ELECTRONICALLY FILED - 2018 Nov 07 10:30 AM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700784

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	Civil Action No.: 2018-CP-07-00784
BRADLEY CIRCLE VACATION PARTNERS, LLC and MONTI DEVELOPMENT HH, LLC, Petitioners/Appellants,	)	ORDER
vs.	)	
TOWN OF HILTON HEAD ISLAND, TOWN OF HILTON HEAD ISLAND BOARD OF ZONING APPEALS, TAMARA BECKER and RHONDA CARPER, Respondents.	)	

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SC Court of Appeals

THIS MATTER came before me for a hearing in chambers in Beaufort, South Carolina on August 23, 2018. The hearing was upon the appeal by the Petitioners/Appellants from a decision previously made by the Town of Hilton Head Island's Board of Zoning Appeals (BZA), concerning issues of allowable heights for residential buildings at certain locations in the Bradley Beach Circle neighborhood of the Town of Hilton Head Island.

Appearing for the Petitioners/Appellants was Drew A. Laughlin, Attorney at Law, of the law firm of Laughlin & Bowen, P.C., of Hilton Head Island. Gregory M. Alford, Attorney at Law, of the law firm of Alford Law Firm, LLC, also of Hilton Head Island, appeared on behalf of the Respondents Town of Hilton Head Island (Town) and Town of Hilton Head Island Board of Zoning Appeals. Barry L. Johnson, Attorney at Law, of the law firm of Johnson & Davis, PA, of Bluffton, South Carolina, appeared on behalf of the Respondents Tamara Becker and Ronda Carper. (It has been pointed out to the court that Rhonda Carper is referenced in the official record of this case as such, but the proper spelling of her name is Ronda Carper.)

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The parties filed pleadings and the BZA Record was duly filed with the court. Argument was had on all issues, and ably conducted by all counsel.

BACKGROUND

Appellants/Petitioners are the proposed developers/builders of tall, multi-story residence buildings in the Bradley Beach Circle neighborhood of the Town. Respondents Becker and Carper own property and reside in that neighborhood, and object to the proposed heights of those buildings.

In February of 2016, the Appellants/Petitioners applied for a variance from certain requirements of the Town's Land Management Ordinance (LMO) and, as required by law, that variance application was considered by the BZA. Specifically, that variance application (VAR 352-2016) requested only these variances for the subject property:

A. Variance from LMO § 16-5-102, Adjacent Street Setbacks (and setback angles);

B. Variance from LMO § 16-5-103, Adjacent Street Buffers.

Nothing in that variance application requested a variance for any specific heights of the proposed buildings for the subject property. At the time of those proceedings in March 2016, the LMO Zoning District, in which the subject property was located, limited building heights to 75 feet above base flood elevation.

On March 28, 2016, the BZA granted the two variances requested in VAR 352-2016.

Subsequently, on April 7, 2016, the Town amended the LMO and the Town Zoning Map and placed the subject property into the RM8 Zoning District, with a height limitation of 45 feet above base flood elevation.[1]

[1] Base Flood Elevation is defined in the Town's LMO Section 16-10-102.3

Appellants/Petitioners applied on August 8, 2017 for the Town's permission to build buildings on the subject property to a height of 75 feet above base flood elevation. The Town's LMO Official, by letter dated February 8, 2018, issued her determination that the March 28, 2016 variance granted by the BZA had included a vested right for the Appellants/Petitioners to build to a height of 75 feet above base flood elevation.

Respondents Becker and Carper duly appealed, to the BZA, that determination on February 8, 2018 determination by the Town's LMO Official. On March 26, 2018, the BZA heard the appeal by Respondents Becker and Carper from that February 8, 2018 determination by the LMO Official, regarding the maximum allowable height of the buildings which could be built on the subject properties. The BZA voted to reverse the determination of the LMO Official and, instead, ruled that the March 28, 2016 variances it had granted (VAR 352-2016) did not include a vested right to build to 75 feet above base flood elevation, and that any new building on the subject property would be restricted to a maximum of 45 feet above base flood elevation (the "Decision"). In reaching that Decision, the BZA decided from the record before it that the 2016 variance application (VAR 352-2016) of the Appellants/Petitioners did not include a "site specific development plan" as defined in S.C. Code § 6-29-1520 and LMO Appendix D-19.[2]

The instant case before this Court arises on the appeal of Appellants/Petitioners from that March 26, 2018 BZA Decision.

