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SC Court of Appeals

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

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.

BRIEF OF APPELLANTS

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Columbia, South Carolina
February 12, 2021

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in upholding the decision of the Town of Hilton Head Island Board of Zoning Appeals to affirm the planning staff determination approving the proposed development of a Spinnaker Welcome Center on Hilton Head Island?

STATEMENT OF THE CASE

This appeal arises from the proposed development of a piece of property by within the Town of Hilton Head located at 30 Waterside Drive and is identified as Parcel 202 on Beaufort County Tax Map 18. The property is zoned Resort Development ("RD") and is located within both the Corridor Overlay District and the PD-2 Waterside (Town Center) Overlay District ("Waterside PD-2 District").

In 2016, Appellants learned that a property owner proposed to construct a Spinnaker Welcome Center on a vacant parcel of land within the Town of Hilton Head that is within the same planned unit development as certain of Appellants' property. Appellants did not believe that the proposed Welcome Center was allowable under the Town of Hilton Head's Land Management Ordinance. Appellants requested a formal determination on what effect the applicable zoning district and overlay districts had on development of the property. (R.p. 1589.)

On August 23, 2016, Nicole Dixon, CFM, Senior Planner for the Town of Hilton Head Island, issued her Determination Letter that the Welcome Center was permitted to be constructed as proposed. (Determination Letter, R.p. 1589.) Appellants appealed Ms. Dixon's Determination Letter to the Town's Board of Zoning Appeals ("BZA") in case number APL001515-2016, and a hearing was held on November 28, 2016. (Appeal Petition, R.p. 1569; Trans. of Hr'g, Nov. 28, 2016, R.p. 605.) At the conclusion of the hearing, a motion was made and seconded to deny the appeal. That motion passed by a 4-2 vote. (Trans. Hr'g, Nov. 28, 2016, R.pp. 720-21.) The Board of Zoning Appeals issued a Notice of Action on November 30, 2016. (Notice of Action, Nov. 30, 2016, R.p. 1566.)

Appellants moved for reconsideration before the BZA, and a hearing on the motion for reconsideration was heard by the BZA on January 23, 2017. (Trans. of Hr'g, Jan.23, 2017, R.p. 93.)

On December 30, 2016, Appellants appealed the BZA decision to the circuit court. (Notice of Appeal and Petition, dated Dec. 30, 2016, R.p. 1527.) On February 6, 2017, Respondent SDC Properties, Inc. ("SDC") moved to intervene in the appeal to the circuit court as a necessary party to the proceedings. On March 28, 2017, the circuit court entered a Consent Order granting SDC's motion to intervene and be joined as party defendant. (Consent Order, dated March 28, 2017, R.p. 17.)

On April 17, 2017, Appellants filed an Amended Notice of Appeal and Petition, and on July 24, 2017, Appellants filed a Second Amended Notice of Appeal and Petition. (2nd Am. Notice of Appeal and Petition, dated July 24, 2017, R.p. 20.) On November 16, 2017, the circuit court held a hearing on the appeal. (Trans. of Hr'g, Nov. 16, 2017, R.p. 725.) At the conclusion of this hearing, the Special Circuit Judge remanded the matter to the BZA for rehearing and directed the BZA to answer three questions for the circuit court's further consideration. (Order, dated April 20, 2018, R. p. 13.)

On August 27, 2018, the BZA heard the remanded appeal. (Trans. of Hr'g on Aug. 27, 2018, R.p. 818.) At the rehearing, the BZA answered the Special Circuit Judge's three questions. (*Id.*)

On March 12, 2019, the circuit court held a hearing on the merits of the appeal, taking into consideration the answers from the BZA. (Trans. of Hr'g on March 12, 2019, R.p. 1149.) On September 11, 2019, the circuit court issued its Order, concluding that the Town's staff and BZA committed no error of law, no arbitrariness or

unreasonableness, and no abuse of discretion and upheld the decision of the BZA that the proposed development would be permitted. (Order (Ending Case), dated Sept. 11, 2019, R.p. 4.)

