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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2024-000659

David L. Lambert and Julia H. Beamish, Appellants,

v.

Aiken County Planning Commission, Aiken County Government, Pyramid Network Solutions for Verizon Wireless, Respondents.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case...1

Arguments

1. THE CIRCUIT COURT ERRED BY NOT REMANDING THIS MATTER TO THE AIKEN COUNTY PLANNING COMMISSION AND REQUIRING THE COMMISSION TO SET FORTH IN WRITING ITS FINDINGS AND CONCLUSIONS WITH RESPECT TO ITS DECISION TO GRANT VERIZON'S APPLICATION FOR THE CONSTRUCTION AND OPERATION OF A CELL TOWER WITHIN THE BLUFFWOOD EAST COMMUNITY? 6

2. THE CIRCUIT COURT ERRED BY NOT CONCLUDING THAT THE EVIDENCE PRESENTED TO THE PLANNING COMMISSION DOES NOT SUPPORT ITS DECISION TO ALLOW VERIZON TO CONSTRUCT AND OPERATE A CELL TOWER WITHIN THE BLUFFWOOD EAST COMMUNITY? 11

Conclusion...13

TABLE OF AUTHORITIES

CASES

Grays Hill Baptist Church v. Beaufort County, 431 S.C. 630, 850 S.E.2d 29 (2020) 6

STATUTES

S.C. Code Ann. § 6-29-360(B) (1976) 7

S.C. Code Ann. § 6-29-370(1976) 7

Aiken County Ordinance Section 24-3.5.2 .... 9, 11, 13

Aiken County Ordinance Section 24-3.5.5.(6)(b) 10

RULES OF COURT

Rule 60(b)(2), SCRCP 5

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR BY NOT REMANDING THIS MATTER TO THE AIKEN COUNTY PLANNING COMMISSION AND REQUIRING THE COMMISSION TO SET FORTH IN WRITING ITS FINDINGS AND CONCLUSIONS WITH RESPECT TO ITS DECISION TO GRANT VERIZON'S APPLICATION FOR THE CONSTRUCTION AND OPERATION OF A CELL TOWER WITHIN THE BLUFFWOOD EAST COMMUNITY?

2. DOES THE EVIDENCE PRESENTED TO THE PLANNING COMMISSION SUPPORT ITS DECISION TO ALLOW VERIZON TO CONSTRUCT AND OPERATE A CELL TOWER WITHIN THE BLUFFWOOD EAST COMMUNITY?

STATEMENT OF THE CASE

This matter is an appeal of a decision of the Respondent Aiken County Planning Commission (referred to here as "the Planning Commission") and by which it approved an application to construct a wireless telecommunications facility (referred to here as "the Cell Tower") on a parcel of real estate located in Aiken County. The application to construct the Cell Tower was presented to the Planning Commission by the Respondent Pyramid Network Solutions for Verizon Wireless (referred to here as "Verizon").

The parcel of property where the Cell Tower is proposed to be located is owned by the Gerald L. Waters Living Trust, which is not a party in this case (referred to here as "the Waters Property")[1]. The Appellants, David L. Lambert and Julia Beamish, own two parcels of property directly adjacent to the Waters Property, and where they reside during certain parts of the year. One of their lots was purchased from Mr. Waters in 2010 and the other was purchased from him in September 2020.

The Appellants' property is located within what is known as the Bluffwood East

[1] Mr. Waters, individually, purchased the property in January 2006 and transferred it to his living trust in January 2006.

development. Bluffwood East is a planned equestrian and residential community, and is governed by the "Restrictive Covenants for Bluffwood East." ("the Restrictive Covenants"). The Appellants also contend that the Waters' property, where the Cell Tower is proposed to be located, is also part of Bluffwood East and is governed by those covenants.

The Restrictive Covenants, which are signed by Mr. Waters, first state: "The property described herein is specifically made subject to the following "Restrictive Covenants". Mr. Waters is the "grantor" under the terms of the covenants. They then provide:

> 1. Grantor intends that this property and *other nearby property owned by Grantor*, shall be known as Bluffwood East. (emphasis added).
>
> The Restrictive Covenants further state:
>
> 6. No commercial activity shall be conducted on subject property specifically including, but not limited to, chicken houses, hog farms, or bait farms. The boarding and training of horses is permitted. It will be the responsibility of each owner to contain the animals on their property, and to prevent them from becoming a nuisance to their neighbor.
>
> (R. p. 393).

