THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2018-CP-07-00784
Appellate Case No. 2019-000314

Bradley Circle Vacation Partners, LLC and Monti Development HH, LLC... Appellants,

v.

Town of Hilton Head Island, Town of Hilton Head Island Board of Zoning Appeals, Tamara Becker, and Rhonda Carper ..... Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUE ON APPEAL

I. Did the Master in Equity Err in Affirming a Decision of the Town of Hilton Head Island Board of Zoning Appeals which Overruled an Interpretation by the Town's LMO Official that a Previous Approval of Variances Constituted Approval of a Site Specific Development Plan for 28 Bradley Circle and 3 Whelk Street, Hilton Head Island and Established a Vested Right to Undertake and Complete the Development Plan and Build the Homes to a Height Allowed by LMO when the Variances were Approved?

STATEMENT OF THE CASE

On March 28, 2016, the Town of Hilton Head Island Board of Zoning Appeals ("BZA") approved variances from Sections 16-5-102, Adjacent Street Setbacks, and 16-5-103.D, Adjacent Street Buffers, of the Town's Land Management Ordinance ("LMO") for two single family homes to be built on 28 Bradley Circle and 3 Whelk Street, Hilton Head Island. At the time the variances were granted, the LMO allowed the homes to be built to a maximum height of 75' above base flood elevation. [BZA CRA p. 362]

In May 2016, after the variances were approved, the Town of Hilton Head Island amended the LMO and reduced the maximum height of homes in the zoning district where 28 Bradly Circle and 3 Whelk Street are located to 45 feet above base flood elevation. [BZA CRA pp. 362-63, 366]

On August 1, 2017, Appellants applied for Commercial Building Permits to construct two homes at 28 Bradley Circle and 3 Whelk Street with four stories over parking as depicted in the variance application. The plans showed the height of the homes would exceed 45' above base flood elevation.

The Town planning staff charged with reviewing the building permit applications received numerous emails from members of the public objecting to the height of the homes and to the issuance of the permits. Staff also received inquiries from the mayor and members of town council. [BZA CRA pp. 170, 175-179, 182-194] In the end, the Town refused to issue the permits because of an alleged contract dispute involving neither the Town nor the Respondents here and not raised by any of the actual parties to the contract. [BZA CRA p. 177]

By letter dated December 14, 2017, Appellants requested a written interpretation from the LMO Official, pursuant to LMO Section 16-2-103.R, answering the following questions:

1. Did the BZA's approval of the Variances constitute approval of a development plan and establish a vested right to build two single family attached homes with four levels over parking on the properties as described in the application for the Variances and Staff Report to the BZA?
2. Is the Town required to issue building permits to construct two single family attached homes with four levels over parking on the properties as described in the application for the approved Variances? If not, what provisions of the Town Code allow the Town to refuse to issue the permits?
3. Do [the applicants] have a right to receive the building permits they applied for on August 1, 2017? If not, what conditions must be satisfied in order for the permits to be issued?

On February 8, 2018, the LMO Official issued a written determination that the site development plan described in the variance application was vested for a maximum height of 75' above base flood elevation and stated that the Town would continue its review of the building permits as submitted on August 8, 2017. [BZA CRA pp. 78-79]

On February 21, 2018, Respondents Becker and Carper filed an appeal of the LMO Official's determination. [BZA CRA p. 2]

At a hearing on March 26, 2018, the BZA overruled the LMO Official's determination. The BZA decided that the variance application, VAR 352-2016, did not

include a site specific development plan as defined in S.C. Code Ann. § 6-29-1520 and without such a plan, the granting of the variances did not create a vested right, as defined by S.C. Code Ann. § 6-29-1520, to build to any particular height. Absent any such vested right, 28 Bradley Circle and 3 Whelk Street were subject to the height restriction of 45' above base flood elevation adopted subsequent to approval of the variances. [BZA CRA pp. 197-98]

On April 13, 2018, Appellants filed a Notice of Appeal and Petition in the Beaufort County Court of Common Pleas seeking reversal of the BZA decision. The case was referred to the Beaufort County Master in Equity, who convened a hearing on August 23, 2018.

On November 7, 2018, the Master entered an order affirming the BZA decision.

On November 19, 2018, Appellants filed a motion to reconsider or alter or amend the order. The Master held a hearing on December 18, 2018 and took the matter under advisement.

On January 23, 2019, the Master entered an order denying Appellants' motion. On February 22, 2019, Appellants filed and served a notice of appeal.

