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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS FOR CHARLESTON COUNTY
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2025-001048

Ten Mile Neighborhood Association of Awendaw, S.C., Appellant,

v.

Charleston County Planning Commission, McNeil Henry, Dream Finders Homes, LLC, and Crescent Homes CHS, LLC,

Respondents.

AND

Ten Mile Neighborhood Association of Awendaw, S.C., Appellant,

v.

Charleston County Planning Commission, Betty Ann Goodwater, Isaac Goodwater, Joseph Goodwater, and Crescent Homes CHS, LLC,

Respondents.

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TABLE OF CONTENTS

INTRODUCTION 1

STANDARD OF REVIEW 1

ARGUMENT 3

I. The Circuit Court Erred Because the Planning Commission Failed to Consider Consistency of the Subdivision Proposals with the Comprehensive Plan 3

A. Subdivision Proposals in Historic Districts like Ten Mile Must Comply with the ZLDR and the Cultural Resources Element of the Comprehensive Plan 4

B. Because the Comprehensive Plan was Ignored by the Planning Commission, the Circuit Court's Ruling Was Erroneous 7

II. The Circuit Court Erred by Concluding that Both Subdivision Applications Complied with the Requirements of the Comprehensive Plan 10

CONCLUSION 12

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 642 S.E.2d 565 (2007)………... 3

Evans v. Teton Cnty., 73 P.3d 84 (Id. 2003) ………………………………………..…...……...... 5

Gurganious v. City of Beaufort, 317 S.C. 481, 454 S.E.2d 915 (Ct. App. 1995) …..………….3, 8

Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953) ……………………………………. 11-12

Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 656 S.E.2d 346 (2008)…. 1-3, 10

Mikell v. Cnty. of Charleston, 386 S.C. 153, 687 S.E.2d 326 (2009) …………………………… 5

Peterson Outdoor Adver. v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997) …….... 2

Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 516 S.E.2d 442 (1999)……………………......3

Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013) ………………………..… 2-3

Other Authorities

Charleston Cnty. Code § 4.10.1……………………………………………………………..…..5

Charleston Cnty. Code § 8.3.2 ……………………………………….....……………… 3, 4, 6

Charleston Cnty. Code § 21-2 ……………………………………………………………….5

INTRODUCTION

In its Brief, Appellant, Ten Mile Neighborhood Association of Awendaw, S.C. ("Appellant"), painstakingly detailed how the Circuit Court erred in affirming the Charleston County Planning Commission decisions when the Planning Commission (1) had failed to determine whether the Gadsdenville Road subdivision or the Theodore Road subdivision complied with any aspect of the Cultural Resources Element ("CRE") of the Charleston County Comprehensive Plan and (2) had approved both subdivisions when there was no evidence that either proposal complied with the goal and certain strategies of the CRE.

All Respondents had to do to address these two issues was identify where in the records the Planning Commission made a determination of consistency with the CRE and point to some evidence that showed that both subdivision proposals are, in fact, consistent with the historic character of the Ten Mile Historic District such that they comply with the CRE's goal and strategies. Respondents could not accomplish either of these tasks. Instead, as to the first issue, Respondents merely recounted the same evidence that Appellant detailed in its Brief which showed that the Planning Commission was presented with the issue of whether the proposals complied with the CRE but made no actual determination of compliance in either case. As to the second issue, Respondents cited the same evidence discussed at length by Appellant but attempted to recast it as somehow supporting historic consistency when the evidence related solely to modern development patterns. Respondents have not identified any evidence that supports the Planning Commission's decisions and which supports affirming the Circuit Court's decision.

STANDARD OF REVIEW

The standard of review for this matter should not be disputed. The parties have cited many of the same cases. Yet, Respondents fail to acknowledge that there are separate standards of review found in *Kurschner v. City of Camden Planning Commission*. 376 S.C. 165, 173-74, 656 S.E.2d

346, 351 (2008). There is no question that the "any evidence" standard applies to factual determinations made by planning commissions. *Id*. But there is also no question that the arbitrary and capricious standard applies to questions of law. In *Kurschner*, the Court applied the "any evidence" standard only to questions related to findings of fact but the Court applied the error of law standard when addressing whether the planning commission in the case had misapplied a regulation. *Id*. at 174 (citing *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997)).

