

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
COURT OF COMMON PLEAS

RECEIVED

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SC Court of Appeals

Larry B. Hyman, Jr., Circuit Court Judge

APPELLATE CASE NO. 2016-000029

Robert and Pamela Wilkes,.....Appellants,

v.

Town of Pawleys Island,
Georgetown County Planning Commission.....Respondents.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN THE RULING THAT THE MANDATORY UNIFORM DEVELOPMENT CHECKLIST AND TUTORIAL IS NOT A BINDING REGULATION OF THE TOWN OF PAWLEYS ISLAND?**
- II. DID THE ZONING BOARD OF APPEALS, GEORGETOWN COUNTY ZONING ADMINISTRATOR, AND LOWER COURT ERR IN ONLY CONSIDERING 2-10.1 OF THE TOWN OF PAWLEYS ISLAND UNIFORM DEVELOPMENT CODE AS THE APPLICABLE ZONING REGULATION GOVERNING APPELLANTS' VARIANCE REQUEST AND NOVEMBER 17, 2009 PERMIT APPLICATION?**
- III. DID THE LOWER COURT ERR IN RULING THAT APPELLANTS WERE NOT ENTITLED TO A BUILDING PERMIT FOR THEIR NOVEMBER 17, 2009 WALKWAY PERMIT APPLICATION WHEN APPELLANTS DID NOT COMPLY WITH TOWN ORDINANCES AND LAWFUL EXCEPTIONS GOVERNING WALKWAY WIDTH?**

STATEMENT OF THE CASE

Robert J. Wilkes and Pamela J. Wilkes (hereinafter, "Appellants") own property located at 302 Atlantic Avenue within the municipality of Pawleys Island. The Appellants began extensive remodeling of their residence and built a walkway from their residence to the beach in the Summer of 2009. (R. p. 2 lines 5-7). The Appellants applied for a permit for said walkway on June 25, 2009. (R. p. 4 line 3). Thereafter, a walkway was constructed on the Appellants property, without approval and without securing the necessary permits from the Zoning Department. (R. p. 4 line 4). The walkway, landward of the OCRM line exceeded four feet in width, is in violation of the Town of Pawleys Island Unified Development Ordinances. (R. p. 4 line 5).

The Town of Pawleys Island informed the Appellants that their walkway exceeded the permissible width provided for in the Town's zoning ordinance. (R. p. 5 line 11). On August 28, 2009 the Appellants submitted a variance request to the Zoning Board of Appeals and on November 24, 2009 the Appellants request was denied. (R. pp. 12-14). On Nov. 17, 2009 the Appellants submitted a revised building permit application to the Town of Pawleys Island and to Georgetown County Planning, stating that two feet of said walkway would be benches. This permit was denied.

The matter was appealed to the circuit court on December 21, 2009. (R. pp. 22-30). On June 28, 2011 the Court remanded the case for mediation and rehearing before the Zoning Board of Appeals. An appeal hearing was then held by the Town of Pawley's Island Board of Zoning Appeals on March 29, 2012 at 6:00 P.M. at the Waccamaw Neck Branch Library in Pawleys Island community of Georgetown County, South Carolina and

this appeal was denied. (R. pp. 57-62). The Appellants appealed the decision of the Zoning Board of Appeals on June 20, 2012. A hearing on the appeal was held before the Honorable Larry B. Hyman, Jr., on November 6, 2014, and a Final Order affirming the Zoning Board of Appeals was filed December 18, 2014. (R. pp. 34-37). Appellants filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP on January 7, 2015, which was heard on October 12, 2015. (R. pp. 31-33). The Circuit Court denied Appellants' Motion by written Order filed on December 21, 2015 and Appellants submitted their Notice of Appeal on January 4, 2016. (R. pp. 4-11).

The Appellants contend that their Revised Application for a variance, submitted on November 17, 2009, seeking to allow their walkway exceeding four feet in width, was wrongfully denied. The Appellants base their contention on non-authoritative documents, specifically the "quick analysis tutorial", which states walkways that exceed four feet in width can be extended to a maximum of six feet in width when two feet of the width of the walkway consists of benching. The Town of Pawleys Island (hereinafter known as "Town") responds by arguing that the "quick analysis tutorial" is not a legally binding document and that the "tutorial" itself specifically refers to the Pawleys Island Unified Development Ordinances for any stipulation of details. Further, the Town responds by arguing that if Appellants had waited for the issuance and approval of a permit from the Town, they would have been informed that the design and construction of a six foot walkway, with added benches, and in that particular location would have been denied by the Town.

