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 the Respondents

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the decision of county planning officials who concluded that a development permit issued in response to an application for a two-phased development did not entitle the permit holder to initiate the second phase of the development ten years after the permit was issued?

2. Did the Court of Appeals err in deferring to the reasonable conclusion of county planning officials, who determined that a new 10,000 square foot hall would increase the "occupant load" of an existing non-conforming structure, as that term is used in the development regulations that those officials are charged with administering?

STATEMENT OF THE CASE

The brief of petitioner Grays Hill Baptist Church (Grays Hill) provides a generally accurate overview of the procedural history of this matter and that history will not be repeated here.[1] However, Grays Hill's brief does not supply important context regarding the important public safety function served by the zoning regulations at issue, and also does not provide certain important facts. We provide that additional context below.

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[1] Although it is not material to any issue, we note that the *de novo* hearing conducted by the Beaufort County Planning Commission was held on December 5, 2011 (Record on Appeal, p. 134), not on December 3, 2007, as stated in Grays Hill's brief (Br. 4).

A. The Important Interest In Limiting Development Near Federal Air Stations

This dispute involves the efforts of Grays Hill to build a new 10,000 square foot Fellowship Hall near the U.S. Marine Corps Air Station in Beaufort County. The Air Station is the home of the Marine Corps' Atlantic Coast fixed-wing, fighter-attack aircraft assets including six Marine Corps F/A-18 squadrons and one F-35B Fleet Replacement Squadron. It is the only location in the world where pilots train to fly the F-35B.[2]

The Department of Defense has long recognized that unchecked development in the immediate vicinity of a military air station endangers public safety and can also compromise the integrity of air station operations. Unchecked development even can—and has—led to base closures. *See* Bernard K. Schafer, *The Air Installation Compatible Use Zone Program: The Science and the Law*, 31 A.F. L. Rev. 165, 165 (1989). To address these concerns and ensure that development near military air stations is limited to compatible uses, the Department of Defense has for decades followed a planning program known as the Air Installations and Compatible Use Zone policy (AICUZ). *See* Department of Defense, Instruction No. 4165.57, *Air Installations Compatible Use Zones (AICUZ)* (May 2, 2011) (*AICUZ Program*).[3] The AICUZ Program

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[2] U.S. Marine Corps, History, https://www.beaufort.marines.mil/Community-Resources (last visited Dec. 11, 2019).

[3] https://go.usa.gov/xppYJ.

exists to serve two primary objectives. First, it "[p]romote[s] the health, safety, and welfare of persons in the vicinity of and on air installations by minimizing aircraft noise and safety impacts." *Id.* at 2; *see also* Air Force Handbook 32-7084, *AICUZ Program Manager's Guide* § 1.3 (Nov. 2, 2017) (*AICUZ Guide*).[4] Second, it serves to "ensur[e] the continued viability of the defense flying mission," which can be compromised by incompatible development in the immediate vicinity of an airfield. *AICUZ Guide* § 1.3.

One important aspect of the AICUZ program is a process for identifying Accident Potential Zones, areas in the immediate vicinity of an air station that statistical analysis indicates have an elevated possibility of an air crash. An Accident Potential Zone I is an area that possess "a significant potential for accidents." *AICUZ Program* 30. An Accident Potential Zone II is the area beyond an Accident Potential Zone I that still has "a measureable potential for accidents." *Id.* In Accident Potential Zones, "some type of land use control is essential." *AICUZ Guide* § 2.2.3. High density uses such as places of assembly, including churches, are not considered appropriate in an Accident Potential Zone II. *Id.* § 2.11.2.

