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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

J. Mark Hayes, II, Circuit Court Judge

Consolidate Case Nos. 2023-CP-42-01221, 2023-CP-42-01226, 2023-CP-42-01367, 2023-CP-42-01545

Appellate Case No. 2024-001828

South Carolina Native Plant Society, Appellant,

vs.

Spartanburg County Planning Commission and Blue Sky Associates, LLC d/b/a T. Tree Farms RV Park, Respondents,

and

The Enclave at Fairview Farm Homeowners' Associations, Inc., Golden Hills of Fairview Homeowners' Association, Inc., Greenspace of Fairview, LLC, North Pacolet Association, Inc., Debra A. Whitaker, Charles D. Whitaker, Roxanne M. Hellman-Wojan, Richard G. Wojan, Judie R. Klapholz, Trustee of The Judie R. Klapholz Trust, and Slater Properties, Inc., d/b/a Caroland Farms, Appellants,

vs.

Spartanburg County, SC, Spartanburg County Planning Commission, and Blue Sky Associates, LLC d/b/a T. Tree Farms RV Park, Respondents.

APPELLANT SOUTH CAROLINA NATIVE PLANT SOCIETY REPLY BRIEF

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INTRODUCTION

The South Carolina Native Plant Society (the "Society") submits this reply to the joint response brief of Blue Sky Associations, LLC ("Blue Sky") and the Spartanburg County Planning Commission (the "Commission") (jointly, "Respondents"). Respondents' brief misstates the law, asks this Court to allow Respondents to file an untimely appeal that is jurisdictionally barred, and attempts to offer after-the-fact rationalizations to support the Circuit Court's errors in upholding portions of the Commission's conditional approval despite violations of the Spartanburg County Unified Land Management Ordinance (the "Ordinance") and abuses of discretion. Respondents similarly misstate the law and misstate the Society's arguments in attempting to uphold the Commission's failure to reconsider its conditional approval, the Commission's failure to offer an explanation for its decisions, and the Circuit Court's conclusion that remand was the appropriate remedy.

For the reasons that follow, the Society's appeal is proper and the Circuit Court erred (1) in upholding portions of the Commission's conditional approval that violate Ordinance requirements related to natural features and sewage systems, (2) in upholding the Commission's failure to reconsider its conditional approval, (3) in upholding the Commission's failure to offer an explanation for its decisions, and (4) in concluding that remand was the appropriate remedy.

ARGUMENT

1. The Society Did Not Misstate the Standard of Review.

Respondents contend that the Society misstated the standard of review. Resp. Br. at 4–6. It did not. As the Society explained in its Initial Brief, a planning commission decision will be overturned on appeal when "it is based on error of laws," where the commission "has abused its discretion," or when the commission's decision is "arbitrary" or "capricious." *Grays Hill Baptist Church v. Beaufort Cnty.*, 431 S.C. 630, 637 (2020); *see also Kurschner v. City. of Camden*

Planning Comm'n, 376 S.C. 165, 174–75 (2008) (explaining that commission decisions will not be upheld where they lack evidentiary support, are based on errors of law, or where the commission acted arbitrarily, unreasonably, or abused its discretion). The Society further explained that "[a]n abuse of discretion occurs" when a decision is based upon "an error of law," or lacks evidentiary support. *Citizens for Quality Rural Living v. Greenville Cnty. Planning Comm'n*, 426 S.C. 97, 103 (Ct. App. 2019); *Kurschner*, 376 S.C. at 174 (2008). Last, the Society explained that "[i]ssues involving the construction of an ordinance are reviewed as a matter of law," *Mikell v. Cnty. of Charleston*, 386 S.C. 153, 158 (2009), and the standard of review for questions of law is de novo, *Citizens for Quality Rural Living*, 426 S.C. at 102. This explanation of the standard of review comes directly from cases dealing with the very issues before the Court—review of a planning commission decision.

