

# **EXHIBIT 2**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 BEACHWALK HOTEL & )  
 CONDOMINIUMS ASSOCIATION, )  
 INC. and BEACHWALK HILTON )  
 HEAD, LLC, )  
 )  
 Appellants/Petitioners, )  
 )  
 vs. )  
 )  
 THE TOWN OF HILTON HEAD )  
 ISLAND and/or THE TOWN OF )  
 HILTON HEAD ISLAND BOARD OF )  
 ZONING APPEALS, and SDC )  
 PROPERTIES, INC. )  
 )  
 Respondents/Defendants. )  
 )

IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT  
 CIVIL ACTION NO.: 2016-CP-07-02712

ORDER  
 (Ending Case)

RECEIVED  
 APR 20 2020  
 SC Court of Appeals

THIS MATTER is before me upon the Appellants/Petitioners' Notice of Appeal and Petition filed December 30, 2016, appealing from a decision of the Town of Hilton Head Island Board of Zoning Appeals ("BZA") dated November 28, 2016 to uphold determinations made by Nicole Dixon, CFM, Sr. Planner for the Town of Hilton Head Island, SC ("Town") in her letter of August 23, 2016 to Chester C. Williams, Esquire, an attorney for Appellants/Petitioners ("Determination Letter"). The Determination Letter expressed Ms. Dixon's determination that the proposed development of land ("Parcel E") owned by Respondent/Defendant SDC Properties, Inc. ("SDC") for a Spinnaker Welcome Center, as contemplated by the Development Plan Review Application DPR-001056-2016, is permitted under the applicable Town code requirements. From time-to-time the Appellants/Petitioners amended their Notice of Appeal and Petition.

Originally, the Town and/or the BZA were) the only Respondents/Defendants. Subsequently, by order, SDC was granted leave to intervene and be joined as a party Respondent/Defendant, which it did.

The Respondent/Defendant SDC Properties, Inc. is part of the Spinnaker group of companies headquartered at Hilton Head. Part of the subject planned unit development (PUD) was used for the development of Waterside by Spinnaker as a timeshare project. Within that PUD, the Appellants/Petitioners own a parcel of land which was formerly built and operated as a hotel and/or residential condominiums, but now is, and for many years has been, out of operation, dilapidated, and in poor repair and disuse.

The appeal of this matter is pursuant to S.C. Code § 6-29-840 (1994), providing the mechanism for appeal and judicial review by the circuit court of an appeal under S.C. Code § 6-29-820 (1994) from the decision of the BZA upholding the determinations made by Ms. Dixon in the Determination Letter.

The BZA first considered this matter on the original 2016 appeal by the Petitioners/Appellants, upholding the Determination Letter. Then, in early 2017, the BZA conducted its second hearing, this upon the motion for reconsideration filed by the Appellants/Petitioners, and declined to reconsider its original decision to uphold the Determination Letter.

Following a thorough hearing before this court on the appeal to the circuit court by the Appellants/Petitioners, I issued an order remanding this case to the BZA to consider three

questions. The BZA thereafter conducted its third hearing in this matter, whereupon it came back to me for a second hearing and final decision.

Upon this court's initial review of this matter at our first hearing, I found that the record from below was unclear as to certain issues that I believed were important for appropriate judicial review of this appeal, including the basis for the BZA's decision. Thus, I determined that the certified record of the proceedings before the BZA and the original Application for Appeal APL-001673-2016 were insufficient to complete my review and, as stated, I remanded the matter to the BZA for a rehearing, directing the BZA specifically to focus upon and answer the following questions for the court's further consideration:

1. Is Parcel E in a PD-2 Overlay District established by the LMO?
2. If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?
3. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?

Subsequently, on remand, the BZA conducted a rehearing of this matter and focused upon the above three questions. The BZA answered those questions as follows:

Question 1: Yes.

Question 2: Yes.

Question 3: "Because (the BZA has) determined Parcel E is subject to the LMO's PD-2 Overlay District, we need to take into consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E".

In the course of the BZA remand hearing, counsel for Respondents/Defendants, moved the BZA to dismiss the appeal of the Appellants/Petitioners on the grounds of their alleged “lack of standing”. The BZA voted to deny the motion.

Also, at the BZA remand hearing the BZA made and considered its own motion to uphold the determinations in the Determination Letter, and the original decision of the BZA to uphold the determinations in the Determination Letter. This motion at the BZA remand hearing failed on 3-3 split vote leaving, as still standing before me, the BZA’s original decision in this appeals process made on December 28, 2016, to uphold the Determination Letter of Ms. Dixon, and to deny the appeal from that Determination Letter by Appellants/Petitioners.

The matter came back to me from the BZA remand hearing on the foregoing determinations by the BZA, together with its answers to my questions. Also before me, following the BZA’s remand hearing, were the Motion for Summary Judgment by Respondent/Defendant SDC, and the Motion for Summary Judgment by Appellants/Petitioners.

Thus at the further hearing before me on March 12, 2019, I considered the following:

1. Respondent/Defendant SDC’s Motion for Summary Judgment, filed October 1, 2018; and
2. Appellants/Petitioners’ Motion for Summary Judgment, filed on October 24, 2018; and
3. The merits of the appeal, itself, which were back before me, having been stayed pending the outcome of the BZA remand hearing.

The issues have been extensively briefed, and re-briefed, and all parties have been ably represented by counsel. The two hearings (November 16, 2017 and March 12, 2019) conducted by this court enabled me to consider fully all arguments and briefs, as well as the court’s

questions, in addition to the huge record on appeal consisting of multiple reams of paper of documents and transcripts of testimonies, discussions, and hearings of the evidence and proceedings before the BZA.

