THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III

Civil Action No.: 2012-CP-07-01394
Appellate Case No.: 2016-000687

GRAYS HILL BAPTIST CHURCH.....Respondent

-vs-

BEAUFORT COUNTY, AND THE BEAUFORT COUNTY ZONING BOARD OF APPEALS, DEFENDANTS

AND

THE UNITED STATES OF AMERICA, DEFENDANT – INTERVENOR

OF WHICH BEAUFORT COUNTY AND THE UNITED STATES OF AMERICA ARE THE.....Appellants

---

FINAL BRIEF OF APPELLANT BEAUFORT COUNTY

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Ordinance

STATEMENT OF ISSUES ON APPEAL

I. The trial court erred in finding that the Planning Commission committed an error of law in failing to honor the Church's original development permit and in finding the Planning Commission inappropriately applied the ordinance and abused its discretion in refusing to issue a new development permit.

II. The trial court erred in finding that the Church was entitled to a variance, as they could not meet the five conditions set forth at Beaufort County Zoning Ordinance Sec. 106-522.

PROCEDURAL HISTORY

This matter comes before the Court pursuant to two appeals, which have been consolidated by consent of the parties. The first appeal, formerly Case Number 08-CP-07-1114 and now Case Number 12-CP-07-1394, was commenced by the filing of the Plaintiff on April 3, 2008. This appeal is from the decision of the Beaufort County Planning Commission denying Grays Hill Baptist Church's (hereinafter "the Church") request for a permit to construct a Fellowship Hall. Following a hearing on this appeal, by consent the trial court stayed this appeal originally while the Church applied for a variance related to the construction of the same fellowship hall. The Beaufort County Board of Zoning Appeals denied the Church's application for a variance finding that it did not meet the minimum requirements for a variance under the relevant ordinance. A Summons and Complaint-Petition was filed by the Plaintiff on October 4, 2010, and was assigned Case Number, 10-CP-07-4844.

The United States of America moved to intervene, on behalf of the Marine Corps Air Station Beaufort, South Carolina (hereinafter "Air Station") and opposed the Church's application to build a secondary structure to be used as a sanctuary/fellowship hall on the site at 2749 Trask Parkway, Beaufort, SC 29906. The motion to intervene was granted by order dated June 30, 2011.

This matter went before the Circuit Court pursuant to the consolidated appeals. In a hearing on both appeals held on July 25, 2011, the Circuit Court ordered that the DRT's decision to deny the permit request be remanded back to the Planning Commission with instructions to rehear the appeal de novo as the

current record was insufficient to be ruled upon. The Court left open the question of the propriety of the variance for a later determination if necessary.

The Planning Commission reheard the appeal of the permit application request for the Fellowship Hall de novo on December 5, 2011. Following argument and testimonies by the parties, the Commission voted to deny the permit. **[R. p. 239]**

The Church appealed this decision to the Court of Common Pleas, and this Court heard argument on both appeals on October 23, 2012. This Court ruled on both appeals on March 19, 2013, finding that in case number 12-CP-07-1394 the decision of the Beaufort County Planning Commission be reversed and Beaufort County be directed to allow the Grays Hill Baptist Church to conclude the development of its property and proceed with the construction of its Fellowship Hall as depicted on the development plat. Additionally, the Court ruled that Case 2008-CP-07-114 and 2010-CP-07-4844 shall be dismissed as they are rendered moot by the decision in case Number 12-CP-07-1394. Beaufort County moved to reconsider that order and following an extended period while the United States and the Church attempted to resolve this matter. By order filed February 29, 2016, the court denied the motion for reconsideration. This appeal follows.

STATEMENT OF FACTS

Petitioners began construction in 1997 on the church and supporting infrastructure. The original site plans submitted to the County included both a church and an adjoining proposed sanctuary/fellowship hall. However, when

Petitioner applied to the County for a building permit, they applied only for permission to construct the church and surrounding parking facilities. The master plan ultimately approved by the County indicates that the adjoining fellowship hall was designated as "Phase II" and would therefore be completed separately from the church. Construction on the church and surrounding infrastructure were completed in 1997.