On September 13, 2019, Appellants filed a Motion to Alter or Amend Judgment in the circuit court. (Mtn. to Alter or Amend, filed Sept. 13, 2019, R.p. 586.) On March 17, 2020, the circuit court issued its Order denying Appellants' Motion to Alter or Amend Judgment. (Order, dated March 17, 2020, R.p. 1.) This Appeal followed.

STANDARD OF REVIEW

This court has recently set forth the standard of review on appeal from a decision of a zoning board in *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018).

> On appeal, we apply the same standard of review as the circuit court below . . . . In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [b]oard is correct as a matter of law." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004). "However, a 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.* (quoting *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cty*., 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *Cty. of Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

Id. at 182-83, 813 S.E.2d at 880-81.

STATEMENT OF FACTS

This dispute is over whether SDC's proposed use of certain property as a Welcome Center is allowable under the current zoning ordinances for the Town of Hilton Head.

The proposed development of the Spinnaker Welcome Center was submitted to the Town of Hilton Head Island for permitting through Development Plan Review Application DPR-001056-2016 (the "DPR Application" R.p. 1627). The subject property is a tract of land within a larger development commonly referred to as the Waterside PUD. The subject property consists of 1.068 acres and is designated as "Parcel E" on the plat of survey entitled "15.100 Acres Waterside P.U.D." recorded in Beaufort County Plat Book 35 at Page 79 (the "Waterside PUD Survey"). The Waterside PUD Survey shows a 15.100 acre tract subdivided into four separate parcels. Parcel E is the subject of the DPR Application, the Determination Letter, and this Appeal. The tract designated as "Parcel D" is the right-of-way of Waterside Drive. The tract designated as "Parcel F" is the site of the Waterside by Spinnaker interval occupancy (timeshare) development (the "Spinnaker Project"). The tract designated as "Parcel A&C" is the site of the Beachwalk Hotel. (Attachment A to the Appeal Application filed with BZA, R.p. 1592.)

Appellant Beachwalk Hotel & Condominiums Association, Inc. is the owners' association for various condominium units in the Beachwalk Hotel. Appellant Beachwalk Hilton Head, LLC is the owner of many of the condominium units in the Beachwalk Hotel.

Parcel E, the subject property, and the Waterside PUD as a whole are subject to several zoning designations. Per the Town of Hilton Head Land Management Ordinance ("LMO"), codified as Title 16 of the Municipal Code of the Town of Hilton Head Island, the base zoning district is Resort Development ("RD"). The Waterside PUD is also located within the PD-2 Waterside (Town Center) Overlay District ("Waterside PD-2 District").

What is now the Waterside PD-2 District received preliminary approval on December 12, 1983 from the Joint Planning Commission under the provisions of the

Town's 1983 Development Standards Ordinance (the "DSO") as the Town Center P.U.D. The November 5, 1984 Conceptual Master Plan for Town Center P.U.D. (the "1984 Master Plan"),[1] which Ms. Dixon refers to in the Determination Letter, was part and parcel of that approval. A copy of the 1984 Master Plan is attached to the original appeal to the BZA as Exhibit C. (R.p. 1593.)

It is undisputed that on May 6, 1987, the Town's Planning Commission voted to approve a conditional use application to change the boundary of the Waterside PUD, which resulted in the current configuration of the Waterside PUD Tract, and also a special exception application to amend the 1984 Master Plan to (i) increase the number of hotel rooms permitted on the Waterside PUD Tract from 50 rooms to 94 rooms, (ii) reduce the permitted square footage for office and retail space, (iii) reduce the permitted residential dwelling units from 222 to 200, and (iv) require 1.3 acres of common open space. The files of the Town Planning Department no longer contain a copy of the 1987 Master Plan.

Shortly after the Planning Commission's approval of the 1987 Master Plan, the structure that is now the Beachwalk Hotel was permitted on Parcels A & C of the Waterside PUD Tract, and thereafter construction was completed.

