

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
D.R. HORTON, INC.,)
Plaintiff,)
vs.)
TOWN OF MOUNT PLEASANT; and)
ROY NEAL, HOWARD CHAPMAN,)
BEN BRYSON, Alys CAMPAIGNE,)
JOSH MALONE, JOSEPH WREN, BOB)
BRIMMER, CHERYLL WOODS-)
FLOWERS and TRIPP CUTTINO, as the)
appointed members of the MOUNT)
PLEASANT PLANNING COMMISSION,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

RECEIVED

JUL 25 2016

Case No.: 2015-CP-10-5043

SC Court of Appeals

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2016 MAY 11 PM 2:01

FILED

ORDER GRANTING APPEAL

Before this Court is Plaintiff Appellant D.R. Horton, Inc.'s (DRH) appeal of the decision of the Town of Mount Pleasant Planning Commission to deny a sketch plan for the intended Cambridge Square Townhome Subdivision within the Park West Community. A hearing was held on November 13, 2016 with counsel for both Appellant and Defendant Respondent Town of Mt. Pleasant ("Town") in attendance. Having carefully considered the arguments of counsel, the pleadings and briefs filed by the parties, and the record on appeal as submitted by Respondent, this Court finds as follows:

Factual Background and Procedural Posture

DRH is the owner of certain real property located within a large, multi-phase residential and commercial development project within the Town of Mt. Pleasant known as Park West ("Park West"). Specifically, DRH is the owner of a parcel (hereinafter to be referred to as "the

Subject Property") designated as Lot 14-B containing 14.006 acres on a plat styled "A Subdivision Plat of Lot 14 into Lots 14-A, 14-B and 14-C" dated February 17, 2006 and recorded March 23, 2006 in the RMC Office for Charleston County at Plat Book EJ at page 607 ("the 2006 Plat"). DRH's Verified Complaint and Petition for Appeal (hereinafter "Petition") at Exhibit A.

The Subject Property is located within the Dunes West Planned Development District and as such is subject to The Dunes West Planned Development District Ordinance ("PDD") that was adopted by Respondent in 1990. Petition at Exh. B. The PDD sets forth the standards for the development of Dunes West and provides for a variety of uses that could be implemented at the discretion of the developer thereof. The PDD also established a Master Land Use Plan ("1990 MLUP"), which is included within the PDD as Exhibit B thereto. The PDD specifies that the 1990 MLUP is intended to be a conceptual design plan illustrating tentative development uses and facility locations that are subject to change. Specifically, the PDD states in pertinent part as follows:

3.01 Purpose

These standards are intended to permit the flexibility necessary to accomplish this type of development. This ordinance therefore contemplates a departure from the strict application of use, setback, height, and minimum lot requirements found in conventional zoning regulations.

3.02 Land Use

Table I "Land Use Summary" (page 8-1) identifies the intended land use designations, their approximate acreages and the percentage of that acreage to the total project acreage. The location and relationship of these land uses are shown in Exhibit "B" The Master Land Use Plan.

Variations in land use parcel design and relative acreages shall be permitted to accommodate topography, vegetation, drainage patterns, and other site or market conditions. The final size and configuration of land

uses will depend on the actual requirements of adjacent building parcels, roadway patterns, golf course layout and water management factors.

3.03 Master Land Use Plan




Exhibit B, Master Land Use Plan is a conceptual design plan which illustrates tentative development uses and locations of certain facilities. Design criteria and layout illustrated on the Master Land use Plan and other exhibits supporting this Project shall be understood to be flexible. **The Master Land Use Plan is not intended to show the final land uses.** The final design of development use and locations may be shifted to satisfy market objectives and be consistent with the overall general plan of development, as set forth, including but not limited to the relationship of zoning areas as may, from time to time, be shown on the Master Land Use Plan. **Revisions of the location of zoning areas on the Master Land Use Plan shall not be deemed an amendment to this ordinance so long as the overall density and permitted uses under this ordinance are not increased.** When used herein, the Master Land Use Plan shall mean the Master Land Use Plan **then in effect.** (Emphasis added).

The aforementioned 2006 Plat (Exh. A to DRH's Petition), was approved by signature of the Director of Planning and Development for the Town of Mt. Pleasant on March 21, 2006 and recorded March 23, 2006. The 2006 Plat designates Lot 14-B, the Subject Property, as "Zoned RTH." As used in the PDD, the "RTH" designation refers to Townhouse Residential District. PDD at 4.03. By deed dated May 4, 2006 and recorded with the Charleston County RMC at Bk. O582 Pg. 812, DRH took title to the Subject Property. Petition at Exh. G.