There is no question that the operation of a wireless communications facility within Bluffwood East is a proscribed "commercial activity".

Verizon's application to construct a cell tower on the Waters' property was considered by the Planning Commission during three separate public hearings beginning in October 2022. (R. pp. 94-392; see also, R. p. 2). In addition to the Appellants a number of other residents of Bluffwood East appeared before the Planning Commission and expressed their objections to approval of the application.

Those objections are two-fold: (1) the Restrictive Covenants for Bluffwood East do

not allow the construction and operation of a cell tower within the Bluffwood community and (2) the construction and operation of such a tower within the community greatly and adversely affects the aesthetic nature of the community and adversely impacts the visual aspects of the land within and around the community.

During the course of the three hearings held before the Planning Commission the Appellants offered to its members a copy of a plat of Bluffwood East Mr. Waters gave to them in 2020 when they first bought property in Bluffwood East from him. (R. p. 395). This plat is referred to Plat "A". Importantly, the lots designated as 34, 35 and 36 on Plat "A" were owned by Mr. Waters at the time he gave that plat to the Appellants.

One of the lots purchased by the Appellants from Mr. Waters is a portion of Lot 36 on Plat "A". The Cell Tower is proposed to be built on Lot 34 - which is owned by Mr. Waters. At the hearings before the Planning Commission the Appellants told its members that the property they purchased from Mr. Waters was subject to the Restrictive Covenants, as well as the "other nearby property" owned by him.

At some point between the dates of the three hearings held before the Planning Commission, the Commission's staff undertook to research the issue of whether Lot 34 was subject to the Restrictive Covenants and, therefore, prohibited the installation and operation of the Cell Tower. The staff of the Commission concluded that it was not so restricted.

The last of the three hearings before the Planning Commission was held on January 19, 2023. At the conclusion of that hearing, and in a vote split amongst its members, the Commission verbally approved Verizon's application to construct and operate the Cell Tower on Lot 34 as shown on Plat "A". The Commission did not reduce its decision to writing, explaining why it voted to

approve the application.

The Appellants then appealed the Planning Commission's decision to the Court of Common Pleas for Aiken County. Following a hearing held before the Honorable Clifton B. Newman, Circuit Court Judge, the Planning Commission's decision was affirmed. (R. pp. 1-9).

The Appellants then filed a Motion to Alter and /or Amend Judge Clifton's order affirming the decision of the Planning Commission. (R. pp. 83-85). Judge Newman subsequently summarily denied the Appellants' motion. (R. pp. 10-11). The Appellants then filed a Notice of Appeal of Judge Newman's orders for this case. (R. p. 491-493).

On April 19, 2024 the Appellants and several other residents of Bluffwood East commenced a civil action in Aiken County against Mr. Waters and his Living Trust, titled Julia H. Beamish, et al. v. Gerald Waters, et al., and bearing Civil Action No. 2024CP0200989. By way of that civil action the plaintiffs seek a declaration from the court that Lots 34, 35, the remaining portion of Lot 36 owned by Mr. Waters, and "other nearby property" still owned by him or his Trust, are subject to the Restrictive Covenants for Bluffwood East.

Mr. Waters and his Trust answered the lawsuit and also asserted counterclaims against the plaintiffs. As part of their counterclaims, Mr. Waters and his Trust denied that Lot 34 as shown on Plat "A" is subject to the Restrictive Covenants. In support of that position counsel for Mr. Waters and his Trust attached, as an exhibit to their pleading, another plat of Bluffwood East, which is referred to here as Plat "B".

The production of Plat "B" was startling to the Appellants as well as the other plaintiffs in the civil action. As can be readily seen, Plat "A" and Plat "B" are distinctly different from each other, and particularly with respect to the issues presented in this appeal as well as the civil action filed in Aiken County - Plat "B" does not show Lots 34, 35 and 36. It is clear that Plat

"A" was prepared after Plat "B" was prepared, as Lots 34, 35 and 36 are drawn over and obscure portions of certain surveying information shown on the upper right side of Plat "A".

The logical conclusions to be drawn by the discovery of Plat "B" is that it predates Plat "A" and has likely been used by Mr. Waters in an attempt to show that Lot 34 - where the Cell Tower is proposed to be located - is not a part of Bluffwood East and is, therefore, not subject to the Restrictive Covenants. In other words, Mr. Waters probably has used two plats of Bluffwood East, which contain conflicting information, and for different purposes.

