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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Robert J. Bonds

Case No.: 2024-CP-07-01072

Appellant Case No.: 2024-001984

MARE DECKARD.....Appellant(s),

vs.

TOWN OF PORT ROYAL ZONING BOARD OF APPEALS.....Respondent(s).

RESPONDENT INITIAL BRIEF

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Statement of the Issues

I. Did the Town of Port Royal Zoning Board of Appeals correctly determine that Division 5.5 of the Town Code, rather than Divisions 2.2 and 2.3 of the Town Code, applies to the fence permit at issue because Divisions 2.2 and 2.3 apply only to new development or redevelopment and not to property developed thirty years ago?

II. Did the both the Circuit Court and the Town of Port Royal Zoning Board of Appeals appropriately issue their respective orders in this case when the Circuit Court issued a Form 4 Order and the Zoning Board of Appeals explicitly outlined its findings of fact and conclusions of law as required by statute?

Statement of the Case

This case comes down to a dispute between two neighbors, Ms. Deckard and Ms. Witt, regarding a licit fence that Ms. Witt erected on her own property, adjacent to a communal alleyway. [April 15, 2024 Order of Zoning Board of Appeals]. As a result of this fence, Appellant Ms. Deckard testified that she is no longer able to back her boat out from behind her house into the alleyway without hitting Ms. Witt's fence, which has inconvenienced her and her business. [Video Transcript of April 15, 2024 hearing before the Zoning Board of Appeals].

The neighborhood at issue was platted in 1994, and it contains an alleyway that runs from 10th Street to 11th Street with two bends in the alleyway. [Plat, Phase 1 Village Renaissance]. Ms. Witt's property is located at one of those bends. [Video Transcript of April 15, 2024 hearing before the Zoning Board of Appeals]. Ms. Witt and other neighbors testified before the Zoning Board of Appeals ("ZBOA") that for years, users of the alleyway have been driving over the corner of her property as they come around the bend. [Video Transcript of April 15, 2024 hearing before the Zoning Board of Appeals]. Ms. Witt first installed planters, and then large, six foot (6') wooden posts on the end of her property, presumably in an attempt to prevent people from driving over that area. [Mare Deckard letter to TOPR dated February 3, 2024]. Ms. Deckard, who had also written to the Town that she has been concerned about the ingress and egress of her boat vis-à-vis this property since at least 2022, filed a FOIA request relating to the posts on January 10, 2024, and formally complained about the posts to the Town of Port Royal ("the Town") on February 3, 2024. [Mare Deckard letter to TOPR dated February 3, 2024], [Mare Deckard letter to TOPR dated February 26, 2024]. On

February 15, 2024, the Director of Administrative Services responded to Ms. Deckard's letter, advising her that the permit for the posts had been rescinded but that Ms. Witt would "not be prohibited from resubmitting an application for the construction of a fence on her property," so long as it complied with the Town's Development Code. [February 15, 2024 Letter from Town of Port Royal Director of Administrative Services to Appellant].

Ms. Witt was eventually granted a permit to construct (and did in fact construct) a 3.5' tall fence along the end of her property, as was permitted under Division 5.5 of the Development Code. The Town of Port Royal testified that the Town worked closely with Ms. Witt to ensure that the fence complied with the Development Code. [Video Transcript of April 15, 2024 hearing before the Zoning Board of Appeals]. Ms. Deckard wrote the Town of her intention to appeal the permit for Ms. Witt's fence, and a hearing was held before the Town of Port Royal Zoning Board of Appeals on April 15, 2024. [Mare Deckard letter to TOPR dated February 26, 2024], [See generally Video Transcript of April 15, 2024 hearing before the Zoning Board of Appeals]. In addition to arguing that the fence prohibited her from backing her boat out of her driveway, Ms. Deckard argued at the hearing that the fence was a safety hazard because it blocked visibility and it restricted emergency vehicles' access to the alleyway. [Video Transcript of April 15, 2024 hearing before the Zoning Board of Appeals]. Specifically, Ms. Deckard argued that the fence violated Sections 1.2.10, 1.3.40, 2.1.10, 2.2.80, 4.2, 5.5.10, 5.5.20, and 5.5.30 of the Development Code. [Video Transcript of April 15, 2024 hearing before the Zoning Board of Appeals].