A Current Master Land Use Plan for Park West was prepared and issued dated March 25, 2015 ("the Current MLUP"). Petition at Exh. H. The Current MLUP designates the Subject Property as "Multi-Family, Townhouse".

Seeking to commence development of the Subject Property for construction of residential townhomes, and pursuant to Town of Mount Pleasant Code of Ordinances § 155.021, DRH submitted a sketch plan application to the Planning Commission dated July 21, 2015 ("the

Sketch Plan”). Petition at Exh. I. The Sketch Plan incorporates the 2006 Plat and the Current MLUP.

At a hearing held August 19, 2015, the Town’s Planning Commission voted to disapprove the Sketch Plan on the grounds that “the submittal is improper due to the fact that zoning does not allow townhomes as indicated in the staff report”. DRAFT Minutes-Special Planning Commission-August 19, 2015, Petition at Exhibit J and Minutes-Special Planning Commission-August 19, 2015, Record Appeal at DRHORTON0030-31. In reaching this decision, the Planning Commission relied upon the fact that the requested use was not compatible with the zoning classification set forth within the 1990 MLUP.

DRH timely filed its Verified Complaint and Petition for Appeal within which the First Cause of Action sets forth an appeal of the Planning Commission’s decision to deny the Sketch Plan as provided within S.C. Code Ann. § 6-29-1150. DRH has requested relief from this Court in the form of reversal of the decision of the Planning Commission and a determination that the Sketch Plan is in compliance with the zoning requirements of the PDD and that DRH is entitled to proceed under an approved Sketch Plan for the Subject Property with respect to the process of attaining preliminary and final plats and building permits.

Standard of Review

A Circuit Court may reverse the decision of a Planning Commission where the Planning Commission’s decision is arbitrary, where it is based on an error of law, or where it reflects an abuse of discretion. *Peterson Outdoor Advertising v. City of Myrtle Beach*, 489 S.E.2d 630, 632-633 (S.C. 1997). A Planning Commission must use specific standards in exercising its discretion in order to avoid being overturned. *Id.* This requirement is rooted in the concept of vagueness

and indefiniteness and the guarantee of procedural due process that requires fair notice and proper standards for determination of a question presented. *Id.*

In a circumstance where the Planning Commission's application of an ordinance is placed before the Court, the Court's standard of review is broadened. *See, Helicopter Solutions, Inc., d/b/a Helicopter Adventures, v. Hinde and Horry County Zoning Administrator*, Op. No. 5350 S.C. Ct. App., Filed September 2, 2015, Shearouse Adv. Sh. No. 34 at 79 ("issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than as applied in reviewing issues of fact Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance") (internal citations omitted).



Legal Analysis

Reference to the Record on Appeal demonstrates that the singular deciding factor in the Town's decision to deny DRH's Sketch Plan was its election to assume that the PDD requires strict compliance with the zoning designations depicted on the 1990 MLUP. DRH maintains that the Town incorrectly construed the PDD arguing, that the PDD provides, on its face, for a flexible application of land use standards providing discretion to the developer or its successors (of which DRH is one). Accordingly, the primary issue raised on this appeal is one of interpretation of the PDD.

The guiding principles of statutory construction require the Court to (1) give effect to the intent of the legislating body, (2) apply the plain language of the document where it is clear and unambiguous, and (3) to seek a reasonable and practical construction consistent with the express purpose of the legislation. *Mikell v. County of Charleston*, 654 S.E.2d 92 (S.C. App. 2007). It is

also well-established that whenever possible, and particularly if there is any ambiguity or uncertainty, ordinances seeking to restrict use of real property are to be construed in favor of the free and unencumbered use of land. As stated by the Court of Appeals in *Helicopter Solutions*:

Statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that terms limiting the use of the property must be liberally construed for the benefit of the property owner.

Helicopter Solutions at 82.

Moreover, “while ‘local governments have wide latitude to enact ordinances regulating what people can do with their property,’ they ‘must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.’” *Id.* (citing *Keane/Sherratt P’ship by Keane v. Hodge*, 537 S.E.2d 193, 196 (S.C.App. 1987).

In this case, any reasonable interpretation of the PDD on its face requires the conclusion that it was never the intent of the ordinance to constrain land use to the designations illustrated on the 1990 MLUP. Instead, it was the intent to allow wide discretion in the placement and designation of land uses. The documents appended to DRH’s Petition further demonstrate this fact. These include, but are not limited to, the 2006 Plat (approved by the Planning Commission Director and recorded showing the Subject Property zoned for residential townhome use) and the Current MLUP (dated March 25, 2015 and designating the Subject Property as “Multi-Family, Townhouse”).

