

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY JUL 15 2016
Court of Common Pleas

SC Court of Appeals

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2016-000029

Robert and Pamela Wilkes,

Appellants,

v.

Town of Pawleys Island,
Georgetown County Planning
Commission,

Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN RULING THAT THE MANDATORY UNIFORM DEVELOPMENT CHECKLIST AND TUTORIAL IS NOT A BINDING REGULATION OF THE TOWN OF PAWLEYS ISLAND WHEN THE UNIFORM DEVELOPMENT ORDINANCE CHECKLIST AND TUTORIAL WAS CREATED BY THE TOWN VIA ORDINANCE AND AMENDED BY THE TOWN VIA ORDINANCE?
2. DID THE ZONING BOARD OF APPEALS, GEORGETOWN COUNTY PLANNING COMMISSION, AND LOWER COURT ERR IN ONLY CONSIDERING SECTION 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 WHEN MULTIPLE ORDINANCES GOVERN A BEACH WALKWAY'S PERMITTED WIDTH?
3. 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 IT COMPLIED WITH ALL TOWN ORDINANCES AND LAWFUL EXCEPTIONS GOVERNING WALKWAY WIDTH?

STATEMENT OF THE CASE

Robert and Pamela Wilkes own real property within the Town of Pawleys Island, South Carolina. Appellants applied for a building permit on June 25, 2009 to construct a beach walkway from their home at 302 Atlantic Avenue to the beachfront on the island. The Town of Pawleys Island (hereinafter "Town") issued a stop work order on the walkway in July 2009 on the basis that the walkway was six (6) feet in width and in contravention of Section 2-10.1 of the Town of Pawleys Island Uniform Development Code, which allowed for beach walkways four (4) feet in width. Appellants sought a variance with the Town Zoning Board of Appeals (hereinafter "Board") to remove the stop order and submitted a revised permit application on November 17, 2009 to the Town and the Georgetown County Planning Department (hereinafter "Planning Department") seeking approval for a walkway that was six-feet wide with two feet of such width comprised of benches. To comply with the Unified Development Code and to obtain a building permit for a walkway, Appellants were directed to Section 3-6.2(A), which mandates that a walkway applicant complete a Uniform Development Ordinance, or "UDO," checklist provided by the Town. By its terms, the checklist and tutorial provided that:

"Beach Walkways (only one per dwelling) may be expanded with benches not to exceed 6 feet wide but landward of the OCRM baseline."

On December 14, 2009, The Planning Department denied the revised permit application by phone, which Appellants appealed to the Board. On January 5, 2010, the Board forwarded an order denying the original variance with a letter from the Town's counsel stating that the ruling was considered a denial of both the June 25 and November 17 permit applications.

The matter was appealed to the circuit court on December 21, 2009. On June 28, 2011, the Court remanded the case for mediation and rehearing before the Zoning Board of Appeals. A rehearing before the Board was held on March 29, 2012 and a decision denying the variance request issued on May 3, 2012. Appellants appealed the decision of the Board on June 20, 2012. A hearing on the appeal was held before the Court on November 6, 2014, and a Final Order affirming the Zoning Board of Appeals was filed on December 18, 2014. 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. The lower court denied Appellants' Motion by written Order filed on December 21, 2015. Appellants submitted their Notice of Appeal on January 4, 2016.

STANDARD OF REVIEW

“Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact.” Eagle Container Co., LLC v. Cnty. of Newberry, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008) (citing Sea Island Scenic Parkway Coal. v. Beaufort Cnty. Bd. of Adj. & App., 321 S.C. 548, 550, 471 S.E.2d 142, 143 (1996). “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.’” Charleston Cnty. Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (internal citation omitted) (quoting Sea Island Scenic Parkway Coal., 316 S.C. at 235, 449 S.E.2d at 256).

ARGUMENTS

I. THE UNIFIED DEVELOPMENT CHECKLIST AND TUTORIAL CONSTITUTE ZONING REGULATIONS THAT HAVE THE FORCE OF LAW AND COMPRISE PART OF THE TOWN OF PAWLEYS ISLAND'S ZONING REGULATIONS REGARDING ALLOWABLE BEACH WALKWAY WIDTHS.

“The cardinal rule of statutory construction is that courts will ascertain and effectuate the intent of the lawmaking body.” First General Services of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994). “In ascertaining the intent of the lawmaking body, the ordinance must be read as a whole; sections which are part of the same general statutory law must be construed together and each given effect if it can be done by any reasonable construction.” Id. (citing Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989); Smalls v. Weed, 293 S.C. 364, 370, 360 S.E.2d 531, 534 (Ct. App. 1987)).