In response, Blue Sky and the Commission incorrectly claim that "S.C. Code Ann. § 6-29-1150 states the standard of review and requires the same level of deference given to findings of fact by a jury." Resp. Br. at 4. That is wrong. Nothing in S.C. Code § 6-29-1150 states a standard of review. Indeed, the phrase "standard of review" is not even mentioned in that section.[1] Blue Sky and the Commission then proceed to cite appellate cases where a party sought to overturn a jury decision. *Id.* (citing *Welch v. Epstein*, 342 S.C. 279 (Ct. App. 2000) and *Town of Hollywood v. Floyd*, 403 S.C. 466 (2013)). Neither case is applicable here given that there is no jury verdict at issue. As for Blue Sky and the Commission's citation to *Kurschner*, *Restaurant*

[1] To the extent Blue Sky and the Commission intended to cite S.C. Code § 6-29-840, that section does not provide such a standard of review. S.C. Code § 6-29-840 governs appeals from a Board of Zoning Appeals, but it does not provide a standard of review. Rather, it merely provides that the circuit court must make its determination based on the certified record and, as in reviewing jury findings of fact, "may not take additional evidence" beyond the facts that were before the Board.

Row, and *Gurganious*, those cases confirm the Society's explanation of the standard of review—the Commission's decision here should be set aside if it "is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Gurganious v. City of Beaufort*, 317 S.C. 481, 485 (Ct. App. 1995).

With respect to questions of law, including interpretations of an ordinance, Blue Sky and the Commission argue that the Society improperly cited the *Mikell* holding. But they do not explain how the Society misstated the holding of *Mikell*. As the Society explained, and as the *Mikell* quote included in Respondent's brief provides, "issues involving the construction of an ordinance are reviewed as a matter of law." *Mikell*, 386 S.C. at 158; *see* Society Initial Br. at 12. Matters of law are reviewed under "a broader standard of review than is applied in reviewing issues of fact." *Mikell*, 386 S.C. at 158. And as this Court explained in *Citizens for Quality Rural Living*, "questions of law" are reviewed "de novo." 426 S.C. at 102. Accordingly, the Society properly explained the relevant standard of review.

2. The Society's Appeal is Proper.

Respondents contend that the Society's appeal is premature because the Circuit Court's September 2024 Order was not final. But as the Society explained in its Initial Brief, the Circuit Court's September 2024 Order is a final judgment, as set out by the Circuit Court's selection of "Statement of Judgment by the Court" rather than "See attached order (formal order to follow)" on the Form 4 Order reproduced in relevant part below.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

These consolidated appeals came before this court on Sptbg County's, Sptbg County Planning Commission's, and Blue Sky's Motion for Reconsideration of an Order electronically issued on April 22, 2024. After receiving briefing and arguments from all parties, the motion is granted to the extent that the court needs to clarify the term "vacate". The term vacates means that the matter is remanded to the commission. This court declined the invitation to give further direction to the commission.

Order, *S.C. Native Plant Society v. Spartanburg Cnty. Planning Comm'n*, Case No. 2023-cp-42-01221 (Sept. 26, 2024) ("September 2024 Order") (R. pp. 00015–17). Indeed, as Respondents acknowledge, Resp. Br. at 8, this is also consistent with what Judge Hayes stated he would do at the hearing—issue "a very short order saying vacate equals remand." Hearing Tr. at 49, *S.C. Native Plant*, Case No. 2023-cp-42-01221 (Sept. 24, 2024) ("September 2024 Hearing Tr.") (R. p. 00636, lines 4–6). Moreover, the Society and the homeowners' associations ("HOAs") did not rush to appeal but waited 30 days from the issuance of the September 2024 Order, and no additional order was issued during that time. *See* Society Notice of Appeal (filed Oct. 28, 2024); HOAs Notice of Appeal (filed Oct. 28, 2024).