Designations made under the AICUZ program have no independent operative legal effect. *See AICUZ Program* 7 ("This Instruction does not impose any requirements on members of the public or State or local governments, nor does it

[4] https://go.usa.gov/xpp7C.

prescribe any specific course of action for these groups to take in dealing with the DoD on land-use questions."); *see also Blue v. United States*, 21 Cl. Ct. 359, 362 (1990) ("AICUZ studies are for advisory purposes only. The authority to permit or restrict development or use of private lands is left to the local jurisdiction."). Rather, the AICUZ program recommends procedures for collaborating with local governments to adopt land use policies consistent with the findings of AICUZ studies. Base officials work with their surrounding communities, like Beaufort County, to ensure the adoption of appropriate land use regulations. The "AICUZ program is [then] implemented through the local government's police power over land use, zoning, and building codes." Schafer, *supra*, 31 A.F. L. Rev. at 178.

B. Factual Background And Procedural History

1. In December 1996, Grays Hill sought a development permit from the County. At that time, no zoning rule had been adopted to prevent incompatible development in the vicinity of the Beaufort Air Station. The application included a plan for the proposed development that depicted two primary structures, a church building and a second building to the south (which, though not identified as such in Grays Hill's application, has been known in this litigation as a Fellowship Hall). In a narrative accompanying the application, Grays Hill described the proposed project as consisting of two phases. Phase I was to consist of construction of only the church building and supporting infrastructure. Phase II was identified as the construction of the second building. Record on Appeal, p. 245.

The County issued Grays Hill a development permit for the project, which stated that it would expire two years from the date of approval "unless substantial improvement has occurred." Record on Appeal, p. 35. The County also approved a building permit for the church building and surrounding infrastructure (Record on Appeal, p. 36), and Grays Hill went forward with construction of Phase I. Grays Hill did not seek a building permit for Phase II and otherwise took no steps to commence development of Fellowship Hall. Appendix, p. 8. In December 1997, the County conducted a final inspection of the completed church building and issued a certificate of compliance. Record on Appeal, p. 247.

In 2006, Beaufort County adopted a new zoning ordinance, known as the Airport Overlay District, which was designed to limit development near Beaufort's Marine Corps Air Station. Appendix, p. 2. Under the designations made in the Airport Overlay District, Grays Hill's property falls within an Accident Potential Zone 2. Record on Appeal, p. 19. These new zoning regulations had only prospective effect, so Grays Hill's existing building became a grandfathered non-conforming use. However, under the new zoning rules, Grays Hill has only a limited right to expand on its existing facility, and even then, may do so only if the new expansion would not increase the "occupant load" of the building. Appendix, p. 2-3; Record on Appeal, p. 49.

In 2007, Grays Hill applied to the County for a construction permit in order to build Fellowship Hall. Appendix, p. 3. The County notified Grays Hill that it would

first need to apply for a development permit. Grays Hill then applied for a development permit and the application was considered by the County's Development Review Team, which rejected it. *Id.* The Development Review Team noted that to "protect the public health and safety, the County has prohibited uses within [the Accident Potential Zones] that attract concentrations of individuals such as . . . churches," and that while the regulations allowed for a modest increase in the size of existing non-conforming buildings, it "was not the intent to permit an expansion that could allow more people to be in harm's way." Record on Appeal, p. 50. Accordingly, the request for a permit authorizing construction of a new 10,000 square foot building was denied.

Grays Hill appealed to the Beaufort County Planning Commission, which unanimously upheld the denial of the development permit. The Commission concluded that "the number of persons that could be on the site at any one time could be increased with the expansion," and thus, that the construction of Fellowship Hall would increase the "occupancy load" of the existing structure. Record on Appeal, p. 54.