In its December 21, 2015 Order, the lower court erred in holding that there was only one ordinance governing the width of walkways in the Town of Pawleys Island at the time Appellants submitted their original and revised building permit applications in June and November of 2009, respectively. (R. pp. 8-9). In its holding, the court opined that the Town had exclusive authority to regulate the width of walkways “landward of the OCRM setback line.” Id. OCRM regulations in effect at the time allowed walkways six (6) feet in width seaward of the established setback line. SOUTH CAROLINA OFFICE OF COASTAL RESOURCE MANAGEMENT, CRITICAL PERMITTING REGULATIONS § 30-15(A) (2008), R. p. 90.

It is clear in this matter that, at a minimum, two Town ordinances in effect at the time Appellants submitted their November 17, 2009 revised building permit regulated the construction of beach walkways within the Town of Pawleys Island. Specifically, Section 2-10.1

of the Unified Development Code, as written in 2009, permitted all beach walkways to be four feet in width. Town of Pawleys Island, S.C., Unified Development Code § 2-10.1 (2008). To comply with the Unified Development Code by obtaining a building permit for a walkway, prospective applicants were directed to Section 3-6.2(A), which provides that:

Prior 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. This information is available from the town clerk.

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

The UDO checklist and tutorial from the Town, as it appeared in November of 2009, stated the following with regard to beach walkways:

Beach Walkways (only one per dwelling) may be expanded with benches not to exceed 6 feet wide but landward of the OCRM baseline.

Town of Pawleys Island, S.C., Unified Development Ordinance Checklist Tutorial, p. 4 (2008), R. p. 81.

Strict compliance with the UDO checklist and tutorial was required to obtain any walkway construction application under Section 3-6.2(A) of the Unified Development Ordinance. Town of Pawleys Island, S.C., Unified Development Code § 3-6.2(A) (2015). Indeed, the UDO checklist and tutorial have been openly amended by the Town via ordinance, and the Town has expressed a clear and unambiguous intent to enforce the UDO checklist's terms. Town of Pawleys Island, S.C., Ordinance 2009-16 (Dec. 7, 2009), R. p. 82, ("[a]ll other portions of the Pawleys Island Permit Procedure Handout are to remain in effect.").¹ In fact, the

¹ Under Section 5-7-260 of the South Carolina Code of Laws, a municipal corporation must make amendments to ordinances that, if violated, would result in the imposition of a fine by ordinance. S.C. Code Ann. § 5-7-260. The Town imposes a \$500 per-day fine for violation of its zoning ordinances. Town of Pawleys Island, S.C., Unified Development Ordinance, § 4-4.4 (2003).

UDO checklist and tutorial are so integral to the Town's walkway zoning scheme that the Town has, since November 17, 2009, amended the UDO checklist and Section 2-10.1 such that their terms are the same. See Town of Pawleys Island, S.C., Unified Development Ordinance § 2-10.1(A) (2015); Town of Pawleys Island, S.C., Ordinance 2009-16 (Dec. 7, 2009), R. p. 82. There would be no reason to make such an amendment to the UDO checklist and tutorial by ordinance if Section 2-10.1 was enforceable and the UDO checklist and tutorial were not. Further, Ms. Joanne Ochal of the Georgetown County Planning Commission admitted at the March 29, 2012 Zoning Board of Appeals hearing that the tutorial, in which the exception language is included, "was in part of the ordinance." (R. p. 61, lines 17-21).

"Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Additionally, this Court is bound to construe zoning ordinances narrowly for the benefit of the property owner. See Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953). In this case, Section 2-10.1 of the Unified Development Code provides a width restriction for beach walkways of four feet. The Town's mandatory UDO checklist and tutorial, which specifically applied to "Beach Walkways," allowed for six-foot-wide walkways so long as two feet of said width is composed of benches.² It is clear that both ordinances apply to the

² On December 7, 2009, the Town passed Ordinance No. 2009-16, which expressly amends the UDO checklist:

Beach Walkways (only one per dwelling). The Maximum width of such structure shall not exceed four (4') feet with the exception that a six (6') foot long section landward of the OCRM baseline may be expanded with benches not to exceed six (6') feet wide.

Town of Pawleys Island, S.C., Ordinance 2009-16 (Dec. 7, 2009), R. p. 82.

This ordinance was passed subsequent to Appellants' revised permit application of November 17, 2009. Therefore, the previous version of the ordinance would apply to Appellants' supplemental permit application.

construction of a beach walkway within the limits of the Town of Pawleys Island, providing a default width of four feet for beach walkways while allowing an exception for six-foot-wide walkways when two feet of such width consists of benches.

There is no dispute that the Town publishes the checklist and tutorial, maintains the checklist and tutorial, and edits the checklist and tutorial through the passage of ordinances as it did on December 7, 2009. Any builder, homeowner, or contractor who wants to perform work on a walkway within the Town of Pawleys Island must comply with the UDO checklist and tutorial before a permit may be issued under Section 3-6.2(A). See Town of Pawleys Island, S.C., Unified Development Code § 3-6.2(A) (2015). As such, Sections 2-10.1, 3-6.2(A), and the UDO checklist and tutorial referenced and incorporated therein comprise a complete statutory scheme under which the Town regulates beach walkway construction and which apply to Appellants' variance request and permit application in their entirety.

