THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2015-002086

Ex parte: Historic Charleston Foundation, Preservation Society of Charleston, Charlestowne Neighborhood Association and Harleston Village Association,

Appellants.

Beach Jasper, LLC and Beach Equity Investments, LLC,

Respondents,

v.

City of Charleston and City of Charleston Board of Architectural Review,

Respondents.

APPELLANTS' JOINT RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

INTRODUCTION

The trial court erred in denying Appellants' motions to intervene as parties in the underlying action. This appeal challenges the trial court's ruling that Appellants do not have constitutional standing to intervene as parties in the underlying action because standing is conferred by Section 6-29-915(A) of the South Carolina Code. This appeal is not frivolous and Respondents' motion should be denied.

PROCEDURAL POSTURE

On June 3, 2015, Beach Jasper, LLC and Beach Equity Investments, LLC (collectively "the Beach Company") appeared before the City of Charleston Board of Architectural Review ("the BAR") for a public hearing on its application to develop 310 Broad Street and 322 Broad Street (collectively "the Jasper"). The BAR hearing was moved to the Charleston Museum Auditorium due to overwhelming public interest in the Jasper project. At the conclusion of the June 3, 2015 hearing, the BAR issued a decision denying the Beach Company's application.

On June 29, 2015, the Beach Company appealed the BAR decision to the Charleston County Court of Common Pleas naming both the City and the BAR as Respondents. The Beach Company also filed a Request for Pre-Litigation Mediation in which the only parties would be the Beach Company, the BAR, and the City of Charleston ("the City"). Upon receiving this Notice and pursuant to Section 6-29-915(A) of the South Carolina Code, Appellants Charlestowne Neighborhood Association ("CNA), Harleston Village Association ("HVA"), the Preservation Society of Charleston ("PSC"), and Historic Charleston Foundation ("HCF") (collectively CNA, HVA, PSC, and HCG hereinafter "Appellants") filed petitions to intervene as parties.

On August 11, 2015, the trial court heard oral argument on the petitions to intervene. The court issued an Order on August 13, 2015 that only allowed for Appellants to attend mediation but

denied Appellants' petition to fully participate in it as "parties" to the case. Appellants' motions to reconsider were denied. Thereafter, Appellants timely filed and served their Notices of Appeal. The Beach Company then filed a Motion to Dismiss the Appeals as being frivolous without legal basis. This Return is Appellants' joint response to that Motion.

FACTUAL BACKGROUND

The Jasper, initially built in 1950, is an apartment building situated on Broad Street at the Western gateway to the historic district of the City. The Beach Company owns the Jasper. Id. It is located entirely within the neighborhood served by the mostly residential HVA, and it is just across Broad Street from the neighborhood served by the CNA, which is also mostly residential. Id. The Jasper is located within the City's Old and Historic District which is subject to the jurisdiction of the BAR.

The BAR was established in 1931 with the creation of the first preservation ordinance in the United States. The stated purpose of the BAR is "the preservation and protection of the old historic or architecturally worthy structures and quaint neighborhoods which impart a distinct aspect to the city and which serve as visible reminders of the historical and cultural heritage of the city, the state, and the nation." City of Charleston Code § 54-230. The BAR is an independent regulator of architectural matters in the historic district. See City of Charleston Code § 54-233.

Within the historic districts in which the Jasper is located, the BAR reviews all new construction, alterations, and renovations visible from the public right-of-way. Id. at § 54-240. In plain language, the City's zoning ordinances are generally analyzed and applied first setting the outer limits as to what can be built on a particular parcel of land, and then the BAR is charged with ensuring that such buildings are appropriate in height, scale, mass, and character so as to promote its purpose of preservation and protection of worthy structures and quaint neighborhoods. Id. In

fact, the City Zoning Ordinance explicitly states that "[n]o structure which is within the Old and Historic District shall be erected, demolished or removed in whole or in part, nor shall the exterior architectural appearance of any structure which is visible from a public right-of-way be altered until after an application for a permit has been submitted to and approved by the Board of Architectural Review." City of Charleston Code § 54-232(a).

Despite Appellants being primarily comprised of owners and easement holders of modestly sized historic single family homes, the Beach Company proposed a development plan ("the Plan") for this important site that would be larger than if the Cigar Factory on East Bay Street and the Francis Marion Hotel on Calhoun Street were combined into one structure. The Plan includes demolishing the current structure, and constructing a 14-story tower with adjoining structures that would include 80 residential units, 118,000 square feet of offices, 36,000 square feet of retail, and a parking garage that would accommodate close to 600 vehicles.