ISSUES RAISED ON APPEAL/PETITION

The Petitioners/Appellants, by way of their Notice of Appeal and Petition from the Decision, asserted that the BZA's "findings and conclusions . . . are arbitrary and capricious, an abuse of the board's discretion, and erroneous as a matter of law alleging that:

[2] For purposes of this matter, the terms "site specific development plan" and "Site Plan" are considered by this Court to be the same under applicable law.

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A. the BZA's decision was based on an erroneous construction of S.C. Code Ann. § 6-29-1520 (9) and what constitutes the 'site specific development plan as defined by that statute;

B. there is no evidence in the record that reasonably supports the BZA's finding (or erroneous conclusion based on an error of law) that the variance application for the subject property (VAR 352-2016) did not sufficiently describe a site specific development plan, when the application included a development plan which described with reasonable certainty the types and density or intensity of uses for the specific property or properties identified in the application;

C. the BZA's conclusion of law that the granting of variances in VAR 352-2016 did not create a vested right, as defined by S.C. Code Ann. § 6-29-1520, to build the single-family homes described and depicted in the variance application to maximum height of 75 feet above base flood elevation is error as a matter of law; and

D. the BZA's conclusion of law that the granting of variances in VAR 352-2016 did not create a vested right, as defined by S.C. Code Ann. § 6-29-1520, and that the properties are therefore restricted to a height of 45 feet above base flood elevation is error as a matter of law.

The Respondents Town and BZA, in response, asserted defenses of (1) general denial; (2) qualified specific denials; (3) failure to state a claim because of the language in the Appeal/Petition; and (4) that the BZA decision is supported by some evidence reasonably supporting the BZA's factual findings, which is sufficient to satisfy the standard of review in such an appeal as this.

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The Respondents Becker and Carper, in response, asserted defenses of (1) qualified general denial; (2) pending ordinance doctrine; (3) Town of Hilton Head Island Land Management Ordinance (LMO) Variance Application Requirements.

STANDARD OF REVIEW

S.C. Code Ann. § 6-29-840 prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board. That section provides that "[t]he findings of fact by a board of zoning appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6–29–840(A). However, a reviewing court in a zoning case may rely on uncontroverted facts which appear in the record, but not in a zoning board's findings." *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals,* 342 S.C. 480, 491, 536 S.E.2d 892, 898 (Ct. App. 2000).

A zoning board's factual findings will not be disturbed on appeal unless the record contains no evidence reasonably supporting the findings. *Boehm v. Town of Sullivan's Island Board of Zoning Appeals, et al.,* Opinion No. 5546, filed March 28, 2018. In reviewing questions on appeal, the court should determine only whether the decision of the board is correct as a matter of law. *Id.* 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. An abuse of discretion occurs when a board's decision is unsupported by the evidence or controlled by an error of law. *Id.* "[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Id.* (quoting *Helicopter Sols., Inc. v. Hinde,* 441 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) and *Mikell v. Cty. of Charleston,* 386 S.C. 153, 158, 687 S.E. 326, 329 (2009)). "Although great deference is accorded the decisions of those charged with interpreting and

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applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *Id.* quoting *Helicopter Sols*, 414 S.C. 1 at 9-10, 776 S.E.2d at 757 (quoting *Mikell*, 386 S.C. at 158, 687 S.E.2d at 329).

ARGUMENTS OF APPELLANTS/PETITIONERS

In support of their positions, Appellants/Petitioners argue as follows:

First, that LMO § 16-2-102.J.1 provides that approval of the variance application, VAR 352-2016, constituted approval of the site specific development plan for the subject properties and established a vested right in accordance with the South Carolina Vested Rights Act, S.C. Code Ann. § 6-29-1510, *et seq.*, to undertake and complete the development of the property under the terms and conditions of the site specific development plan.

Second, that S.C. Code Ann. § 6-29-1520 (9) defines "site specific development plan" as "a development plan submitted to a local governing body by a landowner describing with reasonable certainty the types and density or intensity of uses for a specific property or properties."

Third, that S.C. Code Ann. § 6-29-1520(10) defines "vested right" as "the right to undertake and complete the development of property under the terms and conditions of the site specific development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter." "Vested rights under zoning ordinances are undergirded by the same constitutional footing which precludes retroactive application of zoning ordinances". *Friarsgate, Inc. v. Town of Irmo,* 290 S.C. 266, 269, 349 S.E.2d 891, 893 (Ct. App. 1986).