STANDARD OF REVIEW

Section 6-29-840 of the South Carolina Code prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board. That section provides "[t]he 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." S.C. Code Ann. § 6-29-840(A) (Supp. 2017). A jury's factual findings will not be disturbed on appeal unless the record contains no evidence reasonably supporting the jury's findings. *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004).

The same standard of review applies to this court's review of the decision of the circuit court. "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [b]oard is correct as a matter of law. 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 trial court's decision is unsupported by the evidence or controlled by an error of law." *Boehm v. Town of Sullivan's Island Board of Zoning Appeals*, 423 S.C.169, 182, 813 S.E.2d 874, 880 (Ct.App. 2018), *cert. granted* September 21, 2018

"[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." *Boehm v. Town of Sullivan's Island Board of Zoning Appeals*, 423 S.C.169, 182, 813 S.E.2d 874, 880 (Ct. App. 2018), *cert. granted* September 21, 2018 (quoting *Helicopter Sols., Inc. v. Hinde,* 441 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) (alteration by court) (quoting 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 applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *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). Construction of an ordinance is a legal conclusion, not a factual finding. *Boehm, supra.*

ARGUMENTS

I. The Master in Equity Erred in Affirming the BZA's Decision to Overrule the LMO Official's Determination that Previous Approval of Variances Constituted Approval of a Site Specific Development Plan for 28 Bradley Circle and 3 Whelk Street and Established a Vested Right to Build the Homes to the Height Allowed by LMO at the Time the Variances were Approved.

A. Approval of The Variance Application Constituted Approval of a Site Specific Development Plan and Established a Vested Right in Accordance with the Vested Rights Act, S.C. Code §16-29-1510, *et seq.*

The BZA erroneously concluded that approval of the variances did not create a vested right to build to any particular height because the application did not include a site specific development plan as defined in S.C. Code §6-29-1520. [BZA CRA p. 197] The BZA based its conclusion on a misinterpretation of S. C. Code §6-29-1520(9). The BZA also ignored LMO §16-2-102.J.1, which stipulates that approval of variance constitutes approval of a site specific development plan and establishes a vested right in accordance with the Vested Rights Act, S.C. Code Ann. § 6-29-1510, *et seq.*

S.C. Code § 6-29-1520(9) of the Vested Rights Act defines "site specific development plan":

> "Site specific development plan means **a development plan submitted to a local governing body by a landowner describing with reasonable certainty the types and density and intensity of uses for a specific property or properties.** The plan may take the form of, but is not limited to, the following plans or approvals: planned unit development; subdivision plat; preliminary or general development plan; **variance;** conditional use or special use permit plan; conditional or special use district zoning plan; or other land-use approval designations as are used by a county or municipality. (emphasis added).

It was not necessary for the variance application to specify the exact height the homes would be when they were completed in order to describe with reasonable certainty the types and density and intensity of uses for the properties. The application specified that the type of use would be single family residential and that there would be one home on each parcel, each having four stories over parking. The application did not request a variance from the height then allowed by the LMO.

In his Order, the Master found that Appellants "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 Appendix D-19.A.2 and A.4." (Order of November 7, 2018, Finding of Fact C)

LMO Appendix D-19 specifies what must be submitted with a variance application:

D-19. -Variance

A. Submittal Requirements

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

The application included everything necessary to fully comply with the submittal requirements established by the LMO. [BZA CRA pp. 95, 355, 361, 364, 370-71] Among other things, the application included a written narrative explaining the variances requested [BZA CRA p. 101] and a site plan at the specified scale of 1"= 30' which accurately showed the variances. [BZA CRA pp. 108-110, 353-355] It also included elevation drawings showing homes with four stories over parking that would exceed 45'. [BZA CRA pp. 112, 361, 364] Town staff determined the variance application was complete and in full compliance with the LMO's requirements. [BZA CRA pp. 93, 95, 99, 108-112]

In his Conclusions of Law, the Master identified LMO provisions that he found as locally implementing the South Carolina Vested Rights Act. Among those LMO provisions was the following from LMO §16-10-104. – Table of Abbreviations:

> "Site Plan … A detailed engineering plan, to scale, showing uses and structures proposed for a parcel of land as required by this Ordinance." [Order of November 7, 2018, Conclusions of Law B(2)]

§ 16-10-104 is not in the same Chapter of the LMO as the sections on variances and vested rights. LMO Appendix D-19.A.2 includes its own internal description of what the "site plan" required with a variance application must contain. "A site plan at a scale of

1"=30' accurately showing the variance(s) requested". The term "site plan" is not capitalized in Appendix D-19.A.2 as it is in LMO §16-10-104. The "site plan" required by LMO Appendix D-19 is not the "Site Plan" of LMO §16-10-104.