By way of a letter on March 3, 1995, to Robert L. Graves, Thomas P. Brechko, the then equivalent of the LMO Official, acknowledged the right of Pope Avenue Associates, then the owner of the Waterside PUD Tract, to develop the Waterside PUD Tract in conformance with the 1987 Master Plan, and he approved a Categorical Exemption for the Waterside PUD (the "Categorical Exemption") from all subsequent amendments to

[1] What is now the Waterside PUD was originally named Town Center P.U.D.

the DSO[2] and the LMO with regard to permitted uses, densities and design standards for five years, after which any future development on the Waterside PUD Tract parcels is to be subject to all relevant provisions of the LMO. A copy of Mr. Brechko's March 3, 1995 letter to Mr. Graves is attached to the original appeal to the BZA as Exhibit D. (R.p. 1594.)

The Categorical Exemption was issued upon application by Pope Avenue Associates under the administrative procedures adopted by the Town Council pursuant to former LMO Section 16-7-698, which provided for procedures for the determination of vested rights in order to provide fair and equitable determination of vested rights claimed by property owners pursuant to any approval previously granted under the LMO or any approval previously granted prior to the adoption of the LMO. Pope Avenue Associates claimed the vested right to develop the Waterside PUD Tract as allowed under the 1987 Master Plan, notwithstanding subsequent amendments to the LMO that limited development on the Waterside PUD Tract to lower development densities and more strict development standards, and the Categorical Exemption recognized Pope Avenue Associates' right to do so prior to the five-year expiration date of the Categorical Exemption.

After the issuance of the Categorical Exemption, the Spinnaker Project was permitted on Parcel F of the Waterside PUD Tract, and thereafter construction was completed.

[2] DSO was the Town's development standards ordinance that was in place prior to the Town's adoption of its first version of the Land Management Ordinance on 19 January 1987.

Of particular importance to this Appeal, the Categorical Exemption expired on March 3, 2000. After that date, any future development on the Waterside PUD Tract "shall be subject to all relevant provisions of the then existing LMO."

The current LMO was adopted on October 7, 2014, after the original creation of the Waterside PD-2 District. However, LMO Section 16-1-108.F.2 recognizes the continuing validity of PD-2 Master Plans and the corresponding PD-2 Planned Development Overlay Districts, such as the Waterside PD-2 District following the adoption of the 2014 LMO.

The purpose of the PD-2 Overlay District is to encourage creativity in design and planning in the development of parcels by allowing greater design flexibility than the underlying base zoning district so that natural features may be protected and development concentrated in more suitable or less environmentally sensitive areas. LMO Section 16-3-106.G.1. Any use permitted in the underlying base district is permitted in a PD-2 Overlay District. LMO Section 16-3-106.G.3.

To allow for the encouraged design flexibility, concentration of development, and protection of natural features, a section or phase of a PD-2 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 PD-2 planned development, or by an appropriate reservation of common open space elsewhere in the PD-2 planned development. LMO Section 16-3-106.G.4.a. Of particular importance to this appeal, LMO Section 16-3-106.G.4.a provides that the average density for the PD-2 Overlay District

shall not exceed the maximum density permitted in the base zoning district. (Emphasis added.)

When the appeal came before the circuit court, the key issues came down to the effect of the RD zoning and the PD-2 Overlay District on what could and could not be constructed on Parcel E. The Special Circuit Judge remanded the matter to the BZA to answer three questions. The questions and the BZA's answers[3] are as follows:

Question 1:

Is Parcel E in a PD-2 Overlay District established by the LMO?

Answer: The BZA unanimously voted to "affirm that Parcel E is in a PD-2 Overlay District established by the LMO."

Question 2:
If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?

Answer: The BZA unanimously voted "that Parcel is subject to the LMO's PD-2 Overlay District regulations."

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."

[3] Trans. of Hr'g on remand on Aug. 27, 2018 (R.p. 992); Notice of Action by the BZA on the remand of this appeal (R.pp. 527-30.)

ARGUMENT

II. The circuit court erred in upholding the decision of the Town of Hilton Head Island Board of Zoning Appeals to affirm the planning staff determination approving the proposed development of a Spinnaker Welcome Center on Hilton Head Island.

