

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2016-CP-07-02712

APPELLATE CASE NO. 2020-000617

Beachwalk Hotel & Condominium Association, Inc.
and Beachwalk Hilton Head, LLC

vs.

The Town of Hilton Head Island and/or The Town
of Hilton Head Island Board of Zoning Appeals and
SDC Properties, Inc.,

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Dec 01 2020

SC Court of Appeals

Appellants,

Respondents.

REPLY BRIEF OF APPELLANTS

s/Kathleen McDaniel

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ASSOCIATION, INC.
AND BEACHWALK HILTON HEAD, LLC**

Columbia, South Carolina
December 1, 2020

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ARGUMENT

Respondents' Briefs contain the same arguments; therefore, Appellants submit this single Reply Brief in response to both Respondents' Briefs.

The main issue in this appeal is whether there is sufficient acreage remaining in the Waterside PD-2 District for the construction of a new welcome center without exceeding density limitations. The parties appear to agree on the existing acreage and existing development of the Waterside PD-2 District. The size of the entire Waterside PD-2 District, including Parcel E where the welcome center is proposed, is 15.100 acres. Within that 15.100 acres, there currently exist 198 dwelling units, one nonresidential structure consisting of 5,262 square feet, and 91 hotel rooms.

Where the parties disagree is how to calculate the existing density of use and thereby determine if there is any remaining density for the construction of a welcome center. Appellants' calculation of density leaves no remaining density for the construction of Respondent SDC Properties, Inc.'s proposed welcome center. Respondents' calculate the existing density so as to find sufficient remaining density for the construction of a new welcome center.

The underlying base zoning district for the subject development area is RD (Resort Development District). The density guidelines for the RD district (LMO Section LMO 16-3-105.L.3) permit the following maximum densities:

Residential	16 dwelling units per acre
Bed and Breakfasts	10 rooms per acre
Interval Occupancy	16 dwelling units per acre
Hotel	35 rooms per acre
Nonresidential	8,000 gross floor area per acre

The subject property is also controlled by the existence of the PD-2 Overlay District. The Density and Development Standards for the PD-2 Overlay District provide:

A section or phase of the planned development may be built at a density which is greater than the site-specific density allowed by the underlying base zoning district, provided that any such concentration of density is offset by an area of lower density in another section or phase of the planned development or by an appropriate reservation of common open space elsewhere in the planned development. **The average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district.**

LMO Section 16-3-105.G.4.a. (emphasis added).

On remand, the BZA interpreted the PD-2 Overlay District regulations as follows:

Question 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?

Answer: The BZA unanimously voted "that because we've 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"; and "that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with any proposed development for Parcel E."

(Trans. of Hr'g on remand on Aug. 27, 2018 (R.p. ____); Notice of Action by the BZA on the remand of appeal (R.p. ____).) Thus, the BZA determined that the PD-2 Overlay District must be viewed as a whole when considering development of Parcel E. This would include consideration of density. This determination is consistent with the requirement in LMO Section 16-3-105.G.4.a. that the average density for the PD-2 Overlay District **shall not** exceed the maximum density permitted in the base zoning district. Parcel E cannot be developed in a vacuum separate from the rest of the PD-2 Overlay District.

To determine if there is any density remaining within the Waterside PD-2 District, including Parcel E, for the construction of a new welcome center, we first must determine the density requirements for the existing uses. At a maximum density of 16 dwelling units per acre, the Town requires at least 12.375 acres to support the exist 198 dwelling units. At a maximum density of 8,000 gross floor area per acre, the Town requires at least 0.658 acres to support the existing 5,262 gross floor area of nonresidential development. At a maximum density of 35 rooms per acre, the Town requires 2.600 acres to support the 91 existing hotel rooms. That adds up to an acreage requirement under the current LMO of 15.633 acres to support the current development. This already exceeds the 15.100 acres within the Waterside PD-2 District; therefore, there is no remaining density for the development of the proposed welcome center, and the development of the Spinnaker Welcome Center cannot be permitted.

Respondents contend that it is only necessary to consider Parcel E by itself to determine if the density requirement is met. Parcel E is 1.068 acres in size. The proposed welcome center is 7,500 square feet. Dividing 7,500 square feet by 1.068 acres yields a density of 7,022.47 square feet per acre, which is less than the maximum for the RD district. Accordingly, Respondents contend that that there is sufficient density and the welcome center should be permitted.

Respondents' calculation fails to take into consideration that LMO Section 16-3-105.G.4.a. requires that the "average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district." Parcel E is just one acre of the whole PD-2 Overlay District. Density must be evaluated across the PD-2 Overlay District as a whole—not merely on an acre by acre basis. Respondents'

evaluation of density for Parcel E without consideration of the existing development on the other parcels within the PD-2 Overlay District contradicts the BZA's response to the Special Circuit Judge's very targeted question.

In support of their position, Respondents cite the first sentence of LMO Section 16-3-105.G.4.a., which states that a "section or phase of the planned development may be built at a density which is greater than the site-specific density allowed by the underlying base zoning district, provided that any such concentration of density is offset by an area of lower density in another section or phase of the planned development or by an appropriate reservation of common open space elsewhere in the planned development." However, Respondents fail to cite or acknowledge the second, very important, sentence of that code section, which provides the mandatory limitation that the "average density for the PD-2 Overlay District **shall not** exceed the maximum density permitted in the base zoning district." LMO Section 16-3-105.G.4.a. (emphasis added).

Respondents also argue that the definition of density found at LMO Section 16-10-102.B.1 permits a parcel by parcel, use by use calculation of density. This interpretation runs afoul of Section 16-3-105.G.4, which requires a density analysis across the entire PD-2 Overlay District. Respondents' interpretation also contradicts the BZA's determination that development of Parcel E must consider the existing development within the PD-2 Overlay District.

Based upon the foregoing as well as the arguments contained in Appellants' Brief, this Court should reverse the decision of the circuit court and find that Respondent SDC Properties, Inc. is precluded from developing Parcel E as proposed for a Spinnaker Welcome Center.

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APPEAL FROM THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
THE HONORABLE MARVIN H. DUKES III

CIVIL ACTION NUMBER: 2016-CP-07-02712

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and Beachwalk Hilton Head, LLC

Appellants,

vs.

The Town of Hilton Head Island and/or The Town
of Hilton Head Island Board of Zoning Appeals and
SDC Properties, Inc.,

Respondents.

PROOF OF SERVICE

I hereby certify that this law firm represents the Appellants in the above-captioned matter and that on the date below, in Columbia, South Carolina, I served a copy of the forgoing on the following persons via electronic mail to their AIS E-mail address:

Documents Served: **APPELLANT BEACHWALK HOTEL & CONDOMINIUM ASSOCIATION, INC. AND BEACHWALK HILTON HEAD, LLC'S REPLY BRIEF**

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