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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark, Hayes, II
Circuit Court Judge

C.A. No.: 2023-CP-42-01155
Appellate Case No. 2024-000735

Spartanburg County and Cole Alverson in his Official Capacity as County
AdministratorRespondents,

v.

The Spartanburg County Board of Zoning Appeals, and Adam Washington Ballenger
Camp #68, Sons of Confederate Veterans, Inc.,

of which The Spartanburg County Board of Zoning Appeals is a Respondent and Adam
Washington Ballenger Camp #68, Sons of Confederate Veterans, Inc. is the Appellant.

INITIAL BRIEF OF RESPONDENTS

Respectfully submitted,

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January 6, 2025
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT CORRECTLY REVERSE THE DECISION OF THE SPARTANBURG COUNTY BOARD OF ZONING APPEALS AND REINSTATE THE NOTICE OF VIOLATION ISSUED BY THE SPARTANBURG COUNTY PLANNING AND DEVELOPMENT DEPARTMENT

- II. DID APPELLANT FAIL TO PROPERLY OBTAIN A DEVELOPMENT PERMIT FOR A PRINCIPAL USE OF ITS PROPERTY PRIOR TO CONSTRUCTING A STRUCTURE THEREON

STATEMENT OF THE CASE

Appellant appeals the February 20, 2024 Order of the Circuit Court reversing a decision of the Spartanburg County Board of Zoning Appeals and reinstating a Notice of Violation issued by the Spartanburg County Planning and Development Department, as well as the April 25, 2024 Order of the Circuit Court denying its motion to reconsider the February 20, 2024 Order.

In October, 2022, the Spartanburg County Planning and Development Department issued a Notice of Violation to the Appellant because it had constructed a 120 foot flagpole structure on its property without first obtaining a permit for a principal use of its property in violation of the Spartanburg County Unified Land Management Ordinance. Appellant appealed the Notice of Violation, and in its *Order on Appeal* the Spartanburg County Board of Zoning Appeals overturned the October 21, 2022 Notice of Violation. Spartanburg County and Cole Alverson in his Official Capacity as County Administrator timely appealed the decision of the Spartanburg County Board of Zoning Appeals to the Circuit Court, resulting in the above-referenced orders which are the subject of this appeal.

STANDARD OF REVIEW

In reviewing a decision of a zoning board of appeals, the Court of Appeals applies the same standard of review as the circuit court. *Venture Engineering for DT LLC v. Horry County Zoning Board of Appeals* 433 S.C. 419, 858 S.E. 2d 638 (Ct. App. 2021).

In accordance to the provisions of S.C. Code Ann. § 6-29-840(A), when the circuit court is deciding an appeal from the board of zoning appeals, the findings of fact by the board must be treated in the same manner as a finding of fact by a jury. Furthermore, “[i]n determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.” However, findings of the board of zoning appeals may be disturbed when the board has acted arbitrarily or in an obvious abuse of its discretion. “An abuse of discretion occurs when [a decision] is based upon an error of law or, when based upon factual conclusions, is without evidentiary support.” *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). “To the extent the board’s decision is unsupported by the evidence or is clearly erroneous, its decision is not fairly debatable but is instead arbitrary and an abuse of discretion.” *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (S.C. App. 1994), *Vulcan Materials Co. V. Greenville County Board of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), and *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E. 2d 161 (2013). Moreover, a board’s decision “will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. *Rest. Row Assoc.*, 335 S.C. 209, 216, 516 S.E. 2d 442, 446 (1999). “An abuse of discretion occurs when a [tribunal’s] decision is unsupported by the evidence or controlled by an error of law.” *Boehm v. Town*

of Sullivan’s Island Bd. of Zoning Appeals, 423 S.C. 169, 182, 813 S.E. 2d 874, 880 (Ct. App. 2018) (quoting *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E. 2d 282, 284 (Ct. App. 2011)).

STATEMENT OF FACTS

On December 13, 2019, a plat entitled Survey for William C. Berry was submitted to the Spartanburg County Planning and Development Department dividing property on Teaberry Road in Spartanburg County. On December 16, 2019, a quitclaim deed was recorded transferring that same property to the Adam Washington Ballenger Camp #68, Sons of Confederate Veterans, Inc. (the “Camp”). On June 3, 2022, Mr. James Garrett of G&S Electrical Services, LLC applied for an Electrical Permit at the property, providing a work description as “permanent power for decorative lights on pole.” A copy of the referenced Electrical Permit Application and Permit were attached collectively as Exhibit C to the *Petition for Appeal to the Circuit Court from the Decision of the Spartanburg County Board of Zoning Appeals* (“Petition”) filed by Spartanburg County and Cole Alverson in his Official Capacity as County Administrator (“Respondents”) (Petition, R. at ___, Ex. C).