2. BECAUSE THE UNIFORM DEVELOPMENT ORDINANCE CHECKLIST AND TUTORIAL ARE PART OF THE LEGISLATIVE ZONING REGULATION SCHEME PASSED BY THE TOWN TO GOVERN BEACH WALKWAY WIDTHS, THE ZONING BOARD OF APPEALS, GEORGETOWN COUNTY PLANNING COMMISSION, AND LOWER COURT ERRED BY NOT CONSIDERING AND APPLYING ALL APPLICABLE REGULATIONS IN DENYING APPELLANTS' VARIANCE REQUEST AND NOVEMBER 17, 2009 WALKWAY PERMIT APPLICATION.

On November 17, 2009, Appellants submitted a revised permit application for a six-foot-wide beach walkway with a built-in bench composing two feet of the specified width. At that time, the UDO checklist and tutorial under Section 3-6.2(A) continued to read:

Beach Walkways (only one per dwelling) may be expanded with benches not to exceed 6 feet wide but landward of the OCRM baseline.

Unified Development Ordinance Checklist Tutorial, p. 4 (2008); (R. p. 81).

By letter dated November 2, 2009 the Zoning Board of Appeals purports to have denied Appellants' initial variance request. (R. p. 91). The letter noted that the Board only considered Section 2-10.1 as the basis of its decision. Id. Additionally, by letter dated January 5, 2010, the Town denied Appellants' November 17, 2009 permit application without stating the grounds for such denial. See (R. p. 92). On May 14, 2010, the Georgetown County Planning Department formally denied Appellants' permit request on the basis that it does not comply with Section 2-10.1. (R. p. 96). None of these denial letters reference Section 3-6.2(A) or the UDO checklist and tutorial nor do they state that the respective governing bodies considered them in their decision.

In its letter of May 14, 2010, the Planning Commission clearly stated that the basis for its decision to deny Appellants' November 17, 2009 supplemental permit application is that the submitted walkway design does not conform to Section 2-10.1. (R. p. 96). However, the

Planning Commission failed to apply the terms of the UDO checklist and tutorial under Section 3-6.2(A), which provided an exception to Section 2-10.1 and comprised part of the Town's statutory regulating scheme. Thus, the Planning Commission did not properly consider all applicable governing law in denying Appellants' permit.

At the first Board hearing on October 29, 2009, the only ordinance considered by the Board of Zoning Appeals was Section 2-10.1. (R. p. 55). During its March 29, 2012 hearing, the Town Board of Zoning Appeals again did not consider whether Section 3-6.2(A) and the UDO checklist and tutorial applied to Appellants' variance request. (R. pp. 58-59). In its May 24, 2012 Order following the March 29, 2012 hearing, the Board again denied a variance for the permit under the terms of Section 2-10.1 in isolation. See (R. pp. 15-21).

Additionally, in its Final Order, the lower court held that Appellants should "reduce [the walkway] to four feet in width and [bring it] into compliance with the Unified Development Ordinance." (R. p. 3). The court only referenced Section 2-10.1 of the Unified Development Ordinance and failed to consider, as did the Board of Zoning Appeals and the Georgetown County Planning Commission, Section 3-6.2(A) and the UDO checklist and tutorial. Id.

At no time has any municipal body or court in the last seven (7) years considered the application of any ordinance or regulation other than Section 2-10.1 to any of Appellants' variance or permit applications. Yet the Town has made clear that it expects both Section 3-6.2(A) and the UDO checklist and tutorial to remain "in full force and effect" as a zoning regulation. See Town of Pawleys Island, S.C., Ordinance 2009-16 (Dec. 7, 2009), R. p. 82. Failure to properly consider and apply all applicable beach walkway zoning ordinances in reviewing or considering Appellants' variance request or permit applications is an error of law that should be reversed.

3. UNDER SOUTH CAROLINA LAW, APPELLANTS ARE ENTITLED TO A PERMIT FOR THEIR NOVEMBER 17, 2009 WALKWAY APPLICATION AND CONTINUED USE OF SAID WALKWAY AS IT COMPLIED WITH THEN-EXISTING ZONING AND LAND USE REGULATIONS.

It is apparent that Appellants' revised permit application was submitted to the Town and the Planning Commission under then-existing zoning requirements for a beach walkway within the Town as of November 17, 2009. As explained above, those zoning regulations include, at a minimum, Sections 2-10.1, 3-6.2(A), and the required UDO checklist and tutorial referenced therein.

