IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr.
The Honorable Benjamin H. Culbertson

Appellate Case No.: 2018-001221
Civil Action No.: 2016-CP-26-02377

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SC Court of Appeals

In Re: Venture Engineering, agent for DT LLC ....Respondent

vs.

Horry County Zoning Board of Appeals ....Appellant

APPELLANT'S REPLY BRIEF

April 24, 2019

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ARGUMENT

A. THE CIRCUIT COURT'S INTERPRETATION OF THE REQUIRED CONTENTS FOR A CERTIFIED RECORD OF APPEAL WAS IMPROPER AND CONTRARY TO LAW.[1]

The Appellant in this case is the Horry County Zoning Board (the "Zoning Board"). The Respondent contends in its brief that any documents or materials in the Zoning Board's "possession" and relevant to the "matter" lawfully before the Board, are required to be included in the certified record submitted to the circuit court pursuant to S.C. Code Ann. § 6-29-800(B) (Supp. 2018).

Respectfully, this interpretation is wrong, overly broad and misapprehends the statute. Section 6-29-800(B) articulates the obligation of the administrative official(s) from whom the appeal is taken. Such official must assemble and deliver to the Board of Appeals "all papers constituting the record upon which the action appealed from was taken" (emphasis added). Id. The Respondent attempts to use this statute to bolster the argument that the circuit court can reach back beyond the Board of Zoning Appeals and pick and choose what it wants to consider as factual evidence from any matters or materials that may have been in the "possession" of the administrative official(s), the Board of Appeals or even the County-at-large. That interpretation is improper and runs contrary to the established standards of review. Section 6-29-830(A) (Supp. 2018) addresses the creation of the record for the circuit court, which states: "[t]he board [of appeals] must file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of

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[1] As the record reveals, the denial of the Appellant's Motions to Strike was made by Orders of The Honorable Larry B. Hyman, Jr., entered October 13, 2016 and October 17, 2016, respectively (R. pp. 42 and 44). The final circuit court order issued on the merits of the consolidated appeals was entered April 6, 2018, by The Honorable Benjamin H. Culbertson. (R. p. 13).

the board including findings of fact and conclusions." Id. This more limited scope for the "certified record" is logical and follows the applicable standard of review. After all, an "appeal" is generally confined to matters the lower tribunal considered, not matters that were part of the broader file but not presented or argued when the tribunal made its decision. Another statute explains:

> The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

S.C. Code Ann. § 6-29-840(A) (Supp. 2018).[2] The Respondent is essentially asking this Court to impute to the Zoning Board the entire knowledge base of the County and then expect the Board to pull from that knowledge base and deliver all documents and materials deemed to be relevant or related to the proceeding.

Here, the circuit court accepted and considered multiple pieces of factual evidence when there was no indication that such materials had been reviewed or considered by either the initial administrative official(s) or by the Zoning Board in rendering their respective decisions. In the case of Exhibit K (R. p. 313), the Respondent argues that its self-serving and highly prejudicial letter must be included and considered as factual evidence even though it was not admitted into the record before the Zoning Board and there was no evidence that it was considered by the Zoning Board in making its decision.

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[2] As posited in Appellant's Brief, the deferential standard to be applied in cases like the present is firm and well-established. See *Furr v. Horry County Zoning Bd. of Appeals,* 411 S.C. 178, 767 S.E.2d 221 (Ct. App. 2014) (finding that even where a reviewing circuit court disagrees with the reasoning by which the board reached its conclusions, such court must not set aside the board's view of the matter in order to inject its own perception of the facts) (citing *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)).

The circuit court, however, was clearly moved, finding as a factual matter, that "an individual from the Solid Waste Authority was contacting members of the Board in an effort to persuade the Board members to reconsider their votes." In other words, the circuit court accepted the contents of Respondent's counsel's letter as gospel, without the Zoning Board ever having the ability to respond factually or perhaps offer a similarly self-serving response. (R. pp. 451-456). Regarding the contents of Exhibit K, during the merits hearing the circuit court asked of Respondent's counsel "[a]re you saying that that did not happen?" (R. p. 452, line 7). The Zoning Board was essentially asked as part of its case to disprove a conspiracy theory advanced exclusively by Respondent's counsel and passed off as factual evidence. The burden of proof rightfully should have been on the Respondent to establish an error of law, not on the Zoning Board to prove a wild conspiracy-laden negative.

The inclusion of matters and materials that were not introduced or considered in the record of proceedings before the hearing body deprives the opposing party of due process and poses a strong likelihood of improper prejudice. This is precisely why the certified record on appeal to the circuit court is limited to "a copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including findings of fact and conclusions." S.C. Code Ann. § 6-29-830(A) (Supp. 2018). It is simply impossible for a reviewing circuit court to faithfully give the required deference to the factual findings of the lower tribunal when it is improperly led to consider and ultimately believe facts outside of the record that were not a part of said tribunal's proceedings. See *Furr v. Horry County Zoning Bd. of Appeals,* 411 S.C. at 183, 767 S.E.2d at 224 (Ct. App. 2014). This consideration of improper evidence resulted in extreme prejudice to the Zoning Board and was only exacerbated by the consolidation of the two distinct legal analyses that the appeals should have required.