Because the Beach Company sought to redevelop their property, it first applied to the BAR for conceptual approval of a proposed plans on May 4, 2015. This plan included an 18-story residential tower with 80 units, approximately 120,000 square feet of office space, 40,000 square feet of retail space and 592 parking spaces. Both the Preservation Society and Historic Charleston submitted opposition statements to the BAR and spoke in opposition to the Beach Company's plan at the May 13, 2015 BAR meeting.

Dozens of residents of the surrounding neighborhoods, including members of HVA and CAN, also spoke in opposition to the Beach Company's modified plans. At the end of the meeting, the BAR voted to defer voting on "height, scale and mass, specifically as it relates to the tower... ."

A new application was submitted for consideration at the BAR meeting scheduled for June 3, 2015. Although the Beach Company decreased the height of the tower from its original plan, the size of the other sections of the building were increased in an apparent effort to make up for the reduced tower height. Despite the obvious fact that the height, scale and mass of the proposed building was clearly inconsistent with the surrounding neighborhoods and the City's own long-range planning documents, the City staff recommended approval of the Plan as presented at the June 3, 2015 hearing, with a few minor modifications. The Mayor also appeared at the BAR hearing to voice his support the Beach Company's plan. After careful consideration of the foregoing, the BAR denied the Beach Company's Application at the June 3, 2015 hearing finding its height, scale, and mass were not compatible with the character of Appellants. On June 29, 2015, the Beach Company appealed the BAR's decision to the circuit court pursuant to Sections 6-29-900(B)(2) and 6-29-915(A) of the South Carolina Code and the underlying action was commenced.

For the reasons set forth below, this appeal is not frivolous, and the trial court erred in refusing to permit Appellants to intervene as parties pursuant to Section 6-29-915. Appellants are entitled to have this appeal heard on the merits. Respondents' motion should be denied.

I. THIS APPEAL PRESENTS A QUESTION OF STATUTORY INTERPRETATION AND SHOULD BE DECIDED ON THE MERITS.

Respondents move to dismiss this appeal only on the ground that it is "frivolous." In order to summarily dismiss this appeal, this Court would have to completely ignore the basic framework and long-established jurisprudence regarding statutory interpretation. Respondents' motion should be denied and Appellants should be afforded an appellate forum to challenge the merits of the trial court's Orders.

Appellants contend the trial court's interpretation of Section 6-29-915 was legal error and

ask this Court to reverse. The proper interpretation of a statute of a question of law for the court. Catawba Indian Tribe of S. Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). South Carolina law has long held that an appellate court's review of statutory interpretation is *de novo*; thus, this Court will review the construction of Section 6-29-915 and the rights it confers upon Appellants with no deference to the trial court's interpretation. See Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("this Court reviews questions of law *de novo*.") As discussed below, this Court has never addressed the meaning of "substantial interest" in the context of Section 6-29-915 and this appeal presents an important issue of first impression. Additionally, the plain effect of the trial court's Orders is that Appellants are not parties to the underlying action. The right to be a party to an action which affects its interests is a fundamental tenant of our justice system. Regardless of the ultimate outcome of this appeal on the merits, the posture in which this appeal is pending before the Court plainly demonstrates a meritorious issue that cannot be dismissed summarily.

Respondents offer neither a reason nor an argument as to why Appellants' participation in the appellate process established to challenge a trial court's interpretation of a statute is frivolous. Respondents loosely cite Rule 269, SCACR and then proceed to argue the merits of the appeal. Simply, the need to resort to merits of issues on appeal undermines Respondents' claim that this appeal has no merit. Respondents cannot demonstrate the appropriateness of dismissing this appeal at this premature juncture and, thus, the motion to dismiss should be denied.

Respondents' request for sanctions against Appellants based on the notion that this subject appeal is frivolous has no factual basis whatsoever. Respondents' application was denied by the BAR; thus, Respondents do not currently possess any rights to move forward with redevelopment of the Jasper. In fact, the underlying action in which Appellants have sought to intervene is the

BAR's denial of the Beach Company's Plan to redevelop the Jasper site.

II. APPELLANTS HAVE A "SUBSTANTIAL INTEREST" IN THE BAR'S DECISION AND, THUS, HAVE STANDING TO INTERVENE IN THE UNDERLYING ACTION PURSUANT TO SECTION 6-29-915.