The Master also seems to have equated "Site Plan" as it appears in LMO § 16-10-104 with the "site specific development plan" defined in S.C. Code § 6-29-1520(9) to which vested rights attach pursuant to LMO § 16-2-102.J.1. It is unclear whether the Master considered them to be the same thing, or whether he considered that there could be no "site specific development plan" in the absence of a "Site Plan" as defined in LMO §16-10-104. Regardless, in effect, the Master concluded that the variance application did not satisfy the requirement of LMO Appendix D-19.A.2. This is reversible error.

The variance application depicted the height of the homes well enough that it dominated the discussion when the application came for hearing before the BZA, where it received much discussion from members of the public, mostly from the neighborhood where the subject parcels are located. [e.g., BZA CRA pp. 136, 143-149]. Nicole Dixon, the Town's Senior Planner, told the BZA that the homes depicted in the variance application were substantially the same as homes that had recently been approved for construction in the same neighborhood [BZA CRA p. 146] which, when completed, were slightly over 52' above base flood elevation. [BZA CRA p. 368]

If the application was incomplete or did not fully satisfy the requirements of LMO Appendix D-19, the variances could not have been approved. The BZA did approve the variances, establishing approval of the site specific development plan to build homes at 28 Bradley Circle and 3 Whelk Street, each having four stories over parking as shown and described in the application. The BZA did not have the authority to deny Appellants the

vested rights established by that previous approval of the variances by subsequently requiring a degree of detail or specificity regarding the height of the buildings that is not required by the LMO or S.C. Code § 6-29-1520 and was not requested by the Town when the variances were approved. **"Approval ... of ... a Variance shall constitute approval of a site specific development plan that establishes a vested right in accordance with the Vested Rights Act, S.C. Code Ann. § 6-29-1510 et seq."** LMO Section 16-2-102J.1. (emphasis added).

In short, both the BZA and the Master based their findings and conclusions on erroneous interpretations and applications of S.C. Code § 6-29-1520 and LMO § 16-2-102.J.1 and LMO Appendix D-19. The BZA abused and exceeded its authority when it denied Appellants' vested rights by holding, after the fact, that the variance application should have specified an exact height of the proposed homes in order to establish a vested right to build up to the height allowed by the LMO at the time. The Master committed reversible error when he affirmed the BZA's decision.

The variance application was seeking approval of variances, not building plans, which are typically produced after necessary variances are obtained and are reviewed when an application for a building permit is made. It is because costs are incurred in reliance upon approval of variances and other plans that vested rights attach. Vested rights assure the landowner the rules of the game, including allowable height, won't change.

> "A vested right pursuant to this section is not a personal right, but attaches to and runs with the applicable real property. **The landowner and all successors to the landowner who secure a vested right pursuant to this article may rely upon and exercise the vested right for its duration subject to applicable federal, state, and local laws adopted to protect public health, safety, and welfare including, but not limited to, building,**

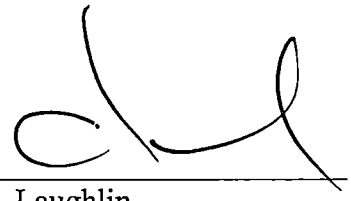
> **fire, plumbing, electrical, and mechanical codes and nonconforming structure and use regulations which do not provide for the grandfathering of the vested right.** This article does not preclude judicial determination that a vested right exists pursuant to other statutory provisions. This article does not affect the provisions of a development agreement executed pursuant to the South Carolina Local Government Development Agreement Act in Chapter 31 of Title 6." (emphasis added)
>
> [S.C. Code § 6-29-1550]

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.)

The denial of Appellants' vested rights was an error of law and an abuse of discretion. Neither S.C. Code Ann. § 6-29-1520(9) nor the Town LMO required the variance application to specify the exact height of the homes in order for approval of the application to establish approval of a plan to build homes with four stories over parking on the parcels at 28 Bradley Circle and 3 Whelk Street. The variance application described with reasonable certainty the proposed types and density or intensity of uses for the properties and fully complied with the LMO's requirements for submittal of an application for a variance. [BZA CRA pp. 95, 388-90] Once vested rights were established, Appellants' development was not subject to subsequently enacted changes in zoning or site development standards, including reductions in allowable height.