Respondents attempt to argue that there are cases broadly holding that remand orders are not immediately appealable. Resp. Br. at 7–8. Not so. The line of cases that Blue Sky and the Commission cite simply hold that a remand order directing an agency to conduct additional proceedings—specifically, taking additional testimony—and which does not reach the merits is not immediately appealable. *See Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 52 (1994) (citing *Owens v. Canal Wood Corp.*, which involved remand for additional testimony, and explaining that such a remand is not immediately appealable); *Owens v. Canal Wood Corp.*, 281 S.C. 491, 491–92 (1984) (concluding that order remanding case "for the taking of additional testimony on the existence of an employer-employee relationship" was not immediately appealable); *Hunt v. Whitt*, 279 S.C. 343 (1983) (order remanding case "for the purpose of taking additional medical testimony from the claimant" was not immediately appealable); *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 386–87 (Ct. App. 2005) (recognizing that remands for additional testimony are not appealable); *S.C. Baptist Hosp. v. S.C. Dep't of Health & Envt'l*

Ctrl., 291 S.C. 267, 270 (1987) (declining to hear appeal of order remanding for additional proceedings where agency had not even held the required evidentiary hearing).

In fact, one case Respondents cite, *Brown v. Greenwood Mills, Inc.,* supports the Society's argument. In *Brown*, the court determined that a remand order *was appealable* because the order, unlike those in *Montjoy* and *Hunt*, involved a ruling on the merits.[2] 366 S.C. at 387–88. Here, the Circuit Court did not simply issue an order remanding for additional proceedings without addressing the merits of the appeal, rather the Circuit Court decided the merits of the Society's appeal. Indeed, Judge Hayes himself acknowledged at the hearing that the parties could appeal his remand decision. *See* September 2024 Hearing Tr. at 49 (Judge Hayes explaining he would issue a short order clarifying that vacate means remand, but that "[the parties] could take [him] on appeal" after that) (R. p. 00636, lines 8–9).

Moreover, as explained in the Society's opening brief and as explained below, Spartanburg County's own Ordinance contains no procedures for amending an application or considering an application a second time after the Circuit Court's decision. Instead, the Ordinance provides that judicial review is the end of the process for an application. *See* Article I, Ordinance (setting out procedures for major development plans) (R. pp. 01023–30). The proper process is for the applicant developer to submit a new application when it wishes to make changes in the application in response to judicial review. Indeed, that is what Blue Sky did here; in 2021 it submitted an application based on public water, and when it found public water unavailable, it filed the new 2023 application (now under review before this Court) to try to build

[2] The Supreme Court in *Bone v. U.S. Food Service* recognized that the *Brown* decision was "implicitly overruled" because it applied the "involving the merits" standard found in S.C. Code § 14-3-330 (the relevant statutory provision for the Society's appeal) when it should have applied the South Carolina Administrative Process Act standard for appeals applicable to administrative agencies. 399 S.C. 566, 573–74 (2012).

the development with only a well. *See* Planning & Development Project Form (Feb. 8, 2023) (explaining change from public water to well) (R. pp. 00928–29). It did not seek to amend its 2021 application, and the Commission considered a new application and did not amend the 2021 application. There is no process in the Ordinance for the subsequent proceedings that Blue Sky argues for in claiming the Circuit Court's remand order cannot be appealed.

Respondents last claim that they have not waived their right to appeal the Circuit Court's orders. They have. Because the Circuit Court's September 2024 Order was a final judgment and the Circuit Court *did not* select the box indicating a formal order would follow, Blue Sky and the Commission were required to appeal the Circuit Court's orders within 30 days. S.C.A.C.R. 203(b)(1). If Respondents felt that the Circuit Court's September 2024 Order was unclear on whether an additional formal order would follow, as they now suggest, they could have asked for clarification at any point during the 30-day period before the Society and HOAs filed their notices of appeal. But they cannot now correct their mistake. "The requirement [for a timely] notice of appeal is jurisdictional, *i.e.,* if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline. . . ." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15 (2004). Accordingly, contrary to Respondents' argument, if the Court determines that the September 2024 Order was a final judgment, it *cannot* allow Respondents the opportunity to file an untimely appeal.

3. The Circuit Court Erred in Rejecting the Society's Arguments That the Commission Violated the Preamble and Ordinance Sections 3.13 (2) (natural features) and 3.13 (8) (septic) When it Conditionally Approved the RV Park.