The Town in turn offered photographic evidence that a seated driver can see over a 3.5' tall obstacle, and the Town also read from an email from the Fire Chief stating that the Fire Marshall confirmed that the fire department would access the relevant buildings from the front streets (10th and 11th Street), not from the alleyway, thus addressing concerns that the fence affected EMS vehicles' ability to access the residences and accessory buildings. [Video Transcript of April 15, 2024 hearing before the Zoning Board of Appeals].

The Zoning Board of Appeals issued an order dated April 15, 2024 concluding that, under Division 5.5, a 3.5' tall living fence ***is permissible*** adjacent to the alley right-of-way at Ms. Witt's property. [ZBOA Order dated April 15, 2024 (emphasis added)]. Specifically, the Zoning Board of Appeals made the following findings of fact:

1. The fence is not encroaching upon the alley right-of-way.
2. The fence is in compliance with the requirements of the zoning ordinance.

[ZBOA Order dated April 15, 2024]. The Zoning Board of Appeals specifically concluded that various Code sections raised by Ms. Deckard, including Sections 1.2.10, 1.3.40, 2.1.10, 2.2.70, 2.2.80, and 4.2.10, were not relevant to this appeal. [ZBOA Order dated April 15, 2024]. This Order was mailed to the parties on April 30, 2024. [ZBOA Order dated April 15, 2024].

On May 16, 2024, Ms. Deckard filed a notice of appeal of the ZBOA's order with the circuit court of Beaufort County. [May 16, 2024 Notice of Appeal]. A hearing was held on her appeal before Judge Bonds on August 13, 2024. [Transcript of August 2024 hearing]. On August 19, 2024, Judge Bonds denied Ms. Deckard's appeal by a Form 4 Order. [Form 4 Order dated August 19, 2024]. Ms. Deckard filed a motion for

reconsideration on August 28, 2024, which was heard on November 4, 2024 and denied on November 6, 2024. [Motion for Reconsideration dated August 28, 2024], [Transcript of November 4, 2024 hearing], [Form 4 Order dated November 6, 2024]. On November 20, 2024, Ms. Deckard filed a notice of appeal to the Supreme Court, which was later transferred to the Court of Appeals. [Notice of Appeal dated November 20, 2024]. This appeal follows.

Standard of Review

As this court very recently acknowledged, "[t]he appellate court gives 'great deference'" to the decision of the zoning board of appeals. John's Marine Serv., Inc. v. Oconee Cnty. Bd. of Zoning Appeals, No. 2022-001796, 2025 WL 542574, at *4 (S.C. Ct. App. Feb. 19, 2025), reh'g denied (Apr. 17, 2025). In reviewing a decision of the zoning board of appeals, the appellate court must use the same standard of review as the circuit court, Venture Eng'g for DT LLC v. Horry Cnty. Zoning Bd. of Appeals, 433 S.C. 419, 426, 858 S.E.2d 638, 642 (Ct. App. 2021), and "the circuit court must uphold a decision of the BZA unless there is no evidence to support it." John's Marine Serv., 2025 WL 542574, at *4.

When reviewing an appeal from the zoning board of appeals, the South Carolina Code specifically requires the court to treat the zoning board's findings of fact "in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code § 6-29-840. Additionally, "In 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." Id. Notably, a zoning board's decision will only 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 Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

Argument

The scope of this appeal is limited by statute to "determin[ing] only whether the decision of the [Zoning Board of Appeals] is correct as a matter of law." S.C. Code § 6-29-840. Appellant has raised numerous arguments in her opening brief, some of which are ancillary to whether the Zoning Board of Appeals correctly interpreted and applied the law. The two issues that are directly within the scope of this appeal are her second and fourth arguments: namely, whether the ZBOA properly applied Division 5.5 and failed to apply Divisions 2.2 and 2.3 of the Town of Port Royal Development Code ("Development Code") to the fence in question; and whether the ZBOA laid out sufficient grounds for its decision as required by South Carolina Code Section 6-29-800, subd. (F) (and similarly, whether the Circuit Court laid out sufficient grounds for its decision). Respondent's brief will focus predominantly on these two arguments, and will only briefly address the ancillary arguments at the very end of this Argument section.

I. The Zoning Board of Appeals correctly determined that the only relevant Section of the Town Code implicated in this dispute is Section 5.

