STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Case No.: 2019-CP-10-01434
	)	
David Abdo,	)	
	)	
Appellant,	)	
	)	
v.	)	**ORDER ON APPEAL**
	)	
City of Charleston and Board of Zoning Appeals-Zoning,	)	
	)	
Respondents.	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Respondents' Attorney:	Daniel McQueeney, Jr., Esq.
Appellant's Attorney:	John Massalon, Esq.
Date of Hearing:	July 30, 2019
Court Reporter:	Phyllis Norton

This matter came before the Court on July 30, 2019 by way of Appellant's Notice of Appeal pursuant to S.C. Code. Ann. § 6-29-820 seeking an order reversing the decision of the City of Charleston Board of Zoning Appeals- Zoning ("BZA-Z"), which was issued on February 19, 2019.

In this Zoning Appeal, Appellant David Abdo ("Appellant") argues that the City of Charleston's Board of Zoning Appeals-Zoning (the "Board") committed an error of law in determining that Appellant's flagpole is not a monument under the exceptions to the height limitations in the City of Charleston's (the "City's") Zoning Ordinance (the "CZO"). As a result, Appellant asserts he had the right to construct a 60-foot tall flagpole on his lot within a residentially zoned subdivision despite the CZO's 35-foot height limitations on any structures within the zoning district.

On July 30, 2019, the matter came to be heard before this Court. After considering the record, memorandum, and oral arguments of counsel the Court Affirms the BZA-Z's decision of February 19, 2019 and Dismisses Appellant's Petition for Appeal.

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FACTUAL AND PROCEDURAL BACKGROUND

Appellant and his wife, Ilonka Sonja Taylor, own residentially zoned property in The Crescent, a residential subdivision in West Ashley. R. at 6; R. at 28; R. at 40, lines 23-25; R. at 42, lines 20-25.[1] The CZO limits the height of buildings and other structures on the Property to thirty-five (35) feet. R. at 33; R. at 41, line 21; R. at 42, line 3.

Appellant constructed an unpermitted, sixty-foot (60) tall flagpole on the Property. R. at 41, lines 3-5. In July 2018, after discovering the flagpole due to resident complaints, the City required Appellant to apply for a building permit after-the-fact.[2] R. at 13-19; R. at 41, lines 10-16. Appellant subsequently submitted an application to the City of Charleston to approve the installation of the flagpole, which the City of Charleston denied on October 17, 2018. Appellant contends that his flagpole is permitted to exceed the height limits in the residential zoning district based on section 54-505(a) of the CZO, which excepts, among other things, "monuments, water towers, observation towers, transmission towers, masts and aerials" from the thirty-five (35) foot height limitations in the CZO. R. at 60. Mr. Lee Batchelder ("Batchelder") denied Appellant's permit, explaining: "I believe the exception listed in Sec. 54-505 for 'monuments' is intended to apply to a statue, building, or other structure erected in a public or semi-public space to commemorate a famous or notable person or event." R. at 1.

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[1] Unless otherwise provided, all citations herein are to the page and line numbers, if applicable, of the Record on Appeal filed by the City and the Board on April 22, 2019.

[2] Based on the testimony of Lee Batchelder, the City's Zoning Administrator (R. at 41, lines 3-20), this Court finds that the City was not aware of the flagpole or its height until after Appellant installed it. Appellant, who attended the original hearing before the Board (R. p. 48, lines 3-7), did not contradict Batchelder's testimony at this hearing. Instead, during a subsequent proceeding to determine whether the Board should rehear the matter, Appellant's counsel read an email from Appellant to attempt to contradict Batchelder's live testimony after the fact. R. at 120, line 17; R. at 121, line 3. Appellant did not attend the subsequent proceeding. R. at 119, lines 8-13. This Court finds that Appellant's email is unavailing under these circumstances. Further, even if true, would not preclude zoning's required permitting process nor the Board's review.

On December 11, 2018, Appellant requested the Board reconsider Batchelder's decision, which unanimously determined that Appellant's flagpole did not constitute a monument under section 54-505(a). R. at 6-11; R. at 54, lines 4-9; R. at 54, line 20; R. at 55, line 25; R. at 86. Appellant requested reconsideration of the Board's decision, and the Board denied the request on February 19, 2019. R. at 62-68; R. at 109.

STANDARD OF REVIEW

"Interpreting and applying statutes and regulations administered by an agency is a two-step process." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). "First, a court must determine whether the language of a statute or regulation directly speaks to the issue." Id. "If so, the court must utilize the clear meaning of the statute or regulation." Id. "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." Id. at 33, 766 S.E.2d at 717, quoting Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984).

"As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ." Id. at 34, 766 S.E.2d at 718 (citations and internal quotation marks omitted). "Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts . . . will defer to the agency's interpretation absent compelling reasons." Id. "We defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." Id. at 34-35, 766 S.E.2d at 718 (citations and internal quotation marks omitted); see also Purdy v. Moise, 223 S.C. 298, 304-05,

75 S.E.2d 605, 608 (1953) (applying "deference doctrine" in reviewing decisions of boards of zoning appeals).

Generally, a trial court must uphold the decision of a zoning board unless there is no evidence to support it. See S.C. Code. Ann. § 6-29-840 (2019) ("The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury."); Townes Assoc's, Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976) (holding that factual findings of the jury will not be disturbed unless there is no evidence which reasonably supports the jury's findings) (overruled on other grounds).

