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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Charleston County
Court of Common Pleas
Thomas J. Rode, Circuit Court Judge

Case No. 2024-CP-10-05670
App. No. 2025-001337

Paul R. Vannatta and Jennifer S. Vannatta,

Appellants,

v.

Town of Sullivan's Island Board of Zoning Appeals,

Respondent.

INITIAL BRIEF OF APPELLANTS PAUL R. VANNATTA and JENNIFER S. VANNATTA

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I. Did the Circuit Court err in affirming the Zoning Board's decision to deny the Appellants a permit to construct a dock on their property where the Town's Zoning Ordinance §21-75(B)(2) constitutes unconstitutional, illegal spot zoning?

A. Does the prohibition of docks at the property located between Station 18 and Station 27 constitute spot zoning because it imposes a significant land use restriction that is not imposed on all neighboring properties?

1. Is there any evidence to support the Zoning Board's finding that the Ordinance applies to prohibit docks on all the properties in that location?

2. Is there spot zoning where the Ordinance prohibits docks at five of 39 parcels/lots?

3. Is there spot zoning even where the Vannattas' property was not rezoned during their ownership?

B. Is the spot zoning invalid because (1) the ordinance does not form a part of the Town's comprehensive zoning plan or (2) it fails to promote the common welfare and results in clear injustice?

II. Did the Circuit Court err in affirming the denial of the dock permit where the Town's Zoning Ordinance §21-75(B)(2) violates substantive due process in that the location and length prohibitions are arbitrary, capricious or unreasonable?

III. Did the Circuit Court err in affirming the Zoning Board's decision where the Town's Zoning Ordinance §21-75(B)(2) violates equal protection because the geographical location prohibition does not bear any rational relation to any plausible policy goal as stated in the Town's Comprehensive Zoning Plan?

IV. Did the Circuit Court err in affirming the Zoning Board's denial of a variance where the Vannattas made the requisite showing of an unnecessary hardship and the four factors set forth in S.C. Code § 6-29-800(A)(2)?

STATEMENT OF THE CASE

This appeal arises from the denial of the Appellants' application for a residential dock permit and alternative request for a variance to construct a dock at their property in the Town of Sullivan's Island. The issues involve the validity of Section 21-75(B)(2) of the Town's Zoning Ordinance which prohibits construction of docks in a discretely defined geographical location – from centerline extension of Station 18 to the centerline extension of Station 27 -- within the larger RS/RC-2 zoning district, and also prohibits construction of docks greater than 300 ft. in length.

Relevant Background Facts

The Appellants, Paul R. Vannatta and Jennifer S. Vannatta, own property in the Town of Sullivan's Island located at 1802 Back Street which sits at the corner of Station 18 Street and Back Street. [ROA ___; Title – BZA Record 0110.] The property was purchased in 2014. [Id.] The property, which is located on a creek, is the westernmost marsh-front property situated between the centerline extensions of Station 18 Street and Station 27 Street. [ROA ___-___; See plats – BZA Record 0019-0020. See also ROA ___-___, Photos – BZA Record 0051-57.] The property is located in a Single-Family Residential District as well as the Town's RC-2 Area District – a Recreation and Conservation zoning district. [See Staff Report - ROA ___-___; BZA Record 102-03.]

In July 2022, the Vannattas obtained plans to build a recreational dock to access the creek at the rear of their property. As presented in the plan revised in 2023, the proposed dock would be 486 feet long and reach a creek that is 62 feet wide. [ROA ___, ___; Plans - BZA Record 0477, 0489.]

The Zoning Process

The Vannattas first obtained approval and permits for the proposed dock from the South Carolina Office of Coastal Resource Management ("OCRM") and the United States Army Corps of Engineers. [ROA ___, ___; DHEC approval dated March 9, 2023 – BZA Record 0468, OCRM Permit No OCRM042920472 – BZA Record 0472. ROA ___; Army Corps verification and authorization No. DA GP # SAC-RGP-09, dated April 7, 2023, BZA Record 0483.]

On May 22, 2024, the Vannattas submitted their proposed dock plans to the Sullivan's Island Department of Planning and Zoning and applied for a permit to build the dock. [ROA ___; BZA Record 0513.] The dock plans were rejected on the basis that: "A dock is not permitted by the Town in this location; no docks are permitted between the Station 18 centerline extention [sic] and the Station 27 centerline extention. Furthermore, no docks longer than 300 linear feet are permitted unless they reach a 200-ft wide creek." [ROA ___; BZA Record 0513.]