In light of the discovery of Plat "B" the Appellants have, along with their Initial Brief, filed a motion before this Court, pursuant to Rule 60(b)(2), SCRCP. They contend that the revelation of Plat "B" is newly discovered evidence which bears on the relevant issues pending before this Court.

As there are no means of discovery allowed in the matter before the Planning Commission there is no way the Appellants, using due diligence or otherwise, could have uncovered the existence of Plat "B" during the course of the Commission's consideration of the application for construction and operation of the Cell Tower.

Further, the Appellants contend that had the Planning Commission been made aware of the existence of Plat "B" a majority, if not all, of its members would have summarily denied Verizon's application for the Cell Tower; it clearly shows that after Plat "B" was prepared Mr. Waters expanded the boundaries of Bluffwood East using Plat "A" - which he gave to the Appellants--and made Lot 34, as well as Lots 35 and 36, subject to the Restrictive Covenants, which bars construction and operation of the Cell Tower on those properties. At a minimum, Lots 34, 35 and 36 are "nearby property" owned by Mr. Waters as defined by the Restrictive Covenants and, therefore, are subject to the Covenants.

The Appellants respectfully assert that this Court should grant the Appellants' Motion to introduce Plat "B" into evidence as part of this case, and remand this matter to the Planning Commission for additional proceedings before it with respect to consideration of Verizon's application to build and construct a Cell Tower on Lot 34.

During the pendency of that remand counsel in the civil action intend to conduct discovery to determine the exact facts and circumstances surrounding the preparation of both Plats "A" and "B", as well as the facts and circumstances surrounding Mr. Waters' contact with Verizon and what he told them with regard to the existence or non-existence of the Restrictive Covenants as that issue bears on the resolution of the issues presented before this Court.

ARGUMENTS

I. THE CIRCUIT COURT ERRED BY NOT REMANDING THIS MATTER TO THE AIKEN COUNTY PLANNING COMMISSION AND REQUIRING THE COMMISSION TO SET FORTH IN WRITING ITS FINDINGS AND CONCLUSIONS WITH RESPECT TO ITS DECISION TO GRANT VERIZON'S APPLICATION FOR THE CONSTRUCTION AND OPERATION OF A CELL TOWER WITHIN THE BLUFFWOOD EAST COMMUNITY.

The Appellants submit that the standard of review to be used by this Court in this case is whether the Planning Commission's decision lacks evidentiary support or is affected by an error of law. Grays Hill Baptist Church v. Beaufort County, 431 S.C. 630, 850 S.E.2d 29 (2020).

The Appellants first contend that the Planning Commission erred, as a matter of law, in this case by failing to set forth in writing its findings and conclusions with respect to why it granted Verizon's application to build and operate a wireless telecommunication tower next door to them. Without such findings and conclusions the Appellants, as well as this Court,

are unable to determine if the Commission, when mandated to do so, considered certain key factors which directly bear on whether the application should be denied or granted.

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 sets forth specific requirements for counties and municipalities to follow when considering and acting upon applications such as the one Verizon presented to the Aiken County Planning Commission.

In particular S.C. Code Ann. § 6-29-360(B) (1976) provides, in part:

> (B) The commission shall adopt rules of organizational procedure and shall keep a record of its resolutions, findings, and determinations, which record must be a public record.

S.C. Code Ann. § 6-29-360(B) (1976).

Further, S.C. Code Ann. § 6-29-370(1976) provides:

> The governing authority may provide for the reference of any matters or class of matters to the local planning commission, with the provision that final action on it may not be taken until the planning commission has submitted a report on it or has had a reasonable period of time, as determined by the governing authority to submit a report.

S.C. Code Ann. § 6-29-370(1976)

There appears to be no specific South Carolina authority interpreting this statutory obligation with respect to the facts of this case, or offering any guidance as to the extent to which planning commissions must comply with this obligation. In his order dated December 28, 2023, and after reviewing the entirety of 6-29-360(B) (1976), Judge Newman first appears to decide that the Aiken County Planning Commission has no obligation whatsoever to explain its decision in this case. He then decided that there is "modest" obligation in that regard.