In reviewing the questions presented by the appeal, the Court shall determine only whether the decision of the zoning board is correct as a matter of law. See S.C. Code. Ann. § 6-29-840 (2019); Austin v. Board of Zoning Appeals, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004). Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Id. (quoting Restaurant Row Assoc. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)).

The 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." Id. "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).

Further, "issues 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." Mikell v. City of Charleston, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) (citing Eagle Container, LLC v. City of Newberry, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008)). "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." Id. (citing Eagle Container, 379 S.C. at 568, 666 S.E.2d at 894).

The Court holds that this broader standard of review does not apply because Section 54-505(a) of the CZO does not require the Court to apply the rules of construction. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001).

Here, the language of Section 54-505(a) is plain and unambiguous, and conveys a clear and definite meaning. The Section provides an exception to the CZO's height restriction for "church spires, belfries, cupolas and domes not intended or used for human occupancy; monuments, water towers, observation towers, transmission towers, masts and aerials, provided that such uses are not within the aircraft landing approach zone." CZO § 54-505(a). These words are understood in common parlance and do not require the Court to apply the rules of construction to determine their meaning. Accordingly, the Court holds that the rules of construction do not apply, and the Court is bound to review the decision of the BZA-Z only for errors of law.

CONCLUSIONS OF LAW

I. As a matter of law, the Board's conclusion that Appellant's flagpole is not a monument is correct inasmuch as the decision is not arbitrary, capricious, or manifestly contrary to the CZO.

As a matter of law, the Court concludes that the Board's decision that a flagpole is not a monument within the meaning of Section 54-505(a) of the CZO is correct. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another

meaning." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). Further, this Court is bound to uphold the factual determination of a zoning board unless there is no evidence to support it. See S.C. Code. Ann. § 6-29-840 (2019); Townes Assoc's, Ltd. V. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). There is ample evidence in the record to support the Board's determination that Appellant's flagpole is not a monument entitling it to a height exception.

Batchelder defined a "monument" as "a statue, building, or other structure erected in a public or semi-public space to commemorate a famous or notable person or event." R. at 1. The Board supported its interpretation of the word monument at the hearing, which Appellant and his counsel was present for, with citations to internet search-engine results, as well as the generally accepted meaning of the word in common parlance. R. at 36-36, 45-47.

Appellant disagrees with Batchelder's decision that the term "monument" connotes a "public" or "semi-public" element or that it must commemorate a "famous" or "notable" person or event. Appellant also argues that a "monument" should be defined as a "memorial stone or building erected in remembrance of a person or event," (Appellant's Notice of Appeal at 5, ¶ 18) or "an outstanding, enduring, and memorable example of something." Id. at 6, ¶ 20. The Court dismisses Appellant's challenges to the Board's definition because the Board's interpretation is not arbitrary, capricious, or manifestly contrary to Section 54-505(a) of the CZO. Further, it is within the sound discretion of the Board to adopt a definition for the word monument that aligns with what the Board believes the City Council intended to except from the height restriction when it drafted the CZO. The definition promulgated by the Board and its subsequent factual determination that Appellant's flagpole does not fall within that definition is a factual issue that should not be disturbed by the Court.

However, the Court also concludes that the BZA's conclusion that Appellant's flagpole is not a statue, building, or other structure erected to commemorate *any* person or event is not arbitrary and is correct as a matter of law. Likewise, their conclusion: that Appellant's flagpole is neither a memorial stone nor a building. Moreover, their further conclusion that Appellant's flagpole is not an example of anything traditionally commemorative, nor is Appellant's flagpole outstanding, enduring, or memorable, in and of itself is with adequate factual support and not arbitrary or capricious.

The Court is also persuaded by the Board's argument that the attachment of an American flag to the flagpole to commemorate the service of our military does not change this conclusion. Even if Appellant subjectively intends to attach the same flag to the flagpole in perpetuity, a flag is interchangeable, and zoning approval typically runs with title to the land. See S.C. Code Ann. § 6-29-1550 (explaining that zoning approvals generally run with title to the land). Therefore, under Appellant's interpretation of the CZO and the word "monument," Appellant, or any successor-in-title to the Property may, by the simple action of changing out the flag, convert the flagpole from a "monument" to a "mere" flagpole and back again.

In addition, under Appellant's interpretation, a successor-in-title who does not subjectively intend for the same flag to commemorate anyone or anything would convert what Appellant characterizes as a monument back to a "mere" flagpole. The Court declines to disturb the Board's finding that such an interpretation would lead to an absurd result that was not intended by the City Council. See Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.").

To the extent Appellant argues that section 54-505(a) is silent or ambiguous on the issue, the Court defers to the Board's interpretation of the CZO and the term "monument" because nothing in the record supports a finding that the Board's interpretation is arbitrary, capricious, or manifestly contrary to its purpose. Further, because this Court finds that there is sufficient evidence to support the Board's interpretation, this Court is bound to uphold the decision of the Board and leave its findings of fact undisturbed. As a result, the Court Affirms the decision of the Board and Dismisses Appellant's Petition for Appeal.