This denial was based on Town of Sullivan's Island Zoning Ordinance, Sec. 21-75. Construction of private docks in RC-2 Area District, provides:

> A. In the RC-2 Area District the construction of private docks by owners of lots adjoining this area may be permitted, provided approval of the Town of Sullivan's Island, U.S. Corps of Engineers, the Department of Health and Environmental Control/Office of Ocean and Coastal Resource Management (DHEC/OCRM) and any other governmental or regulatory agency with jurisdiction.
>
> B. The following restrictions govern the construction of docks in the RC-2 Area District:
>
> (1) No dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation;
>
> (2) No dock shall be permitted to be constructed across marshland in the RC-2 Area District from the centerline extension of Station 18 to the centerline extension of Station 27 and no dock shall be permitted to be constructed in the marsh

> lands of the RC-2 Area District in the area located between the intersection of the eastern point of the Sullivan's Island Fire Rescue Squad Boat Landing lot located at the end of Point Street, TMS#523-06-00-070, and the Osceola Avenue right-of-way and the intersections of the western point of the lot located at 1010 Osceola Avenue, TMS#523-06-00- 003, and the Osceola Street right-of-way. In all other areas of the RC-2 Area District, no dock shall be permitted to be constructed where the length of the dock shall exceed three hundred (300) feet in total length; (4-18-06)
>
> (a) Exception: a dock may extend up eight hundred (800) feet to reach a creek that is two hundred (200) feet or more in width (width of creek measured from land or marsh grass to land or marsh grass); however, said dock shall not be permitted to cross a creek that is greater than eight (8) feet in width to reach the two hundred (200) foot width creek.

[ROA ___; BZA 0126.] This ordinance had been amended in 2004 to add the geographic prohibition of any docks in the Station 18-27 area. [ROA ___; BZA Record 0134.] Currently, there is only one dock located between the extended centerlines of Station 18 to Station 27 -- the community dock located at the rear of Stith Park which is owned and maintained by the Town.[1]

The Vannattas appealed to the Board of Zoning Appeals seeking a reversal of the Zoning Administrator's denial of the dock permit. [ROA ___; Completed Board of Zoning Appeal Application, dated July 19, 2024 – BZA Record 0011-0014.] They do not challenge the Zoning Administrator's interpretation of the Zoning Ordinance Section 21-75(B)(2); rather, they contend that the ordinance is unconstitutional:

> Section 21-75(B)(2) of the Zoning Ordinances constitutes illegal spot zoning and is an arbitrary, capricious, and unreasonable exercise of power as prohibited by Section 1 of the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the Constitution of the State of South Carolina. Denying the permit on these bases was an error of law and the enforcement of unconstitutional ordinance provisions.

[1] The community dock was built prior to the 2004 ordinance amendment so it exists as a legal non-conforming structure within the RC-2 District.

[ROA ___; BZA Record 0012.] In the alternative, they requested a variance from the strict enforcement of the ordinance, arguing that

- The proposed dock would be at the absolute edge of the geographic dock prohibition, such that the purpose of the prohibition is fulfilled. The dock length restriction further serves no purpose due to the proposed location.

- The Vannatta property is one of the very few properties with realistic access to the tributary. Most other nearby properties within this boundary are unaffected by the ordinance. Being at the eastern edge of the tributary, the length of the dock would not interfere with navigation, as determine by OCRM.

- The strict enforcement of Section 21-75(B)(2) acts as a n absolute barrier to the rest, relaxation and recreation meant to be afforded by preserving the RC-2 Area District, meanwhile the discernable purposes of Section 21-75(B)(2) are not achieved.

- Between Station 18 and Station 22, there are only two other properties with realistic access to the tributary. The proposed dock has been found to not impede navigation, such that there would be no detriment to neighboring parcels or the public at large. Neighboring properties to the west have docks extending over 300 feet in length and access the tributary at the same width as the property dock.

[ROA ___; BZA Record 0013.]

By Orders, issued October 11, 2024, the Zoning Board affirmed the denial of the dock permit and denied the request for a variance. In denying the appeal, the Board expressed a finding that it did not have jurisdiction to address the constitutionality issue, but alternatively found that the ordinance was not unconstitutional and does not constitute impermissible spot zoning:

> Motion was made by Michael Scruggs, seconded by James Elliot finding that the Board of Zoning Appeals does not have the jurisdiction or the power to interpret the constitutionality of ordinances enacted by the Town; however, should it be determined that the Board of Zoning Appeals has the authority to determine the constitutionality of Zoning ordinances enacted by the Town of Sullivan's Island, the Board finds the following: Zoning Ordinance, Section 21-75 (B) 2 was validly enacted by the Town of Sullivan's Island after extensive public comment and input and consideration of both the Planning Commission and Town Council over a 7-month period, and after following the appropriate process for adopting and/or amending Town ordinances; further, the Board finds that Zoning Ordinance 21-75

> (B) 2 is neither arbitrary nor capricious, but rather the ordinance is rationally related to a number of legitimate government purposes, including, but not limited to the preservation of the marsh area, the preservation of views, lessening environmental impact, and general conservation within the Recreation and Conservation Zoning District; finally the Board finds that 21-75 (B) 2 does not constitute impermissible Spot Zoning because it does not target a single parcel or relatively small parcel of land or single land owner, rather it includes properties that abut over a mile of marsh front coastline (looks like over thirty parcels), passed unanimously.