Fourth, that their 2016 application for variance (VAR 352-2106) clearly described a plan to develop two single family homes with four full stories over parking on two specifically

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identified parcels (together, the "subject property"). They contend that the application included a subdivision plat, as-built survey, detailed site plans showing the proposed location of the homes on the lots, and elevation drawings of the homes, although their application did not specify the exact height of the homes, because the applicant was not requesting a variance from the allowed height of 75 feet. However, the description given was more than sufficient, in their view, to describe the size and height of the homes with reasonable certainty.

Fifth, that the Record is devoid of evidentiary support for the BZA's finding that the 2016 variance application did not describe a development plan for the subject properties.

Sixth, that S.C. Code Ann. § 6-29-1520(9) requires only that the plan "describe with reasonable certainty the types and density or intensity of uses" for the properties. They contend that the description of the planned development as being two single family homes each with four full stories over parking, the detailed site plan, and the illustrative elevation drawings clearly meet the statutory definition. Further, they contend that the SC statute does not require detailed construction drawings and specifications or a specific height measurement for the homes that are clearly shown to be four stories over parking and located in accordance with a detailed site plan and that, therefore, the BZA's "Finding of Fact" that the variance application lacked a satisfactory development plan was not only factually incorrect, but, *arguendo*, it was also based on an erroneous legal construction of the ordinance. They cite to *Boehm v. Town of Sullivan's Island Board of Zoning Appeals, supra.*

At the hearing before me, Appellants/Petitioners summarized their arguments as boiling down to this: That LMO § 16-2-102.J.1, properly applied, means that the BZA's variance approval of March 28, 2016 (VAR 352-2016) constituted approval of the site specific development plan for the subject property and established a vested right under S.C. Code § 6-29-

1510, et seq., to undertake and develop the subject property under the terms and conditions of that site specific development plan, to a height of 75 feet above base flood elevation.

ARGUMENTS OF RESPONDENTS BECKER AND CARPER

Respondents Becker and Carper argued in support of their positions as follows:

First, that the LMO, in Appendix D-19, adds more local requirements as required to implement the SC statute, and prescribes the "submittal requirements" for a variance application to the BZA including, in pertinent parts:

A. "A site plan at a scale of 1"=30' accurately showing the variances requested . . ." and the detailed engineering plan also there required. (LMO Appendix D-19 A.2.).

B. "A written narrative explaining in detail the variance(s) requested and how the criteria of (LMO) § 16-2-103.S.4, Variance Review Standards, apply to the request." (LMO Appendix D-19 A.4.).

Second, that nothing was presented in the Record before the BZA in compliance with LMO Appendix D-19 A.2., and A.4., as quoted above, to demonstrate that the subject variance application contained either the (A) required 1"=30' site plan accurately showing any height variance requested, or (B) a narrative requesting such a height variance.

Third, that the 2016 variance requested did not comply with LMO § 16-2-103.S.4, in that it did not show that the variance would not be a substantial detriment to adjacent property or the public good, and that the character of the zoning district where the property is located would not be harmed by the granting of the variance.

Fourth, Respondents Becker and Carper also demonstrated that the drawing on which Appellants/Petitioners rely (Record, Drawing attached as Attachment G, and Record, BZA

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Hearing March 28, 2018 Transcript, p. 28. l. 19 – p. 29, l. 4; p. 40, l. 15 – p. 41, l. 10) for their site-specific plan is for a different property, 22 Bradley Beach Circle, and not for the subject property at 28 Bradley Beach Circle.

Fifth, and in addition, Respondents Becker and Carper asserted that the Pending Ordinance Doctrine applied and barred the Petitioners/Appellants from any vested right to build a building on the subject property in excess of 45 feet above base flood elevation.

At the hearing before me, Respondents Becker and Carper concluded their arguments by asserting that the Decision of the BZA was reasonably supported by the Record and evidence before the BZA, and that the BZA Decision was not erroneous as a matter of law and that the BZA Decision was not an abuse of discretion, nor was it arbitrary or capricious.

ARGUMENTS OF RESPONDENTS TOWN AND BZA

The Respondents Town and BZA supported the arguments of Respondents Becker and Carper and pointed to the absence of a site-specific development plan, compliant with LMO Appendix D-19, as outlined in more detail in the discussion of the arguments of Respondents Becker and Carper. The Respondents Town and BZA also strongly emphasized that the Record before the BZA (and also before this court) contained more than enough evidence from which the BZA could have reasonably, and not erroneously as a matter of law, concluded that there was no LMO-compliant site-specific development plan (Site Plan) at the 2016 BZA variance proceeding sufficient to consider vesting height to 75 feet above base flood elevation.