On December 11, 2006, Beaufort County adopted the Airport Overlay District. The Airport Overlay District includes all lands underlying the noise zones of 65 decibels and above, and all accident potential zones as designated in the most recent Air Installations Compatible Use Zones (AICUZ) Report as determined by the Department of the Navy, and as adopted by the Beaufort County Council. The Petitioner's property is located in the Accident Potential Zone-2 (APZ-2) which has a "measurable potential for an aircraft accident." Accident Potential Zones are based upon statistical analyses of past Department of Defense (DOD) aircraft accidents. APZs consist of a clear zone (CZ), APZ I, and APZ II. The CZ, the area closest to the runway end, is the most potentially hazardous. APZ I is an area beyond the CZ that possesses a significant potential for accidents. APZ II is an area beyond APZ I having a lower, but still significant, potential for accidents.

Under the guidelines of the District, the Church became a "nonconforming place of assembly and worship" which limited expansion to 15%. Due to questions as to whether the expansion limitation was 15% of the total disturbed area of the church complex, or 15% of the current square footage constituting the

church building, Beaufort County amended its ordinance on February 25th, 2008 to clarify that the limitation was to a 15% expansion of the building only.

In 2007, the Church submitted an application to build a new sanctuary/fellowship hall next to their Church which is the subject of this appeal. On October 17th, 2007, Beaufort County's Development Review Team denied the Petitioner's request to construct the sanctuary/fellowship hall by unanimous vote, specifically noting the safety hazard of having increased numbers of people meeting at a centralized location (occupancy load) and the additional times people would congregate at the subject location.

On November 6th, 2007, the Church appealed to the Planning Commission and again was denied permission to construct the sanctuary/fellowship hall. The Church then appealed the Planning Commission's denial to the Circuit Court. After an initial hearing on the matter, the Court agreed to stay the case while the Church requested a variance from Beaufort County to build the fellowship hall. On July 22, 2010 by the Beaufort County Zoning Board of Appeals denied the Church's request for a variance. The Church summarily appealed the denial of the variance to the Circuit Court as well.

This matter went before the Circuit Court pursuant to the two appeals, which were consolidated by consent of the parties. In a hearing held on July 25, 2011, the circuit court ordered that the DRT's decision to deny the permit request be remanded back to the Planning Commission with instructions to rehear the appeal de novo as the current record was insufficient to be ruled upon. The court

left open the question of the propriety of the variance for a later determination if necessary.

This matter was reheard before the Planning Commission. The Commission heard argument from Counsel and testimony on this matter de novo on December 5, 2011. The Planning Commission determined that the DRT was correct in denying the permit application because the site expansion requested in the permit would have been an unlawful increase in occupant load contrary to the limitation set forth in Appendix A1 Section 7(a)(6).

Appendix A1 Section 7(a)(6) as it existed at the time of the petition provided that

> ...."nonconforming places of assembly and worship shall be permitted to be rebuilt if damaged greater than 50 percent of their market value provided that the noise attenuation requirements of section 6 are met. Nonconforming places of assembly and worship may be expanded up to 15 percent in accordance with table 106-9 provided the expansion does not increase the occupant load of the building."

Table 106-9 provides for Expansion with regard to "Uses" that "15 percent disturbed area expansion allowed within required setbacks and with maximum feasible buffers." Likewise Table 106-9 provides for "Buildings and structures" expansion that "Expansions of up to 15 percent are allowed provided setbacks are not reduced and maximum feasible landscaping and buffers are used.

STANDARD OF REVIEW

The findings of fact by a County Zoning or Planning Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. 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." Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). A decision of a municipal zoning board will only 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

1. The trial court erred in finding that the Planning Commission committed an error of law in failing to honor the Church's original development permit and in finding the Planning Commission inappropriately applied the ordinance and abused its discretion in refusing to issue a new development permit.

In the first instance, the Court found that the Church should never have been required to seek a new development permit as a prerequisite to the construction permit for the Fellowship Hall as the Fellowship Hall is plainly and clearly shown on the development plat and the original development permit, under its own terms, and because the permit had not expired since substantial improvement to the development had occurred within two years from the issuance of the permit.