[ROA ___; BZA Record 0035.] In denying the request for a variance, the Board found that the ordinance generally applied to the other properties in the vicinity, stating:

> Motion was made by James Elliott, seconded by Michael Scruggs, to deny variance for application in opposition to Section 21-71(B) 2 which concerns the location limitation where the house is at and length of dock, which is a 300 foot limitation and they would want to go beyond that; they have not shown that the application of the ordinance would result in unnecessary hardship because there is nothing that has been shown that would evidence that there are extraordinary exceptional conditions pertaining to this piece of property that do not apply to others; there is nothing that can be shown that the conditions don't generally apply to properties in the vicinity; they have not shown that the property would effectively be prohibited from use or unreasonably restricted in its use; they have not established that if we give the variance, they have not shown there not be a substantial detriment to the adjacent property or the general public; and they have not shown that granting the variance would not harm of the character of the district where it's located, passed unanimously.

[ROA ___; BZA Record 0034.]

The Court Proceedings

The Vannattas appealed to the Circuit Court. [ROA ___; Notice of Appeal filed Monday, November 11, 2024. *See also* ROA ___; Petition for Appeal, filed February 6, 2025.] Town filed an answer and return on March 7, 2025. [ROA ___; Answer/Return.] The matter was heard by the Honorable Thomas J. Rode on May 29, 2025, who affirmed the Zoning Board's decision and dismissed the petition for appeal. [ROA ___; Form 4 Order (formal order to follow), filed May 30, 2025. ROA ___; Formal Order, filed June 11, 2025.]

The Vannattas timely filed and served a Notice of Appeal in the Supreme Court pursuant to Rule 203(d)(1)(A)(ii), SCACR, since the decision involves a challenge to the constitutionality of the Town's zoning ordinance. [ROA ___; NOA, filed July 3, 2025.]

ARGUMENT

Standard of Review

Pursuant to the South Carolina Local Government Comprehensive Planning Enabling Act, S.C. Code Ann. § 6-29-840:

> The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. **** 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.

As well settled in numerous appellate decisions, the applicable standard of review of decisions of a zoning board defers to findings of fact under an any evidence standard, but errors of law are subject to de novo review:

> This Court will not reverse the findings of a county review board unless the board's findings have no evidentiary support or the board has committed an error of law. In the zoning context, a decision of the reviewing body will not be disturbed if there is evidence in the record to support its decision. Indeed, we will not substitute our judgment for that of the reviewing body, even if we disagree with the decision. 'However, the decision of the zoning board will not be upheld where it is based on errors of law ....'. Instead, 'a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.'

Grays Hill Baptist Church v. Beaufort Cnty., 431 S.C. 630, 637, 850 S.E.2d 29, 33 (2020) (citations omitted). However, "[t]his deferential standard of review does not mean a zoning board can never be reversed." Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals, 423 S.C. 169, 184, 813 S.E.2d 874, 881 (Ct. App. 2018). "A decision of a zoning board will not be upheld where it is

based on errors of law…" Kurschner v. City of Camden Plan. Comm'n, 376 S.C. 165, 174, 656 S.E.2d 346, 351 (2008).

It is the function and duty of the courts to consider challenges to the constitutionality of a zoning ordinance. Conway v. City of Greenville, 254 S.C. 96, 104, 173 S.E.2d 648, 652 (1970) ("We recognize that the adoption of zoning ordinances is a legislative function and that a wide discretion rests with the governing authority of the municipality in determining the wisdom or expediency of such legislation. However, the determination of whether such ordinances deprive a citizen of constitutional rights is a judicial function and not legislative. And where an ordinance is clearly violative of constitutional rights, it is the duty of the court to so hold."); James v. City of Greenville, 227 S.C. 565, 585–86, 88 S.E.2d 661, 671 (1955) ("where an ordinance is clearly violative of constitutional rights, it is our duty so to declare it, for the final analysis the question of due process is a judicial, not legislative, one."); Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000) ("this Court determines 'whether the decision of the board is correct as a matter of law.'").

"As in all instances, we review the circuit court's legal and constitutional conclusions with no deference to the circuit court. *See* Callawassie Island Members Club, Inc. v. Dennis, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018) ("We review questions of law de novo."); [State v. Frasier, 437 S.C. 625, 634, 879 S.E.2d 762, 766 (2022)] (holding constitutional questions are questions of law which we review de novo)." Owens v. Stirling, 443 S.C. 246, 264, 904 S.E.2d 580, 589 (2024).

The primary question of law is whether the Town's Zoning Ordinance §21-75(B)(2) is valid. The Vannattas maintain that the geographical location and dock length prohibitions in §21-75(B)(2) constitute illegal spot zoning as well as constitutional due process and equal protection violations as set forth below.

I. THE ZONING BOARD'S DECISION TO DENY THE APPELLANTS A PERMIT TO CONSTRUCT A DOCK ON THEIR PROPERTY IN ACCORDANCE WITH THE TOWN'S ZONING ORDINANCE §21-75(B)(2) CONSTITUTES UNCONSTITUTIONAL SPOT ZONING.

The Applicable Law – Spot Zoning

While the Town has broad zoning authority and the Courts are constrained from interfering with the exercise of the Town's exercise of it zoning power, the Courts will redress violations of the constitutional rights of citizens. Bob Jones Univ., Inc. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963). One aspect of the limits on zoning power is illegal spot zoning.