A. The RV Park Does Not Protect Ecologically Sensitive Areas or Preserve Natural Features and Landscape.

In its Initial Brief, the Society explained the important natural features and ecologically sensitive areas on the RV Park site—specifically, an extremely rare native plant and its habitat that has been designated for special protection by the South Carolina Department of Natural Resources. Society Initial Br. at 16–17. Yet Blue Sky and the Commission ignored the Ordinance's express requirement to "preserve[ ] natural features" of the site. Ordinance, § 3.13 (2) (R. p. 01047); *see also* Society Initial Br. at 6, 17–19. In response to this argument, Respondents attempt to reduce the Ordinance's mandate to preserve natural features to a "vague qualitative requirement" that requires nothing more than setbacks and screening. Resp. Br. at 10. But the Ordinance requires that RV sites "shall . . . preserve[ ] natural features and landscape"—an intentionally broad and definitive phrase that is backed up by the overarching Ordinance intent to protect "ecologically sensitive areas." Ordinance, Preamble (R. p. 01022). The requirement to "preserve[ ] natural features" is contained in the governing Section of the Ordinance and is a legal prerequisite that Blue Sky and the Commission cannot ignore.

By its plain language, the Ordinance's requirement to preserve natural features is not satisfied by a standard plan that simply includes setbacks. When the Ordinance requires only setbacks, it says so; there are multiple provisions throughout the Ordinance clearly laying out setback requirements. *See, e.g.*, Ordinance § 2.02-1, (table detailing setback requirements for land development) (R. p. 01031); Ordinance § 3.04-4 (11) (provision specifying setback requirements for manufactured home parks) (R. p. 01042); Ordinance § 3.07 (7) (setbacks for auction barns and auction houses) (R. p. 01046). As for the "screening features," Resp. Br. at 10, it is not entirely clear what these features are, and Respondents do not provide a citation. But a "screen" would do nothing to preserve the natural features and landscape as the Ordinance

mandates. These "screens" would only hide unattractive development from outside view. Moreover, when the Ordinance means to require only screening, it says so. *See, e.g.*, Ordinance § 3.19-3 (fencing and screening requirements for junkyards) (R. p. 01049). Section 3.13 of the Ordinance mandates that RV park plans "preserve," not "screen," natural features.

When the Ordinance uses different, separate, and more far-reaching language specifically for RV Parks to "preserve[ ] natural features and landscape," it plainly reaches beyond mere setback and screening requirements set out elsewhere in the Ordinance. Any other interpretation would ignore the Ordinance's plain language and render the "natural features" requirement a meaningless redundancy.

Otherwise, Respondents argue only that Blue Sky chose not to develop the entire site and argue that this supported the Commission's "findings." Resp. Br. at 10. But there is nothing in the record to support such an argument. Indeed, the most obvious flaw in Respondents' argument is that the Commission did not make any findings to be supported and did not even acknowledge this mandatory provision of the Ordinance or these important natural features, as detailed in Section 5 below. Moreover, the Society has submitted affidavits by leading scientists and naturalists demonstrating that the rare species and its habitat are in the area where the RV Park will be built, not in the area not yet to be developed. *See* Newberry Aff. ¶¶ 13–15 (R. pp. 01089–90); Gaddy Aff. ¶¶ 10–17 (R. pp. 1105–07); Whitten Aff. ¶¶ 14–19 (R. pp. 01080–81); Huffman Aff. ¶¶ 10–15 (R. pp. 01097–99). Accordingly, the fact that Blue Sky is not developing the entire site is meaningless to the requirement to preserve natural features when the portions it is developing are where the important natural features exist.

The Commission committed a legal error in failing to acknowledge and follow this express Ordinance mandate, and Respondents have provided nothing to support their argument to the contrary.

B. The RV Park is Not Serviced by a Septic System "Approved by DHEC."

The Society explained in its Initial Brief that the DHEC Board concluded that the RV Park's proposed septic system does not meet state regulatory requirements and in fact is inadequate to treat the sewage produced by this 49-unit RV Park. The DHEC Board was the highest authority of the agency, and thus Blue Sky's proposed septic system is one rejected by the agency's governing board. Society Initial Br. at 20–22. Respondents contend that the RV Park is serviced by a sewage system "approved by DHEC," because the DHEC Board's decision was vacated on a technical timing ground. But neither the Administrative Law Court nor the Court of Appeals addressed or questioned the substantive conclusion of the DHEC Board.

