THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

In The Court of Common Pleas

Hon. Marvin H. Dukes, Circuit Court Judge

Case Number 2018-CP-07-784

Appellate Case Number 2019-314

BRADLEY CIRCLE VACATION PARTNERS, LLC, and MONTI DEVELOPMENT, LLC,

Appellants,

v.

THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA, BOARD OF ZONING APPEALS, TAMARA BECKER and RHONDA CARPER,

Respondents.

FINAL BRIEF OF THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA

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STATEMENT OF QUESTIONS PRESENTED

1. ON AN APPEAL FROM A DECISION OF A MUNICIPAL ZONING BOARD, AFFIRMED BY THE TRIAL COURT, MUST THE APPELLATE COURT AFFIRM THE TRIAL COURT'S ORDER WHEN THERE IS EVIDENCE IN THE RECORD SUPPORTING THE FACT-BASED DECISION OF THE MUNICIPAL ZONING BOARD AND THE TRIAL COURT?

2. WHERE A TRIAL COURT'S ORDER IS BASED ON MORE THAN ONE GROUND, AND AN APPELLANT HAS FAILED TO PRESENT ARGUMENTS ON ONE OF THE GROUNDS, MUST THE APPELLATE COURT AFFIRM THE TRIAL COURT'S ORDER?

3. CAN A DRAWING OF STRUCTURES SUBMITTED IN AN APPLICATION FOR A VARIANCE WHICH: 1) HAS NO SCALE; 2) HAS NO STATEMENT AS TO THE HEIGHT OF THE STRUCTURES SHOWN IN THE DRAWING; 3) ABOUT WHICH NO AGREEMENT EXISTS AS TO THE HEIGHT OF THE STRUCTURES SHOWN IN THE DRAWING ; AND, 4) WAS NOT THE SUBJECT OF THE VARIANCE GIVEN BY THE BOARD OF ZONING APPEALS, QUALIFY AS A "SITE SPECIFIC DEVELOPMENT PLAN" UNDER S. C. CODE ANN. § 6-29-1510, *ET SEQ.* (SUPP. 2019), SO AS TO VEST A RIGHT TO BUILD STRUCTURES TO A CERTAIN HEIGHT?

STATEMENT OF THE CASE

Bradley Circle Vacation Partners, LLC, and Monti Development, LLC (hereinafter, the "Appellants") are the owners of two residential building lots located within the municipal limits of The Town of Hilton Head Island, South Carolina.

By an application filed on February 26, 2016, and identified as "VAR-352-2016," predecessors in title to the Appellants sought a variance from requirements of the Town of Hilton Head Island, South Carolina's zoning ordinance.[1] VAR 352-2016 was made to The Town of Hilton Head Island, South Carolina, Board of Zoning Appeals (herein, the Town of Hilton Head Island, South Carolina and the Town of Hilton Head Island, South Carolina Board of Zoning Appeals are collectively referred to as the "Board of Zoning Appeals").

By VAR-352-2016, the then owners of the property sought two variances, as follows:

1. Relief from the requirements of § 16-5-102(C), *Municipal Code of The Town of Hilton Head Island, South Carolina*, 1983.[2]

2. Relief from the requirements of § 16-5-103(D), *Municipal Code of The Town of Hilton Head Island, South Carolina*, 1983.[3]

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[1] R., pp. 272-276.

[2] At the time of the variance application, the two lots were not configured as they are today. *Compare:* R., pp. 213, 214, with R. 216, showing the then existing configuration with the planned re-configuration. VAR-352-2016 was made in contemplation of reconfiguring the two lots, and the variances that were sought were directly related to the proposed reconfigured lots. R., p. 209; p. 406, l. 25 to p. 409, l. 10. The reconfiguration of the lots is not an issue in this case.

[3] R., p. 201, 210, 485, 486. Throughout the record, the zoning ordinance is referred to as the "LMO," which is the colloquial descriptor for the zoning ordinance.