Spot zoning had been defined by the Court as "the process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of owners of such property and to detriment of other owners." Bob Jones University 133 S.E.2d at 848, *cited in* Knowles v. City of Aiken, 305 S.C. 219, 407 S.E.2d 639, 641 (1991). The Court has addressed the issue of spot zoning in a number of cases. Most recently, in Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals, 440 S.C. 266, 890 S.E.2d 748, 756 (2023), the Court identified two types of spot zoning – traditional spot zoning and reverse spot zoning.

> "Traditional spot zoning occurs when a small parcel of land is singled out for a use classification different from that of the surrounding area, for the benefit of the parcel's owner(s) and to the detriment of others. **** Typically, traditional spot zoning singles out and reclassifies a relatively small tract that is owned by a single person and surrounded by a much larger, uniformly zoned area, such that the small tract is relieved from restrictions to which the rest of the area is subjected.

Id. at 756 (citations omitted). The United States Supreme Court has defined "reverse spot" zoning as "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 132 (1978). The South Carolina Supreme Court similarly has stated:

> In contrast, reverse spot zoning occurs when a zoning ordinance restricts the use of a property when virtually all the property's adjoining neighbors are not subject to the use restriction. Oftentimes, reverse spot zoning occurs where a zoning "island" develops as the result of a municipality's failure to rezone a portion of land to bring

> it into conformity with similar surrounding parcels that are otherwise indistinguishable.

Ani Creation, 890 S.E.2d at 756. The Court also has recognized that while appellate opinions have referred to "use classification," spot zoning may be effectuated in certain other ways, such as a different in height classifications. Historic Charleston Found. v. City of Charleston, 400 S.C. 181, 734 S.E.2d 306, 307–08 (2012).

Not every incident of spot zoning is illegal. "Spot zoning is not impermissible per se in South Carolina." Ani Creation, 890 S.E.2d at 756. Rather, the validity of spot zoning, as explained in Talbot v. Myrtle Beach Bd. of Adjustment:

> [W]here an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such 'spot zoning' is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare.

222 S.C. 165, 72 S.E.2d 66, 71 (1952) (quoting 149 A.L.R. 293). The Court further discussed the appropriate consideration of a challenge to spot zoning, in Ani Creation, 890 S.E.2d at 756-57:

> Thus, when the Court finds an ordinance constitutes spot zoning, 'the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown.'

(Quoting Knowles v. City of Aiken, 223, 407 S.E.2d at 642. *See also* Historic Charleston Found. v. City of Charleston, 734 S.E.2d at 312).

A. The prohibition of a dock at the Vannattas' property located between Station 18 and Station 27 constitutes spot zoning because it imposes a significant land use restriction that is not imposed on all neighboring properties.

The Zoning Board found "that 21-75 (B) 2 does not constitute impermissible Spot Zoning because it does not target a single parcel or relatively small parcel of land or single land owner, rather it includes properties that abut over a mile of marsh front coastline (looks like over thirty

parcels)." [ROA ___; BZA Record 0005.] The Zoning Board's finding, as affirmed by the Circuit Court, ignores the undisputable evidence in the record as to the impact of the ordinance and misapprehends the caselaw on spot zoning.

The Zoning Board's statement that the geographic dock prohibition "includes properties that abut over a mile of marsh front coastline (looks like over thirty parcels)" is wholly inconsistent with the evidence presented at the hearing and fails to appropriately consider the facts presented therein. The record evidence, comprised of plats and photos, establish that there are 39 lots/parcels/properties located in the designated area between Station 18 and Station 27 that that are even within the thousand-foot OCRM requirements, but with the other specific constraints of §21-75, the real effect of that ordinance is to prohibit the construction of docks at 1802 Back Street, and possibly approximately four other parcels. [ROA ___, ___, ___; BZA Record 0596 (illustrating the OCRM's limits of 1,000 feet to access navigable waters); 0597 (illustrating parcels where docks must cross a creek over eight feet wide); 0594 (illustrating that the majority of parcels in this zone have no otherwise legal or realistic access to the navigable waters). The facts shown from the documents in the record give rise to but one inference – that Section 21-75(B)(2) constitutes reverse spot zoning as applied to Appellants' parcel. Therefore, the BZA's findings were made with no factual support, made in error, and must be overturned.

The Zoning Board, as affirmed by the Circuit Court, has ruled that there is no spot zoning because the Vannattas' property is not the only tract affected. In so holding, the Zoning Board and the Court misconstrue the prior appellate decisions as to what can constitute spot zoning. The Court has stated that "traditional spot zoning singles out and reclassifies a relatively small tract that is owned by a single person…" Ani Creation, 890 S.E.2d at 756. However, the Court has never articulated a categorical ruling that spot zoning can only arise from different treatment of a

single parcel/lot. Rather, the Court has stated that spot zoning may arise from different treatment of "a small area within the limits of a zone." Talbot, 72 S.E.2d at 71. The Court has also stated that "reverse spot zoning occurs when a zoning ordinance restricts the use of a property when virtually all the property's adjoining neighbors are not subject to the use restriction." Ani Creation, 890 S.E.2d at 756. Here, while this situation might not present a traditional case of spot zoning, the prohibition of docks in the area between Station 18 to Station 27 together with the dock length limitations imposes a significant land use restriction on the Vannattas' property, that is not shared by virtually all the neighboring properties, thus constituting illegal spot zoning.