FINDINGS OF FACT

Having duly considered these matters before this court, and having reviewed all of the Record and materials before me, and having evaluated the able (and sometimes contrary) arguments of counsel for the parties, I make the following material Findings of Fact:

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A. The subject property for purposes of this matter is known as 28 Bradley Beach Circle, and 3 Whelk Street, Town of Hilton Head Island, and consists of two parcels: TIN: R510 009 000 0896 0000 (0.115 acres) and TIN R510 009 000 1102 0000 (0.189 acres), and is not the property known as 22 Bradley Beach Circle, Town of Hilton Head Island.

B. At no time did Appellants/Petitioners apply for a height variance to build on the subject property above 45 feet above base flood elevation.

C. Appellants/Petitioners never filed with the Town or the BZA a site specific development plan ("Site Plan") for the subject property, containing the elements required by LMO Section D-19.A.2 and A.4.

D. Before the Appellants/Petitioners applied for permits to build on the subject property, the Town changed the LMO and the Zoning Map, and placed the subject property in a Zoning District RM8, limiting construction of buildings to 45 feet above base flood elevation and that is the limitation currently applicable to Appellants/Petitioners for the subject property.

E. Appellants/Petitioner never applied for nor acquired any vested right to build to 75 feet above base flood elevation on the subject property.

F. Any Finding of Fact that is deemed to be a Conclusion of Law shall be deemed such.

CONCLUSIONS OF LAW

Having duly considered these matters before this court, and having reviewed all of the Record and materials before me, and having evaluated the able (and sometimes contrary) arguments of counsel for the parties, I make the following Conclusions of Law:

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I. These variance issues are covered by provisions of the South Carolina Code of Law and the Town's LMO, as follows:

A. S.C. Code § 6-29-1540 (2014), is the "umbrella" or enabling State legislation for the Town's LMO provisions on these variance issues, and provides as follows:

"A vested right established by this article and in accordance with the standards and procedures in the land dèvelopment ordinances or regulations adopted pursuant to this chapter is subject to the following conditions and limitations:

(1) the form and contents of a site specific development plan must be prescribed in the land development ordinances or regulations;

(2) the factors that constitute a site specific development plan sufficient to trigger a vested right must be included in the land development ordinances or regulations;

(3) if a local governing body establishes a vested right for a phased development plan, a site specific development plan may be required for approval with respect to each phase in accordance with regulations in effect at the time of vesting;

(4) a vested right established under a conditionally approved site specific development plan or conditionally approved phased development plan may be terminated by the local governing body upon its determination, following notice and public hearing, that the landowner has failed to meet the terms of the conditional approval;

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(5) the land development ordinances or regulations amended pursuant to this article must designate a vesting point earlier than the issuance of a building permit but not later than the approval by the local governing body of the site specific development plan or phased development plan that authorizes the developer or landowner to proceed with investment in grading, installation of utilities, streets, and other infrastructure, and to undertake other significant expenditures necessary to prepare for application for a building permit;

(6) a site specific development plan or phased development plan for which a variance, regulation, or special exception is necessary does not confer a vested right until the variance, regulation, or special exception is obtained;

(7) a vested right for a site specific development plan expires two years after vesting. The land development ordinances or regulations must authorize a process by which the landowner of real property with a vested right may apply at the end of the vesting period to the local governing body for an annual extension of the vested right. The local governing body must approve applications for at least five annual extensions of the vested right unless an amendment to the land development ordinances or regulations has been adopted that prohibits approval. The land development ordinances or regulations may authorize the local governing body to:

(a) set a time of vesting for a phased development plan not to exceed five years; and

(b) extend the time for a vested site specific development plan to a total of five years upon a determination that there is just cause for extension and that the public interest is not adversely affected. Upon expiration of a vested right, a building permit may be issued for development only in accordance with applicable land development ordinances or regulations;

(8) a vested site specific development plan or vested phased development plan may be amended if approved by the local governing body pursuant to the provisions of the land development ordinances or regulations;

(9) a validly issued building permit does not expire or is not revoked upon expiration of a vested right, except for public safety reasons or as prescribed by the applicable building code;

(10) a vested right to a site specific development plan or phased development plan is subject to revocation by the local governing body upon its determination, after notice and public hearing, that there was a material misrepresentation by the landowner or substantial noncompliance with the terms and conditions of the original or amended approval;

(11) a vested site specific development plan or vested phased development plan is subject to later enacted federal, state, or local laws adopted to protect public health, safety, and welfare including,