§ 16-5-102(C), *Municipal Code of The Town of Hilton Head Island, South Carolina*, 1983, sets out requirements that all parts of any structure on real property be setback from adjacent streets in the distances shown in Table 16-5-102(C), and also imposes setback angles for structures as shown in Figure 16-5-102(C).[4]

§ 16-5-103(D), *Municipal Code of The Town of Hilton Head Island, South Carolina*, 1983, sets out requirements for buffers on property along adjacent streets.[5]

The Town's Zoning Board of Appeals granted the variance requests sough in VAR-352-2016. Specifically, the following variances were approved:

1. For "Lot 1": Reduce the 8 foot setback and buffer from Sweet Grass Manor to a 1 foot setback and no buffer.

2. For "Lot 2": Reduce the 8 foot setback and buffer from Whelk Street to a 4 foot setback and a three foot buffer.[6]

No other relief was requested or granted by the Zoning Board of Appeals, in connection with VAR-352-2016.

In April of 2017, the Town of Hilton Head Island, South Carolina, passed amendments to its zoning ordinance which reduced the allowable height of structures in the zone where the Appellants' properties are to forty five (45) feet.[7] In August of 2017, the Appellants sought building permits for structures on the property which would exceed the

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[4] § 16-5-102(C), *Municipal Code of The Town of Hilton Head Island, South Carolina*, 1983. Appendix, p. 1.

[5] § 16-5-103(D), *Municipal Code of The Town of Hilton Head Island, South Carolina*, 1983. Appendix, p. 2.

[6] R., pp. 504-505.

[7] R., pp. 267-271.

forty five (45) foot height limitation adopted in April of 2017.[8]

On December 14, 2017, the Appellants sought an interpretation from Teri B. Lewis, the Director of Community Development, on the question of whether they had a vested right to build structures to a height of seventy five (75) feet on the property.[9]

On February 18, 2018, Teri B. Lewis issued her written interpretation to the effect that the Appellants had a vested right to build structures to a height of seventy five (75) feet on the property.[10]

On February 21, 2018, Tamara Becker and Rhonda Carper timely filed an appeal of Teri B. Lewis' February 18, 2018, written interpretation to the Town of Hilton Head Island Board of Zoning Appeals.[11]

At a hearing on the appeal of Tamara Becker and Rhonda Carper, held on March 26, 2018, the Board of Zoning Appeals voted to reverse the written interpretation of Teri B. Lewis.[12]

The Appellants timely appealed the decision of the Board of Zoning Appeals to the Court of Common Pleas. Following a hearing on August 23, 2018, the Hon. Marvin H. Dukes, III, filed his Order on November 7, 2018, by which Judge Dukes affirmed the

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8 R., pp. 267-271.

9 R., pp. 267-271.

10 R., pp. 267-271. Teri B. Lewis was the "Official" as described in § 16-10-105, *Municipal Code of the Town of Hilton Head Island*, 1983, and was authorized to make determinations related to zoning ordinance under § 16-2-103(R), *Municipal Code of the Town of Hilton Head Island*, 1983.

11 R., pp. 191-199.

12 R. pp., 386-387.

decision of the Board of Zoning Appeals.[13]

On November 18, 2018, the Appellants timely filed a Motion to Alter or Amend under Rule 59, SCRCP.[14]

By an Order filed on January 23, 2019, the Hon. Marvin H. Dukes denied the Motion to Alter or Amend under Rule 59, SCRCP.[15]

The Appellants timely filed their Notice of Appeal of the November 7, 2018, and January 23, 2019, Orders of the Hon. Marvin H. Dukes, III, on February 21, 2019.

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[13] November 7, 2018, Order of Hon. Marvin H. Dukes, III. R., pp. 20-40.

[14] November 18, 2018, Motion to Alter or Amend. R., pp. 69-71.

[15] January 23, 2019, Order of Hon. Marvin H. Dukes, III. R., pp. 38-40.

STANDARD OF REVIEW

This case presents an appeal from an Order of the Court of Common Pleas upholding a decision of the Board of Zoning Appeals of The Town of Hilton Head Island, South Carolina. By statute, the Circuit Court must uphold a decision of municipal zoning board unless there is no evidence to support the decision, or the decision is controlled by an error of law.[16] A Court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.[17] On appeal, the appellate courts apply the same standard of review as the circuit court: the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury.[18] The appellate court will uphold the trial judge's decision unless it was based on an error of law or is not supported by the evidence.[19]

A zoning board's decision should not be disturbed unless the board's findings resulted from action "which is arbitrary, an abuse of discretion, illegal, or in excess of lawfully delegated authority.[20] A governmental body's decision "is arbitrary if it is without

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[16] *See:* S. C. Code Ann. § 6-29-840 (Supp. 2019), which reads, in relevant part:

> The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. . . . In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

[17] *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 148, 735 S.E.2d 659, 661 (Ct. App. 2012).