The Circuit Court also misconstrued applicable spot zoning caselaw in holding that there was no spot zoning because "the area between Stations 18 and 27 was not rezoned while the Property was left behind." [ROA ___; Order, p. 4.] Again, there is nothing in the spot zoning jurisprudence that sets a flat rule that spot zoning only arises through a rezoning. On this point, the Court's opinion in Ani Creation acknowledges that spot zoning may occur even in the absence of a rezoning. 890 S.E.2d at 575. To the extent that the zoning decision in this case might not fall reflect the typical scenario of traditional spot zoning and reverse spot zoning as considered in prior spot zoning appellate decisions, the crux of the spot zoning is established in this record where the Vannattas' property is being treated differently that the vast majority of the neighboring properties.

B. The spot zoning is invalid where (1) the ordinance does not form a part of the Town's comprehensive zoning plan and (2) it fails to promote the common welfare and results in clear injustice.

As noted above, when the Court finds an ordinance creates spot zoning, "the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common." Knowles v. City of Aiken, 223, 407 S.E.2d at 642, *quoted in* Ani Creation, 890 S.E.2d at 757. The record demonstrates that

the geographic dock prohibition qualifies as impermissible spot zoning. because it is incompatible with the Town's comprehensive plan and it does not promote the common welfare.

1. The geographic dock prohibition in § 21-75(B)(2) does not adhere to the Town's Comprehensive Plan.

The record clearly demonstrates that the geographic dock prohibition not only fails to adhere to the Town's Comprehensive Plan, but directly conflicts with a stated provision for docks in regards to the Plan for the Recreation/Conservation district which is espoused as: "Recognizes limited use of land for recreational purposes (i.e. docks where otherwise permitted by applicable laws and regulations), but otherwise envisions long-term preservation of the land without commercial activity or subdivision, with minimal impact on the view corridor. This land use pertains to both marsh and ocean front areas (RC1 and RC2)." [ROA ___; BZA Record 0587.] The record is devoid of any fact upon which a reasonable conclusion could be drawn that the prohibition of docks between Station 18 and Station 27 adheres to the intended use of the R-C area district.

While the Comprehensive Plan provides no definition of "limited land use for recreational purposes," it does characterize a specified purpose – "to allow docks where otherwise permitted by applicable laws and regulations." To the extent that the Vannattas obtained OCRM and Army Corp approvals that establish that their dock is "otherwise permitted," prohibiting docks specifically between Station 18 and Station 27 is wholly inconsistent with that express intention.

Under the Comprehensive Plan, the RC-2 area district is intended by the Town to be used for recreational opportunities, yet the Vannattas' ability to engage in the very recreational opportunities sought to be afforded by the RC-2 area district is thwarted by the Town eliminating their ability to access the marshland and waterways with a dock. Furthermore, there is no real point in issue about whether the proposed dock would interfere with the "long-term preservation of the

land" or constitute "commercial activity or subdivision." As the record shows, the OCRM and Army Corps of Engineers granted approvals to build the proposed dock after thorough analysis and review was undertaken with respect to preservation and environmental protection of the surrounding area.

Moreover, there is no evidence in this record to support any finding that the geographic dock prohibition adheres to the Comprehensive Plan's stated goal of preserving the "view corridor." Again, there is no definition or description as to what constitutes the "view corridor" in the RC-2 area district in either the Comprehensive Plan or the zoning ordinances. Even if there was a valid basis for conditioning dock permits to protect scenic views, the photographs submitted into the record demonstrate the scenic marsh vista with other private docks in clear view and clearly establishes that the proposed dock would have no detrimental impact to the community's scenic vista. [ROA ___-___, ___-___; BZA Record 0195-0212, 0602-0603.]

2. The geographic dock prohibition in § 21-75(B)(2) does not promote the common welfare.

In Ani Creation, the Supreme Court undertook the requisite analysis of whether the common welfare was promoted by an ordinance that prohibited the sale of sexually explicit merchandise and tobacco paraphernalia within a zoning overlay district. The Court reviewed specific factual findings set forth in the ordinance that were explicitly and immensely probative of the city council's intent in implementing that ordinance; namely that the sale of those items repelled families from the area and that city sought to encourage tourism by creating a more family friendly atmosphere. 890 S.E.2d at 758. The Court ultimately concluded that the ordinance was adopted to promote the common welfare. Id.

In contrast, while the Town's zoning ordinances governing the RC-2 area district set forth various "findings of fact" as announced by the Town, there is no mention of docks, and no

"finding" to support a decision that the common good would be promoted by the outright prohibition on docks in that specific geographical location between Station 18 and Station 27. [ROA ___; BZA Record 582.] On the contrary, the total prohibition of docks within any geographic zone in the RC areas is inconsistent with §21-67, wherein it is declared that "[t]he RC Areas greatly contribute to the health, safety, and welfare of the residents of Sullivan's Island and that they provide…countless hours of pleasurable activity and rest and relaxation which is imporant to the goal of public health, safety and welfare." [ROA ___; BZA Record 0582.] This clearly evidences the Town's intent that the RC-2 area district be utilized in ways that promote recreation. [Id.]