Respondent/Defendant SDC's Motion for Summary Judgment:

Respondent/Defendant SDC moved for summary judgment under *SCRCP* Rule 56 on the grounds of the Appellants/Petitioners' alleged "lack of standing" and related principles. I have determined that the Appellants/Petitioners do have standing and, therefore, I deny this Motion for Summary Judgment by the Respondent/Defendant SDC.<sup>1</sup>

Appellants/Petitioners' Motion for Summary Judgment:

Appellants/Respondents moved for summary judgment under *SCRCP* Rule 56 on the grounds that they believe they were entitled to judgment as a matter of law. I have determined that the Appellants/Petitioners are not entitled to judgment as a matter of law and, therefore, I deny their Motion for Summary Judgment.<sup>2</sup>

The Merits of the Appeal Itself:

In considering the merits of this appeal, the court is cognizant that its review is constrained by the law of South Carolina, as well expressed in the Vulcan<sup>3</sup> case: "[T]he decision of the zoning board will not be upheld where it is based on errors of law, or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion (citations omitted)". Otherwise, of course, this court must uphold the BZA's decision.

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<sup>1</sup> Pursuant to *SCRCP* Rule 52(a) findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 56.

<sup>2</sup> Pursuant to *SCRCP* Rule 52(a) findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 56.

<sup>3</sup> Vulcan Materials Company v. Greenville County Board of Zoning Appeals, 266 S.C. 81, 221 S.E.2d 773 (Ct. App. 1976).

Having fully re-considered this appeal, since having first considered this appeal and remanded it to the BZA, I here deny the appeal and petition by the Appellants/Petitioners, and grant judgment in favor of the Respondents/Defendants.

In reaching these decisions, I have concluded that the Town's Senior Planner (Nicole Dixon) in her Determination Letter, and in the underlying Notice of Action (DPR-001056-2016), and the BZA, all had evidence to support their findings and determinations.

In this decision, I find that there was, in fact, substantial evidence in the record before the BZA to support the decision of the BZA in upholding the November 28, 2016 Determination Letter issued by the Town's Senior Planner, Ms. Dixon, and her underlying Notice of Action (DPR-001056-2016). Without limitation, some of this evidence included the following:

1. The proposed development of Parcel E as a commercial building for a welcome center for timeshare sales activities, check-ins, etc. is a use that is, in fact, among the uses allowed under the current RD District zoning of the subject property.
2. The proposed development of Parcel E as a commercial building with a square footage of 7,500 is less than the 8,000 square feet of nonresidential uses allowed per net acre in the RD District.
3. The subject property, Parcel E, contains 1.068 acres and appears to qualify for as much as 8,544 square feet of nonresidential or commercial construction.
4. The subject property, Parcel E, is a part of what is today called the Waterside PUD, formerly known as the Town Center PUD.
5. The rights to develop Parcel E under the Categorical Exemption Certificate for the Town Center PUD, as issued by the Town of Hilton Head Island in 1995, expired in 2000.

6. Parcel E was not developed before the expiration in 2000 of the Categorical Exemption Certificate and, therefore, did not become vested, beyond that date in 2000, as to uses, densities and design standards under the Categorical Exemption Certificate.
7. Under the master plan protected by the 1995 Categorical Exemption Certificate, Parcel E could have been developed to the extent of 16,787 square feet of nonresidential uses and 12,916 square feet of retail.
8. The proposed development of Parcel E at 7,500 square feet is substantially less than the 16,787 square feet of office and 12,916 square feet of retail formerly permitted under the master plan formerly protected by the 1995 Categorical Exemption Certificate.
9. The proposed development of Parcel E at 7,500 square feet does not exceed the square footage limitations for nonresidential construction under the current RD District zoning or under the former, previously-vested, master plan for Town Center PUD.
10. The Determination Letter recites numerous other facts in the history of this Parcel E, and the Town Center PUD of which it is a part (now known as Waterside PUD), concerning the history of open space requirements, calculations, distributions, allocations, and sharings within the PUD.
11. Despite numerous questions in the record by BZA members, and by this court, to the Appellants/Petitioners, the Appellants/Petitioners have failed to demonstrate any cognizable harm, damage, or injury to them or their property located within the PUD

if the Respondent/Defendant SDC Properties, Inc. is permitted to develop its Parcel E as presently approved by the Town of Hilton Head Island.

12. If the view of the Appellants/Petitioners were to prevail, there would be no allowable economic utility for the subject property, Parcel E, since no development, construction, or permitted use can take place thereon.

In addition to the substantial supporting evidence found, I have concluded as a matter of law that the Town's Staff Planner (Nicole Dixon) and the BZA properly considered every aspect of this matter, through extensive considerations and deliberations in the original reviews and proceedings, and in the BZA's remand hearing, and committed no error of law, no arbitrariness or unreasonableness, and no abuse of discretion. Therefore, in keeping with Vulcan, I uphold the BZA on this appeal and deny the appeal of the Petitioners/Appellants.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Respondent/Defendant SDC Properties, Inc.'s Motion for Summary Judgment is denied.
2. Appellants/Petitioners Beachwalks' Motion for Summary Judgment is denied.
3. The appeal and petition of the Appellants/Petitioners is hereby denied on the merits.

**AND IT IS SO ORDERED.**



**Beaufort Common Pleas**

**Case Caption:** Beachwalk Hotel & Condominiums Association Inc , plaintiff, et al VS  
Town Of Hilton Head Island , defendant, et al  
**Case Number:** 2016CP0702712  
**Type:** Order/Other

**So Ordered:**

**s/Marvin H. Dukes III #3069**

Electronically signed on 2019-08-11 10:19:15 page 8 of 8

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