[18] *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 35–36, 606 S.E.2d 209, 212–13 (Ct. App. 2004).

[19] *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 173, 656 S.E.2d 346, 351 (2008).

[20] *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 205, 516 S.E.2d 439, 440 (1999).

a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.[21] The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary.[22]

"Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, [citation omitted], a broader and more independent review is permitted when the issue concerns the construction of an ordinance."[23] However, the decisions of those charged with interpreting and applying zoning ordinances should be given some consideration and not overruled without cogent reason therefore.[24]

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[21] *Deese v. South Carolina State Board of Dentistry*, 286 S.C. 182, 184–5, 332 S.E.2d 539, 541 (Ct.App.1985).

[22] *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 516 S.E.2d 442 (1999).

[23] *Charleston County Parks & Recreation Commission v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

[24] *Furr v. Horry County Zoning Board of Appeals*, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014).

ARGUMENT NUMBER 1

THE BOARD OF ZONING APPEALS AND THE TRIAL COURT FOUND THAT THE FACTS DISCLOSED THAT NO SITE SPECIFIC DEVELOPMENT PLAN SHOWING THE HEIGHT OF ANY STRUCTURE WAS APPROVED BY THE BOARD OF ZONING APPEALS IN ITS REVIEW OF VAR 352-2106, AND THE EVIDENCE SUPPORTS THE FINDING OF FACT. (Question on Appeal Number 1)

In its determination, the Zoning Board of Appeals found as a matter of fact that VAR 352-2016 "did not include a site specific development plan as defined in South Carolina State Code Section 6-29-1520."[25] The Trial Judge made the same finding of fact in his Order.[26] There is evidence in the record that supports this factual finding by the Zoning Board of Appeals and the Trial Judge.

Ms. Teri B. Lewis presented the following testimony before the Zoning Board of Appeals:

1. Attachment "H" to VAR 352-2016, did not specify the height of the structures.[27]

2. Because Attachment "H" to VAR 352-2016 lacked information as to the height of structures, the Town staff "filled it in."[28]

3. Attachment "H" VAR 352-2016, showed four stories over parking, but "four stories over parking" is not defined in the Town's zoning ordinance, and

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[25] R., p. 386.

[26] November 7, 2018, Order, page 10, item "C," R., p. 29.

[27] R., p. 550, l. 19-23; p. 551, l. 6-13; p. 553, l. 2-7; p. 558, l. 5-8; p. 561, l. 2-9. The drawing was attached to VAR 352-2016 as Attachment "H." R., p. 555, l. 15-18.

[28] R., p. 561, l. 2-16.

has no specific meaning.[29]

4. Teri B. Lewis' initial interpretation as to the height of the structures shown in Attachment "H" to VAR 352-2016, was erroneous, and her new interpretation of the height was 52 feet, one and one half inches.[30]

In this case, the Appellants claim a vested right to build structures up to 75 feet. The claim is that VAR 352-2016 included a "site specific development plan"[31] which is defined in S. C. Code Ann. § 6-29-1520(9)(Supp. 2019) as:

> 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 or intensity of uses for a specific property or properties.

As the record made before the Zoning Board of Appeals shows, the plan that the Appellants argue is a "site specific development plan" does not show the height of the structures with reasonable certainty because of the following facts:

1. Attachment "H" to Variance Application VAR 352-2016 does not show the height of the structures, nor a scale;

2. The Town Staff made its own interpretation as to the height of the structures shown in Attachment "H" to Variance Application VAR 352-2016;

3. The depiction of the structures in Attachment "H" to Variance Application VAR 352-2016 as having four stories over parking has no specific

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[29] R., p. 301; p. 553, l. 8-14; p. 554, l. 1-5.

[30] R., p. 301; p. 556, l. 9 to p. 557, l. 2.