While §21-67 states that "[t]he RC Area are of a particular beauty" and "should be preserved in their natural state" [id.], the fact is that other docks do exist and have been constructed in the RC-2 area district. [ROA ___-___; BZA Record 0604- 0607 (showing the recent construction of a recreational dock at 1710 Blanchard Street – just seven parcels west of the Vannatta's home). ROA ___; BZA Record 0595 (illustrating the numerous docks just west of the Vannatta's home).] This evidences that the existence and construction of private recreational docks within this RC-2 area is not incompatible with the Town's overall intent of conserving in the RC-2 area district for the common good. For these reasons, the adoption of the Station 18 to Station 27 dock prohibition is incompatible with the Town's explicit goals with respect to the promotion of the general welfare.

In addition, the "common good" is being protected by the OCRM and Army Corps that are charged with the responsibility of protecting this coastal region. The Office of Ocean and Coastal Resources Management in the Coastal Division of the Department of Health and Environmental Control is charged with the responsibility to comprehensively manage coastal resources "to protect

the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." S.C. Code § 48-39-30(A). The OCRM already has considered and approved the dock plan under the state process which evidences that the dock will not be a detriment to the common good. *See* S.C. Code § 48- 39-150 (providing the extensive factors OCRM must consider before approving a critical area permit such as that which was awarded to the Vannattas). Similarly, the U.S. Army Corps of Engineers, the federal agency that is charged with protecting the aquatic resources and navigation capacity in the Nation's waters, including wetlands, see 33 U.S.C.A. §§ 401 *et seq*., has approved the proposed plans which establishes that the dock will not be a detriment to the common interest in the navigable waters on the creek.

Petitioners live at the literal outer edge of an arbitrary dock dead zone and their access to the waterway has been effectively seized on arbitrary and unreasonable grounds. The clear injustice contemplated by Talbot and Knowles is manifest here as the "confiscatory" and arbitrary denial of rights and privileges that are otherwise afforded to others similarly situated. *See* Yacht Club by Luxom, LLC v. Village of Palmetto Bay Council, 316 So.3d 748, 751, n. 1 (Fla. 3d DCA 2021). For all of these reasons, the evidence set forth in the record clearly demonstrates that the Station 18 to Station 27 dock prohibition in the Town of Sullivan's Island constitutes impermissible spot zoning and the decision of the Zoning Board must be overturned.

II. THE TOWN'S ZONING ORDINANCE §21-75(B)(2) VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE THE LOCATION AND LENGTH PROHIBITIONS ARE ARBITRARY, CAPRICIOUS OR UNREASONABLE.

A municipality has the power to enact regulations for the purpose of preserving the health, safety, welfare, and comfort of dwellers in its jurisdiction. A municipality's police power includes the authority to enact zoning ordinances, restricting the use of privately owned property. Dunes

W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601, 609 (2013). However, while this police power is broad, it is not absolute. Our courts can and must correct violations of due process where a municipal zoning ordinance is found to be unreasonable: "The exercise of police power is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." Denene, Inc. v. City of Charleston, 359 S.C. 85, 93, 596 S.E.2d 917, 921 (2004) (citing Main v. Thomason, 342 S.C. 79, 87, 535 S.E.2d 918, 922 (2000)).[2] "In reviewing substantive due process challenges to municipal ordinances, a court must consider whether the ordinance bears a reasonable relationship to any legitimate interest of government." Dunes West, 737 S.E.2d at 609. The substantive due process standard has also been stated in terms of whether a town zoning ordinance is arbitrary and capricious: "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Harbit v. City of Charleston, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct. App. 2009).

The geographical location and length prohibitions in §21-75(B)(2) violate due process because they are unreasonable and arbitrary and capricious for virtually the same reasons as discussed above regarding the illegal spot zoning issue. The facts that the geographic location prohibition does not form a part of the Town's comprehensive zoning plan and it fails to promote the common welfare establishes that it is unreasonable and arbitrary and capricious.

Contrary to the faulty premise presented by the Town in an attempt to justify the geographic dock prohibition, the fact is shown in the record that the zoning ordinance applies a blanket prohibition on a land use to an overwhelming number of parcels where docks already could not

[2] *Overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).

possibly comply with either OCRM's rule that docks longer than 1,000 feet will not be permitted and/or could not comply with the dock length restrictions, much less the parcels where dock construction is realistically impossible. There simply is no evidence of any logical, rational reason for prohibiting docks in this specific, isolated strip of properties within the greater RC-2 area district, particularly, where it prohibits docks at just five of 39 properties. Likewise, there is no rational reason for the dock length prohibition, particularly, where the OCRM and Army Corps approval process has already addressed any legitimate concerns about potential environmental impacts on the marsh and the navigability of the creek.