In his order Judge Newman held that "the Commission not only met, but well exceeded its modest obligation under Section 62-29-360(B) of the Act." To support this conclusion he wrote that the Planning Commission's staff "investigated and prepared a report" in which it determined that Verizon's proposed cell tower:

> a. Has met and / or exceeded County adopted IBC and ANSI codes;
>
> b. Does note conflict with any designated historical site; and
>
> c. Does not pose an 'unacceptable risk or unreasonable probability of' risks to residents, the public, employees, and agent of the County or employees of service providers"
>
> (R. p. 6).

First, there is absolutely no public written decision or report of the Planning Commission's members themselves setting forth their decision in this case, nor any of the findings set forth above. All of these findings were made by the Planning Commission's staff before the members of the Commission even considered and acted upon the Verizon application. (Record of Planning Commission; Commission Staff Report - Telecommunication Tower Application - dated 9/30/22). Further, there is nothing in the record for this matter by which the members of the Planning Commission adopted any findings made by its staff.

Further, and despite a recognition of at least "modest obligation" of the Planning Commission, Judge Newman then wrote:

> Appellants' argument proves too much. The Act mandates only that "a record of [the Commissions] resolutions, findings and determination" be kept - it does not specify what form the record must take or require the Commission to explain its decision.

(R. p. 4).[2]

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[2] In their motion to alter and /or amend Judge Newman's Order dated 12/28/23 the Appellants asked Judge Newman, without success, to clarify what he meant by stating "Appellants' argument proves too much." (R. p. 83-84).

Second, and perhaps most importantly, the Planning Commission made no findings or conclusions with respect to certain criteria it must consider while considering Verizon's application for construction and operation of the Cell Tower. Aiken County Ordinance Section 24-3.5.2 sets forth the County's "Overall policy and desired goals for permits for wireless telecommunications facilities", and provides:

> *In order to ensure that the placement, construction, and modification of wireless telecommunications facilities protect the county's health, safety, public welfare, environmental features, and nature and character of the community*, the county hereby adopts an overall policy with respect to permits for wireless telecommunications facilities for the express purpose of achieving the following goals:
>
> (1) Requiring permits for any new wireless telecommunications facilities, tower, co-location of antennas, or material modification of an existing wireless telecommunications facility.
>
> (2) Implementing an application process for person(s) seeking permits for wireless telecommunications facilities;
>
> (3) Establishing a policy for examining an application and issuing permits for wireless telecommunications facilities that is both fair and provides consistent disposition.
>
> (4) Promoting and encouraging, wherever possible, the sharing and/or co-location of wireless telecommunications facilities among service providers.
>
> *(5) Regulating 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.*
>
> (Aiken County Ordinance Section 24-3.5.2) (emphasis added).

Of note, the Planning Commission staff set forth at the bottom of its report the following statement, consistent with the mandate provided by Section 24-3.5.2 of the County Ordinance:

> The telecommunications tower regulations are intended to protect the County's health, safety, public welfare, environmental features, and nature and character of the community.
>
> (R. p. 107).

Despite its Staff's recognition of this mandate, the members of the Planning Commission did not make any findings or conclusions with respect to them.

In addition, the Planning Commission made no findings or conclusions as to whether the property where the cell tower is proposed to be located is governed by restrictive covenants which prohibit the operation of a commercial enterprise within Bluffwood East. Such findings are necessary for purposes of determining whether the Cell Tower is "legally permissible". (See Aiken County Ordinance Section 24-3.5.5.(6)(b): "The application shall include the following statements in writing: (b)The construction of the wireless telecommunications facility is legally permissible, including, but not limited to the fact that the applicant is authorized to do business in the state and county."[3]

In fact, the issue of whether the Restrictive Covenants prohibit the construction and operation of a cell tower Mr. Waters' property is the most hotly-contested issue in this case. The Appellants submit that the controversy over this issue is why three hearings took place before the Commission, and extensive discussions were had regarding the Restrictive Covenants, before it verbally voted, wrongfully, to approve Verizon's application. (R. p. 96).

In his Order dated December 28, 2023 Judge Newman concluded that the Appellants did not raise, as part of this appeal, the issue of whether the Restrictive Covenants prohibit the construction and operation of a cell tower on Mr. Waters' property. The Appellants submit that this issue is fully embraced in their Notice of Appeal of the Planning Commission's

[3] Verizon's application for construction of the Cell Tower contains none of this information.

Decision, was fully argued initially on appeal before Judge Newman without objection, and also was made part of their Motion to Alter and / or Amend his Order dated December 28, 2023. (R. pp. 12-13; see also, R. pp. 473-474).