Based on the clear terms of the Church's development permit application, the Church only sought a permit to construct a 15,872 sq. foot building. **[R. pp. 244, 245]** This permit request was made ten (10) years prior to the permits that were requested in 2007 and are at issue in this matter. Clearly, all construction which was requested in the initial development permit was completed by 1997. **[R. p. 248]** The Narrative which was the descriptive basis of the Church's 1997 Development Permit Application clearly divides the project into phases. Phase I being a 15,872 sq. ft. church with 25,150 sq.ft. asphalt and concrete paving. Phase II of the development will consist of a 11,250 sq. ft. building shown on the enclosed plans as the building south of the church. The application for the permit itself only requests to construct the "Phase I" building. **[R. pp. 244, 245]** Also, it is important to point out that the County issued a final inspection certificate of compliance for Phase I which effectively closed out this development permit in December of 1997. **[R. p. 248]** There is no evidence which would support the continued validity or vested right in the subject 1997 development permit as alleged by the Church.

Moreover, this issue has previously been addressed by our Courts in the context of a vested rights determination when dealing with a project that is divided into phases. In F.B.R. Investors v. County of Charleston, the Court of Appeals held that Developer did not have vested right to continue construction of multifamily project on property, even though it had completed part of project before County downzoned property to single-family status, where Developer chose to divide its project into two phases, where second phase was essentially

barren land when downzoning took effect, where no construction had begun on second phase at time of zoning change, and where developer had not yet obtained building permits to complete construction. F.B.R. Investors v. County of Charleston, 303 S.C. 524, 525, 402 S.E.2d 189, 190) (Ct.App. 1991). Such is this case before the court, thus there is no "vested right" to a second phase of a project where no construction had begun on second phase at time of zoning change, and where developer had not yet obtained building permits to complete construction for the second phase of its development.

Next, the Church asserts, and the Court found, that the DRT erred in denying the new Development Permit in that the DRT abused its discretion by concluding that the expansion would increase the occupant load of the building if the permit was approved.

The Church maintains that the fellowship hall will have no impact on occupancy in practice. The County, conversely, argues that there is no question that construction of an additional 10,000 sq. ft. building would increase the occupiable space on this site. While it is admitted by the County that the term "occupant load" is not defined directly anywhere in the County ordinance, the County has adopted the International Fire Code by reference and has incorporated this Code into the County Ordinances. The Fire Code specifically defines "occupant load" as the number of persons for which the means of egress of a building or portion thereof is designed. The Code further goes on to set forth the means of mathematically calculating the occupant load of a Building based upon its intended use.

The County provided the testimony at the Planning Commission hearing in December 5, 2011, of Tim Ogden, Beaufort County Fire Marshall, with regard to the application of the calculation to the site. **[R. pp. 170, 171]** Mr. Ogden testified that the site's current occupant load for the church building is 293. He further testified that the structure applied for in the permit would have a minimum occupant load of 533, thereby nearly doubling the occupant load for the site. He additionally testified that when calculating occupant load, the potential for how many people can occupy the space is considered as opposed to representations as to how many people will actually occupy the building. In summary, and for purposes of this analysis, occupant load it is a mathematical calculation of the number of person authorized to safely occupy a site based upon the square footage and use of the building.

Because the calculation of the occupant load of the structure as requested in the permit would nearly double what the current load is, the site expansion requested in the permit would violate the prohibitions set forth in Appendix A1 Section 7(a)(6). Based on the foregoing, the permit for the Fellowship Hall expansion to the Grays Hill Baptist Church was properly denied by the Planning Commission.

Additionally, the Court found that even if a new development permit was required so that the subject ordinance is applicable to this requested project, the county applied the incorrect standard pursuant to Appendix A1, Section 7(a)(6) and Table 106-9 of the Ordinance, that being that the appropriate standard for expansion is up to 15% of the "disturbed area" not 15% of the pre-existing

buildings. While of no merit, given the ultimate intent of the ordinance, this ruling even if correct, is of no effect if the court finds that that the expansion increases the occupant load of the building as argued above.

