THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master in Equity

Appellate Case No. 2021-000139
Case No. 2020-CP-07-0112

Eric Greenway, as Agent for Beaufort County...……..Appellant,

v.

Beaufort County Zoning Board of Appeals, Robert Sample, Jr., and Ballpark Place, LLC……..……...Respondents.

FINAL BRIEF OF APPELLANT

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II. The trial court erred in finding that a parcel of real property which is improved for the placement of fewer than three manufactured homes and on which only one home site is leased is designated as Manufactured Home Community, as defined by Section 106-1098, Code of Ordinances for Beaufort County, Zoning and Development Standard, Supp. No. 24.

STATEMENT OF THE CASE

I. Procedural History

On January 20, 2020, Eric Greenway, the Director of the Beaufort County Department of Community Development, as agent for Beaufort County (hereinafter "Appellant"), filed a Petition for Appeal from the Beaufort County Zoning Board of Appeals (hereinafter "Petition") in the Beaufort County Court of Common Pleas appealing a Decision of Respondent Beaufort County Zoning Board of Appeals (hereinafter "ZBOA") dated November 22, 2019 which overturned a decision of the Director of the Beaufort County Department of Community Development and found that the use of real property owned by Respondent Ballpark Place, LLC (hereinafter "Ballpark Place") as a manufactured home community was a lawfully existing legal nonconforming use under the relevant ordinance. The matter came before the Honorable Marvin H. Dukes, III in the Court of Common Pleas on August 6, 2020. The Court of Common Pleas issued an Order Denying and Dismissing Appeal (hereinafter "Order") on October 6, 2020 which upheld the decision of the ZBOA.

On October 16, 2021, the Appellant filed a Motion for Reconsideration of the Order. Judge Dukes denied the Motion for Reconsideration in a Form 4 Order dated January 26, 2021. This appeal followed by Notice of Appeal dated February 1, 2021.

II. Statement of the Facts

A. History of the Property and Applicable Zoning Ordinances

This matter concerns real property located on Ball Park Road, Saint Helena Island, South Carolina (hereinafter the "Property"). In the past, there were multiple manufactured homes located on the Property and the Property was used as a Manufactured Home

Community.[1] Pursuant to the applicable zoning ordinances at the time, as set out in the Code of Ordinances for Beaufort County in Chapter 106, Zoning and Development Standards (hereinafter the "Old Code"), a Manufactured Home Community was defined, in pertinent part, as "[a] parcel of land planned and improved for the placement of three or more manufactured homes for use as residential dwellings where home sites within the development are leased to individuals who retain customary leasehold rights."[2] Manufactured Home Communities were permitted for limited use under the Old Code in areas zoned Rural.[3] The Property was zoned Rural under the Old Code.

From 2009 to the time of the filing of the Petition, there had been at least one continuously occupied manufactured home located on the Property.[4] The address of this manufactured home was 89 Ball Park Road.[5] However, there is no evidence that there has been more than one manufactured home located on the Property since July 2013 and there is no evidence that there has been more than one manufactured home actually rented on the Property since May 2011.[6] Respondent Robert Sample (hereinafter "Sample") has acknowledged that Ballpark Place's predecessor in title divested itself of all but one mobile home on the Property.[7] There is nothing in the record that reflects that more than one site on the Property was improved for the placement of a manufactured home since 2013, at the latest.[8] There is evidence that three sites on the Property were connected to electricity

[1] R. pp. 32–38, 172–179.
[2] Code of Ordinances for Beaufort County, Sec. 106-1098 (as amended by Ord. No. 2014/2, 1-13-2014)
[3] *Id.*
[4] R. pp. 40–56, 110–160.
[5] *Id.*
[6] *See generally*, R. pp. 76–181.
[7] R. pp. 58, 67–68, 180–181.
[8] R. pp. 32, 172, 179. The Rent Roll for 2013 indicates that several of the sites are "Vacant." A generous interpretation of this designation would be that, if the sites were vacant, they could be filled. However, no such evidence exists for subsequent years.

until 2016 but only two sites have been connected to electricity since May 2016.[9] The only evidence in the record concerning the Property for the year 2017 is that there was one manufactured home on the Property, that manufactured home was leased, and there were electric connections for that manufactured home and one other site. The only evidence in the record concerning the Property for the year 2018 is that there was one manufactured home on the Property, that manufactured home was leased, and there were electric connections for that manufactured home and one other site.