In terms of compliance with the regulations governing DHEC procedure, the DHEC Board decision was vacated on timeliness grounds, as Respondents' brief emphasizes. But contrary to Respondents' arguments, this appeal does not challenge that conclusion or deal with the timeliness rules of DHEC regulations. The governing requirement here is a totally different requirement set out in the County's Ordinance designed to protect public health, safety, and the environment, as its Preamble sets out. The only thing that matters in this instance is the substantive adequacy of the septic system. DHEC's highest authority held on substantive grounds that the proposed septic system for the RV Park does not satisfy the protective requirements of the state regulations and is inadequate. DHEC Board, Final Agency Decision on

Docket No. 21-RFR-81 at 2–3 (Jan. 13, 2022) ("DHEC Board Decision") (R. pp. 00698–99). In the only sense that matters for the Ordinance—the adequacy of the septic system—DHEC through its highest authority has rejected, not approved, this septic system.

That ruling has not been questioned. Under the plain language and clear intent of the Ordinance, the RV Park plan does not include a septic system "approved by DHEC." The Circuit Court's conclusion otherwise was in error.

4. The Circuit Court Erred in Rejecting the Society's Argument Regarding the Commission's Decision Not to Reconsider its Decision.

Following the Commission's initial decision, the Society submitted a request that the Commission reconsider its decision and detailed all the ways in which the Commission's decision violated the Ordinance. *See* Southern Environmental Law Center, Reconsideration of Conditional Approval for the Site Plan of T. Tree Farm RV Park of Blue Sky, LLC (Mar. 31, 2023) (R. pp. 01003-12). Thereby and otherwise, the Commission had before it voluminous evidence detailing the ways in which the site plan and the Commission's conditional approval violated the Ordinance. *Id.* (R. pp. 01003-12). Yet the Commission decided not to reconsider its decision approving the RV Park plan. The Commission's Rules provide that it can reconsider any decision that it has made, but it chose not to do so. *See* Society Initial Brief at 23. The Commission's decision not to reconsider in the face of the voluminous evidence of violations was an abuse of discretion. Respondents fail to explain how it was not.

5. The Circuit Court Erred in Rejecting the Society's Argument That the Commission's Failure to Offer Any Explanation For its Decisions Was Unlawful, Arbitrary and Capricious, or an Abuse of Discretion.

The Society explained in its Initial Brief that the Commission was required to provide an explanation for its decision to conditionally approve the RV Park site plan. *See* Society Initial Brief at 24–25. In response, Respondents again misstate the Society's argument by contending

that the Society is asking for "an exhaustive list of findings that the[] [Commission] had to make in approving . . . [the] project." Resp. Br. at 14. In fact, the Society is asking only that the Commission comply with the basic requirements of the statute and the proper exercise of discretion. As the Society explained in its Initial Brief, the South Carolina Local Government Enabling Act provides that local governments must "maintain[ ] as a public record" "all actions on all land development plans . . . *with the grounds for approval or disapproval*." S.C. Code § 6-29-1150(B). Yet the Commission did not comply with that bare minimum requirement because it offered no explanation whatsoever for its decision and did not even mention the Ordinance's requirement to protect natural features or any of the important natural features of this site. Respondents appear to argue that because the Commission placed conditions on its approval, these conditions satisfied the explanation requirement. But none of these conditions address the key Ordinance provision or the extremely rare species and habitat on the site. The existence of conditions requiring the RV Park to obtain other necessary approvals, *see* Commission Mtg. Mins. at 19 (Mar. 7, 2023) (R. p. 00675), is irrelevant to the Ordinance requirement at issue in this appeal. Indeed, S.C. Code § 6-29-1150(B) separately provides that the public record of the Commission's action on land development plans should also provide "any conditions attached to the action." This shows that "conditions" and "the grounds for approval" are distinct requirements.