The trial court erred in refusing to permit Appellants to intervene as parties in the underlying action as persons with a "substantial interest" in the BAR's decision. South Carolina Code § 6-29-915 ("the BAR Intervention Statute") mandates that the circuit court must grant a petition to intervene when the proposed intervener has a substantial interest in a BAR decision. See S.C. Code Ann. § 6-29-915 ("this motion [petition to intervene] *must* be granted if the person has a substantial interest" (emphasis added)). This particular section of the South Carolina Code is a necessary byproduct of § 6-29-900 ("the BAR Mediation Statute") which would otherwise allow property owners whose property is the subject of a BAR application to appeal an unfavorable decision to the circuit court, request pre-litigation mediation, and confidentially resolve the dispute pursuant to the South Carolina Alternative Dispute Resolution Rules without any public involvement in a matter of great concern to the citizens of the City. See S.C. Code Ann. § 6-29-900. Without the BAR Intervention Statute, the only way a non-owner with a substantial interest in a BAR decision could intervene into the process would be through Rule 24 of the South Carolina Rules of Civil Procedure by demonstrating constitutional standing, and if constitutional standing were required for a non-party to intervene via the BAR Intervention Statute, that would render it completely purposeless. Compare S.C. Code Ann. § 6-29-915 with SCRCP 24.

Our Courts have yet to analyze what the phrase "substantial interest" means in the context of a BAR decision, but that term has been analyzed in zoning appeal cases, which are governed by similarly worded statutes as the BAR Mediation Statute and the BAR Intervention Statute. See

Bevivino v. Town of Mt. Pleasant Bd. of Zoning Appeals, 737 S.E.2d 863 (S.C. Ct. App. 2013) (reversing a trial court's decision to dismiss an appeal on a finding that substantial interest in the zoning statutes is more relaxed than in the context of constitutional standing). In analyzing the issue, the Courts focus on whether the party seeking to demonstrate a substantial interest can show it has standing as acquired by statute noting, "the traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." Id.

In Bevivino, this Court found the challenging party had statutory standing under the zoning statutes. Id. In Bevivino, homeowners in the Candlewood Neighborhood challenged a the decision of Mount Pleasant's Board of Zoning Appeals ("the BZA") which allowed the construction of a telecommunications tower on a piece of property that was adjacent to Candlewood. Id. On appeal, the Court found that the objectors had standing, under S.C. Code Ann. § 6-29-820, to pursue judicial review of the board's decision and to appeal the circuit court's decision. Id. Although this Court later affirmed the BZA's decision, finding it did not abuse its discretion, the significance of this decision is that an adjacent property owner was held to have a substantial interest in the matter and statutory standing challenge the decision. Id.

III. THE LEGISLATIVE INTENT IS CLEAR FROM THE PLAIN LANGUAGE OF 6-29-915 AND MANDATES THAT APPELLANTS BE PERMITTED TO INTERVENE AS PARTIES IN THE UNDERLYING ACTION.

The trial court erred in ignoring the clear legislative intent of Section 6-29-915. The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 617 S.E.2d 369, 377 (S.C. Ct. App. 2005). The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 606 S.E.2d 503, 505 (S.C. Ct. App. 2004). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc., 606

S.E.2d 468, 470 (S.C. 2004). If, however, the plain language of statute gives rise to doubt or uncertainty, it should be resolved in favor of a just, beneficial, and equitable operation of the law. State v. Hudson, 519 S.E.2d 577, 581 (S.C. Ct. App. 1999). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 573 S.E.2d 783, 785 (S.C. 2002). Courts should reject an interpretation that leads to results so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7, 649 S.E.2d 28, 30 (S.C. 2007).

The legislative intent is clear from the plain language of the BAR Intervention Statute. The purpose of that statute is to allow intervention by those with a substantial interest in a BAR decision who might not meet the standards for intervention under Rule 24 of the South Carolina Rules of Civil Procedure and traditional notions of constitutional standing. Since both Rule 24 and the parameters of constitutional standing predate the enactment of the BAR Intervention Statute, the Legislature must have intended to relax the rules for intervention in an appeal such as the underlying action. Otherwise, as is apparently being attempted here, the City and a property owner could completely eliminate all public input on issues that will significantly and irreversibly impact the public.

The affidavits submitted by Appellants demonstrate a substantial interest in the BAR's decision. Specifically, those affidavits demonstrate the following:

- Appellants' members and their respective property interests will be substantially and particularly affected by the disposition of the underlying action that is different than the general grievances from the public at large because of their substantial, particular, and individualized interest in the following:
    - Their Properties' values;

- Their access to their Properties;
- Increased traffic and congestion at their Properties that they will face as they enter and exit their Properties;
- Increased noise, trash and pollution that will be generated by the residents of the Jasper;
- Their views from their Properties; and
- Their use and enjoyment of their Properties.