II. THE EVIDENCE PRESENTED TO THE PLANNING COMMISSION DOES NOT SUPPORT ITS DECISION TO ALLOW VERIZON TO CONSTRUCT AND OPERATE A CELL TOWER WITHIN THE BLUFFWOOD EAST COMMUNITY.

As stated above it is difficult for the Appellants to determine why and how the Planning Commission reached the decision it made in this case without having the benefit of written findings and conclusions supporting that decision. If this Court, however, finds that the Commission adequately set forth the reasons for its decision the Appellants contend that the evidence contained in the record for this case does not support that decision.

It is clear that the construction and operation of a cell tower on Mr. Waters' property is not allowed and for two principal reasons. First, as argued above, the clear terms of the Restrictive Covenants for Bluffwood East prohibit it.

Second, and even more importantly, construction and operation of the Cell Tower in the Bluffwood East community is not consistent with the mandates set forth in the Aiken County Ordinance in that it does not protect the "environmental features and nature and character" of the community. See Aiken County Ordinance, Section 24-3.5.2.

In that regard Mr. Waters himself has defined the environmental features and nature and character of the Bluffwood East community by way of the Restrictive Covenants he produced himself, and placed upon the lands owned by the Appellants as well as the other plaintiffs in the lawsuit filed against him. These covenants are typical of those placed upon land to protect the character and nature of equestrian communities.

For example, the Restrictive Covenants do not allow mobile homes in

Bluffwood East, and homes built there must be of “high quality and workmanship” and shall be “in keeping with suitability of such improvements *to the environment and surroundings*, so as to enhance the value of the subject property and *the surrounding property”*. (R. pp. 393-394) (emphasis added).

The covenants further allow barns to house animals, and related out-buildings to be constructed, but restrict the construction of other types of structures. As previously noted no “commercial activity” is allowed in Bluffwood East, except those typically allowed in equestrian communities - for example, the “boarding and training of horses”. (R. pp. 393-394). Fencing along frontage roads is allowed but limited to “black three or four boards with or without black woven wire”, a typical type of fencing used along the borders of horse and animal farms. (Id.).

The covenants state that trash and debris must be contained and property owners must “prevent any unclean, unsightly or unkept condition of buildings or grounds which *subtract from the natural harmony and aesthetic of Bluffwood East”*.(R. pp. 393-394) (emphasis added). Horse trailers, campers and similar vehicles may be parked within the community “so long as such vehicles are not displayed in an unsightly manner, *such as to spoil the aesthetic beauty of Bluffwood East”*. (Id.) (emphasis added).

Finally, the Restrictive Covenants establish 15-foot “horse and pedestrian” easements along the rear of lots in Bluffwood East “for the use and enjoyment of all owners”. (R. pp. 393-394) No bicycles, mountain bikes, motor bikes, or all-terrain vehicles may be operated upon these easements, but horse drawn carts or carriages are “specifically permitted.” (Id.).

Each property owner in Bluffwood East is responsible for maintaining that

portion of an easement adjoining their property to keep it "clean and usable" by other property owners in the community - this is a typical requirement placed upon residents of equestrian communities to ensure that no manure or other animal waste is thrown over a fence and deposited in an easement where horses are ridden or individuals walk.

Having the benefit of such specific restrictions which define and protect the "nature and character" of Bluffwood East and "other nearby property" owned by Mr. Waters, it is difficult to understand how the Planning Commission approved the construction and installation the Cell Tower in this case. At a minimum this Court should require the Planning Commission to explain why it disregarded the mandate set forth in Section 24-3.5.2 of the Aiken County Ordinance governing the construction and operation of such towers.

CONCLUSION

For the reasons set forth above the Appellants respectfully submit that this Court should remand this matter to the Aiken County Planning Commission and order it reconsider the application submitted by Verizon, and set forth in writing the specific reasons why that application should be denied or granted. Such an order should require the Commission to address whether the Restrictive Covenants of Bluffwood East apply to the property where the cell tower is to be located, and to also consider the mandate set forth in Section 24-3.5.2 of the Aiken County Ordinance as set forth above.

In the event that this Court finds that the Planning Commission adequately explained its decision to grant the application the Appellants respectfully submit that the evidence contained in the record for this case does not support the Commission's decision in that regard, and it should be reversed in its entirety.

Respectfully Submitted,

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