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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2019-001201
Lower Court Case Nos. 2012-CP-07-01394,
2010-CP-07-04844, 2008-CP-07-01114

Grays Hill Baptist Church, Petitioner,

v.

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 Respondents.

PETITIONER'S BRIEF

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II. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN REVERSING THE CONCLUSION OF THE BEAUFORT COUNTY MASTER-IN-EQUITY THAT THE RESPONDENT BEAUFORT COUNTY ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE FELLOWSHIP HALL WOULD INCREASE THE "OCCUPANT LOAD" OF THE SITE.

STATEMENT OF THE CASE
I. INTRODUCTION

This is an appeal from a Final Order issued by the Beaufort County Master-In-Equity in which the Master-In-Equity concluded that Beaufort County wrongfully required the Grays Hill Baptist Church to apply for a new Development Permit in order to construct its Fellowship Hall, inasmuch as the Development Permit which had previously been issued by the County to the Church included the Fellowship Hall. Record on Appeal, pp. 31 – 32 (Conclusion of Law #3).

As an additional sustaining ground, the Master-In-Equity alternatively concluded that the County wrongfully refused to issue a new Development Permit for the Fellowship Hall, inasmuch as the Church qualified for a Development Permit under the Ordinance that was in effect at the time the new permit was sought since the Fellowship Hall would have no effect on the occupancy load of the development site. *Id.*, pg. 32 (Conclusion of Law #5).

II. PROCEDURAL HISTORY
A. INTRODUCTION

This case has a somewhat convoluted procedural history. The Beaufort County Master-In-Equity, in his Final Order of Judgment, considered three (3) separate cases or appeals which were consolidated with the consent of the parties. The first (Case No. 2008-CP-07-1114) and third appeals (Case No. 2012-CP-07-1394, respectively) were from the Beaufort County Planning Commission and involved Beaufort County's refusal to recognize the Church's existing Development Permit when the Church applied for a Construction Permit for the Fellowship Hall, and instead required the Church to apply for a new Development Permit, which Beaufort County subsequently denied. The second appeal heard (Case No. 2010-CP-07-4844) by the Master-In-Equity was from the Beaufort County Zoning Board of Appeals and involved Beaufort County's refusal to grant to the Church a variance for its Fellowship Hall.

B. DEVELOPMENT PERMIT
(Case No. 2008-CP-07-1114)

The first appeal, Case Number 2008-CP-07-1114, is an appeal from a decision of the Beaufort County Planning Commission denying the Church permission to construct a Fellowship Hall. In this appeal, the Church alleges that the Planning Commission erred in concluding that a Development Permit that had previously been issued by the County to the Church on February 27, 1997 did not include the Fellowship Hall. Alternatively, the Church alleged that even if the prior Development Permit did not encompass the Fellowship Hall, the County erred in refusing to issue a new Development Permit for the Fellowship Hall under the then existing Ordinance because the Fellowship Hall did not increase the "occupant load" of the site.

C. VARIANCE REQUEST
(Case No. 2010-CP-07-4844)

The second appeal, Case Number 2010-CP-07-4844, is an appeal to the Beaufort County Master-In-Equity from a decision by the Beaufort County Zoning Board of Appeals. In this appeal, the Church alleged that the Zoning Board of Appeals wrongfully denied the Church's application for a variance inasmuch as the decision by the Zoning Board of Appeals was controlled by two (2) errors of law, to-wit:

1. That only physical characteristics of the land could be considered in determining if "extraordinary and exceptional conditions pertaining to the particular piece of property" existed; and

2. That subsection (c) of Section 106-522 applied to the Church's variance request, where the requested variance did not involve "the establishment of a use" but rather, involved a use which had been long established previously.

The Church is no longer pursuing its challenge to the denial of the variance request.

D. APPEAL AFTER REMAND
(Case No. 2012-CP-07-1394)

The third, and final, appeal bears Case Number 2012-CP-07-1394. Due to the lack of a record from the Planning Commission, the first appeal (Case Number 2008-CP-07-1114) was remanded with the consent of the parties back to the Beaufort County Planning Commission for the purpose of conducting a *de novo* hearing. In the meantime, the appeal on the Church's variance request (Case Number 2010-CP-07-4844) was taken under advisement and held in abeyance pending the Planning Commission's decision.

Pursuant to the remand, the Beaufort County Planning Commission held a *de novo* hearing on December 3, 2007, and subsequently issued its decision essentially confirming its earlier decision refusing to issue a permit for the Fellowship Hall. The Church appealed this decision to the Beaufort County Master-In-Equity and this third and final appeal was assigned Case Number 2012-CP-07-1394. With the consent of the parties, all of these appeals were consolidated under the most recent case number.

I. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN REVERSING THE CONCLUSION OF THE BEAUFORT COUNTY MASTER-IN-EQUITY THAT THE ORIGINAL DEVELOPMENT PERMIT AND PLAT ENCOMPASSED A SINGLE DEVOLPMENT PROJECT WHICH INCLUDED THE CHURCH'S FELLOWSHIP HALL.

A. SUMMARY OF ARGUMENT

The Master-In-Equity properly found that the County should not have required the Church 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 original Development Plat and the original Development Permit, under its own terms, had not expired since substantial improvement to the development had occurred within two (2) years from the date of issuance of the Development Permit. The Church's development of its property is one unified single comprehensive development and the Fellowship Hall is clearly, boldly and unambiguously depicted as part of that development on the Development Plat. Record on Appeal, pp. 34, 35, 200 and 201. There is simply no "Phase II" to the development. *Id.* There is nothing in the Development Permit which prohibits **construction** of the development from being accomplished in phases, so long as substantial improvement to the development occurs within two (2) years of the permit. *Id.*, pg. 35 and 201.

The South Carolina Court of Appeals found that the above finding by the Master-In-Equity was erroneous, reasoning that the Fellowship Hall was not encompassed by the original Development Permit, but rather, was part of an independent, "Phase II" development for which a permit had never been issued. It is respectfully submitted that the Court of Appeals confused the phased **construction** of the project with the unified **development** of the project. Additionally, the Court of Appeals failed to distinguish between what is contained in the application for the Development Permit, with what was actually granted in the Development Permit itself. Nowhere in either the Development Permit, nor in the Development Plat, is there a reference to a "Phase

II," but rather, both the Development Permit and the Development Plat encompass one single development which plainly and clearly shows not just the Church building, all parking, paving, and driveways, but also shows the Fellowship Hall as an integral part of one unified development project. *Id.*, pp. 34, 35, 200 and 201.

B. ARGUMENT

The fundamental facts underling this case are fairly straight forward.

The Church is the owner of a parcel of real property located in Beaufort County, South Carolina consisting of 9.35 acres located at the intersection of U.S. Highway 21 and South Carolina Highway 71. In 1996 the Church applied to Beaufort County for a Development Permit to develop its 9.35 acre parcel of real property, which at that time was vacant.

In conjunction with its application for a Development Permit, the Church prepared and submitted to Beaufort County a plat depicting in detail the proposed development. The primary features of this proposed development are two (2) large buildings, one (1) labeled "Proposed Church" and the other labeled "Proposed Sanctuary." The "Proposed Sanctuary" has generally been referred to in this litigation as the "Fellowship Hall" and is the building which is the subject of this appeal. In addition to the above buildings, the Development Plat also shows asphalt paved roadways encircling the two (2) proposed buildings, as well as paved and unpaved parking surrounding both of the proposed buildings. Record on Appeal, pg. 34 and 200.

On January 7, 1997, the Church received a Development Permit from Beaufort County to develop its 9.35 acre parcel of property as shown on the aforesaid Development Plat. See Development Permit, Record on Appeal, pg. 35 and 200.

Notably, neither the Development Permit, nor the Development Plat, is broken down into phases. The entire 9.35 acre parcel is encompassed by the Development Permit, and the

Development Plat clearly and plainly shows the proposed Fellowship Hall in place and as an integral part of the development, surrounded by parking, sidewalks, and roadways.

The Development Permit contains the following language:

> "All permits expire two (2) years from the date of approval **unless substantial improvement has occurred** or final subdivision plat has been recorded."

See Record on Appeal, pg. 35 (emphasis added).

Shortly after the issuance of the Development Permit, on February 26, 1997, the County issued to the Church a Construction Permit to begin construction of the improvements as shown on the Development Plat. Record on Appeal, pg. 36.

In December of 1997 the Church completed the construction of all improvements shown on the Development Plat, except for the Fellowship Hall. These completed improvements included the primary sanctuary building, and all of the parking, paving and infrastructure for **both** buildings. The Church did not construct the Fellowship Hall at that time solely for financial reasons, and it began saving money to pay for construction of the last remaining item, the Fellowship Hall. Record on Appeal, pg. 146.

The Construction Permit expired under its express terms 180 days after there was a stoppage in active construction, or in mid-1998. The Development Permit, on the other hand, did not expire since substantial improvement to the development had occurred within two (2) years of the date of issuance. Record on Appeal, pg. 35 (Item #1).