The question before the ZBOA was simply whether Ms. Witt's fence was permissible. The applicable section in the Development Code governing fences is Division 5.5, titled "Fences and Walls," and the ZBOA unequivocally found that the fence here complied with the requirements of Division 5.5. [ZBOA Order dated April 15, 2024]. On appeal, Appellant does not seem to challenge that the fence at issue violates this section. Instead, Appellant has shifted the focus of the issue from the fence itself to the supposed effect that the fence has on the alleyway. She argues that certain

sections of the Development Code governing alleyways cannot be simultaneously complied with as long as the fence on Ms. Witt's property exists.

Thus, instead of only looking at Division 5.5, Appellant alleged before the ZBOA that the fence at issue was governed by various subsections of Articles 1, 2, 4, and 5 of the Development Code. The ZBOA, in its order, specifically concluded that Division 5.5 governed this fence, *and that the other sections referenced were not relevant.* [ZBOA Order dated April 15, 2024 (emphasis added)].

On appeal, Respondent now highlights two subdivisions that she argues regulate her alleyway and require the removal of the fence: Divisions 2.2 and 2.3. In reality, however, Divisions 2.2 and 2.3 only apply to alleyways built in *new or redeveloped* subdivisions. Respondent's subdivision was built in 1995 and has not been redeveloped; it is thus outside the scope of Divisions 2.2 and 2.3.

A. Division 2.2 explicitly does not apply to an alleyway built in 1995 and cannot be applied retroactively.

Division 2.2 does not apply to the alleyway in question because it applies only to new alleyways and cannot be enforced retroactively. Division 2.2 of the Port Royal Development Code contains "general standards for laying out blocks, lots, civic space set-asides, and thoroughfares." PRDC § 2.2.10. They are explicitly "for use in *new* developments, as well as the retrofit or infill of existing locations." *Id.* (emphasis added). Specifically, Subdivision 2.2.20, titled "Applicability," states that "[t]hese general layout standards apply to all development that is subject to Site Development Plan Review, described in Division 8.3 (Site Development Plan Review), or Subdivision Review, described in Division 8.4 (Subdivision Review), unless specifically exempted in a Subsection." PRDC § 2.2.20, subd.(A). Division 8.3 is applicable to "proposed

development" by a landowner[1], and Division 8.4 is applicable to "new subdivisions." PRDC §§ 8.3.10, 8.4.10. An alleyway that is thirty years old is neither part of "proposed development" nor a "new subdivision," and thus it is not subject to the regulations of Division 2.2.

Additionally, Respondent would point out that Appellant cites to and quotes from an educational pop-out-box found at the end of Subdivision 2.2.80 titled "We Do This Because" to support her contention that fire trucks should be able to use alleyways. She does not cite directly to any of the regulations themselves. The contents of this box provide commentary on the regulations and information for the public, but they are not regulations themselves and cannot supersede the black letter of the law. However, regardless of whether the text in the pop-out-box is authoritative, it would still only apply to new alleyways and not retroactively to this alleyway.

B. Division 2.3 applies only to new thoroughfares and not the 1995 Alleyway.

Notably, in an argument not made before the Zoning Board of Appeals, Appellant claims that Division 2.3 regulates the alleyway in question. However, by its own text Division 2.3 applies only to "the transformation of existing thoroughfares and the creation of new thoroughfares." PRDC § 2.3.20, subd. B. The 1995 Alleyway is certainly not new and it is not undergoing "transformation" in any sense of the word that is relevant to the Development Code. Again, the fence is on Ms. Witt's property and not on the alleyway, and thus the construction of her fence does not affect the standards applicable to the alleyway.

[1] Notably, the addition of a fence on Ms. Witt's property did not qualify as new development by a landowner under this section, as it was specifically exempted by Section 8.3.20(F). This, however, only answers whether Ms. Witt's property was subject to Division 2.2; it is still irrelevant to the question of whether the *alleyway* is subject to Division 2.2.

Because Divisions 2.2 and 2.3 only govern new or redeveloped alleyways, they do not apply to the case at issue. This Court should affirm the circuit court and the Zoning Board of Appeals and hold that Division 5.5 – and not Divisions 2.2 or 2.3 – governs and allows Ms. Witt's fence.

II. Both the Town of Port Royal Zoning Board of Appeals and the Circuit Court issued valid orders with sufficient basis.

Appellant makes the argument that both the ZBOA and the Circuit Court should have provided more explicit grounds for their conclusions. Both orders, however, were fully justified by the rules and statutes governing them.

A. The Zoning Board of Appeals made sufficient factual findings to support their conclusion.

Appellant claims that the ZBOA did not sufficiently state grounds for its decision to affirm the permit for Ms. Witt's fence. The South Carolina Code section governing the Zoning Board of Appeals provides as follows: "All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board..." S.C. Code §6-29-800, subd. (F). Appellant relies on this statutory subdivision for her contention that the ZBOA's order is deficient.