III. THE ORDINANCE'S PROHIBITION ON DOCKS BETWEEN STATION 18 AND STATION 27 VIOLATES THE EQUAL PROTECTION CLAUSE.

In Ani Creation, the Court addressed an equal protection challenge to the zoning ordinance, separately, but in conjunction with the spot zoning challenge. 890 S.E.2d at 757-58; U.S. Const. amend. XIV, § 1. As in that case, the Town's zoning ordinance is tested under the 'rational basis' standard which considers whether "(1) there is a plausible policy reason for the classification; (2) the facts on which the classification is based rationally may have been considered to be true by the decision maker; and (3) the relationship of the classification to the goal is not so attenuated as to render the distinction arbitrary or irrational." Id. at 758. The geographical location prohibition in the Town's Ordinance §21-75(B)(2) violates the Equal Protection Clause because there is no plausible policy reason for that distinct Station 18 to Station 27 location within the RC-2 area district; the supposed facts upon which the Town purported to rely are not substantiated by the evidence of record; and the relationship of the dock prohibition does not bear any rational relation to achieving the goals stated in the Town's Comprehensive Zoning Plan.

The Station 18 to Station 27 dock prohibition, which serves as the basis for the classification at issue, is arbitrary, capricious, and has no reasonable relationship to the purported

policy objectives that can be extrapolated from the evidence in the record. This analysis has been discussed in Section II above and is incorporated without restating verbatim. Eli Witt Co. v. City of West Columbia, 309 S.C. 555, 558, 425 S.E.2d 16, 17-18 (1992) (recognizing that an ordinance violates the Equal Protection Clause if it is arbitrary). In short, the record clearly establishes that the ordinance fails rational basis review because the classification established by the geographical location dock prohibition does not rest on any reasonable basis for the same reasons why the ordinance is arbitrary and capricious. Namely, because prohibiting docks between the discrete location from Station 18 to Station 27 is wholly unrelated to the policy goals as found in the Town's Comprehensive Plan.

IV. THE REQUEST FOR A VARIANCE WAS UNJUSTIFIABLY DENIED WHERE THE VANNATTAS HAVE MADE THE REQUISITE SHOWING OF UNNECESSARY HARDSHIP AND THE FOUR FACTORS SET FORTH IN §6-29-800.

Pursuant to S.C. Code § 6-29-800(A)(2), a zoning board of appeals is empowered "to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship." This statute identifies four factors that an applicant must prove to obtain a variance:

> A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:
>
> (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;
>
> (b) these conditions do not generally apply to other property in the vicinity;
>
> (c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
>
> (d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

A. The application of Section 21-75(b)(2) to Vannattas' property causes the very unnecessary hardship that a variance is meant to relieve.

There is no set definition of "unnecessary hardship" in the statute or caselaw related to variances:

> In South Carolina, 'The courts have never undertaken to formulate an all-inclusive definition of 'unnecessary hardship'. Although it has been stated that the phrase should be given a reasonable construction, it is recognized that it does not lend itself to precise definitions automatically resolving every case.' *Stevenson v. Board of Adjustment of City of Charleston,* 230 S.C. 440, 448, 96 S.E.2d 456, 460 (1957); *Application of Groves,* 226 S.C. 459, 463, 85 S.E.2d 708, 709–10 (1955); *Hodge v. Pollock,* 223 S.C. 342, 348, 75 S.E.2d 752, 754 (1953).

Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 217, 516 S.E.2d 442, 446–47 (1999). However, the Supreme Court has established alternative guideposts to guide the analysis.

As one point, the Court must screen for whether the owner's actions created the claimed unnecessary hardship or whether the owner is claiming a nonconforming use existing at the time of the property's purchase works an unnecessary hardship. Id. (citing Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527, 532 (1965)). While this point technically does not apply because the ordinance was in place before the Vannattas bought their property, there was nothing set forth in the deed or legal description of the property that would have put them on reasonable notice that they would not be able to build a dock on their marsh-front property.

Still, the other point is applicable in this case, namely there must be proof that the particular property suffers a singular disadvantage through the operation of the zoning ordinance. 516 S.E.2d at 447. The unnecessary hardship standard is not as demanding as the Fifth Amendment's takings analysis. See Id. at 448 ("Even though the County's zoning ordinance is constitutionally valid, Thee DollHouse argues that the Board applied it unconstitutionally by denying the variance.") Thus, the Vannattas are not required to prove that their parcel has been deprived of all of its enjoyment or economic use. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding

that the Fifth Amendment's Takings Clause is violated where a regulation deprives a property owner of the economic value of the property). Proof of a property's singular disadvantage caused by a zoning ordinance does not have to take any particular form for the purpose of proving an unnecessary hardship, but this portion of the analysis is functionally similar to the portion of the impermissible spot zoning analysis addressed in Ani Creation, Inc., 440 S.C. at 283-84, as discussed above.

Here, while the Town has expressed the intent for its zoning ordinances to enable the Town's resident to enjoy the marshland and waterways [ROA ___; BZA Record 0582, 0587], the Vannattas are precluded from constructing a recreational dock to access marshland and waterways from their own property. For reasons already articulated above in the spot zoning issue and constitutional violations, the record shows that the geographic location and length prohibitions in § 21-75(b)(2) are an arbitrary and unreasonable and are imposing an unnecessary hardship on these property owners unlike so many other parcels in the RC-2 area district.

B. The Vannattas presented ample facts supporting the four statutory factors that must be met in applying for a variance.