C. The circuit court erred as a matter of law in failing to take into account the existing development within the Waterside PD-2 Overlay District when evaluating whether any density remained for development of Parcel E.

The substantive issue in this appeal is the applicability of the PD-2 Overlay District average density regulations in LMO Section 16-3-106.G.4.a to the development of Parcel E. The LMO provides guidance for its interpretation. First, LMO Section 16-1-106.A.1 provides, "When any LMO provision is inconsistent with another LMO provision... the more restrictive provision shall govern unless the terms of the more restrictive provision specify otherwise." Further, LMO Section 16-1-106.A.2 provides, "When there is a conflict between an overlay zoning district and an underlying base zoning district, the provisions of the overlay district shall control."

In this case, the underlying base zoning district is RD (Resort Development District). The density guidelines for the RD district are found in the LMO at LMO Section LMO 16-3-105.L.3.

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

Upon remand, the BZA held that 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." Accordingly, Parcel E cannot be developed in vacuum separate from the remainder of Waterside PD-2 District. The Density and Development Standards for a PD-2 Overlay District must apply.

According to the Town's records, over the years of the development of the Spinnaker Project within the Waterside PD-2 District, Building Permits for the construction of 198 dwellings units were issued.[4] In addition, one Building Permit for a nonresidential structure with 5,262 square feet was issued.[5] Under the current RD District regulations, which allows a maximum of 16 dwelling units per net acre (LMO 16-3-105.L.3), the Town requires 12.375 acres to support the existing 198 dwelling units in the Spinnaker Project. Given the RD District's maximum nonresidential density of 8,000 square feet per net acre (LMO 16-3-105.L.3), the Town requires 0.658 acre to support the existing nonresidential development that is part of the Spinnaker Project. Therefore, under current LMO regulations, the Spinnaker Project's existing density would take up 13.033 acres of land in the RD District.

To the Appellants' information, the Beachwalk Hotel was originally developed with 91 hotel rooms. Under the current RD Zone regulations, which allow a maximum of 35

[4] Town Building Permits 8215, B9800299, B9901068, B9902863, B0000531, B0002113, B0100890, and B0101129. (R.p. 169.)
[5] Town Building Permit B0000199. (R.p. 169.)

hotel rooms per net acre, the Town requires 2.600 acres to support the existing 91 hotel rooms on the Beachwalk Hotel tract.[6] LMO 16-3-105.L.3.

Averaging the existing density of the Spinnaker Project and the Beachwalk Hotel over the entire 15.10 acres of the Waterside PUD Tract, under current LMO requirements for the RD District, 15.633 acres must be allocated to the existing development for the Spinnaker Project and the Beachwalk Hotel. This is less than the acreage existing for development. Therefore, there is no remaining density available, and the development of the Spinnaker Welcome Center cannot be permitted.

In reaching its determination that development of the Spinnaker Welcome Center would be permitted, the circuit court relied on several points without any basis in law or the LMO. First, the circuit court found it persuasive that the development of Parcel E would consist of 7,500 square feet, which is less than what would have been permitted under the Categorical Exemption Certification. Second, the circuit court found it persuasive that the proposed development of Parcel E at 7,500 square feet would not exceed what would be allowed for nonresidential construction in the RD District or under the former master plan for the property. There is no carve out in the PD-2 Overlay District density requirements that allows these sorts of consideration. The current development limitations within the PD-2 Overlay District cannot be ignored simply because the proposed development is possibly less intensive than what could have been developed under expired development standards or on property with the same base zoning but not subject to the PD-2 Overlay District.

[6] In fact, according to the Waterside PUD Survey, the Beachwalk Hotel tract, which is Parcel A&C on the Waterside PUD Survey, is exactly 2.60 acres. (R.p. 1592.)