A review of the Order of the Zoning Board however shows that the order was in writing and separately stated all findings of fact and conclusions of law. Specifically, the Order made explicit conclusions of fact that: "(1) The fence is not encroaching upon the alley right-of-way," and "(2) The fence is in compliance with the requirements of the zoning ordinance." [ZBOA Order dated April 15, 2024]. The Order also made conclusions of law that "zoning ordinance section 5.5 is applicable in this case" and that

"Sections 1.2.10, 1.3.40, 2.1.10, 2.2.70, 2.2.80, and 4.2.10 are not applicable in this case." [ZBOA Order dated April 15, 2024 (grammatical alternatives removed from original text)]. The findings of fact and conclusions of law laid out in this Order satisfy the requirements of Section 6-29-800.

While acknowledging Section 6-29-800, Appellant in her argument seems to assert that because this particular ruling of the ZBOA was an extraordinary one that "amended the Town's code" it requires even more than the usual justification required by the statute. She cites to no authority for that. Additionally, as discussed above, the ZBOA's Order does not amend the Town's Code. Divisions 2.2 and 2.3 still apply to all new development, as they have done since their enactment. Rather, the ZBOA in this case simply ruled on the compliance of a fence with the Zoning Ordinance that governs fences (Division 5.5). This case is not extraordinary, and it required no extraordinary or extra-statutory justification.

B. The Circuit Court properly and sufficiently issued a Form 4 Order.

This Court is well aware that judges in South Carolina may use a Form 4 Order to dispose of a case. The Notes to Rule 54 of the South Carolina Rules of Civil Procedure state that "the simple form of judgment as set out in the Appendix of Forms [that is, Form 4] is sufficient." The use of such Form 4 Orders will "simplify entry, execution, enforcement and proof of judgment, and [the Form 4 Order] should state simply and directly the recovery or relief granted." Note to S.C.R. Civ. P. 54. Notice that the Court is only required to state the recovery or relief granted, not its reasons for reaching its decision. The Circuit Court in this case stated in relevant part that "After careful consideration, the Respondent's decision is affirmed. Therefore, this case is

dismissed with prejudice." [Form 4 Order dated August 15, 2024]. Because the Circuit Court sufficiently articulated its judgment, the Court's order satisfies the requirements under the Rules and should be affirmed.

III. The remaining issues raised by Appellant are beyond the scope of her appeal.

Appellant makes two other arguments in her brief: one regarding the introduction of emails from the Fire Chief and/or Fire Marshall at the ZBOA hearing; and one regarding allegedly false statements by the Town Attorney during the hearing in front of the Circuit Court. Respondent does not concede the merits of either argument but does not address them in depth in this brief because both issues are beyond the scope of this appeal.

On appeal is the decision of the Zoning Board of Appeals regarding whether the fence in question may be placed on the owner's property abutting the alleyway. Nothing else is under review – not whether Appellant's FOIA requests were adequately handled, not whether it was appropriate for the Town to reach out to the Fire Chief, and not whether Appellant was entitled to production of emails in advance of the hearing. Likewise, the allegations regarding the Town Attorney's responses to the Circuit Court during the hearings, in which the attorney attempted to answer the Court's questions and offered to verify the information for the Court after the hearing, are beyond the scope of this appeal as the information was not before the ZBOA, and the Circuit Court is explicitly not allowed to take any additional evidence. See S.C. Code § 6-29-840.

The appellate court must review only whether the decision of the ZBOA was correct, and, as stated before, this Court "must uphold a decision of the [ZBOA] unless there is no evidence to support it." John's Marine Serv., 2025 WL 542574, at *4.

Appellant here has failed to carry her burden to show that there is no possible evidence that could support the ZBOA's decision. What the evidence does show is that the Town permitted a fence that complied with Division 5.5 of the Town Code, as was appropriate.

Conclusion

Because Appellant has failed to carry her burden to show that the Zoning Board of Appeals' decision was void of any evidentiary support, and further because the Zoning Board of Appeals correctly determined that Divisions 2.2 and 2.3 did not apply and then correctly preserved its decision in a writing that satisfies the South Carolina Code, the decisions of the Zoning Board of Appeals and the Circuit Court should be affirmed, and Ms. Deckard's challenge should be dismissed.

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