Upon proof an unnecessary hardship, the Zoning Board was required to address the four factors in §6-29-800(A)(2)(a-d) in considering the variance request. The Vannattas argued and proved each of the four factors:

- The proposed dock would be at the absolute edge of the geographic dock prohibition, such that the purpose of the prohibition is fulfilled. The dock length restriction further serves no purpose due to the proposed location.

- The Vannatta property is one of the very few properties with realistic access to the tributary. Most other nearby properties within this boundary are unaffected by the ordinance. Being at the eastern edge of the tributary, the length of the dock would not interfere with navigation, as determine by OCRM.

- The strict enforcement of Section 21-75(B)(2) acts as an absolute barrier to the rest, relaxation and recreation meant to be afforded by preserving the RC-2 Area District, meanwhile the discernable purposes of Section 21-75(B)(2) are not achieved.
- Between Station 18 and Station 22, there are only two other properties with realistic access to the tributary. The proposed dock has been found to not impede navigation, such that there would be no detriment to neighboring parcels or the public at large. Neighboring properties to the west have docks extending over 300 feet in length and access the tributary at the same width as the property dock.

[ROA ___; BZA Record 0012.]

In denying the Vannattas' application for a variance, the Zoning Board decided that none of the four factors had been met. The Zoning Board attempted to justify its conclusion by asserting that there was no evidence to show extraordinary and exceptional conditions pertaining to the particular piece of property, no evidence that those conditions do not apply to others, no showing that property would be "effectively prohibited from use or unreasonably restricted in its use", and no showing that the authorization of the variance would not be of a substantial detriment to adjacent property or to the public good, and no showing that the character of the district would not be harmed. [ROA ___; BZA Record 0034.] However, the Zoning Board's conclusions on these factors were made summarily and with no reference to the ample evidence presented at the hearing and with no factual findings taken therefrom.

Our Supreme Court has recognized that extraordinary and exceptional circumstances that do not apply to other properties in the vicinity may be found where the character of the property at issue is unique based on its potential use. Black v. Lexington County Board of Zoning Appeals, 396 S.C. 453, 722 S.E.2d 22 (2012) (finding extraordinary and exceptional circumstances exist that are not applicable to nearby parcels where a lot sought to be enhanced for commercial purposes was home to the only steel fabrication facility in the area). At the hearing, the Vannattas showed that extraordinary and exceptional circumstances exist at the property that do not apply to other parcels because, given the application of the Station 18 to Station 27 dock prohibition, their parcel

is one of very few in the area where a dock may even realistically and otherwise legally be built but for the application of the ordinance sought to be relieved by a variance.

With regard to the prohibited utilization of the property, the Vannattas demonstrated at the hearing that the expressed purpose of the RC-2 area districts is to enhance rest, relaxation, and recreation. [ROA ___; BZA Record 0582, 0587.] The outright prohibition of their proposed recreational dock eliminates the Vannattas' ability to access the RC-2 area district from their parcel, which is an opportunity afforded to the Vannattas neighbors just a few blocks to the west.

Finally, the Vannattas presented ample evidence to demonstrate that the requested variance would provide no substantial detriment to adjacent property or the public good. Notably, the same point was necessarily considered by the OCRM in its approval process. S.C. Code § 48-39-150 (A)(10) (providing that OCRM must consider "the extent to which the proposed use could affect the value and enjoyment of adjacent owners"). Moreover, the Vannattas presented evidence of the nature of a dock at 1710 Blanchard Street[3], as well as the various nearby docks. All of these comparative docks are relatively similar in character to the Vannattas' proposed dock, and therefore the construction of the Vannattas' dock would not prove any substantial detriment to neighboring properties or the public at large. As previously discussed above, the evidence shows the Vannattas' proposed dock would have no negative impact on the "view corridor". The only reasonable conclusion is that the Vannattas presented sufficient evidence to satisfy the statutory factors for granting a variance in this matter.

There are three findings which serve to preclude outright the issuance of a variance: (1) a variance must not allow a use not otherwise permitted in a zoning district; (2) a variance must not

[3] 1710 Blanchard Street is located seven parcels west of the Vannatta home. [ROA ___; BZA Record 0604-0607.]

extend physically a nonconforming use of land; and (3) a variance must not change the zoning district boundaries shown on an official zoning map. S.C. Code § 6-29-800(A)(2)(d)(i). The BZA made no findings that any of these three limitations forestall the Vannattas' request for a variance.

Ultimately, the record is replete with evidence that denial of the dock permit under §21-75(B)(2) works an unnecessary hardship and establishes the four elements set forth in §6-29-800(A)(2), that must be found in order to grant a variance. Accordingly, the Town's decision to deny a variance should be overturned.

CONCLUSION

WHEREFORE, based on the foregoing, the facts set forth in the Record on Appeal, when applied to the laws designed to curtail government overreach inflicted through the enforcement of arbitrary, unreasonable, and otherwise impermissible land use decisions, show that the Ordinance is invalid. In the alternative, the Vannattas made the requisite showing for a variance. In either circumstance, order of the Circuit Court should be reversed and the matter should be remanded with directions for the Town to issue a permit for the proposed dock.

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