Appendix A1 Section 7(a)(6) as it existed at the time of the petition provided that

> ...."nonconforming places of assembly and worship shall be permitted to be rebuilt if damaged greater than 50 percent of their market value provided that the noise attenuation requirements of section 6 are met. Nonconforming places of assembly and worship may be expanded up to 15 percent in accordance with table 106-9 provided the expansion does not increase the occupant load of the building."

Table 106-9 provides for Expansion with regard to "Uses" that "15 percent disturbed area expansion allowed within required setbacks and with maximum feasible buffers." Likewise Table 106-9 provides for "Buildings and structures" expansion that "Expansions of up to 15 percent are allowed provided setbacks are not reduced and maximum feasible landscaping and buffers are used.

In this instance we are talking about building an additional building so it is clear that the addition of a building structure is limited to 15% of the area of the building as opposed to 15% of the landscaping and parking. However, given the fact as set forth above that the Planning commission had reliable evidence before it that the expansion would increase the potential occupant load of the site, the permit request was properly denied.

Based on all of the above, the trial court erred in finding that the Planning Commission committed an error of law in failing to honor the Church's original

development permit and its "grandfathered or vested status" and in finding the Planning Commission inappropriately applied the ordinance and abused its discretion in refusing to issue a new development permit.

2. The trial court erred in finding that the Church was entitled to a variance, as they could not meet the five conditions set forth at Beaufort County Zoning Ordinance Sec. 106-522.

In order to grant a variance, the Zoning Board must make the factual determination that each of the four elements above favors granting the variance. See Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct.App.1992). Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions. Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953). A strong presumption exists in favor of the validity and application of zoning ordinances. Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997). In the context of zoning, a decision of a reviewing body, in this case the Beaufort County Zoning Board of Appeals, will not be disturbed if there is evidence in the record to support its decision. Id. The court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. Peterson, 327 S.C. at 235, 489 S.E.2d at 632. 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. See id.; Knowles v. City of Aiken, 305 S.C. 219, 407 S.E.2d 639 (1991); Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953); Gurganious v. City of Beaufort, 317 S.C. 481, 454 S.E.2d 912 (Ct.App.1995). The SC Supreme Court has summarized its standard of review in zoning appeals as follows

> It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Talbot v. Myrtle Beach Board of Adjustment, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952).

As the variance applicant in this case, the Grays Hill Baptist Church bore the burden of proving its entitlement to a variance. Application of Groves, 226 S.C. 459, 85 S.E.2d 708 (1955). If the Church failed to meet the requirements of each element of the ordinance, then the Board correctly denied the variance. The Court has clearly erred in finding that the ZBOA ruling is arbitrary. Importantly, the Court gives no explanation for this finding.

The Church has sought a variance under Beaufort County Zoning Ordinance Sec. 106-522 from the Zoning Board of Appeals. This section establishes the procedures and conditions for a variance to be approved. The statute states that approval is only under "limited circumstances" "when strict enforcement would represent a unique, undue, and unnecessary hardship". The

Ordinance sets forth five standards and requires that all five standards must be met in order for a variance to be granted. The County maintains no unique, undue or unnecessary hardship is present here, nor, it asserts, has the Church established any of the five standards set out in the ordinance, let alone all five. In fact, the Church failed to even address these standards in their application. **[R. p. 248]** Each standard is addressed below.

(1) " There are extraordinary and exceptional conditions pertaining to the particular piece or property. Extraordinary conditions could exist due to topography, street widening, beachfront setback lines or other conditions which make it difficult or impossible to make reasonable use of the property."

The Church makes a claim of extraordinary and exceptional conditions, but they are not extraordinary, nor exceptional as defined by the statute. The Church's contention in satisfying this requirement is that they are a nonconforming use within the Airport Overlay District and as such should be treated as being an extraordinary or exceptional piece of property. However, this contention is without merit as the ordinance clearly identifies the extraordinary and exception conditions as pertaining to the physical or geographical attributes of the property.