Additionally, the Court herein benefits from the prior pronouncement of our Supreme Court which has already had occasion to describe the land use scheme established under the

PDD. In *Dunes West Golf Course, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601 (S.C. 2013), it explained that:

Essentially, the [PDD] provides for mixed uses throughout the Development and sets forth amounts of land assigned for particular uses but in no particular locations. Accordingly, the location of a particular use is determined at the developer's discretion and may be changed or shifted, essentially without Town oversight, so long as minor development standards such as setback requirements are met and the overall density of the 4,518 acre development does not increase.

Id. at 605, f.3. The Supreme Court's description of the PDD is entirely consistent with and lends credence to DRH's position that it should not be constrained from building townhomes, as shown on approved plat dated 2006, because of the illustrations shown on the 1990 MLUP. Deposition testimony offered by the Town's Planning Director and Division Chief in *Dunes West*, cited in DRH's Petition at ¶¶ 27 and 28, are consistent with the Supreme Court's description.

Based upon the guiding principles set forth in the case law described above, the PDD ordinance should be interpreted in DRH's favor. In fact, it has been interpreted in DRH's favor by the two most high-ranking planning staff members for the Town via sworn testimony and by the Supreme Court. For the Planning Commission to reverse course and deny a property owner a use in contravention of the Town's own precedent and the Supreme Court's construction of the ordinance on an *ad hoc* basis is the epitome of arbitrary and capricious conduct exceeding the Planning Commission's authority and depriving the landowner of its rights based upon a clear error of law.

For its part, the Town maintains, in its briefing on this matter and as further explained by counsel at oral argument, the flexibility clearly written into the PDD is essentially trumped by a provision of the Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code

Ann. § 6-29-310, *et seq.* Specifically, the Town relies upon a portion of § 6-29-740, Planned Development Districts, which provides that “[a]mendments to a planned development district may be authorized by ordinance of the governing authority after recommendation from the planning commission. These amendments constitute zoning ordinance amendments and must follow prescribed procedure for amendments.”


The Town argues that by virtue of this statutory language, any amendment to the PDD must be enacted pursuant to procedures set forth therein, e.g., via an act of City Council. The Town goes on to argue that as a result, any deviation in the use of the Subject Property from the conceptual usage depicted in the 1990 MLUP must be approved by City Council as an amendment to the PDD. Therefore, in the absence of such action by City Council, the Planning Commission is constrained to deny any use inconsistent with the 1990 MLUP, and the land owner has no options but to use the land in the manner contemplated within that document, or petition City Council for an amendment to the PDD.

This argument is unavailing. As discussed at length above, the PDD is inherently flexible by its plain terms and there is nothing contained therein which can reasonably lead to a construction characterizing a deviation from the 1990 MLUP as an amendment to the ordinance. This conclusion is founded upon the plain language of the statute, evidence of the Town’s course of conduct with respect to the Subject Property (the 2006 Plat) and the community as a whole (the Current MLUP), and Supreme Court precedent.

It is evident to this Court that DRH’s proposed use of the Subject Property as shown in the Sketch Plan is consistent with the provisions of the PDD as written. Perhaps somewhat ironically, it is actually the Town’s proffered strict application of the 1990 MULP that is inconsistent with the provisions of PDD and which would, in order to be validated, require an

amendment of the same to be promulgated pursuant to the Enabling Act. For these reasons, the Town's argument based upon the 1994 Enabling Act is rejected.

To the extent that the Town's argument may be premised not on construction of the PDD, but instead upon the argument that the flexibility imparted by the PDD is somehow unlawful, by virtue of the 1994 Enabling Act or otherwise, the Town's position still fails. First, the Town has offered no persuasive authority to support such an assertion. It is well settled law that municipal zoning ordinances are presumed to be valid. *See, e.g., Momeier v. John McAlister, Inc.*, 99 S.E.2d 177 (S.C. 1957). The Court finds this presumption to be of particular significance where the municipality which promulgated the ordinance in the first instance, and which has taken no action to rescind or amend it through the legislative process, asks the judiciary to cure its alleged error by refusing to enforce the ordinance as drafted.



A governing body cannot selectively interpret or suspend its own ordinance on an *ad hoc* basis. A municipality that no longer wishes to comply with its own ordinance can, and must, repeal or replace the ordinance with "another ordinance or instrument of equal dignity." *Simpkins v. City of Gaffney*, 431 S.E.2d 592, 594 (S.C.App. 1993). The 1994 Enabling Act has been codified for over twenty years. The Town has had ample time to repeal or amend the PDD if its Town Council deemed such action appropriate, and it has failed to do so. Accordingly, that portion of the Town's argument that is premised upon an alleged invalidity in the PDD is likewise rejected.