B. THE CIRCUIT COURT'S CONSOLIDATION OF THE APPEALS WAS IMPROPER AND RESULTED IN A PREJUDICIAL CONFLATION OF DIFFERENT SETS OF FACTS REQUIRED FOR DIFFERENT LEGAL ANALYSES.[3]

The Respondent argues consolidation of the two appeals was proper on two grounds: (1) that the language of Rule 42(a), SCRCP, provides that, for reasons of efficiency and judicial economy, consolidation may occur; and (2) that even when consolidation does occur, the circuit court retains the ability to receive and address common questions of fact, while nonetheless rendering separate and distinct legal analyses. Although both grounds are certainly true in the abstract, the latter did not occur. It is evident from the record that the circuit court did not employ the separate and distinct legal analyses that the separate cases required.[4]

It is undisputed that the legal analysis and standards of proof required for each of the legal determinations under the two appeals are vastly different. In an appeal from an administrator's decision as to compliance, the Zoning Board has all the powers of the officer from whom the appeal is taken and may affirm or reverse, wholly or in part, or may modify said decision as appropriate. S.C. Code Ann. § 6-29-800(E) (Supp. 2018). In contrast, in an appeal from the denial of a variance, an applicant must establish that the enforcement of a particular zoning ordinance results in an unnecessary hardship and:

> (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;
>
> (b) these conditions do not generally apply to other property in the vicinity;

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[3] Similar to improper inclusion of extraneous matters into the certified record, the consolidation of the appeals was accomplished by Order of The Honorable Larry B. Hyman, Jr., entered October 13, 2016 (R. p. 51). The final circuit court order issued on the consolidated appeals was entered April 6, 2018, by The Honorable Benjamin H. Culbertson. (R. p. 13).

[4] In the merits hearing before the circuit court, The Honorable Benjamin H. Culbertson initially expressed some dismay that two appeals, with separate standards of proof and review, were attempting to be heard in one proceeding, stating "let's don't commingle them. Let's do one and then let me do the other because this is going to get confusing." See (R. pp. 440, lines 6-25, - p. 441, line 1). As the transcript of the hearing reveals, the circuit court was right to have been concerned.

> (c) because of these conditions, the application of the ordinance the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
>
> (d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

S.C. Code Ann. § 6-29-800(A)(2)(a)-(d) (Supp. 2018). The Board may not grant a variance in order to extend physically a non-conforming use of land. S.C. Code Ann. § 6-29-800(A)(2)(d)(i) (Supp. 2018). Moreover, "[t]he fact that property may be utilized more profitably, if a variance is granted, may not be considered as grounds for a variance." Id. Whether from an appeal of an administrative official's decision or from the denial of a variance, the circuit court's scope of review is limited exclusively to the correction of errors of law. S. C. Code Ann. § 6-29-840 (Supp. 2018).

The circuit court's April 6, 2018 order is devoid of a single factual finding relative to any of the factors enumerated in Sections 6-29-800(A)(2)(a)-(d). Rather, and as alluded to above, the circuit court's factual findings focus almost exclusively on (a) references to an investment opportunity that the Respondent alleges (without factual support or the Zoning Board's opportunity to respond) was improperly frustrated by the Board[5], and (b) matters and materials outside the proper certified record that alleged a conspiratorial progression of the appeals process. The circuit court's factual findings summarily characterized the testimony of the citizens and residents surrounding the Respondent's facility as "predominately limited to testimony indicating they were told [Respondent] was going to begin taking in and recycling compost/trash[.]" (R. p. 23, ¶25). The circuit court did not address or assess the credibility of witnesses, Ms. Janice Dowe

[5] As cited above, by law such issues of potential profitability are not only irrelevant, but may not be considered as a part of the determination on whether a variance is appropriate. S.C. Code § 6-29-800(A)(2)(d)(i) (Supp. 2018).

or Mr. Wesley Finley, who testified as to their concerns for the health and welfare of the surrounding community. (R. p. 492 (p. 39), lines 22-25; R. p. 492 (p.. 40) lines 1-9; R. p. 493 (p. 42) lines 6-10 and 14-15; R. p. 494 (pg. 45) lines 18-25 – R. p. 494 (pg. 46) lines 1-21).

As the Zoning Board previously argued before the circuit court, although the subject matters of the two appeals involve the same parcel of real property and the particular business conducted thereon, the factual circumstances that control the outcomes of the two are different, and to allow such matters to proceed concurrently would be improper and unduly prejudicial to the Zoning Board. The record of the instant appeal establishes resolutely that the prejudice and confusion that the Zoning Board sought to prevent – and the circuit court judge responsible for the merits hearing initially feared (see *supra* footnote 4) - became manifest.

As a direct and proximate result of the admission of factual matters outside the proper certified record, the circuit court improperly substituted its own judgment for that of the Zoning Board, and then improperly used those facts to conflate two distinct legal analyses into one unfounded and prejudicial conspiracy theory propounded by the Respondent. Had the matters been addressed separately, the Zoning Board would have been afforded its legal opportunity to properly segregate and marshal the factual evidence from an appropriate record that bore on each of the legal issues. In the present case, due to the improper consolidation, the Zoning Board was deprived of having the proper facts applied to each of the two relevant legal standards.

CONCLUSION

For the reasons set forth above and in its lead brief, the Horry County Zoning Board of Appeals respectfully contends that the circuit court erred in consolidating the appeals and in improperly considering matters beyond the certified record, thus violating the applicable standard of review. As a result, this Court should reverse the circuit court and reinstate the decisions of the

Zoning Board and the Horry County zoning authorities.

Respectfully submitted,

April 24, 2019

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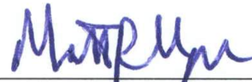
CERTIFICATE OF COUNSEL

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

April 24, 2019



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