On December 11, 2006 the County adopted an Ordinance creating the Airport Overlay District. With the enactment of the Airport Overlay District the Church's property was re-zoned and the Church's development, as a place of "assembly and worship," became a "nonconforming use." Record on Appeal, pg. 39, Section 5(a)(2).

Shortly after the enactment of the Airport Overlay District Ordinance, in early 2007, the Church approached the County to obtain a Construction Permit to commence construction of the Fellowship Hall and complete its development. The County refused to issue a Construction Permit to the Church and, instead, instructed the Church to apply for another Development Permit for the Fellowship Hall, despite the fact that the current Development Permit had not expired.

The South Carolina Court of Appeals concluded that the development of the Church's property was broken down into two (2) phases, which the Court of Appeals referenced as Phase I and Phase II, and that a Development Permit was issued only for Phase I. It is respectfully submitted that this conclusion has no basis in fact. The Development Permit plainly and clearly encompasses the entire 9.35 acre parcel (Record on Appeal, pg. 35 "Acreage: 9.35"), and the Development Plat plainly and clearly shows the Fellowship Hall, not a blank, unimproved parcel of land. Record on Appeal, pg. 34. Nowhere on the Development Plat do the phrases Phase I and Phase II appear. *Id.* It is respectfully submitted that the Court of Appeals confused the Church's **development** of its property with the Church's **construction**. The Development Permit does not require that all construction be accomplished at once, but rather, requires only that "substantial improvement" be made within two (2) years. *Id.*, pg. 35. With its Development Permit in hand for the entire project the Church substantially completed all construction of the development, saving only the Fellowship Hall as its last construction project in order to complete the development. The Court of Appeals, simply put, confused construction in phases with development in phases. The Church had one development project, which encompassed all the

improvements on the 9.35 acre parcel, as shown on the plat, and the Development Permit and Plat plainly and clearly on their face include the Fellowship Hall.

It is respectfully submitted that the South Carolina Court of Appeals also confused the **application** for the Development Permit, with what was actually **granted** by the Development Permit itself. The application discusses **constructing** the project in phases. As previously noted, there is nothing in the Development Permit which prohibits construction occurring in phases. Moreover, what may have been applied for is often different from what is actually granted. In this case, regardless of what is set forth in the application for the Development Permit, the bottom line is that the Development Permit and Plat both unambiguously and expressly depict the Fellowship Hall.

In its Decision, the South Carolina Court of Appeals cites *FBR Investors v. County of Charleston*, 303 S.C. 524, 402 S.E.2d 189 (Ct. App. 1991) in support of its decision. The facts of that case, however, are easily distinguishable from the case *sub judice*. In *FBR,* supra, a group of investors purchased a 15 acre tract of land to build multi-family dwellings. Instead of developing the entire tract as a single project, the investors decided to develop the tract in two (2) phases. Their plan called for the construction of twenty-five (25) duplexes on an eight (8) acre parcel of the tract during Phase I of the project, which would then be followed by the building of additional multi-family dwellings on the remaining parcel as Phase II of the development. As Phase I neared completion, but before any "substantial" expenses had been incurred toward Phase II, the second parcel was rezoned to prohibit multi-family dwellings. The investors claimed they had a "vested right" to complete Phase II due to their expenditures on Phase I. The trial Court agreed because it viewed the development as an aggregate rather than two (2) separate projects. The South Carolina Court of Appeals reversed the trial Court because the investors

chose to develop the tract as two (2) separate projects. The investors' focus on Phase I left Phase II "essentially barren land when the zoning change occurred," and therefore, the Court of Appeals held the investors had not expended the necessary effort to establish a vested right to complete Phase II. *FBR Investors v. County of Charleston,* 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991).

Accordingly, in *FBR Investors v. County of Charleston*, it was **undisputed** that FBR Investors decided to develop the property in two (2) phases. *Id.,* 303 S.C. at 526, 402 S.E.2d at 190. Also, *Vulcan Materials Company v. Greenville County Board of Zoning Appeals,* 342 S.C. 480, 496, 536 S.E.2d 892, 901 (Ct.App. 2000) (referencing *FBR Investors v. County of Charleston,* stating "Instead of developing the entire tract as a single project, the investors decided to develop the tract in two (2) phases."). In the instant case, it is clear that the Church developed its property as one (1) single project and the Fellowship Hall is plainly and clearly shown as part of that development project.