[31] Although there are a considerable number of references to the drawing throughout the record, it is rarely identified. For clarity, the drawing is Attachment H to VAR 352-2016. R., p. 555, l. 15-18; R., p. 301.

meaning or legal significance under the Town's zoning ordinance;

4. Teri B. Lewis determined that her initial interpretation as to the height of the structures shown in Attachment "H" to Var 352-2016, was erroneous, and that height depicted was actually 52 feet, one and one half inches.[32]

The Board of Zoning Appeals found as a matter of fact that the Appellants did not submit a "site specific development plan" as defined in S. C. Code Ann. § 6-29-1520(9)(Supp. 2016), and there is evidence in the record supporting that finding, as is shown above. The Trial Court made the same finding, and there is evidence in the record supporting the Trial Court's finding, as is shown above.[33] Under the standard of review set out in S. C. Code Ann. § 6-29-840 (Supp. 2019), the November 7, 2018, Order of the Trial Court must be affirmed.[34]

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[32] R., p. 556., l. 9-17. Both Ms. Lewis' initial conclusion as to the height of the structures and the revised conclusion are different from that promoted by Counsel to the Appellants at the August 23, 2018, hearing. *See:* Argument 3, below.

[33] November 7, 2018, Order of Hon. Marvin H. Dukes, III, p. 10, item "C." R., p. 29.

[34] *See also: Wyndham Enterprises, LLC v. City of North Augusta, supra.; Austin v. Bd. of Zoning Appeals, supra.; Kurschner v. City of Camden Planning Commission, supra.*

ARGUMENT NUMBER 2

THE APPELLANTS HAVE FAILED TO PRESENT ARGUMENTS ON ONE OF THE GROUNDS STATED IN THE TRIAL COURT'S ORDER. (Question on Appeal Number 2)

In their Brief, the Appellants argue only that the decision of the Zoning Board of Appeals and Judge Dukes were controlled by errors of law.[35]

As was demonstrated in Argument 1 above, both the decision of the Board of Zoning Appeals and the Order of Judge Dukes include factual determinations that the Appellants did not submit a "site specific development plan" as defined in S. C. Code Ann. § 6-29-1520(9)(Supp. 2019).

Because the Appellants have not made any argument regarding the factual determinations of both the Board of Zoning Appeals and Judge Dukes, there is an un-appealed ground that is sufficient to affirm the Order of Judge Dukes.

This is known as the "two issue rule" and under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the un-appealed ground will become law of the case.[36]

Because the factual findings of the Zoning Board of Appeals and Judge Dukes are unappealed, and because the same provide an independent basis to affirm the Order of Judge Dukes, the Appellants have failed to show any basis for reversal.

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[35] Brief of Appellants, p. 7, 11, 12. At the hearing before Judge Dukes, the Appellants argued that the only issue was a legal issue. August 23, 2018, Transcript, p. 29, l. 21 to p. 30, l. 1; R., p. 104.

[36] *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012).

ARGUMENT NUMBER 3

ATTACHMENT "H" TO VAR 352-2016 IS NOT A "SITE SPECIFIC DEVELOPMENT PLAN" UNDER S. C. CODE ANN. § 6-29-1510, *ET SEQ.* (SUPP. 2019), BECAUSE IT: 1) HAS NO SCALE; 2) HAS NO STATEMENT AS TO THE HEIGHT OF THE STRUCTURES SHOWN IN THE DRAWING; 3) NO CONSENSUS EXISTS AS TO THE HEIGHT OF THE STRUCTURES SHOWN IN ATTACHMENT "H"; AND, 4) NO APPROVAL WAS GIVEN BY THE BOARD OF ZONING APPEALS RELATED TO ATTACHMENT "H". (Question On Appeal Number 3)

In 2016, the Zoning Board of Appeals granted the variances sought the then owners of the subject property of VAR-00352-2016. Specifically, the following variances were approved:

1. For "Lot 1": Reduce the 8 foot setback and buffer from Sweet Grass Manor to a 1 foot setback and no buffer.

2. For "Lot 2": Reduce the8 foot setback and buffer from Whelk Street to a 4 foot setback and a three foot buffer.[37]

No other relief was requested or granted in connection with in VAR-00352-2016, and no approval of any kind was given with respect to Attachment "H". The Appellants argue that, in addition to the relief that was actually sought from and granted by the Zoning Board of Appeals, that other unrelated rights were also granted.

The specific relief that the Zoning Board of Appeals actually granted is governed by the Vested Rights Act.[38] In VAR 352-2016, there are two drawings depicting elevations of

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[37] R., pp. 504-505.