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston County Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E. 2d. 6,8 (1993). "The determination of legislative intent is a matter of law." *Eagle Container Co. v. County of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894(2008). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. " *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000). "If a statute's terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense." *Etiwan Fertilizer Co. v. South Carolina Tax Comm'n*, 217 S.C. 354, 360, 60 S.E. 2d 682, 684(1950). "The prime object, of course, in the construction of a statute is to ascertain and give effect to the legislative intent." *Id.*

In this case, the BZA held that Parcel E is subject to the LMO's PD-2 Overlay District regulations, and the circuit court had no right or authority to impose any meaning contrary to the requirement that the average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district. Accordingly, this Court should reverse the circuit court and find that the proposed development cannot be permitted on Parcel E.

B. The circuit court erred as a matter of law in basing its decision in part on a finding that if Appellants prevail then there would be no allowable economic utility for the subject property.

In its Order (Ending Case), the circuit court finds, "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 could take place thereon. (Order, dated Sept. 11, 2019, R.p. 4.) The transcript of the BZA's hearing on August 27, 2018, also shows there was some sentiment among the Town Staff and some members of the BZA that following the requirements of the current LMO, in particular the PD-2 Overlay District average density regulations of LMO Section 16-3-106.G.4.a, would make Parcel E "unbuildable" or "worthless." For example:

1. the comment by Gregory M. Alford, Esq., counsel for the Town, that it "Puts the Town in a tough spot" at Page 146, Lines 9-10 of the transcript of the August 27, 2018 hearing (R.pp. 1001-02);

2. BZA member Robert Johnson's comments beginning on Page 174, Line 12 through Page 175, Line 5 of the transcript (R.pp. 1037-38);

3. Page 189, Lines 21-22 of the transcript, where Ms. Dixon states, "And staff does not think we can determine that the lot [referring to Parcel E] is unbuildable." (R.p. 1056); and

4. the last paragraph of BZA Member Jerry Cutrer's motion in the Notice of Action and beginning at Page 251, Line 22 through Page 252, Line 2 of the transcript (R.p. 1135), in which he refers to *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

Appellants respectfully note that the record clearly shows that Parcel E could have been developed by the SDC's predecessor in title to Parcel E, and also by SDC itself, pursuant to the vested use and density rights recognized by the March 3, 1995 Categorical Exemption before the Categorical Exemption expired on 3 March 2000. The fact is, Respondent SDC Properties, Inc., for reasons unknown to the Appellants, chose not to develop Parcel E prior to the expiration of the Categorical Exemption, and thus SDC assumed the risk of not relying on the "use it or lose it" benefit conferred on Parcel E by the Categorical Exemption. Taken in this context, any inability to further develop Parcel E is not a harsh result, but rather is a self-inflicted predicament.

Moreover, what the Town's staff, BZA, and circuit court are contemplating is the possibility of a subsequent lawsuit by Respondent SDC Properties, Inc. alleging a regulatory taking. However, this is not a regulatory taking case. This is a case solely examining whether the Town of Hilton Head Island's staff and BZA properly interpreted the LMO. As much was noted by counsel for Respondent SDC Properties, Inc. at the hearing on November 25, 2019, on Appellants' motion to alter or amend, wherein he stated, "these -- not a taking case, but it's a dark cloud over this whole case at this point." (Trans. Hr'g,, Nov. 25, 2019, p. 35, lines 22-23, R.p. 1283.)

The jurisdiction of the BZA is circumscribed by S.C. Code Ann. § 6-29-800 and does not encompass adjudication of an alleged regulatory taking. Whether a decision in favor of Appellants could possibly constitute a taking is a separate legal matter with the possible remedy of just compensation being paid to Respondent SDC Properties, Inc. It was an error of law for the circuit court to interpret the zoning ordinance so as to avoid the possibility of Respondent Town of Hilton Head Island facing a regulatory taking claim. Accordingly, the circuit court erred in basing its decision in part on the avoidance of a possible regulatory taking claim, and this Court should reverse the circuit court's decision.

CONCLUSION

For the reasons set forth above, 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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants' Final Brief has been served on the Respondents and that the Appellants' Final Brief complies with Rule 211(b), SCACR.

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