It is accordingly respectfully submitted that the Beaufort County Master-In-Equity properly concluded that the Fellowship Hall was encompassed as part of the original Development Permit and Development Plat, which had not expired at the time the Church applied for a permit to construct the Fellowship Hall and complete its development as originally platted and permitted.

II. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN REVERSING THE CONCLUSION OF THE BEAUFORT COUNTY MASTER-IN-EQUITY THAT THE RESPONDENT BEAUFORT COUNTY ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE FELLOWSHIP HALL WOULD INCREASE THE "OCCUPANT LOAD" OF THE SITE.

A. SUMMARY OF ARGUMENT

It is respectfully submitted that the Court of Appeals erred in concluding that the County properly refused to issue a new Development Permit for the Fellowship Hall because the Fellowship Hall would increase the "occupant load" of the development site. The Master-In-Equity properly found that the "occupant load" of the site would not be increased by the construction of the Fellowship Hall inasmuch as the Fellowship Hall would not be occupied while Church services were being held in the Church building, and conversely, the Church building would not be occupied while activities were occurring within the Fellowship Hall. This finding by the Master-In-Equity is made all the more compelling by the fact that the Church, as a condition to granting the new Development Permit, offered to agree that such alternative use would be an enforceable condition to granting the new Development Permit. The Master-In-Equity expressly authorized the County to place a restriction on the new Development Permit forbidding its occupancy at the same time as the Church sanctuary, noting that this restriction could be enforced in the same manner as any other zoning restriction. Record on Appeal, pg. 32.

B. ARGUMENT

In early 2007 the Church approached Beaufort County to obtain a Construction Permit to commence construction of the Fellowship Hall in order to complete its development. Beaufort County refused to honor the original Development Permit and accordingly refused to issue a Construction Permit to the Church. Instead, Beaufort County instructed the Church to apply for another Development Permit for the Fellowship Hall, despite the fact that the current

Development Permit had not expired. Record on Appeal, pg. 147. The County eventually denied issuance of the new Development Permit, on the ground that the Fellowship Hall would increase the "occupant load" of the site, in violation of the County's newly enacted Airport Overly District Ordinance.

The Master-In-Equity found that the original Development Permit included the construction of the Fellowship Hall and that it was accordingly error for the County to require the Church to apply for a new Development Permit. As an additional sustaining ground, however, the Master-In-Equity also found that even if the original Development Permit did not include the Fellowship Hall, the County erred in refusing to issue to the Church a new Development Permit, inasmuch as construction of the Fellowship Hall would not increase the "occupant load" of the site.

As previously noted, Beaufort County passed an Airport Overlay District Ordinance on December 11, 2006 which re-zoned the Church's property and prohibited the "use" of "assembly and worship." Record on Appeal, pg. 39, §5(a)(2). This new Ordinance rendered the Church's development a "nonconforming use."

In early 2007, the Church approached Beaufort County to obtain a Construction Permit to commence construction of the Fellowship Hall, and was instructed by the County to apply for a new Development Permit. As instructed by Beaufort County, the Church applied for the new Development Permit and on March 7, 2007 met with the County's Development Review Team (DRT) as the initial step in the process. In conjunction with its application for a new Development Permit the Church submitted to the DRT a new plat, nearly identical to the already approved Development Plat from 1997, Record on Appeal, pg. 44. The DRT noted that the Church's development, as a result of the enactment of the Airport Overly District, was now a

nonconforming use and made a preliminary decision not to issue a Development Permit to the Church. Record on Appeal, pg. 45.

On October 10, 2007 the DRT made a final decision on the Church's application, recommending that it be disapproved. The only reason relied upon by the DRT in disapproving the project was its conclusion that allowing the new building "**could** substantially increase the occupant load of the site." Record on Appeal, pg. 50 (emphasis added). In so concluding, the DRT relied upon Section 7(a)(6) of the Ordinance which provided that nonconforming places of assembly and worship may be expanded provided the expansion does not increase the "occupant load."

The Church appealed the decision of the DRT to the Beaufort County Planning Commission and the Church's appeal was heard by the Planning Commission on December 3, 2007. At the hearing, members of the Church explained that allowance of the Fellowship Hall would not increase the occupant load of the site. Members of the Church testified that the Fellowship Hall would not be occupied while Church services were being held in the Church building, and conversely, the Church building would not be occupied while activities were occurring within the Fellowship Hall. Currently, the sanctuary of the Church building is outfitted with folding chairs and when the Church desires to hold an activity such as a dinner or service function, the members of the Church pick up, fold and store away all of the chairs, and replace them with tables, and once the dinner or social function is concluded, they then have to remove all of the tables and return all the folding chairs, ready for the next church service. Once the Fellowship Hall was constructed, then the folding chairs in the sanctuary would be replaced with permanent pews, and the ancillary fellowship activities, instead of taking place within the sanctuary, would take place in the Fellowship Hall. In other words, the number of people on the

development site at any one time would be same, they would simply be located in the Fellowship Hall as opposed to the sanctuary building. Record on Appeal, pp. 149 and 158.