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but not limited to, building, fire, plumbing, electrical, and mechanical codes and nonconforming structure and use regulations which do not provide for the grandfathering of the vested right. The issuance of a building permit vests the specific construction project authorized by the building permit to the building, fire, plumbing, electrical, and mechanical codes in force at the time of the issuance of the building permit;

(12) a vested site specific development plan or vested phased development plan is subject to later local governmental overlay zoning that imposes site plan-related requirements but does not affect allowable types, height as it affects density or intensity of uses, or density or intensity of uses;

(13) a change in the zoning district designation or land-use regulations made subsequent to vesting that affect real property does not operate to affect, prevent, or delay development of the real property under a vested site specific development plan or vested phased development plan without consent of the landowner;

(14) if real property having a vested site specific development plan or vested phased development plan is annexed, the governing body of the municipality to which the real property has been annexed must determine, after notice and public hearing in which the landowner is allowed to present evidence, if the vested right is effective after the annexation;

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(15) a local governing body must not require a landowner to waive his vested rights as a condition of approval or conditional approval of a site specific development plan or a phased development plan; and

(16) the land development ordinances or regulations adopted pursuant to this article may provide additional terms or phrases, consistent with the conditions and limitations of this section, that are necessary for the implementation or determination of vested rights."

B. The Town's LMO locally implements the foregoing State statute in several LMO provisions, as follows:

(1) "All words, terms, phrases and expressions used in this ***Ordinance*** shall have their usual and customary meaning in the context of the general purposes of this ***Ordinance*** set out in Sec. 16-1-103, Purpose and Intent, and elsewhere. Defined terms in this ***Ordinance*** shall have the meaning stated in the definition of the term. Defined terms are shown in bold italicized type. Where a defined term is not shown in bold italicized type, it shall have its usual and customary meaning." LMO Section 16-10-101.A.

(2) "Site Plan. . . A detailed engineering plan, to scale, showing ***uses***, and ***structures*** proposed for a ***parcel*** of ***land*** as required by this ***Ordinance***." LMO Section 16-10-104.

(3) Variance Submittal Requirements:

"An ***application*** for variance shall consist of information necessary for the ***Board of Zoning Appeals*** to make a determination

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regarding the variance request, including but not limited to the following:

1. An ***application*** form as published by the ***Official*** and appropriate fee as required by Sec. 16-2-102.C.2, Application Fees.
2. A ***site plan*** at a scale of 1"=30' accurately showing the variance(s) requested. If the ***application*** is for a variance of Sec. 16-6-102.D, Wetland Buffer Standards, the survey must be **certified by the permitting authority.**
3. Notarized certification, written and signed by the ***development site*** owner of record, that such owner formally consents to the proposed ***development*** .
4. A written narrative explaining in detail the variance(s) requested and how the criteria of Sec. 16-2-103.S.4, Variance Review Standards, apply to the variance request.
5. Any supporting documentation deemed necessary by the ***applicant*** .
6. A copy of the proposed Mailed Notice as required by Sec. 16-2-102.E." LMO Appendix D-19.A.

II. Neither LMO Section 16-2-102.J.1, or S.C. Code § 6-29-1520(9) afford Appellants/Petitioners relief from the more particular provisions of the LMO and the SC Code cited in the section next above.

III. There is more than ample evidence in the Record to support the BZA's March 26, 2018 Decision, here appealed from.

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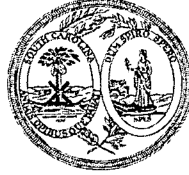
IV. There was no error of law, no arbitrariness or capriciousness, and no unreasonableness, in the BZA's Decision that there was no "site specific development plan" before the BZA at the 2016 variance hearing, compliant with S.C. Code § 6-29-1520 and LMO Appendix D-19, and that Appellants/Petitioners had not acquired a vested right to build on the subject property to a height above 45 feet and up to 75 feet, above base flood elevation in the now-existing RM8 Zoning District.

V. Any Conclusion of Law deemed to be a Finding of Fact shall be deemed such.

CONCLUSION

Based on the Record, the applicable law and the foregoing, therefore, I deny the appeal/petition of Appellants/Petitioners and uphold the BZA Decision of March 26, 2018 in this matter.

AND IT IS SO ORDERED.



Beaufort Common Pleas

Case Caption: Bradley Circle Vacation Partners Llc , plaintiff, et al VS Hilton Head Island Town Of , defendant, et al

Case Number: 2018CP0700784

Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

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