Grays Hill filed an action in the Court of Common Pleas, challenging the decision of the Planning Commission. Due to the absence of a record, that action was remanded with consent of the parties to the Planning Commission for the purpose of conducting a de novo proceeding. Appendix, pp. 3-5. The Planning Commission conducted a hearing and, among other things, took testimony from

Beaufort County's fire code official, who explained that under the definition of "occupant load" employed in the fire code, a new 10,000 square foot hall would substantially expand the "occupant load" of a site. Record on Appeal, p. 170. After taking this and other testimony, the Planning Commission subsequently denied Grays Hill's application, and Grays Hill filed a new action challenging that denial. Appendix, p. 5.[5]

2. In light of the federal interest in proper application and enforcement of the Airport Overlay District, which serves to protect the Marine Corps Air Station and the adjacent public, the United States intervened in order to support Beaufort County in defending the permit denials. The United States explained that the Air Station "facilitates and supports the essential training of military pilots" and that Grays Hill's property "lays directly in the immediate landing pattern of military aircraft operating from the Marine Corps Air Station." Record on Appeal, p. 131.

3. In 2013, the Court of Common Pleas entered judgment in favor of Grays Hill. Record on Appeal, p. 13-33. As relevant here, the court concluded that the 1997 Development Permit granted the right to build Fellowship Hall, and thus, that Grays Hill had no need to obtain further development approval from the County in order to move forward with its project. In so holding, the court rejected the County's

[5] Grays Hill separately unsuccessfully sought a variance from Beaufort's Zoning Board. While the denial of Beaufort's request for a variance was at issue in earlier stages of this litigation, Grays Hill has abandoned that challenge in this Court.

determination that only the first phase of the project (the initial church building) was authorized in 1997. Record on Appeal, pp. 27-28, 31-32. The court also reasoned that because Grays Hill had engaged in "substantial improvement" by completing construction of the church building, the 1997 Development Permit never expired and gave Grays Hill a vested right to complete construction of Fellowship Hall a decade later. Record on Appeal, p. 19.

The court further held that, in any case, the 2007 request for a new development permit should have been granted. Record on Appeal, p. 32. Whereas the County had found that the zoning rules would not allow for the construction of a new 10,000 square foot structure because such a structure would expand the occupancy load of the building, the court found that conclusion to be unsupported. Record on Appeal, p. 30. Rather, the court concluded that Fellowship Hall would have no effect on the occupancy load of the site because the church and Fellowship Hall would not be occupied simultaneously. Record on Appeal, pp. 26-27, 30-31.

4. Both the County and the United States filed appeals, and the Court of Appeals reversed. As relevant here, the Court of Appeals recognized that the narrative description included in the application for the 1997 development permit divided the development into two phases, and concluded that because Grays Hill never sought to develop the second phase of the project (*i.e.*, Fellowship Hall) within two years of issuance of the permit, it had no vested right to pursue the second phase of the development in 2007. Appendix, p. 8.

The Court of Appeals also upheld the denial of Grays Hill's 2007 application for a new development permit. The Court of Appeals noted the substantial deference owed to the judgment of local planning officials. And citing the testimony of the fire code official, the Court of Appeals concluded that "the evidence in the record clearly supports the Planning Commission's finding that the fellowship hall would increase the occupant load for the site." Appendix, p. 10.

SUMMARY OF ARGUMENT

Grays Hill seeks to substantially expand its existing nonconforming structure by erecting a new 10,000 square foot hall in an area with a statistically measurable potential for air crashes. But Grays Hill identifies no legal error committed by County planning officials, and their expert judgments as to the scope and duration of the 1997 development permit should be upheld. Likewise, the Court of Appeals was correct to defer to the Planning Commission's interpretation of the term "occupant load" as used in the development regulations that the Commission is charged with administering.

STANDARD OF REVIEW

A reviewing court is to give "great deference to the decisions of those charged with interpreting and applying local zoning ordinances" and will not "substitute its judgment" for that of county zoning officials. *Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 505, 443 S.E.2d 401, 405 (Ct. App. 1994). Accordingly, the finding of those expert officials must be affirmed unless they "have no evidentiary support or

the Board commit[ed] an error of law." *Id.*; *see also Brock v. Board of Adjustment & Appeals of Rock Hill*, 308 S.C. 539, 545, 419 S.E.2d 773, 777 (1992) ("The reviewing court will not disturb the findings and decision of the Board of Adjustment unless it determines that such findings or decision resulted from action of the Board which is arbitrary, an abuse of discretion, illegal, or in excess of lawfully delegated authority.").

