6] So even assuming, *arguendo,* erection of fencing in the public parking lot were somehow compatible with the deed restriction, the statute in question would have prevented the City from issuing a permit. The legal constraints on fencing left Appellant without

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6-8 ("And the City is not prohibiting the Appellant from having a fence. Rather, the City is merely regulating the type of fence.").

[3] Respondents' Initial Brief, P. 10, ll. 2-3.

[4] Appellant's Supp. Brief, Part B, p.10, p. 27; Circuit Court Transcript, p. 5, ll. 5-10.

[5] Appellant's Initial Brief, p. 17, ll. 5-8.

[6] Appellant's Initial Brief, p. 17, ll. 2-4 (citing Scott Y. Barnes et al., Practical Guide to Commercial Real Estate in South Carolina 197) (discussing Section 6-29-1145 of the 1994 Comprehensive Act).

an effective means of protecting invitees and the public on its property. Appellant's only option was to locate a section of fencing on neighboring CSX right of way pursuant to an agreement with the railroad.

The City had actual knowledge of the deed restriction by way of Appellant's request to replace the deed restriction with an easement. And it was planning staff that erroneously instructed the Board the City was not denying Appellant the right to construct fencing anywhere on its property. Respondents obliquely claim Appellant failed to address the deed restriction to the trial court but the issue was raised to trial court at the Hearing and in Appellant's Motion to Reconsider.[7]

The circuit court failed to rule on this issue in its Order. The failure to exercise any discretion constitutes an error of law. This error was unrebutted by Respondents.[8]

II. RESPONDENTS' ENFORCEMENT ACTION DOES NOT ENCOMPASS FENCING ON NEIGHBORING PROPERTY.

Appellant asked the trial court to address the scope of the City's enforcement action, notice of which is addressed to "owner or occupant", and rule the action does not encompass fencing on neighboring CSX right of way (Appellant neither owns nor occupies CSX property) or in the alternative, grant the requested variance as to this section of fencing.[9]

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[7] Circuit Court Hearing Transcript, p. 5, ll. 7-10, p. 8, ll. 22-25, p. 19, ll. 4-6; Appellant's Motion to Reconsider, P. 3, ll. 2-3 ("With permission of CSXT, three sections of fencing encompassed by the City's enforcement action were constructed entirely on CSXT right of way. The largest section was constructed on CSXT right of way to avoid placing that section of fence in the public parking lot located east of the Depot building as such placement could have been construed as violative of the *deed restriction mandating public parking on Petitioner's property*.").

[8] Appellant's Initial Brief, p. 2, l. 17, p. 3, ll. 1-2 (citing Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

[9] Appellant's Supp. Brief, Part B, p. 27; Circuit Court Hearing p. 7, ll. 3-12, p. 20, ll. 14-24; Mot. to Reconsider, p. 3, ll. 22-27.

Respondents are correct fence location was not raised to the Board but a variety of Appellant's arguments were constrained by the Board's denial of Appellant's right to due process as discussed *infra*. Moreover, had the court found the City's enforcement action failed to encompass the CSX fencing, Appellant argues the Board would not have had the legal authority to grant or deny the variance request, rendering issue preservation a moot point.

The court's failure to make any ruling on this issue constitutes an error of law which Appellant argues should compel reversal or remand to the court.[10] Respondents fail to offer an argument in rebuttal.

III. RESPONDENTS' NEGLIGENT DELAY IN NOTIFYING APPELLANT THE FENCE WAS NONCONFORMING.

Appellant began fence construction on July 19, 2022 but the City negligently waited fifteen days until the final day of fence construction on August 2, 2022 to notify Appellant the fence was nonconforming.[11] Appellant's property (Historic Greer Depot), which is arguably the most recognizable property and the City of Greer is located only a couple of blocks from planning staff's offices at City Hall, making the delay even more inexplicable.

Respondents bizarrely claim "[t]he law imposes no duty upon the City to notify a property owner that they are violating a zoning ordinance".[12] Basic due process, however, requires notice and opportunity to be heard.[13] Not only was notice required, but it should have been provided

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[10] Appellant's Initial Brief, p. 2, l 17, p. 3, ll. 1-2 (citing Fontaine, 291 S.C. at 354).

[11] Circuit Court Hearing Transcript, p. 6, ll. 20-25, p 7, ll. 1-2; Mot. for Reconsideration, p. 3, ll. 3-4.

[12] Respondents' Initial Brief, p. 16, ll. 3-5.

[13] Appellant's Initial Brief, p. 25, ll. 8-16, p. 26, p. 1-2 (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) ("Due process requires *adequate notice"*) *(emphasis added).*

without unreasonable delay to avoid inflating Appellant's compliance costs.[14] Had Appellant been notified earlier, it would likely have taken the partially completed fence down, thereby avoiding litigation and further expense.