Respondent Crescent Homes CHS, LLC ("Respondent Crescent Homes") contends that the only standard of review is the "any evidence" or "no evidence" standard. Resp. Crescent Homes Br. at 5. Respondent Charleston County Planning Commission ("Respondent Planning Commission") likewise invokes the "any evidence" standard but also contends that since the Circuit Court determined that the Planning Commission actually made a determination as to compliance with the CRE of the Comprehensive Plan, the "any evidence" standard applies. Resp. Planning Comm'n Br. at 6. Presuming the correctness of the underlying ruling is not how one determines which standard of review applies. The type of question at issue must first be defined and then the appropriate standard of review chosen to determine whether the lower court's ruling passes muster. Here, the legal questions of whether the Planning Commission actually made the requisite determinations of compliance with the CRE is governed by the arbitrary and capricious standard while Appellant's second issue regarding whether the two proposals actually comply with the CRE is governed by the "any evidence" standard.

The other cases cited by Respondents do not contravene the dual standards recognized in *Kurschner*. The decision in *Town of Hollywood v. Floyd* merely cites the part of *Kurschner* that

governs questions of fact. 403 S.C. 466, 476, 744 S.E.2d 161, 166 (2013)(citing *Kurschner*, 376 S.C. at 173)(additional citations omitted).

In *Gurganious v. City of Beaufort*, this Court recognized differing standards of review with factual errors reviewed under the any evidence standard and errors of law reviewed for an abuse of discretion or the arbitrary and capricious standard. 317 S.C. 481, 486, 454 S.E.2d 912, 915 (Ct. App. 1995)(reviewing court "should act where the BOAR has abused its discretion by committing errors of law or bases its decision on findings of fact which are not supported by the evidence"). Similarly, the Court in *Clear Channel Outdoor v. City of Myrtle Beach* recognized the distinction between review of a zoning board of appeals decision based upon findings of fact, that is "treated in the same manner as a finding of fact by a jury[,]" and a review of a legal determination which "will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007)(citing *Rest. Row Assocs. v. Horry Cnty*., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). There are differing standards of appeal at play here with the first issue governed by the arbitrary and capricious standard and the second issue governed by the any evidence standard.

ARGUMENT

I. The Circuit Court Erred Because the Planning Commission Failed to Consider Consistency of the Subdivision Proposals with the Comprehensive Plan.

In response to Appellant's first issue, Respondents make, essentially, two separate arguments for affirmance. First, they argue that the Planning Commission needed to rely only on the Charleston County Zoning and Land Development Regulations ("ZLDR"), as opposed to both the ZLDR and Comprehensive Plan, in making its decisions. Second, they argue that the Planning Commission actually considered and made a determination regarding compliance with the

Comprehensive Plan's Cultural Resources Element. Appellant will address each of these arguments in turn.

A. Subdivision Proposals in Historic Districts like Ten Mile Must Comply with the ZLDR and the Cultural Resources Element of the Comprehensive Plan.

When evaluating whether the Planning Commission assessed these proposals for consistency with the Comprehensive Plan, this Court must look to the ZLDR provision that applies here and which requires a determination of consistency with the Comprehensive Plan. Charleston Cnty. Code § 8.3.2. Such a determination necessarily includes a determination of consistency with the Cultural Resources Element's ("CRE") objectives to preserve historic and cultural resources. Nevertheless, Respondents assert that compliance with the ZLDR alone suffices to affirm the Planning Commission's decision or, alternatively, that compliance with the ZLDR inherently satisfies the requirement to comply with the Comprehensive Plan because the ZLDR attempts to implement the Comprehensive Plan. Resp. Planning Comm'n Br. at 8, 11. Such a conclusion is contrary to both the express language of the ZLDR and the purpose of the Historic Preservation Ordinance.

The ZLDR itself mandates that certain Planning Commission decisions be consistent with both ZLDR requirements and the objectives of the Comprehensive Plan. This dual obligation is clear in the ZLDR's language: "… the Zoning and Planning Director may send Minor Subdivision applications to the Planning Commission for approval in order **to determine** whether or not the proposed subdivision is consistent with **all requirements of this Ordinance <u>and</u> the goals and objectives of the *Comprehensive Plan***." Chas. Cnty. Code § 8.3.2 (emphasis added). There is no dispute that these proposals were sent to the Planning Commission pursuant to this provision. One may not presume that compliance with the ZLDR equates to full compliance with the

Comprehensive Plan. Otherwise, the specific invocation of the Comprehensive Plan in the regulation would be unnecessary and surplusage.