STANDARD OF REVIEW

On appeal the Standard of Review is the same standard of review used by the Circuit Court below: “the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence.” Austin v. Board of Zoning Appeals, 606 S.E.2d 209, 211 (Ct.App. 2004); see S.C.Code Ann. § 6-29-840(A) (Supp.2003); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct.App.2001). “In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. Id. Furthermore, “[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.”” Id.; quoting Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). “However, 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.” Id.

ARGUMENT

I. THE “QUICK ANALYSIS TUTORIAL” AND CHECKLIST DO NOT CONSTITUTE ZONING REGULATIONS THAT HAVE THE FORCE OF LAW AND ARE NOT A COMPRISED PART OF THE TOWN OF PAWLEYS ISLAND’S ZONING REGULATIONS REGARDING ALLOWABLE BEACH WALKWAY WIDTH.

The “Quick Analysis Tutorial” and “UDO Checklist” do not have the force of law, were not created by the legislators of the Town of Pawleys Island, and are therefore not a part of the Town’s zoning regulations regarding the allowable beach walkway width. Further, Section 2-10.1 of the Unified Development Code, as written in 2009, is clear and unambiguous, in that it allows beach walkways to be a maximum of four feet in width.

No building or other structure shall be erected, moved, added to or structurally altered without a permit therefor issued by the building inspector. No building permit shall be issued by the building inspector except in conformity with the provisions of these regulations unless he receives a written order from the board of zoning appeals in the form of an administrative review or variance as provided by the zoning regulations. The building inspector shall issue building permits in accordance with the provisions of the building code in effect in the Town of Pawleys Island. Town of Pawleys Island, S.C., Unified Development Code § 3-6.2 (2015).

The primary purpose in interpreting statutes is to ascertain and effectuate the intent of the legislature. Cain v. Nationwide Prop. and Cas. Ins. Co., 378 S.C. 25, 29, 661 S.E.2d 349, 351 (2008). Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 533 S.E.2d 578, 581 (2000); quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning. Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970). The interpretation of a statute is a question of law. CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Further, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Id. at 77, 716 S.E.2d at 882. However, if the agency's interpretation conflicts with the statute's plain language, it must be rejected. Id. Sparks v. Palmetto Hardwood, Inc., 750 S.E.2d 61, (2013).

The Town of Pawleys Island Code of Ordinances, at the time of the Appellants' application for a permit to build a beach walkway, clearly states that any walkways built must be a maximum of four feet in width. Town of Pawleys Island, S.C., Unified Development Code § 2-10.1 (2008). The Pawleys Island Town ordinance is stated in plain language and is clear, explicit, and unambiguous.

The Appellants argue that Section 3-6.2(A) of the Town of Pawleys Island Unified Development Code, which states the "applicant shall complete a UDO Checklist" prior to making application for a building permit, makes this "UDO Checklist" an enforceable law and part of the Town of Pawleys Island Zoning Regulations regarding allowable beach walkway. The Appellants want this aforementioned "UDO Checklist", which is not printed anywhere in the actual Code of Ordinances for the Town of Pawleys Island, to be enforceable law because it mistakenly stated that beach walkways may be expanded "with benches not to exceed 6 feet wide." The UDO checklist explicitly defers to the Ordinance. The "UDO Checklist" was not written, transcribed, or adopted by Pawleys Island legislators, but part of an "agency's interpretation" which "conflicts with the statute's plain language", and should therefore be rejected.

Not only is the "UDO Checklist" not an enforceable law, contrary to Appellants' argument, but also the Appellants failed to comply with the entire ordinance of Section 3-6.2, in which the "UDO Checklist" is mentioned. The Appellants diligently stress the importance of the one mention of the UDO Checklist within Section 3-6.2(A), but failed to obtain a permit before beginning construction as required by Town of Pawleys Island, S.C., Unified Development Code § 3-6.2 (2015). If the Appellants would have properly waited for approval or disapproval of their permit, they would have been informed of