Respondents also fail to respond to the Society's citation to *Johnson v. Johnson*, which held that "[a] decision lacking a discernable reason is arbitrary and constitutes an abuse of discretion." *See* Society Initial Br. at 24 (citing *Johnson v. Johnson*, 296 S.C. 289, 372 (Ct. App. 1988)). As explained in its Initial Brief, even without reference to the Local Government Enabling Act, South Carolina courts—like in *Johnson v. Johnson*—have made clear that an abuse

of discretion occurs when there is no explanation or discernable reason for a decision. That is precisely what occurred here, and Respondents have failed to argue to the contrary.

6. The Circuit Court Erred in Concluding That Remand, Rather Than Vacatur, Was the Appropriate Remedy.

Vacatur is the appropriate remedy where a court concludes that a commission has issued an unlawful approval in violation of its local ordinance. The Circuit Court's decision to the contrary was based on an error of law and was contrary to case law.

As a preliminary matter, Respondents failed to respond to the Society's argument that the Circuit Court's decision to remand should be reversed because it was "based on an error of law." Initial Br. at 25 (citing *Citizens for Quality Rural Living, Inc.*, 426 S.C. at 114). As the Society explained, the Circuit Court committed an error of law when it concluded that "vacate" means "remand." *See* September 2024 Order (R. pp. 00015–17). "Vacate" and "remand" are two different terms with two different legal meanings, *see* Society Initial Br. at 25, and this alone provides a basis to reverse the Circuit Court's decision to remand.

After failing to respond to the Society's first argument, Respondents contend that because the court in *Hodge v. Pollock* "did not discuss the propriety of the remedy of remand versus vacatur," this Court should not rely on the decision's holding as precedent. The *Hodge* decision is a Supreme Court precedent that resolves a local commission's violation of an ordinance by invalidating—not remanding—the commission's action. *Hodge v. Pollock*, 223 S.C. 342 (1953). The fact that the Court found the remedy to be self-evident does not render the decision any less a precedent. Moreover, beyond this unpersuasive critique of *Hodge*, Respondents failed to cite any cases to support their position—that remand is appropriate where a court has determined a local government's decision violated the governing ordinance.

Respondents claim that the Local Government Comprehensive Planning Enabling Act "discusses remand." Resp. Br. at 16. To the extent Respondents are attempting to argue that this act provides that remand is the appropriate remedy, that assertion is simply not true. The two code sections Respondents cite, S.C. Code §§ 6-29-840 and 6-29-930, provide that "[i]n the event the judge determines that the certified record is insufficient for review, the matter may be remanded . . . for rehearing." S.C. Code § 6-29-840; *see also id.* § 6-29-930 (substantially similar language). That is, the circuit court should remand for further proceedings, such as additional testimony, when further factual development is necessary for the court to reach a decision on the merits. The question here is not whether the record lacked information necessary for a court to review the Commission's decision, but rather whether the Commission's decision violated the Ordinance.

Last, Respondents argue that because nothing in the Ordinance explicitly prohibits amending a prior-approved plan, that it must be permissible. Resp. Br. at 16. The Ordinance makes clear that the Ordinance provisions "*shall* govern the basic requirements for processing different types of applications." Ordinance, § 1.01 (R. p. 01023). As the Society explained in its Initial Brief, Article 1 of the Ordinance contains, among other things, the procedures for major development plans. It sets out procedures for amending the Ordinance but contains no procedures for amendments of planning commission approvals of major land development plans. The process established by the Ordinance is, instead, (1) an application, (2) Commission review and public participation, (3) Commission final decision, and (4) judicial review. (R. pp. 01025–26). There is no subsequent process for an amendment should judicial review find the Commission acted unlawfully or should circumstances alter the originally proposed plan. Thus, contrary to Respondents' argument, the Ordinance need not "explicitly prohibit" amendment of

plans. It provides a mandatory application process that must be followed, and that process does not include amendments after final approval. Accordingly, the Circuit Court's conclusion that remand, rather than vacatur, was the appropriate remedy was in error.

CONCLUSION

For the foregoing reasons, the South Carolina Native Plant Society respectfully requests that this Court reverse the appealed conclusions of the Circuit Court and vacate the Commission's conditional approval for Blue Sky's RV Park.

Respectfully submitted,

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