While it is true the ZLDR assists in implementing the Comprehensive Plan as a regulatory tool, the ZLDR does not include provisions that equate to every aspect of the Comprehensive Plan. There is no equivalent provision that Respondents have identified or that Appellant has found that implements all or even some of the Cultural Resources Element's goal and strategies in the ZLDR other than the provision just cited above that the Planning Commission did not comply with. This distinguishes it from the lone example supplied by Respondent Planning Commission in which ZLDR § 4.10.1 makes reference to the "Suburban Residential/Residential Low Density (Urban/Suburban Area) policies of the Comprehensive Plan." Resp. Planning Comm'n Br. at 10-11. In addition, the CRE is further implemented through the Historic Preservation Ordinance, which directs the Historic Preservation Commission to prepare a report on consistency or inconsistency with the CRE for subdivisions within historic districts and also to supply that report to the Planning Commission which is to use it in evaluating subdivision proposals in historic districts. Charleston Cnty. Code § 21-2 (B).

When arguing that Appellant fails to grasp the relationship between the ZLDR and Comprehensive Plan, Respondent Crescent Homes relies on the dissent in *Mikell v. County of Charleston*, which is not controlling and draws on language from a decision of the Supreme Court of Idaho. Resp. Crescent Homes Br. at 6-7 (citing 386 S.C. 153, 163, 687 S.E.2d 326, 329 (2009)(citing *Evans v. Teton Cnty*., 73 P.3d 84 (Id. 2003)). However, the key point from the decision in *Mikell* is found in the majority opinion where the Supreme Court invalidated a local ordinance which purported to rezone property to a higher density because the ordinance conflicted with the "intent… clearly reflected in the *Comprehensive Land Use Plan* and the ZLDR." *Id*. at

386 S.C. 153, 158-59, 687 S.E.2d 326, 329. This case reinforces the need to determine consistency with both the ZLDR and the Comprehensive Plan. But even setting the decision in *Mikell* aside, here the ZLDR provision at issue specifically requires a determination of compliance with both the ZLDR and the Comprehensive Plan. Chas. Cnty. Code § 8.3.2.

Respondent Crescent Homes is also mistaken when it argues that the Appellant is effectively asking the Court to substitute its judgment for the Planning Commission's and engage in impermissible rezoning. Resp. Crescent Homes Br. at 8. Appellant is not seeking to bypass the ZLDR but is instead seeking to ensure that the Planning Commission fulfills its legal obligation to evaluate applications for compliance with both the ZLDR *and* the Comprehensive Plan's CRE goal and strategies within a designated historic district. The arguments advanced by Respondent Crescent Homes would undermine the Comprehensive Plan's objectives by allowing them to be ignored, which is contrary not only to caselaw but also to the ZLDR's express language. Such a practice would also frustrate the very purpose of Charleston County Council's decision to have the Historic Preservation Commission author and submit a report to the Planning Commission for consideration. While the report is not binding, it is also not meaningless and indicates County Council's desire for the Planning Commission to make determinations about whether proposals in historic districts fully comply with the Element of the Comprehensive Plan most germane to historic protection, the CRE. Regardless, there is nothing in the R-4 zoning requirements or anywhere else in the ZLDR that Respondents have identified that is commensurate with the goal and strategies contained in the CRE. In these matters, compliance with the ZLDR requires a finding of consistency with the CRE.

The Circuit Court did not adopt Respondents' argument that compliance with R-4 zoning requirements alone demonstrates compliance with the Comprehensive Plan. (Order at p. 7

(purporting to affirm because of compliance with the ZLDR and consistency with the Comprehensive Plan)). Regardless, reviewing subdivision applications for compliance with only zoning requirements does not satisfy the Planning Commission's express obligation to also determine consistency with the Comprehensive Plan and the ZLDR, and failure to do so is an error of law.

B. Because the Comprehensive Plan was Ignored by the Planning Commission, the Circuit Court's Ruling Was Erroneous.

Both Respondents assert the record shows that the Planning Commission considered the Comprehensive Plan in reviewing the subdivision applications. Resp. Planning Comm'n Br. at 7; Resp. Crescent Homes Br. at 10. Respondents argue that the Planning Commission fulfilled its obligation to determine Comprehensive Plan consistency because it was presented with staff materials, public comments, and aerial photographs, and because a brief exchange occurred between a Commissioner and the Planning Director regarding cadastral patterns. Resp. Planning Comm'n Br. at 8-10; Resp. Crescent Homes Br. at 9. Presentation of information by others, or even a brief discussion of certain information presented, is not the equivalent of making a determination of consistency that is required by the ZLDR.