Additionally, the Church noted that the occupant load of the site was restricted by the number of parking spaces on the site, and the number of parking spaces was already set. No new parking spaces were being created.

On June 24, 2008 the Planning Commission affirmed the decision of the DRT not to issue a permit. The Planning Commission explained that it was denying the application because "the number of persons that **could** be on the site at any one time **could** be increased" if the Fellowship Hall were allowed. Record on Appeal, pg. 54 (emphasis added).

On April 3, 2008 the Church appealed the decision of the Beaufort County Planning Commission to the Beaufort County Master-In-Equity, who heard the appeal on March 15, 2010. The Master-In-Equity properly concluded that the Planning Commission abused its discretion in refusing to issue a new Development Permit to the Church based on the conclusion that "the number of persons that could be on this site at any one time could be increased" if the Fellowship Hall were allowed. The Master-In-Equity properly found that this is a factual finding which is not supported by the evidence. The uncontroverted evidence in this case is that the Fellowship Hall would only be occupied during a social function which, in the absence of the Fellowship Hall, would be occurring within the sanctuary building itself. In other words, the uncontroverted evidence is that the same number of people would be on the site whether or not the Fellowship Hall existed, the only difference being that in the absence of the Fellowship Hall those people would located within the sanctuary building, and if the Fellowship Hall were constructed, those same people would be located within the Fellowship Hall itself.

As the Court of Appeals noted, the term "occupant load," is not defined in the ordinance. The Court of Appeals gave this term a strange definition by relying upon the testimony of a fireman that, for his purposes in fighting fires, "occupant load" means how many people can possibly be squeezed into a space, regardless of its use. This definition may make some sense in the context of fighting a fire, but it is nonsensical when applied to a zoning ordinance, which focuses upon the **use** of a property.

The language of an Ordinance must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Municipal Association of South Carolina v. AT&T,* 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Georgia-Carolina Bail Bonds v. County of Aiken,* 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). A statute as a whole, must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Liberty Mutual Insurance Co. v. South Carolina Second Injury Fund,* 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005). See also, *State v. Sweat,* 379 S.C. 367, 374-376, 665 S.E.2d 645, 649-652 (Ct.App. 2008). With respect to the Airport Overlay District Ordinance, the fundamental focus of the Ordinance is on "uses." The Ordinance prohibits certain "uses" within certain zones, and one of the prohibited uses is "assembly and worship." It is only because the Church's "use" of its property falls within the category "assembly and worship" that the Church's development became a "nonconforming **use**." Accordingly, it is axiomatic that the determinative inquiry, when ascertaining if a proposed development will increase the "occupant load" of a site, that "occupant load" must be evaluated in light of the proposed "use." There is absolutely no evidence in this case that the

Church's proposed "use" of its Fellowship Hall will increase the "occupant load" of the site. To the contrary, the undisputed evidence is that it will not.

It is accordingly respectfully submitted that the Master-In-Equity properly concluded that, even under the new Airport Overlay District Ordinance, a Development Permit should have been given to the Church for the Fellowship Hall because the Church's "use" of the Fellowship Hall would not increase the "occupant load" of the site.

CONCLUSION

The Beaufort County Master-In-Equity properly concluded that Beaufort County wrongfully required that Grays Hill Baptist Church apply for a new Development Permit in order to construct its Fellowship Hall, inasmuch as the Development Permit which had previously been issued by the County to the Church to develop its property included the Fellowship Hall.

As an additional sustaining ground, the Beaufort County Master-In-Equity properly concluded that the County wrongfully refused to issue a new Development Permit for the Fellowship Hall, inasmuch as the Church's **use** of the Fellowship Hall would not increase the "occupant load" of the development site.

It is accordingly, respectfully requested that the South Carolina Supreme Court affirm the decision of the Beaufort County Master-In-Equity.

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CERTIFICATE OF SERVICE

Undersigned certifies that the Petitioner's Brief, to which this certificate is affixed, was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

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in a post office or official depository under the exclusive care and custody of the United States

Postal Service, on November 13, 2019.

By: Sue Radford
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