their improper belief of beach walkway widths that were permissible. The Ordinance states “No building or other structure shall be erected, moved, added to or structurally altered without a permit therefor issued by the building inspector.” Town of Pawleys Island, S.C., Unified Development Code § 3-6.2 (2015). The Appellants applied for a permit for the aforementioned walkway on June 25, 2009. (R. p. 4 line 3). Thereafter, a walkway was constructed on the Appellants property, without the approval and without securing the necessary permits from the Building Inspector. (R. p. 4 line 4). The Town of Pawleys Island, after learning the Appellants had begun construction without a permit and with the improper width dimensions, informed the Appellants that their walkway exceeded the permissible width provided for in the Town’s zoning ordinance. (R. p. 5 line 11). The Appellants feverishly argue that they relied on the verbiage of the aforementioned tutorial, however if they had followed the proper procedure within this tutorial they would not have improperly installed a beach walkway, because the building inspector would have never approved the plans for the structure.

The “Quick Analysis Tutorial” and “UDO Checklist” do not have the force of law, were not created by the legislators of the Town of Pawleys Island, and are therefore not a part of the Town’s zoning regulations regarding the allowable beach walkway width. The intent of Section 2-10.1 of the Unified Development Code, as written in 2009, was clear and unambiguous statute, and any informal interpretation (“UDO Checklist”) of that statute that conflicts with this statute must be rejected.

II. AS THE UNIFORM DEVELOPMENT ORDINANCE CHECKLIST AND TUTORIAL ARE NOT A PART OF THE LEGISLATIVE ZONING REGULATIONS PASSED BY THE TOWN TO GOVERN BEACH WALKWAYS WIDTHS, THE ZONING BOARD OF APPEALS, GEORGETOWN COUNTY ZONING ADMINISTRATOR, AND THE

LOWER COURT CORRECTLY RULED BY CONSIDERING AND APPLYING ALL APPLICABLE REGULATIONS IN DENYING APPELLANTS' VARIANCE REQUEST AND NOVEMBER 17, 2009 WALKWAY PERMIT APPLICATION.

Section 2-10.1 of the Town of Pawleys Island, S.C., Unified Development Code stating that the proper width of beach walkways shall not exceed four feet in width is the correct and only ordinance needed for the determination of Appellant's permit application and variance request, because it was the unambiguous statute that was the controlling law at the time of the permit, construction, and variance request.

The Appellant argues that Zoning Board of Appeals, Georgetown County Zoning Administrator, and the Circuit Court were all incorrect for referencing a valid ordinance in Section 2-10.1 of the Pawleys Island, S.C., Unified Development Code, which allowed for a maximum four feet in width for beach walkways. The Appellant continues by arguing that the Zoning Board of Appeals, the Georgetown County Zoning Administrator, and the Circuit Court should have followed the abovementioned "UDO Checklist" and tutorial as a basis for its decision, or at least that these reviewing bodies should have taken these documents into account.

The "UDO Checklist" is paperwork required for the pre-application permit process of the Town of Pawleys Island, S.C., Unified Development Code § 3-6.2 (2015). Section 3-6.2 states, "the building inspector shall issue building permits in accordance with the provisions of the building code." The "UDO Checklist" and tutorial are not a provision of the building code but a pre-application checklist that states that "(p)rior to making application for a building permit, the applicant shall complete a UDO checklist and secure a signed review by a designated member of the Pawleys Island Planning

Commission.” Town of Pawleys Island, S.C., Unified Development Code § 3-6.2(A) (2015).

Section 3-6.2 further states, “(n)o building permit shall be issued by the building inspector except in conformity with the provisions of these regulations unless he receives a written order from the board of zoning appeals in the form of an administrative review or variance as provided by the zoning regulations.” Town of Pawleys Island, S.C., Unified Development Code § 3-6.2 (2015). Both the Zoning Board of Appeals and the Georgetown County Circuit Court determined that the Appellants permit and variance requests should be denied and that they were not in “conformity with the provisions of these regulations”, specifically, Section 2-10.1 of the Pawleys Island, S.C., Unified Development Code. (R. pp. 54-62); (R. pp. 1-3). The fact that the Zoning Board of Appeals and the Georgetown County Circuit Court did not look to the pre-application permit process of the UDO checklist and tutorial as a controlling authority in making its determination, but instead applied a then existing Town ordinance as its authority, is not only acceptable but a correct judicial form for such scenarios.