The phrase "Comprehensive Plan" is nowhere uttered by any Planning Commissioner in the transcript for the Gadsdenville Road proposal. (Gadsdenville Record on Appeal ("G.R.A.") Transcript at p. 7, l. 6-p. 17, l. 21). Nor was the phrase "Cultural Resources Element" uttered by any Planning Commissioner, much less a discussion of the element goal and strategies. (*Id.*). As for the Theodore Road proposal, no discussion occurred following public comment whatsoever, so the record for this proposal likewise contains no mention from the Planning Commission of the Comprehensive Plan nor CRE. (Theodore Record on Appeal ("T.R.A.") Transcript at p. 5, line 17-p.6, line 23). To summarize, there is nothing in either record that shows the Planning Commission

determined anything regarding whether or not either subdivision proposal complies with the goal and certain strategies of the CRE.

Respondents argue that since the Planning Commission was "presented" with evidence that relates to the CRE, that is sufficient for concluding that it made a determination of consistency. Resp. Planning Comm'n Br. at 7; Resp. Crescent Homes Br. at 9. This argument is belied by their respective citations not to the transcript but to the Theodore Road and Gadsdenville Road presentations. *Id*. In both cases, the Planning Commission was presented with the Historic Preservation Commission's report of inconsistency and the community's evidence regarding inconsistencies with the CRE. Being presented with evidence is not the same as making a determination. Instead, the presentation of evidence is a prerequisite for making a determination, not a substitute for it. In *Gurganious v. City of Beaufort*, this Court upheld the City of Beaufort Board of Architectural Review's ("BOAR") denial of a fence application because the BOAR made explicit findings grounded in its governing ordinances and adopted design standards, supported by a report and the City Code that prohibited visual obstructions. 317 S.C. 481, 486, 454 S.E.2d 912, 915 (Ct. App. 1995). In contrast, here the Planning Commission did not make and the record is devoid of any findings or determinations related to consistency with the CRE.

Respondent Planning Commission recites an exchange between Commissioner Morris and Planning Director Evans in the Gadsdenville Road transcript and contends it demonstrates that a determination was made. Resp. Planning Comm'n Br. at 8. What this exchange shows is that one Commissioner sought an explanation for "current … or existing cadastral patterns for the plots[.]" (G.R.A. Transcript at p. 12, lines 19-21). Even if this discussion related to necessary information that could have informed a required determination, the inquiry alone is not equivalent to a determination. Beyond that, Commissioner Morris sought irrelevant information on "existing

cadastral patterns," but those patterns are not reflective of historic settlement patterns in Ten Mile as the community pointed out in their comments. (G.R.A. at 33)(R-4 zoning "not consistent with the district even when it was zoned R-4[,]" and "[t]he original lot sizes were more consistent with the district"). Again, neither the Comprehensive Plan nor the CRE was mentioned at all.

What the transcript also demonstrates is that the subdivision approvals were based on compliance with R-4 zoning. Respondent Planning Commission's attempt to recast the comments of Commissioner Warwick Jones, suggesting that the Planning Commission was open to "argue the merits" of what the Historic Preservation Commission recommended, is not successful. Resp. Planning Comm'n Br., at 9 n. 4 (citing G.R.A. Transcript at p. 15, line 25-p. 16, line 13). A review of the transcript shows that Commissioner Jones dismissed the objections of the Historic Preservation Commission and the Ten Mile Community by asserting that the Planning Commission was legally bound to act under the R-4 zoning in effect at the time of the application. His comment that "there's nothing much we can do about it," coupled with the subsequent motion to adopt the staff recommendation, which was explicitly based on the application's compliance with the ZLDR's R-4 zoning requirements, shows that the Planning Commission's decision rested solely on zoning compliance while the CRE was ignored. (G.R.A. Transcript at p. 6, lines 6-9; p. 11, line 21-p. 12, line 8).

Although certain information was presented such as aerial photographs, public letters, and the Historic Preservation Commission reports, the failure to consider this evidence and to make legally required determinations constitute legal errors. By failing to address the CRE and related considerations, the Planning Commission's review fell short of the ZLDR's requirements. The absence of such determinations are procedural failures, errors of law, and require reversal in both cases.

II. The Circuit Court Erred by Concluding that Both Subdivision Applications Complied with the Requirements of the Comprehensive Plan.

Contrary to Respondents' characterization, Appellant is not asking this Court to substitute its judgment for that of the Planning Commission just as Appellant was not asking the Circuit Court to engage in similar conduct. Rather, this issue centers on whether there is any evidence in the records that shows that either subdivision proposal is consistent with the goal and certain strategies of the CRE. Even Respondents concede that there is evidence in the records that both proposals violate the CRE. Resp. Planning Comm'n Br. at 12 (each alternative or position "supported by some evidence"); Resp. Crescent Homes Br. at 9 ("Planning Commission heard opposition from two members of the Public").