At some point in time, the Camp allowed a 120 foot flagpole to be constructed on the property. No development application was ever made by either the prior property owner or the Camp to the Spartanburg County Planning and Development Department prior to the erection of the flagpole on the property, and the Camp never received a permit to develop the property or erect the flagpole on the property. The Camp never asked the Spartanburg County Planning and Development Department if a permit was required to

erect a flagpole on the property, instead making those inquiries to the building codes department, a separate department which does not deal with zoning issues. If they had asked the Planning and Development Department if a permit was required to install a 120 foot tall flagpole on the property, according to the sworn testimony of the Director of the Spartanburg County Planning and Development, Ms. Joan Holliday, at the BZA appeal hearing, they would have been told unequivocally that a permit was required. See Petition, Ex. A, pp. 79-80, R. at ____, Ex. A.

On October 21, 2022, the Spartanburg County Planning and Development Department issued a *Notice of Violation* to the Camp. See Petition, Ex. D., R. at ____. On November 7, 2022, the Camp submitted its *Application for Appeal* to the Spartanburg County Planning and Development Department. See Petition, Ex. E, R. at ____. The “Project Name” listed on the Application for Appeal is “Adam W. Ballenger, Memorial Park.”

The Camp’s appeal was scheduled to be heard by the Spartanburg County Board of Zoning Appeals (“BZA”) at its scheduled meeting on December 20, 2022. However, on December 13, 2022, the Camp requested a continuance which was granted. Therefore, the BZA considered the Camp’s appeal of the violation notice on January 31, 2023. A copy of the *Staff Report* of the Spartanburg County Planning and Development Department for use by the BZA at the January 31, 2023 hearing was attached as Exhibit F to the Petition. See Petition, Ex. E, R. at ____.

After considering the Camp’s appeal of the violation notice, the Board voted 5-3 to overturn the October 21, 2022 Notice of Violation. The BZA *Order on Appeal* found that the Notice of Violation was issued in error based on the fact that the Camp had (1)

obtained an electrical permit and (2) that the Unified Land Management Ordinance did not specifically address permits for flagpoles. See Petition, Ex. B, R. at _____. Respondents timely appealed the BZA's ruling to the circuit court, which reversed the decision of the BZA and reinstating the Notice of Violation.

ARGUMENTS

I. THE CIRCUIT COURT CORRECTLY REVERSED THE BZA'S DECISION BY FINDING THAT THE NOTICE OF VIOLATION WAS PROPERLY ISSUED BECAUSE THE CAMP HAD ESTABLISHED AN ACCESSORY USE WITHOUT HAVING BEEN GRANTED A PERMIT FOR A PRINCIPAL USE

This appeal primarily surrounds a land use issue, not a flagpole issue, and certainly not a free speech issue.

The Notice of Violation was issued to the Camp pursuant to the applicable provisions of the Spartanburg County *Unified Land Management Ordinance* ("ULMO"). Section 1.07 of the ULMO, captioned *Required Permits/Certificates*, states in pertinent part as follows:

No building, structure or sign requiring a permit or any part thereof shall be erected, added to or structurally altered, nor shall any excavation or grading be commenced until the required permits have been issued.

No building, structure or land shall be used; nor shall any building, structure or land be converted, wholly or in part to any other use, until all applicable and appropriate licenses, certificates and permits have been issued certifying compliance with the requirements of this Ordinance.

During the BZA hearing on January 31, 2023, Mr. John Harris, the Spartanburg County Attorney, when responding to an inquiry from one of the board members, stated as follows:

I think ultimately the board has to determine whether staff was correct in issuing the notice of violation and whether or not the applicant or the appellant, in this case, is required to get a permit to change the use as has been discussed tonight. That's really the underlying issue. Once that issue

is determined, then if the decision is the appellant has to go through the permit process, then the flagpole and its status would be addressed at that point in time, and that may be an issue that comes back to this board at some point in the future. But that's not the issue tonight. The issue tonight is whether or not they needed a permit to change the use of the property, and whether or not that use has, in fact, changed as staff determined at the point in time staff issued the notice of violation. See Petition, Ex. B, . p. 62 lines 6-22, R. at ____.