II. As a matter of law, the Board's conclusion that the term "monument" in Section 54-505(a) of the CZO connotes a "public" or "semi-public" element is correct inasmuch as the decision is not arbitrary, capricious, or manifestly contrary to the statute.

The Court concludes that the Board's decision that the term "monument" in Section 54-505(a) connotes a "public" or "semi-public" element that is missing from Appellant's flagpole is correct as a matter of law. Accordingly, under the deference doctrine, the Court finds no compelling reason to ignore the Board's interpretation in this respect.

Section 54-505(a) provides, in pertinent part:

> The height limitations of this Chapter shall not apply to church spires, belfries, cupolas and domes not intended or used for human occupancy; monuments, water towers, observation towers, transmission towers, masts and aerials, provided that such uses are not within the aircraft landing approach zone.

R. at 34.

The Court finds no error of law in the Board's contention that "[c]learly, words in a statute must be construed in context." So. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). "According to the doctrine of *noscitur a sociis*, the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." Id.; see also Eagle Container Co., LLC v. Cty. of Newberry,

379 S.C. 564, 570, 666 S.E.2d 892, 895-96 (2008) (applying the same rules in interpreting a zoning ordinance).

Each of the terms associated with the term "monuments" in section 54-505(a)—water towers, observation towers, transmission towers, masts and aerials—connote a "public" or "semi-public" element. See, e.g., S.C. Regs. Ann. § 103-701 to -782 (regulating water plants, defined to include water towers); Ross v. Harris, 860 N.E.2d 602, 607-08 (Ind. Ct. App. 2006) (recognizing absurdity of permitting a 55-foot addition to applicant's residence in the guise of an "observation tower," when height limit is 30-feet).[3]

To hold otherwise would require the Court to assume that City Council intended these exceptions to be permitted as private, accessory uses on a residential lot within a residentially zoned subdivision, thereby substituting the Court's judgment for that of the reviewing body, which it is not permitted to do when there is evidence to support the board's decision. Austin, 362 S.C. at 29, 606 S.E.2d at 209 (quoting Restaurant Row Assoc., 335 S.C. at 216, 516 S.E.2d at 446). Accordingly, the Court is bound to leave undisturbed the Board's conclusion that such an interpretation would be repugnant to the intent behind the creation of the underlying zoning district. Cf. Charleston Cty. Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995) ("Here, we are guided by Council's express declaration of the purpose of a GC-1 zoning district: to foster an 'economically healthy business environment.' To be permitted within

[3] Cited as guidance. It is well accepted in South Carolina that when explicit precedent is lacking in this state, Courts are permitted to turn to other jurisdictions to seek guidance. Magness v. Chicora Chapter, 193 S.C. 205, 8 S.E.2d 344, 347 (1940); State v. Edwards, 373 S.C. 230, 238, 644 S.E.2d 66, 70 (Ct. App. 2007); Wilson v. Willis, 426 S.C. 326, 340, 827 S.E.2d 167, 174 (2019).

a GC-1 zoning district, therefore, the proposed municipal use must not be repugnant to that purpose.").

Accordingly, the Court defers to the Board's interpretation that the term "monument" includes a public or semi-public connotation because nothing in the record supports a finding that the Board's interpretation is arbitrary, capricious, or manifestly contrary to its purpose. Further, because this Court finds that there is sufficient evidence to support the Board's interpretation, this Court is bound to uphold the decision of the Board and leave its findings of fact undisturbed. As a result, the Court Affirms the decision of the Board and Dismisses Appellant's Petition for Appeal.

III. As a matter of law, the Board's factual conclusion that Appellant's residential lot is not a "public" or "semi-public" is correct inasmuch as the decision is not arbitrary, capricious, or manifestly contrary to the statute.

During oral argument, Appellant asserted that the visibility of his residential lot from public or semi-public areas complies with the "public element" interpretation adopted by the Board. However, this argument was not raised in Appellant's Notice of Appeal. Therefore, it is not preserved, and this Court will not disturb the factual findings of the Board. See Newton v. Zoning Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011) ("[T]he sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires.").

Further, the Court holds that the Board's decision that the visibility of Appellant's residential lot within a residential neighborhood does not convert the lot into the type of "public" or "semi-public" space contemplated by section 54-505(a) of the CZO is within the sound discretion of the Board, and the Court will not disturb the Board's finding because there is no

evidence that the Board's decision was arbitrary, capricious, or manifestly contrary to the purpose of the CZO.

Accordingly, the Court finds that because the Board's decision has adequate factual support, was founded upon sufficient evidence, and the decision was not arbitrary, capricious, or manifestly contrary to the purpose of the CZO, the decision of the Board is correct as a matter of law.

IT IS THEREFORE ORDERED the Appellant's Petition for Appeal is Denied and the decision of the Board to deny Appellant' building permit is Affirmed.

IT IS SO ORDERED.

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

October 10, 2019
Charleston, South Carolina