ARGUMENT

The Airport Overlay District was adopted to limit the density of development in an area that has been statistically shown to have a heightened potential for air crash. It also preserves the integrity of the operations of the Marine Corps Air Station, by, for example, allowing the Marine Corps to conduct pilot training missions without jeopardizing the surrounding community. The Beaufort County Planning Commission was faithful to the important purposes of the Airport Overlay District when the Commission denied Grays Hill a development permit that would authorize the construction of a new 10,000 square foot hall on property in the immediate landing pattern of military aircraft operating from the Air Station.

I. THE 1997 DEVELOPMENT PERMIT DID NOT GIVE GRAYS HILL A VESTED RIGHT TO CONSTRUCT FELLOWSHIP HALL AT ANY INDEFINITE FUTURE DATE WITHOUT NEED FOR FURTHER APPROVAL

Grays Hill argues that a development permit issued in 1997 vested it with the right to construct Fellowship Hall at any indefinite future date, irrespective of any intervening changes in the applicable zoning laws. But, as the Court of Appeals

correctly recognized, Grays Hill's application divided the project into two phases and designated construction of Fellowship Hall as the second phase of development. In conjunction with its application for a development permit Grays Hill applied for a building permit that covered only the first phase (*i.e.*, the church building and supporting infrastructure). Properly construed, the 1997 Development Permit did not authorize construction of Phase II or, if it did, any rights in Phase II expired in 1999, more than seven years before Grays Hill sought to construct Fellowship Hall.

The development permit issued by the County in 1997 does not specifically address whether it authorizes both phases of the proposed project or only Phase I. But the development permit does expressly state that the permit will expire within two years unless "substantial improvement" has occurred, indicating that the County did not intend to convey to Grays Hill an indefinite right to pursue development. It would be anomalous to read the permit as conveying a time-limited right to build Phase I of the development, while allowing Grays Hill to build the second phase at any unspecified date in the future. Common sense confirms that the County would not waive its authority to regulate land use a decade—or on Grays Hill's reading, even a century—in the future. Such a construction would lend itself to abuse, with developers using phased development as a means of circumventing land use regulation and securing a right to build at an indefinite point in the future. And it would hamper the ability of the County to effectively implement important land use regulations like the Airport Overlay District.

Background legal principles confirm that the 1997 Development Permit should be read as limited to the first phase described in the development permit. General principles of zoning law provide that "each section or phase is treated as a separate project." James A. Kushner, 2 *Subdivision Law and Growth Management* § 10:16 (2d ed. 2019); *see also F.B.R. Inv'rs v. County of Charleston*, 303 S.C. 524, 527-28, 402 S.E.2d 189, 191 (Ct. App. 1991) (conditional development permit did not give developer a vested right to complete Phase II of a project where only Phase I had been completed before changes in zoning law).[6] Thus, in the absence of a clear statement to the contrary, the permit should be read as limited to Phase I.

This understanding of the development permit as limited to Phase I is also supported by the fact that the building permit issued by the County only authorized construction of the church and supporting infrastructure. In December 1997, the County conducted a final inspection of the completed church building and issued a certificate of compliance. Appendix, p. 2. In doing so, the County effectively closed out the development permit.

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[6] The present version of the Beaufort County Community Development Code explicitly provides: "A phased Land Development Plan or Subdivision shall remain subject to review and approval of all phases prior to any portion of the project being vested in accordance with this Section." Beaufort County Code § 7.4.120(C), https://library.municode.com/sc/beaufort_county/codes/community_development_code?nodeId=ART7PR_DIV7.4STPR_7.4.120VERILADEPLPL.