Respondents maintain this issue was not raised to the Board but Appellant clearly raised the timeline in its PowerPoint presentation presented to the Board at the hearing and filed thereafter by Respondents in circuit court as Respondents' "Record on Appeal".[15]

IV. THE CITY'S ROLE IN APPELLANT'S NEED FOR SECURITY FENCING.

One of the main drivers of Appellant's demonstrable need for security fencing was the City's role in promoting trespass on neighboring property with attendant spillover onto Appellant's property. In their Reply Brief, Respondents contend Appellant's claim of hardship resulting from City-sponsored and directed trespass onto private property is "nonsensical … not supported by the record [and], something that "of course, the City would never do."[16]

This conclusory argument flies in the face of abundant documentation presented to the trial court and to this Court that shows scores if not hundreds of vehicles tightly packed within the CSX right of way, inches from moving trains during City-wide events.[17] Is the City claiming the photographs were doctored and do not represent what they claim to represent? Who do Respondents contend directed such parking, if not the City? Does the City claim it had permission from the property owner to direct hundreds of people and vehicles onto its property? CSX

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[15] Appellant's PowerPoint Presentation to the Board, Slides 14, 18 (filed as Respondent's "Record on Appeal", BZA 000039, 000043).

[16] Respondents' Initial Brief, p. 10, ll. 7-10.

[17] Appellant's Supp. Brief, p. 10, ll. 7-9, p. 14, ll. 13-15, p. 15, 16; Appellant's Mot. for Reconsideration, p. 2. l. 22, p. 3, l. 1; Appellant's Initial Brief, p. 14, ll. 13-15, p. 15, p. 16.

categorically denies granting the City permission to trespass on its right of way or granting the City jurisdictional authority over its property.[18] The aforementioned are, of course, rhetorical questions as the images clearly implicate the City of Greer in directing mass trespass onto private property.

Respondents compound their denial of the obvious with a bald-faced contention the mass trespass on neighboring railroad right of way had no ripple effect on Appellant's property and that Appellant failed to present the issue to the Board. But such spill-over trespass is clearly shown in the transcript and video presented to the Board which documents ultrahazardous trespass from Appellant's property (public parking lot) onto CSX right during a City-wide event (prior to security fencing) wherein scores of vehicles are directed onto private property.[19]

The trial court's failure to exercise any discretion in addressing this City-imposed hardship in its Order constitutes an error of law requiring reversal or at least remand to the court.[20] Respondents' Initial Brief offers no argument in rebuttal.

V. THE BOARD'S DENIAL OF APPELLANT's RIGHT TO DUE PROCESS.

Constitutional Due Process "requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses."[21] While due process does not require a trial-type hearing in every conceivable case of

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[18] Appellant's Initial Brief, p. 15, 4-9, Footnote 33.

[19] Board Transcript P. 14, ll. 16-23, p. 14, ll. 1-6; Appellant's PowerPoint Presentation to the Board, Slides 29, 30, 31; Appellant's Supplemental Brief, Part A, p. 8-14.

[20] Appellant's Initial Brief, p. 2, l. 17, p. 3, ll. 1-2 (citing Fontaine v. Peitz, 291 S.C. 536, 538).

[21] Appellant's Petition, p. 6, ll. 10-14; Appellant's Supp. Brief, p. 23-25; Appellant's Initial Brief, p. 25, ll. 8-13, p. 26, P. 27, ll. 1-4 (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)) ("Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.").

government impairment of a private interest, "[t]he fundamental requirements of due process include notice, an opportunity to be heard in a *meaningful way*, and judicial review.[22] "Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses."[23] In the present matter, Respondents continue to maintain Appellant was provided with its constitutional right to due process at the Board hearing notwithstanding clear and incontrovertible evidence to the contrary.

A. The Board's Denial of Appellant's Right to Present its Case in Full.

Respondents argue Appellant was provided with full opportunity to present its case when the record shows Appellant was repeatedly denied the right to rebut planning staff's errors of law and fact as presented to the Board.[24] In an attempt to deflect culpability, Respondents offer the Court an edited and misleading version of a colloquy that makes it appear Appellant was attempting to rehash something it had already presented to the Board.[25]

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[22] Appellant's Initial Brief, p. 25, ll. 14-16, p. 26, l. 1 (citing Kurschner v. City of Camden Planning Com'n, 656 S.E.2d 346, 376 S.C. 165 (2008) (*emphasis added*) (citing S.C. Const. art. 1, § 22). Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)).

[23] Appellant's Initial Brief, p. 16, ll. 1-2 (citing Dept. of Social Services v. Wilson, 352 S.C. 445, 574 S.E.2d 730 (2002); Turik v. Town of Surf City, 642 S.E.2d 251, 253, 182 N.C. App. 427 (N.C. App. 2007) ("When reviewing a decision of a municipal board the circuit court should: (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.")).