Clearly, the Spartanburg County Planning and Development Department determined that the Camp had changed the use of the property, that such change required a permit from the Spartanburg County Planning and Development Department, and that the Camp had never sought such a permit from the Spartanburg County Planning and Development Department. Indeed, to argue otherwise is ridiculous. On the date the Notice of Violation was issued on October 21, 2022, the property that was once nothing but raw land was now owned by the Camp, a 120 foot flagpole structure had been added at the cost of approximately \$100,000.00 (See Petition, Ex. A, p. 27, lines 17-18, R. at __), and, as the BZA found in paragraph 2 its *Order on Appeal*, the Camp had “developed the property to include the erection of a flagpole and other improvements on the subject site.” See Petition, Ex. B, R. at ____.

Section 1.13 of the ULMO captioned *Development Permit* states: “No building, other structure or land shall be used; nor shall any building, structure or land be converted, wholly or in part, to any other use, until a Development permit, certifying compliance with this Ordinance has been issued by the Planning Department staff, other than for such uses specifically exempted by this Ordinance or meet the following conditions: Continued identical use(s) of any building or land in existence and occupied on the effective date of

this ordinance.”¹ As the circuit court noted on page 10 of its February 20, 2024 order, the Camp never obtained a permit for the development of the property, despite the fact that it was clearly converted, at least in part, to some use other than vacant land. (February 20, 2024 Order, R. at ____).

The bottom line is that the Camp knew or should have known that in order to develop the property and convert its use it needed to be apply for and be issued a Development permit from the Spartanburg County Planning and Development Department. Instead, the Camp attempted to do an end run around the Spartanburg County Planing and Development Department by making inquiries to Spartanburg County Building Codes personnel, which the circuit court noted was not the proper department. (February 20, 2024 Order, p. 5, R. at ____). After BZA Member Thomas Davies had reiterated that ULMO Section 1.07 provides that you can’t change the land use without approval, Ms. Holliday stated that the department to go to obtain such approval is the Spartanburg County Planning and Development Department, which is where the zoning administrator located, not the building codes director who does not deal with zoning issues. See Petition, Ex. A, p. 86, lines 8-15, R. at ____.

¹The Camp argues that ULMO Section 1.13 was not properly raised by the County. However, the circuit court rejected that argument. Furthermore, in Exhibit A to the Petition, Section 1.13 is referenced on p. 71, line 20. See Petition, Ex. A, R. at _____. Also, see Petition, Ex. F. This is a copy of the *Staff Report* provided to the members of the BZA by the Spartanburg County Planning and Development staff for use at the hearing on the appeal of the Notice of Violation. That Report references ULMO Sections 1.07, 3.20, and 1.13. Therefore, ULMO Section 1.13 was properly before the BZA on January 31, 2023, and was therefore properly preserved for appellate review.

II. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE FLAGPOLE IS A STRUCTURE WHICH REQUIRED A PERMIT BECAUSE IT ALTERED THE USE OF THE PROPERTY

Although the Camp argues that the flagpole is not a structure, their own submissions to the circuit court refute that argument. Included as Exhibit C to the Camp's *Response to Petitioner's Petition for Appeal* ("Response") was a copy of the Federal Aviation Administration's Aeronautical Study, captioned **** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ** (CORRECTION)**, issued on April 22, 2022, and addressed to the Camp at its request. On the first page of this Study it identifies the "Structure" studied as a "Flagpole Flag Pole" with a height of 120 feet above ground level. See Response, Ex. C, R. at _____. As the circuit court noted in its February 20, 2024 order, this FAA Study was a pre-construction notice to the Camp of the FAA's safety determination for the 120 foot flagpole, and the term "structure" is repeatedly used in the FAA notice. Furthermore, the Camp sought approval from the former SC DHEC for storm water issues related to the construction project, and as referenced earlier the construction costs were approximately \$100,000.00. The flagpole on the Camp's property is most certainly a structure that changed the use of the property and, as such, required a permit from the Spartanburg County Planning and Development Department prior to being erected. The Camp never submitted a request for such a permit from the Spartanburg County Planning and Development Department, and therefore the October 21, 2022 Notice of Violation was properly issued and should be enforced.

A "zoning ordinance" [should be construed] to give it a 'practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers.'" *Vulcan*

Materials Co. v. City of Greenville Board of Zoning Appeals, 342 S.C. 480, 489, 536 S.E.2d 892, 897 (Ct. App. 2000). “As with statutes, the lawmakers’ intent embodied in an ordinance ‘must prevail if it can be reasonably discovered in the language used.’” *Id.* at 490, 536 S.E.2d at 897 (quoting *Charleston Cty. Parks & Recreation Comm’n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).“ All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *Eagle Const. Co. v. Cty of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895 (2008). “If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” *Id.* at 570-571, 666 S.E.2d at 896 (quoting *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

It strains credulity to argue that a 120 foot flagpole is not a structure. It clearly is and, as such, it was incumbent upon the Camp to seek and obtain a permit from the Spartanburg County Planning and Development Department prior to developing its property and erecting the massive flagpole on the property. Since the Camp did not avail itself of this clearly established permitting process, the BZA should have upheld the October 21, 2022 Notice of Violation issued by the Spartanburg County Planning and Development Department, and not doing so was an abuse of discretion and an error of law.