CONCLUSION

For the foregoing reasons, the Orders of the Master in Equity dated November 7, 2018 and January 23, 2019 and the decision of the BZA dated March 28, 2018 should be reversed.

By: 

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Attorneys for the Appellants

July 18, 2019

THE STATE OF SOUTH CAROLINA

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Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

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Bradley Circle Vacation Partners, LLC and Monti Development HH, LLC... Appellants,

v.

Town of Hilton Head Island, Town of Hilton Head Island Board of Zoning Appeals, Tamara Becker, and Rhonda Carper ..... Respondents.

PROOF OF SERVICE

I, Drew A. Laughlin, do hereby certify that I have this date served one (1) copy of the Appellants' Initial Brief and Appellants' Designation of Matter to be included in the Record on Appeal upon the following counsel of record by causing said copy to be deposited with the United States Postal Service, First Class Mail, as follows:

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July 18, 2019

VIA FEDERAL EXPRESS
The Honorable V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Bradley Circle v. Town of Hilton Head
Appellate Case No. 2019-000314

Dear Ms. Allen:

Enclosed for filing are the original and one (1) copy of the Initial Brief of Appellants, Designation of Matter, and Proof of Delivery. Please file the originals and return clocked copies to me in the enclosed self-addressed stamped envelope.

Thank you for your courtesies. If you have any questions, please do not hesitate to contact me.

Yours truly,

LAUGHLIN & BOWEN, P.C.

Drew A. Laughlin

Enclosures

cc: Clients
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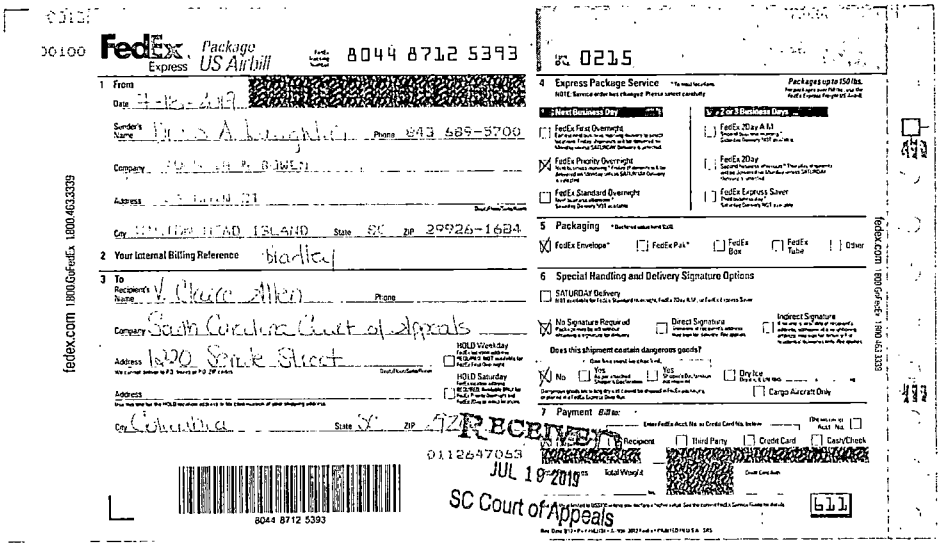
Barry L. Johnson, Esquire



FedEx Express Package US Airbill 8044 8712 5393

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Date 7-18-2019
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Company [redacted]
Address [redacted]
City [redacted] State SC ZIP 29926-1684

2 Your Internal Billing Reference bladley

3 To
Recipient's Name V. Claire Allen Phone
Company South Carolina Court of Appeals
Address 1220 Sinkler Street
Address
City Columbia State SC ZIP 292

4 Express Package Service
Packages up to 150 lbs.
1 Next Business Day
FedEx First Overnight
FedEx Priority Overnight
FedEx Standard Overnight
2 or 3 Business Days
FedEx 2Day A.M.
FedEx 2Day
FedEx Express Saver

5 Packaging
FedEx Envelope* FedEx Pak* FedEx Box FedEx Tube Other

6 Special Handling and Delivery Signature Options
SATURDAY Delivery
No Signature Required Direct Signature Indirect Signature
Does this shipment contain dangerous goods?
No Yes Yes Dry Ice
Cargo Aircraft Only

7 Payment Bill to:
Sender Recipient Third Party Credit Card Cash/Check

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