[38] *See*: S. C. Code Ann. § 6-29-1520(9)(Supp. 2019), which states that a "site specific development plan" may take the form of a variance. *See Also:* § 16-2-102(J)(1)(a), *Municipal Code of the Town of Hilton Head Island*, 1983. In this case, the variance that was actually granted in VAR 352-2016 is not at issue. The Appellants' effort to extend the rights granted by S. C. Code Ann. § 6-29-1510, *et seq.*, (Supp. 2019), and § 16-2-102(J)(1)(a), *Municipal Code of the Town of Hilton Head Island*, 1983, to cover things not described with any "reasonable certainty" and which the Board of Zoning Appeals was not asked to and did not approve is not supported by the text of the statute.

structures to demonstrate the impact of ordinance, and requested variances. Neither drawing was offered or approved with respect the height of the structures that might ultimately be built one the property.

Attachment "G" to VAR-00352-2016 is a drawing showing a different property with a duplex structure, and showing how the strict application the zoning ordinance would affect the structure shown in the drawing.[39]

Attachment "H" to VAR-00352-2016 is a drawing showing what is described as "Bradley Circle Elevation Proposed" with no discernable scale and the following description of what is shown: "Requesting a Variance to Reduce Side Setback Along The Easement from 8 Ft. To 0 Ft. and along Welk Street from 8 Ft. To 4 Ft."[40] There is no text in VAR-00352-2016 showing that the applicant sought any approval related to the height of structures on the property. In the approval given by the Board of Zoning Appeals for VAR 352-2016, no approval is granted with respect to the height of the structures on the property.

Under S. C. Code Ann. § 6-29-1520(9)(Supp. 2019), a "site specific development plan is: ". . .a development plan submitted to a local governing body describing with reasonable certainty the types and density and intensity of uses for the specific property of properties." Under S. C. Code Ann. § 6-29-1530(A)(1)(Supp. 2019), "A vested right is established for two years upon the approval of a site specific development plan.

The record for this case reflects that there is no consensus at all on the height of the structures shown on Attachment "H" to VAR-352-2016. At the hearing before Judge Dukes,

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[39] R., p. 300. This drawing depicts property identified as "Lot 22 Bradley Circle" which is not the property that is the subject of VAR-00352-2016.

[40] R., p. 301.

Counsel for the Appellants stated:

> And there was a lot of discussion about the not to scale drawings that were submitted. And, you know, even though they are not to scale, they do contain some dimensions. And I will tell you that some of those elevations scale out to - - one of them is 58 feet. One of them scales out to 45 feet, I believe.[41]

As was discussed in Argument 1 above, the record made before the Zoning Board of Appeals shows that Attachment "H" to VAR 352-2016 does not show the height of the structures with reasonable certainty or any certainty, for that matter. Since the Town's Official and the Appellants cannot agree as to what is shown on Attachment "H" to VAR 352-2016, it is plain that Attachment "H" does not show the height of the proposed structures with "reasonable certainty."

The approval granted by the Board of Zoning Appeals on VAR 352-2016, does not approve the height of any structure on the property of the Appellants. No approval of any sort was given to Attachment "H."

Based on the record of what was sought and approved in connection with VAR 352-2016, Judge Dukes correctly determined that the Attachment "H" was not a "site specific development plan" under S. C. Code Ann. § 6-29-1520(9)(Supp. 2019).

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[41] August 23, 2018, Transcript p. 12, l. 5-11; R., p. 88.

CONCLUSION

The Zoning Board of Appeals and Judge Dukes both found as matters of fact that Attachment "H" to VAR 352-2016 was not a "site specific development plan" under S. C. Code Ann. § 6-29-1520(9)(Supp. 2019), and there is evidence in the record supporting the findings. Bradley Circle Vacation Partners, LLC, and Monti Development, LLC, have not made any argument regarding the factual determinations of both the Board of Zoning Appeals and Judge Dukes, and the two issue rule mandates that Judge Dukes' Order of November 7, 2018, and January 23, 2019, be affirmed. Because Attachment "H" to VAR 352-2016 does not show any structure's height with reasonable certainty, and no approval was given with respect to Attachment "H," no vested right under S. C. Code Ann. § 6-29-1510, *et seq.*,(Supp. 2019), exists. For these reasons, The Town of Hilton Head Island, South Carolina, and The Town of Hilton Head Island, South Carolina, Board of Zoning Appeals urge this Court to affirm the November 7, 2018, and the January 23, 2019, Orders of the Hon. Marvin H. Dukes, III.

Respectfully Submitted:

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This 29th day of January, 2020.