III. THE BZA'S FINDINGS WERE ERRONEOUS AS A MATTER OF LAW

As the circuit court pointed out in its February 20, 2024 order reversing the BZA's decision, the BZA's *Order on Appeal* concluded that the October 21, 2022 Notice of Violation was issued in error because (1) the landowner had obtained an electrical permit and (2) the ULMO does not specifically address permits for flagpoles. These were the only reasons given for the BZA overturning the Notice of Violation. The fact that the Camp obtained an electrical permit has no bearing on the validity of the Notice of Violation issued by the Spartanburg County Planning and Development Department. The electrical permit was obtained from the Spartanburg County Building Codes Department which, as previously articulated, is separate and distinct from the Spartanburg County Planning and Development Department. As the February 20, 2024 circuit court order articulates, there exists no reasonable relationship of the electrical permit obtained by the Camp to the Camp's non-compliance with Section 1.07 of the ULMO, and it's "illogical and arbitrary to find in this case, that obtaining the electrical permit can excuse non-compliance with the applicable and appropriate licenses, certificates, and permits compliance of Section 1.07. This finding, without justification, shifts zoning regulation and compliance to a separate section of county government. This decision is also capricious." See February 20, 2024 Order, p. 9, R. at ____.

Additionally, the fact that flagpoles are not specifically referenced in the ULMO is irrelevant. The ULMO cannot possibly denote everything that requires permitting by the Spartanburg County Planning and Development Department. However, a plain reading of the pertinent portion of Section 1.07 of the ULMO clearly shows that a permit is required before a structure, such as a 120 foot flagpole, can be erected on real property in the

covered portions of Spartanburg County. Furthermore, Article 6 of the ULMO is captioned *Definitions*. When addressing the word “structure” therein, the terms of Article 6 state: “[a]s defined by the Standard Building Code.” The Standard Building Code defines structure as “that which is built or constructed.” The circuit court also noted that the record establishes that the Camp never obtained a permit for the development of the property, “despite the fact that it was clearly converted, at least in part, to some use other than vacant land.” See February 20, 2024 Order, p. 10, R. at ____.

The circuit court also found as follows:

A plain reading of the zoning ordinance demonstrates that the Board’s decision reversing the staff’s decision to issue NOV was erroneous, as a matter of law. Moreover, the Board’s decision would limit staff to issue NOV’s for “structures” that are only “expressly” listed. This is a clear abuse of discretion by the Board and a clear reason why the decision is an error of law. The Board’s decision to reverse the staff’s NOV based on the fact that “flagpole” is not expressly listed in the LMO is erroneous, as a matter of law, under the facts of the present case, because the staff can no longer consider \$100,000 construction projects of structures of a height of 120-feet under its jurisdictional enforcement powers contained in the ULMO. This Board’s decision is erroneous as a matter of law.

See February 20, 2024 Order, page 11, R. at ____.

IV. FREE SPEECH ISSUES WERE NOT CONSIDERED BY THE BZA

As the circuit court pointed out, free speech issues were not considered by the BZA, there is no reference to any such issues contained in the BZA’s *Order on Appeal*, and the Camp’s attorney and representative at the January 31, 2023 BZA hearing acknowledged that free speech issues were “not why we’re here today. We’re here as to whether or not 1.07 was violated.” See February 20, 2024 Order, pages 12 and 13, (referencing Petition, Ex. A, p. 85, lines 20-25, p. 45, lines 11-15, and p. 29, lines 24-25, R. at ____). Therefore,

because of those declarations by the Camp's representatives to the BZA that free speech issues were not being presented for consideration, the circuit court found that it would be improper to consider those issues as part of the Camp's appeal. See *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E. 2d 161 (2013) (stating an issue must be raised and ruled upon by the trial court in order to be preserved for appellate review). Furthermore, the BZA's *Order on Appeal* contains no reference to any free speech issues. See Petition, Ex. B, R. at _____. Therefore, no free speech issues should be considered in this appeal.

CONCLUSION

The BZA's determination that the October 21, 2022 Notice of Violation was issued in error was without legal evidence to support it, was based on errors of law, and the BZA acted arbitrarily and abused its discretion in overturning the Notice of Violation. Therefore, the circuit court's decision to reverse the decision of the BZA and to reinstate the October 21, 2022 Notice of Violation was proper and should be affirmed by this Court.

Respectfully submitted,

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