For the above mentioned reasons Section 2-10.1 of the Town of Pawleys Island, S.C., Unified Development Code and not the pre-application permit process of the “UDO Checklist” and tutorial was the proper and only authority needed to be applied by the Zoning Board of Appeals, Georgetown County Zoning Administrator, and the Circuit Court.

III. UNDER SOUTH CAROLINA LAW, APPELLANTS ARE NOT ENTITLED TO A PERMIT FOR THEIR NOVEMBER 9, 2009 WALKWAY APPLICATION, AS IT DID NOT COMPLY WITH THE THEN-EXISTING ZONING AND LAND USE REGULATIONS.

The Appellants cite two cases to support their argument that they were entitled to a permit to build their beach walkway greater than the maximum width allowed. In Pure Oil Division v. City Columbia, a “bank proposes to utilize the corner lot of its property for a gasoline filling station, as expressly permitted by the Zoning Ordinance (emphasis added), and an application was made to the Zoning Administrator for a zoning permit for such use. The Zoning Administrator concluded that the application met all of the requirements of the ordinance and approved it but, prior to the actual issuance of the permit, the individual appellants, who reside in adjoining residential districts, appealed to the Zoning Board of Adjustment which, after a hearing, reversed the decision of the Zoning Administrator and denied the permit.” Id..... We have recognized the rule, that, when a zoning or building permit has been properly issued and the owner has incurred expenses in reliance thereon, he acquires a vested property right therein of which he cannot be deprived without cause or in the absence of public necessity.” Pure Oil Division v. City Columbia, 173 S.E.2d 140, 141 (1970).

This case differentiates from the instant case in two important and distinct ways. First, in Pure Oil Division v. City of Columbia, the Zoning administrator concluded that the application for a permit met all requirements and approved the permit. In the instant case, the permit was never approved by the building inspector. (R. pp. 4 line 4) Second, in Pure Oil Division v. City of Columbia, the building permit had been properly issued, when the owner had incurred expenses. In the instant case, the building permit was never issued, yet the Appellants built the beach walkway without properly obtaining a permit, simply relying on a tutorial and checklist, not the actual ordinance itself. Id.

The Appellant continues by citing Kerr v. City of Columbia, stating that, they are “protected even against a change in the zoning ordinance”. Kerr v. City of Columbia, 102 S.E.2d 364, 367 (1958). Appellants base their argument on the underlying premise that the UDO Checklist and tutorial are legally enforceable, and that the change thereof constitutes a change in a “zoning ordinance”. As stated above, the tutorial is not a statute or a regulation. If Appellants had followed the tutorial in completing the requisite UDO checklist when applying for a permit and not commencing construction until the receipt of that permit, then the Appellants would have been notified that their plans for their beach walkway were not in compliance with the Town of Pawleys Island Zoning ordinances.

For the above stated reasons, the Appellants are not entitled to a permit for their November 9, 2009 walkway application, as it does not comply with the then-existing zoning and land use regulations.

CONCLUSION

For the abovementioned reasons the Respondent respectfully asks this court to affirm the Final Order affirming the Zoning Board of Appeals filed December 18, 2014. The Tutorial and checklist do not constitute zoning regulations that have that have the force of law and are not a comprised part of the Town of Pawleys Island’s zoning regulations regarding allowable beach walkway width. Further, the Respondents argue that as the Checklist and Tutorial are not a part of the legislative zoning regulations passed by the Town to govern beach walkways widths, the Zoning Board of Appeals, Georgetown County Zoning Administrator, and the lower court correctly ruled by considering and applying all applicable regulations in denying the Appellants’ variance

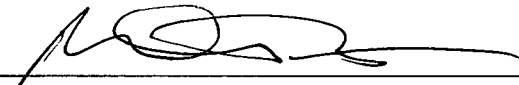
request and November 17, 2009 walkway permit application. Finally, the Respondents submit that under South Carolina law, Appellants are not entitled to a permit for their November 9, 2009 walkway application, as it does not comply with the then-existing zoning and land use regulations. Therefore the Respondent respectfully requests this Court to affirm these matters on appeal.

Respectfully submitted,

Dated at Surfside Beach, South Carolina, this 18 day of July, 2016.

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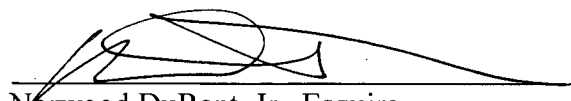
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

July 20, 2016


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