[24]Appellant's Initial Brief, p. 26, ll. 3-9; (citing Board Hearing Transcript, p. 49, ll. 2-23, p. 50, ll. 1-23, p. 51, ll. 1-16, p. 52, ll. 10-14; Appellant's Petition for Appeal, p. 6-7; Appellant's Sup. Brief, Part B, p. 23-26; Appellant's Motion for Reconsideration, p. 7-8; Circuit Court Hearing Transcript, p. 9, ll. 15-25, p. 10, ll. 1-25, p. 11, ll. 1-11).

[25] Respondents' Initial Brief p. 17, ll. 6-15.

Respondents' edited quote:

> MARSHALL LAWSON: Would it be helpful to the Board if I just briefly addressed staff's conclusions as to each one of the criteria …"
>
> STEVE GRIFFIN: Is this just basically a repeat of what you have already covered originally.
>
> MARSHALL LAWSON: It's a repeat in the fact that *we made our case …*

Respondents, however, omit Appellant's full response: "it's a repeat in the fact we made our case, they made their case [unintelligible transcript] … *the conclusions the planning folks derived to each one of these criteria [unintelligible transcript] we believe is flawed*."[26] Although the transcript is garbled, the full text of the transcript indicates Appellant's unequivocal attempt to rebut planning staff's factual and legal conclusions presented to the Board.

In keeping with the edited transcript passage above, Respondents omit Appellant's preceding statement which fully explains Appellant's statement:

> *MARSHALL LAWSON: Would it be helpful to the Board if I just briefly addressed staff's conclusions as to each one of the criteria. That's really the heart of this matter. Those criteria are the criteria the Board is required to look at regarding whether to grant or deny a variance. And I think I can be very quick about it. If we could pull [the] conclusions back up."*
>
> *STEVE GRIFFIN: Ok. Does the board have any strong feelings about either one of those?*
>
> *BOARD MEMBER: I don't need to hear it.*[27]

Respondents also omit Appellant's follow up request to rebut staff's erroneous findings of fact and conclusions of law:

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[26] Board Transcript, p. 49, ll. 15-23.

[27] Board Transcript, p. 49, ll. 2-23.

MARSHALL LAWSON: We talked a little bit about procedural matters, but I think the [unintelligible] – the crooks [crux] of this matter is really those criteria that are listed in the South Carolina Planning Act and in the City zoning code. And I'd be happy to address those very quickly, if we could just pull them back up, if y'all have any interest.

STEVE GRIFFIN: I think that – do one of you have a strong feeling about this?

BOARD MEMBER: No, I just had a question. Was anyone consulted for the fence that was in compliance?[28]

Respondents also omit Appellant's initial attempt to rebut staff's conclusions made earlier in the hearing:

MARSHALL LAWSON: And by the way – and I'd be glad to go through each of staff's conclusions. I strongly disagree with their analysis of those five – of those four criteria or five criteria listed in the planning act. I don't think case law really supports the conclusions that they're drawing to each one of those.[29]

It is clear from the transcript, Appellant requested the opportunity to rebut staff's findings of fact and conclusions of law at least three times at the hearing and those requests were either ignored or denied. Respondents' attempted sleight of hand does not change the fact Appellant was not allowed to present its case in full to the Board and many issues that could have been raised were not raised or evaluated by the Board in rendering its decision.

B. The Board's Late Filing of its Final Decision

Filing of the Board's final decision entitled "Finding of Facts and Conclusions of Law" occurred some five months after the date of the Board's notice of "Official Action" and over four months after Appellant filed its Notice of Appeal on September 28, 2022.[30] Respondent's late filing

[28] Board Transcript, p. 50, ll. 20-23; p. 51, ll. 1-16.

[29] Board Transcript, p. 37, ll. 18-23; p. 38, ll. 1-2.

[30] Appellant's Initial Brief, p. 27, ll. 12-16; p. 28, 1-3.

left Appellant with only a garbled transcript on which to file and initially argue its appeal.

Remarkably, Respondents argue "[t]he Appellant cites no law that the timing of the filing constitutes …. error".[31] This contention ignores Appellant's citation and discussion of *Massey v. City of Greenville Bd.*, wherein this Court held the Board's late notice of its final decision failed to provide Appellant with sufficient right to due process.[32] Respondents are correct the issue was not raised to the trial court as counsel only recently learned of the case, but the lower court knew or should have known of the late filing because the timeline is included in the court's Order.[33] Moreover, Appellant argues an appellate court should be able to take up a matter *sua sponte* where, as here, a potentially dispositive issue that was missed the parties is entirely a question of law and there is no factual dispute.[34]

VI. THE COURT'S ORDER FAILS TO ADDRESS THE BOARD'S ACTUAL FINDINGS.

Section 6-29-800(F) of the 1994 Comprehensive Act requires a Board to make written Findings of Fact and Written Conclusions of Law in support of its decision to grant or deny a

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[31] Respondents Initial Brief, p. 18, ll. 2-4.