There is precedent for affirming a local government's decision to deny a subdivision request when there is evidence that the subdivision will negatively affect a historic resource. In *Kurschner*, a case cited by Respondents, the Supreme Court acknowledged that the planning commission had received "evidence in opposition to [the] application, which mostly consisted of public information regarding the historical significance of Sarsfield." 376 S.C. at 173. The Court concluded that "[t]he Commission found that subdividing Sarsfield would negatively impact the historical value of the property, and evidence in the record supports this finding." *Id*. at 175. The Court also noted, in affirming the decision, that the planning commission had "based its decision on several other regulations, as well as the City of Camden's Comprehensive Plan." *Id*. Here, there is only evidence that the subdivision proposals would negatively affect the Ten Mile Historic district and, consequently, that both proposals are inconsistent with the CRE's goal and strategies CR1, CR3, CR7 and CR9 which focus on preserving historic settlement patterns in historic communities and "ensuring development [that] is in character with inherent rural attributes." (G.R.A. at 64-66).

The only proof Respondents point to in support of the Planning Commission's decisions are current aerial photographs and the discussion between Commissioner Morris and Director Evans. Resp. Planning Comm'n Br. at 12 (citing T.R.A. presentation, at pp. 10-15; GR presentation at pp. 11-16); Resp. Planning Comm'n Br. at 13 (citing G.R.A. Transcript at p. 12, line 11-p. 13, line 22). Appellant has already detailed in its Brief, at the risk of boring any reader, how current photographs that show nonhistorical development patterns are not evidence of historic development in Ten Mile. App. Initial Br. at 17-18.

Appellant has also addressed, both in that Brief and earlier in this Reply, how the colloquy between Commissioner Morris and Director Evans about "current" or "existing cadastral patterns" is not evidence of historic settlement patterns in Ten Mile such that the proposed subdivisions could be consistent with the CRE. The "any evidence" standard is not so broad as to allow for any evidence on any question to suffice. The aerial photographs did not show that the proposed subdivisions would be consistent with the historic character and settlement patterns of the Ten Mile Community.[1] All those photographs show is that more recent zoning is inconsistent with historic settlement patterns, as relayed by the community comments. (G.R.A. at 33-42; T.R.A. at 32).

In *Hodge v. Pollock*, the Supreme Court of South Carolina reversed a zoning board's decision where the record contained only an applicant's conclusory statement of "inconvenience," holding that such a statement did not constitute sufficient legal evidence supporting a variance. 223 S.C. 342, 349-350, 75 S.E.2d 752, 755 (1953)("Considering the facts in the light of the foregoing principles, it clearly appears that the circumstances do not justify a variance… About

[1] Additionally, the aerial photographs only show the subject parcels prior to subdivision, not what the lot sizes would look like after the proposed subdivisions. (G.R.A. presentation at 13; T.R.A. presentation at 12).

all that we have is what Dr. Plenge characterized as 'an inconvenience.'"). Similarly, here, neither record contains evidence to satisfy even the deferential "any evidence" standard, as no reasonable fact finder could conclude that the recent aerial photographs and the discussion between Commissioner Morris and Planning Director Evans supports the conclusion that the proposed subdivisions are consistent with the CRE goal and strategies CR1, CR3, CR7 and CR9. The decision of the Circuit Court on this issue should be reversed.

CONCLUSION

If the Planning Commission does not assess how its decisions may affect recognized historic districts and allows unsuitable development to occur, local protections for those special communities are for naught and the district may be whittled away by modern development. That is contrary to the intent of the Charleston County's Historic Preservation Ordinance, Comprehensive Plan, and the ZLDR and it subverts the aims of the Charleston County Council. For the reasons stated herein and those contained in its Brief, Appellant respectfully requests that this Court reverse the Circuit Court's decision affirming the Planning Commission's subdivision approvals. The Planning Commission erred as a matter of law by failing to determine whether the applications complied with the CRE of the Comprehensive Plan, and the Circuit Court erred in concluding that the Planning Commission made that determination. Furthermore, the record contains no evidence demonstrating that the proposed subdivisions are consistent with the CRE and the Circuit Court and Planning Commission erred in that regard as to both the Gadsdenville Road and Theodore Road subdivision proposals.

[signature on following page]

Respectfully submitted,

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Respondents.

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I hereby certify that on this date I served Appellant, Ten Mile Neighborhood Association of Awendaw, S.C.'s Initial Reply Brief upon counsel of record by U.S. Mail and AIS electronic mail with notification to the following:

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Appellate Case No. 2025-001048

Dear Madame Clerk:

Please find enclosed Appellant Ten Mile Neighborhood Association of Awendaw, S.C.'s Initial Reply together with a proof of service for that filing. Thank you for your kind consideration.

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