Holding

Based upon the foregoing, IT IS ORDERED that (1) the denial of DRH's Sketch Plan by the Town's Planning Commission was arbitrary and capricious and based upon error of law; (2) the Planning Commission's denial of the Sketch Plan is therefore REVERSED and the Sketch

Plan is deemed APPROVED; (3) the land use proposed for the Subject Property, that of residential townhomes, is consistent with the zoning scheme established by the PDD, and the Town must apply this finding and treat DRH's proposed land use as such for purposes of all remaining phases of the process of approval of DRH's plan of development (to include applications for preliminary and final plats and building permits); and (4) the Town (including its agencies, boards and commissions) is restrained from treating DRH's intended use of the Subject Property described herein as non-compliant with the zoning requirements applicable to the Subject Property.

Attorney's Fees

Within its Petition, and specifically within the First Cause of Action for Appeal Pursuant to S.C. Code Ann. §6-29-1150, DRH prays for an award of attorney's fees pursuant to S.C. Code Ann. § 15-77-300, which provides in pertinent part that:

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

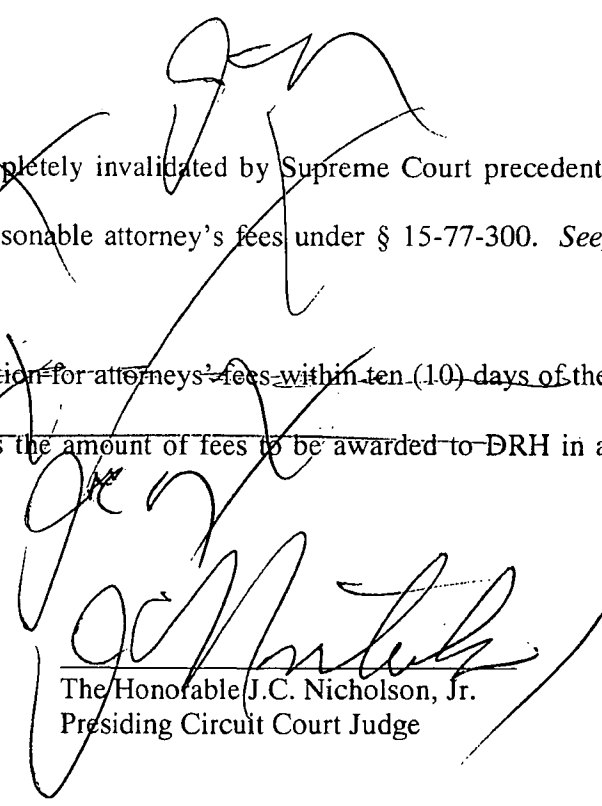
The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

Based upon the foregoing legal analysis, it is apparent to this Court that the Town was not substantially justified in denying DRH's Sketch Plan or opposing its appeal of that decision. The Town sought to advocate an application of the PDD that is wholly inconsistent with the plain

terms of the ordinance and that has been completely invalidated by Supreme Court precedent. Therefore, DRH is entitled to an award of reasonable attorney's fees under § 15-77-300. See, e.g., *Simpkins*, 431 S.E.2d at 594, *supra*.

~~DRH will be permitted to submit a petition for attorneys' fees within ten (10) days of the date of this Order, and this Court will address the amount of fees to be awarded to DRH in a separate order.~~

AND IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.
Presiding Circuit Court Judge

May 9, 2016
Charleston, South Carolina

24578667.1

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-5043

FILED

D.R. Horton

2016 JUL 17 AM 9:51

Town of Mount Pleasant, et al.

PLAINTIFF(S)

JULIE J. ARMSTRONG
 CLERK OF COURT

DEFENDANT(S)

Submitted by:

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Reconsider filed on 5/18/2016 is denied pursuant to SCRPC Rule 59(g) and on the merits.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

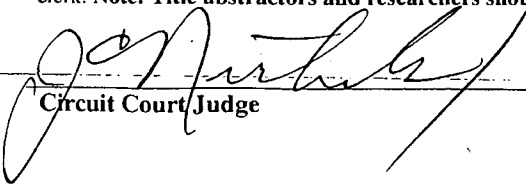
INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$

If applicable, describe the property, including tax map information and address, referenced in the order:
 N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


 Circuit Court Judge

2117
 Judge Code

7/2/16
 Date