[32] Appellant's Initial Brief, p. 28, ll. 4-8. (citing Massey v. City of Greenville Bd., 341 S.C. 193, 532 S.E.2d 885 (Ct. App. 2000)).

[33] Circuit Court's Order, p. 4 (referencing the late filing, stating Appellant filed its appeal on September 28, 2022 and in the next paragraph stating Respondent filed its findings of fact and conclusions of Law on February 8, 2023).

[34] See Barry A. Miller, Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard 39 SAN DIEGO L. REV. (2020) ("When appellate judges believe that a potentially dispositive issue was missed by the parties, they have several options: (1) they can ignore the issue; (2) they can spot the issue in their opinion, but treat it as not properly raised or waived; (3) they can spot the issue and remand it for resolution in the first instance in the trial court; (4) they can ask the parties for supplemental briefs before deciding the issue; (5) they can decide the issue without briefs; (6) they can spot the issue in the opinion, and write dicta.").

variance.[35] In the absence of such written conclusions, courts reviewing the decisions of zoning boards may look to written documents as well as records of proceedings as sufficient formats for rendering final decisions, but the court should not simply disregard the Board's written Conclusions of Law and substitute its own conclusions of law, especially where as here, such conclusions are devoid of factual and legal support.[36] Otherwise, Appellant is forced to address two separate and potentially contradictory rulings, one by the Board and another by the court adopting an opinion of staff.

Respondents appear to argue against precedent by claiming the lower court was free to disregard the Board's Findings of Fact and Conclusions of law.[37] Respondents further argue the issue was not preserved for review because it was not addressed in Appellant's Motion for Reconsideration. This argument ignores the fact the lower court's Order not only failed to address the Board's actual "Conclusions of Law" but also failed to address Appellant's arguments as to those flawed Conclusions. This issue was amply briefed to the court in Appellant's Motion to Reconsider.[38] The substantive difference between the two arguments in terms of issue

[35] Appellant's Initial Brief, p. 20, ll. 15-16, p. 21, ll. 1-5 (citing S.C. Code Ann. § 6-29-800(F) (requiring [a]ll final decisions and orders of the board must be in writing and that [a]ll findings of fact and conclusions of law must be separately stated . . . .").

[36] See Austin v. Board of Zoning Appeals, 362 S.C. 29, 35, 606 S.E.2d 209 (Ct. App. 2004) (Municipalities are not free to ignore "the mandate of section 6-29-800 and other statutory provisions requiring fully formed written final decisions." (By inference, a court should not be able to ignore those final written decisions either.); see also, Massey, 341 S.C. at 200 (citing S.C. Code Ann. § 6-7-740).

[37] Respondents' Initial Brief, p. 11, ll. 20-27, p. 12, ll. 1-3.

[38] Appellant's Mot. to Reconsider, pp. 5-7 (The Order, drafted by Respondents' counsel, is a virtual facsimile of counsel's Reply to Appellant's Petition to the circuit court and fails to rule on or even address Appellant's arguments in rebuttal to the Board's extremely flawed Conclusions of Law.).

preservation would appear negligible.

CONCLUSION

According to the preamble to the Greer Zoning Code, zoning regulations are promulgated for the purpose of promoting the general welfare and public safety. Compelling Appellant to take down critically needed security fencing abutting an active rail line would serve neither the public good nor public safety. Moreover, protection of the public is a core responsibility of government. In conformance with that responsibility, the City should have erected its own security fencing in the parking lot to protect the public from an ultrahazardous condition. By refusing to meet Appellant halfway regarding fencing in the public parking lot, the City effectively abrogated its responsibility for public safety to a private property owner with complete indifference to the attendant burden on the owner. The effects of that abrogation, whether legally justified or not, constitute valid grounds for a variance.

The record shows Appellant satisfied each of the criteria under the Comprehensive Planning Act of 1994 required for a variance. In the alternative, Appellant should be entitled to an order remanding the matter to the Board for a full and fair hearing comporting with due process. The examination and weighing of nuanced and sometimes complex zoning laws can be challenging for lawyers, much less, non-lawyer Board members but is virtually impossible when the Appellant is denied the ability to present its case in full.

It is also clear from the record, the lower court made a variety of legal errors in evaluating Appellant's appeal, the cumulative effect of which should require, if not reversal, then at least remand to the court with instructions to address those errors, including especially those matters Appellant raised but which the court failed to rule on and which are central to Appellant's case.

Respectfully submitted,

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