- As owners and easement holders of Properties in the neighborhoods that include and adjoin the Jasper, a reversal of the BAR's decision will result in Appellants suffering injuries that are concrete, particularized, actual, and/or imminent invasions of their legally protected interests as property owners, if the Appellants are not allowed to participate in the underlying action.
- As owners of Properties in the same neighborhood, a decision upholding the BAR decision will address Appellants' imminent injury.
- The members of Appellants desire their respective organizations to participate in the above-captioned matter on their behalf.

As the affidavits and the public comments made during the hearing make clear, Appellants themselves and/or their members have a substantial interest in this matter. If the BAR decision is reversed, Appellants will suffer a particularized harm. Additionally, there are sworn statements that the upholding of the BAR's decision will adequately protect Appellants' interests, which are are inconvenienced in a different manner than Appellants as a result of the traffic congestion, pollution, noises, and obstructed views. Finally, the issues presented are germane to Appellants' purpose, and this matter should not require their members' involvement. Appellants

demonstrated a "substantial interest" in the BAR's decision and satisfied the requirements of statutory standing.

IV. EVEN IF THIS COURT DETERMINED THAT APPELLANTS MUST DEMONSTRATE CONSTITUTIONAL STANDING IN ORDER TO INTERVENE IN THE UNDERLYING ACTION, APPELLANTS DEMONSTRATED CONCRETE, PARTICULARIZED, ACTUAL/EMINENT DAMAGE TO THEIR PROPERTIES IF THE BAR'S DECISION IS REVERSED.

Even if this Court determined that Section 6-29-915 does not confer standing to intervene in the underlying, Appellants demonstrated the requirements of constitutional standing. For a party to demonstrate constitutional standing, it must have damage that is concrete, particularized, and actual/imminent invasion of a legally protected interest caused by the other party, which a judicial body can redress with a favorable decision. Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 753 S.E.2d 846 (S.C. 2014). In order for an injury to be particularized, it must be personal in an individual way. Id. An association possesses standing by virtue of its members if one or more of its members will suffer an individual injury by virtue of the contested act. Id. The test for associational standing requires that an association's members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Id. As described in more detail above, Appellants presented affidavits and exhibits from the BAR hearing which demonstrate that their members have a particularized interest and potential injuries depending upon the outcome of this appeal that are not mere generalized grievances suffered by the public as a whole. Thus, even if this Court determined Appellants must satisfy constitutional standing requirements in order to intervene, the trial court erred in denying Appellants' motion to intervene on the basis of constitutional standing.

CONCLUSION

Respondents have failed to demonstrate that this appeal is frivolous. Appellants are entitled to present the Court with full briefing on the merits as well as a Record of the proceedings below. Respondents' motion to dismiss and motion for sanctions should be denied.

November 5, 2015

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J. C. Nicholson, Jr., Circuit Court Judge

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Beach Jasper, LLC and Beach Equity Investments, LLC,

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v.

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PROOF OF SERVICE

I certify that I have served Appellants' Joint Return to Respondents' Motion to Dismiss Appeal on Respondents Beach Jasper, LLC and Beach Equity Investments, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on November 5, 2015 addressed to their attorneys of record, Richard S. Rosen, Esquire and Alice F. Paylor, Esquire, Rosen, Rosen & Hagood, LLC, 151 Meeting Street, Suite 400, Charleston, South Carolina 29401.

I certify that I have served Appellants' Joint Return to Respondents' Motion to Dismiss Appeal on Respondents City of Charleston and City of Charleston Board of Architectural Review, by depositing a copy of it in the United States Mail, postage prepaid, on November 5, 2015 addressed to their attorney of record, Frances I. Cantwell, Esquire, City of Charleston, 50 Broad Street, Charleston, South Carolina 29401.

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The Honorable Jenny Abbott Kitchings
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RE: Historic Charleston Foundation, Preservation Society of Charleston, Charlestowne Neighborhood Association and Harleston Village Association v. Beach Jasper, LLC, Beach Equity Investments, LLC, City of Charleston, and City of Charleston Board of Architectural Review
Appellate Court Case No.: 2015-02086
Our File No.: 1022-1

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellants' Joint Return to Respondents' Motion to Dismiss Appeal and Proof of Service in regard to the above-referenced matter. Please return one (1) file-stamped copy to me in the self-addressed, stamped envelope provided. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC

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IRN/cb
Enclosures
cc: Richard S. Rosen, Esquire
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