Additionally, the Church makes claims in paragraph 9 of their Attachment to Application for Variance of exceptional and extraordinary circumstances. In paragraph 9(a), Petitioner claims Beaufort County "failed to acknowledge and recognize that it has already granted to the Church permission to construct the Fellowship Hall when it approved the master plan ..." As previously discussed,

permission was granted by Beaufort County to construct the church, not the sanctuary/fellowship hall which was identified as "Phase II". The Permit clearly did not encompass this structure.

(2) *"These conditions do not generally apply to other property in the vicinity."*

The conditions of the Airport Overlay District clearly apply to the entire district. Thus, the Church's request for a variance fails this standard.

(3) *"Because of these conditions, the application of this chapter to the particular piece of property would effectively prohibit or unreasonably restrict utilization of the property."*

This property is not unreasonably restricted as the Church may continue to utilize the property as it is currently situated and has been used since it was built. The denial of the variance does not prohibit use of the property. Rather, it prohibits the addition of an additional building for meeting space. Therefore, the Church fails to meet this standard as well.

(4) *The authorization of the variance would not adversely affect adjacent property or the public good.*

The purpose of the airport overlay district is to protect the public from harm. It is clear that public good would clearly be harmed due to safety concerns in the APZ-2. In fact, the addition of a Church fellowship hall would effectively double the number of people that can be in attendance at the property at any given time.

(5) The hardship of which the applicant complains must a) "Relate to the applicant's land, and not due to the applicant's personal circumstances"; b) "Be unique, or nearly so, and not one common to many surrounding properties"; c) "Not be the result of the applicant's own actions"; and d) "Be one suffered by the applicant and not the adjoining landowners or the general public."

The Airport Overlay District clearly affects the uses available to all surrounding properties in the district. There is nothing unique as it relates to the hardship complained of, and the restriction to build this type of facility is common to every property in the Airport Overlay District.

Based on the foregoing, the Church has failed to meet any of the five standards, all of which are required by Beaufort County Ordinance Section 106-522. Thus, the denial of the Variance request by the ZBOA was appropriate and the trial court erred in finding that the denial of the variance was arbitrary, an abuse of discretion, illegal, or in excess of lawfully delegated authority.

CONCLUSION

Based on all of the evidence before the Planning Commission and the ZBOA, these bodies properly denied the relative permit and variance requests. Given the standard of review in this matter there is no basis for the Courts determination that these bodies acted arbitrarily or erred as a matter of law.

SIGNATURE PAGE FOLLOWS

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By: _____

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October 24, 2016

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APPELLANT BEAUFORT COUNTY'S CERTIFICATION OF COMPLIANCE WITH RULE 211(B)

I, the undersigned, as counsel for the Appellant Beaufort County, certify that the within Final Brief of the Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

SIGNATURE PAGE FOLLOWS

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By: _____

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Beaufort, South Carolina

November 1, 2016

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Appellant Beaufort County's Certificate of Compliance with Rule 211(b) upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 1st day of November, 2016 addressed to the following:

Lee E. Berlinsky, Esquire
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151 Meeting Street, Suite 200
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Charleston, SC 29402

AND

H. Fred Kuhn, Jr., Esquire
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Final Brief of Appellant Beaufort County upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 24th day of October, 2016 addressed to the following:

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October 24, 2016

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November 1, 2016

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Grays Hill Baptist Church vs. Beaufort County
Appellate Case No.: 2016-000687
Our File No: 10369 MBL

Dear Ms. Kitchings:

Please find enclosed herewith for filing one (1) original and fifteen (15) copies of the *Appellant Beaufort County's Certificate of Compliance with Rule 211(b)* with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

Mary Bass Lohr
MBL/ad
Enclosures

cc: H. Fred Kuhn, Jr.
Lee E. Berlinsky

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October 24, 2016

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Post Office Box 11629
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Please find enclosed herewith for filing one (1) unbound original and fifteen (15) bound copies of the *Final Brief of Appellant Beaufort County* and one (1) unbound original and fifteen (15) bound copies of the *Record on Appeal* with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

Mary Bass Lohr
MBL/ad
Enclosures
cc: H. Fred Kuhn, Jr.
Lee E. Berlinsky