Finally, even if the 1997 permit were construed as authorizing both phases of the proposed development, it still would not follow that Grays Hill could wait a decade before initiating construction of Phase II. If the permit is read as authorizing both phases of development, the requirement of "substantial improvement" within two years should be read as applying to each of the two phases separately. Under this interpretation, had Grays Hill sought to construct Phase II within two years of the issuance of the development permit, it could have done so without obtaining a new development permit. But Grays Hill's right to construct Phase II was still dependent upon Grays Hill completing "substantial improvement" *of Phase II* within two years of the issuance of the development permit. *See* Appendix, pp. 7-8 (discussing *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986)). Grays Hill errs in treating substantial improvement of *Phase I* as sufficient to secure any rights it had in developing Phase II. Even if the 1997 Development Permit authorized Phase II, Grays Hill's rights had expired by 2007 and Grays Hill was required to obtain a new development permit.

II. THE COURT BELOW PROPERLY UPHELD THE JUDGMENT OF EXPERT COUNTY DEVELOPMENT OFFICIALS WHO CONCLUDED THAT A NEW 10,000 SQUARE FOOT BUILDING WOULD INCREASE THE "OCCUPANT LOAD" OF GRAYS HILL'S PROPERTY

Grays Hill argues in the alternative that the Planning Board should have granted it a new development permit in 2007. But by 2007, the Airport Overlay District had been adopted to ensure that development near the Marine Corps Air Station would be limited to compatible uses. It is undisputed that the Airport Overlay District designated Grays Hill's property as falling within an Accident Potential Zone 2. It is also undisputed that under the Airport Overlay District zoning rules, construction of new places of assembly within an Accident Potential Zone 2 is generally prohibited.

The Airport Overlay District allows for a limited exception in cases where an existing house of worship within an Accident Potential Zone seeks to expand by 15%, but only if the expansion would not increase the "occupant load" of the property. The Planning Commission construed those regulations, which it is charged with administering, as not allowing for the construction of a new 10,000 square foot building on the ground that it would increase the "occupant load" of Grays Hill's existing non-conforming building. According to the Planning Commission, it would be incompatible with the limited exception in the Airport Overlay District to allow construction of a large new building with capacity for many hundreds of additional people. In reaching that determination, the Planning Commission considered

evidence from a fire code official, who testified that the occupancy load of a structure is measured by reference to the maximum number of people the structure can accommodate. The Planning Commission acted well within its discretion in interpreting the development code in harmony with the fire code, and its judgment is entitled to deference. *See Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 505-06, 443 S.E.2d 401, 405 (Ct. App. 1994) (recognizing the need to "[g]iv[e] deference to the interpretation of the Zoning Ordinance by the Board which is charged with its interpretation"); *Heilker v. Zoning Bd. of Appeals for the City of Beaufort*, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001) ("The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.").

The Planning Commission's interpretation of the regulation is also in keeping with the purpose and intent of the Airport Overlay District. The Airport Overlay District was adopted out of recognition that both public safety and the integrity of Air Station operations would be compromised by construction of places of assembly within an Accident Potential Zone. Accordingly, any exception to the general limitations on construction in an Accident Potential Zone should be construed narrowly. And while the court below focused on its conclusion that Grays Hill does not presently intend to use Fellowship Hall to increase the number of people on the property, the Planning Commission properly considered the impact on public safety

of a "10,000 square foot addition [which] could accommodate an expanded church population *in the future*." Record on Appeal, p. 54 (emphasis added).

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed. The Church was required to seek a new development permit, and there was evidence to support the Planning Commission's findings regarding increased occupancy loads.

Respectfully submitted,

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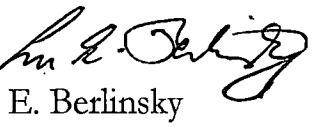
By: 
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that they have served the Respondent's Brief of the United States of America upon all counsel of record by affixing the same with proper postage and placing same with the United States Postal Service on the 13th day of December, 2019 addressed to the following:

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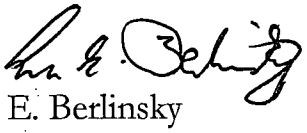
By: 
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