Under long-standing South Carolina law, if a landowner submits a proper application for a permit that is in accord with existing ordinances, said landowner is entitled to such permit. Pure Oil Division v. City of Columbia, 254 S.C. 28, 34, 173 S.E.2d 140, 143 (1970) ("In both instances [application of permit and issuance of permit], the right protected is the same, that is, the good faith reliance by the owner of the right to use his property as permitted under the Zoning Ordinance in force at the time of the application for a permit."). Additionally, a "vested right[] acquired under a zoning ordinance in effect at the time of the application for a permit will be protected even against a change in the zoning ordinance" Id. at 35 (citing Kerr v. City of Columbia, 232 S.C. 405, 413, 102 S.E.2d 364, 367 (1958)). Therefore, it is clear that Appellants had a vested right to the permit that both the Town and the Planning Commission denied to them regardless of whether subsequent changes to any applicable ordinances between the time of Appellants' application, November 17, 2009, and the dates Appellants were informed that their application was denied.

The lower court denied Appellants' estoppel claim based on the November 17, 2009 permit application's compliance with then-existing ordinances, holding that the only ordinance

that applied was Section 2-10.1. (R. pp. 8-9). The lower court also held that Appellants had no vested right in a permit for their walkway with no finding that Appellants' November 17, 2009 permit application complied with all applicable zoning regulations. See (R. pp. 6-9). Further, in its Final Order, the lower court affirmed the Board's erroneous decision that a variance should be denied because Appellants had not received a permit. (R. p. 2-3). All such holdings by the lower court ignore Appellants' rights as held in Pure Oil Division. While the Town may later have disapproved of such six-foot widths, the Town waited until five months after it issued a stop order on Appellant's property and six months after Appellants issued a supplemental permit application before it made any changes to the UDO checklist and tutorial.

In this case, Appellants applied for a permit on November 17, 2009 to construct a walkway in compliance with the UDO checklist and tutorial with which they must comply under Section 3-6.2 of the Unified Development Ordinance. The Town made no changes to its applicable zoning regulations until it passed its December 7, 2009 ordinance editing the language of the UDO checklist. Under Pure Oil Division, the subsequent permit issuance could not have been legally denied, as it would have deprived Appellants of their rights to construct and use a walkway in compliance with the Town's then-existing zoning restrictions. 254 S.C. at 34, 173 S.E.2d at 143. Therefore, under Pure Oil Division, Appellants' failure to procure a permit does nothing to alter their rights to continue their use of the six-foot walkway under the vested rights doctrine until a proper determination as to their November 17, 2009 application is made under applicable law.

Also, as explained above, neither the Town nor the Planning Commission gave consideration as to whether Appellants' November 17, 2009 application was proper under all existing walkway regulations and ordinances. Therefore, at a minimum, this matter should be

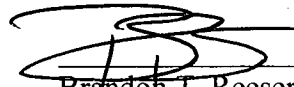
remanded to the Zoning Board of Appeals for consideration as to whether Applicants' November 17, 2009 application was compliant with Section 3-6.2(A) and the UDO checklist and tutorial incorporated therein.

CONCLUSION

For the reasons stated in the above paragraphs, this Court should reverse the December 21, 2015 Order of the lower court. Both Sections 2-10 and 3-6.2(A) of the Town of Pawleys Island govern the width of walkways within the Town. By its terms and through the affirmations of its force and effect by the Town, the mandatory UDO checklist and tutorial under Section 3-6.2 are part of that regulatory scheme. The Zoning Board of Appeals, the Georgetown County Planning Department, and the lower court never considered the application of Section 3-6.2(A) or the UDO checklist and tutorial in their denials of Appellants' 2009 variance and permit requests. Additionally, the lower court erred in holding that Appellants are not entitled to a vested right in the issuance of a permit pursuant to their November 17, 2009 permit application under applicable law. Given that there was no consideration of all of the applicable zoning regulations in effect at the time of Appellants' application, at a minimum this matter should be remanded for a determination as to whether Appellants' November 17, 2009 permit application conforms with Section 2-10, Section 3-6.2(A), and the UDO checklist and tutorial as they existed at the time of the application. Appellants' permit should be granted to the extent it complies with those ordinances and regulations.

July 13, 2016

Respectfully submitted,



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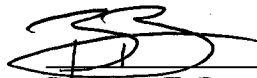
Town of Pawleys Island,
Georgetown County Planning
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Respondents.

PROOF OF SERVICE

I certify that I have served three copies of the Appellants' Final Brief on the Town of Pawleys Island by depositing said copies in the United States Mail, postage prepaid, on July 14, 2016, addressed to its attorneys of record, N. David DuRant and Natale Fata, at their respective addresses of P.O. Box 14722 and P.O. Box 16620, Surfside Beach, SC 29587.

July 14, 2016



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