From November 16, 2010 until May 30, 2019, the Property was owned by CSB Property Management II, LLC.[10] CSB Property Management II, LLC conveyed the Property to Ballpark Place on or about May 30, 2019.[11] Sample represents that he is the holder of the entirety of the membership interest in Ballpark Place.[12] In that capacity, Sample wished to use the Parcels as a manufactured home park.[13] To effect that wish, Sample had contractors and representatives of local utilities visit the parcels to identify the underlying infrastructure.[14] However, he made no repairs or other upgrades to the property.[15]

B. <u>Adoption of the CDC and Applicability Thereof</u>

The Community Development Code of Beaufort County (hereinafter "CDC") was adopted by the County Council of Beaufort County on December 8, 2014 and supplanted the Old Code.[16] With the adoption of the CDC, the Property was zoned T2 Rural

[9] R. pp. 72–73, 162–163, 169–170, 202–203.
[10] R. pp. 165–166, 210-211.
[11] *Id*.
[12] R. pp. 163–164, 171, 204; R. pp. 58, 67–68, 180–181.
[13] *Id*.
[14] R. pp. 62, 83, 197.
[15] *Id*.
[16] *See* Beaufort County Ordinance 2014 / 36

(hereinafter "T2R"). Manufactured Home Communities are not a permitted use in T2R zones.[17] However, uses established before the adoption of the CDC which do not conform to the CDC's terms and requirements, but which were properly permitted and legally established at the time of their establishment, are known as Legal Nonconformities under the CDC.[18]

A legal nonconforming use may be continued on a parcel if that use is not abandoned.[19] However, "[i]f a nonconforming use is abandoned for a period of one year or longer, it shall not be reestablished and shall only be replaced with a conforming use."[20] The burden of establishing that a nonconformity lawfully exists is the responsibility of the owner of the land on which the nonconformity is located.[21] The Director of the Beaufort County Department of Community Development (hereinafter "DCD") is charged with determining whether a legal nonconforming use has been abandoned for a period of one year or longer.[22] In determining whether the use has been abandoned for more than one year, the Director must consider "all of the facts and circumstances regarding the nonconforming use, including, but not limited to the following:

1. If steps have been taken by the property owner to resume the nonconforming use;

2. If utility services such as water, gas, and electricity to the property have been disconnected;

3. If equipment or fixtures necessary for the operation of the nonconforming use have been removed;

4. If signs advertising the nonconforming use have been removed;

[17] CDC § 3.1.60
[18] CDC § 10.1.140
[19] CDC § 8.2.40(A)
[20] *Id.*
[21] CDC § 8.1.30
[22] CDC § 8.2.40(B)

5. If business licenses for the nonconforming use have expired or not been renewed;

6. If activities generally associated with the nonconforming use are no longer observed on the property; and

7. Other actions which, in the opinion of the Director, demonstrate an intention on the part of the owner to abandon the nonconforming use."[23]

C. <u>Determination of Abandonment of Legal Nonconformity</u>

In July and August of 2019, Sample sent emails to Greenway, in Greenway's capacity as Director of the DCD, seeking a determination as to whether the Property's use as a Manufactured Home Community had been abandoned.[24] In a responsive email to Sample dated August 14, 2019, Greenway stated that he, Greenway, had reviewed historical aerial photographs of the Parcels and saw no verifiable evidence that multiple homes had been located on the property for use as residences.[25] Also in that email, Greenway informed Sample that actual proof of the Property's use as a manufactured home park was necessary.[26] On August 26, 2019, Sample emailed copies of rent rolls for the sites on the Property which confirmed that there had been only one mobile home rented on the parcels since June 2011.[27] Sample never provided any evidence that more than one mobile home had been rented on the Parcels since June 2011.

Greenway undertook a review of the information provided by Sample and other pertinent information, including without limitation the Property's electric service history and rent rolls, historic aerial photographs, and tax records in order to determine whether

[23] CDC § 8.2.40(B)
[24] R. pp. 58, 67– 68, 180–181; R. pp. 72, 169, 202.
[25] R. pp. 67, 180.
[26] *Id*.
[27] R. pp. 168–179.

the Property's use as a Manufactured Home Community had been abandoned.[28] In applying the considerations set out in CDC § 8.2.40(B) to the years 2017 and 2018, the information in Greenway's possession showed that, for those years: there was no information concerning steps that had been taken by the property owner to resume the nonconforming use, electricity had been disconnected from all but two sites, only one site was fully connected to utilities, there was no information concerning whether equipment or fixtures necessary for the operation of the nonconforming use had been removed, there was no information concerning whether signs advertising the nonconforming use had been removed, there was no information concerning whether business licenses for the nonconforming use had expired or not been renewed, activities generally associated with the nonconforming use were no longer observed on the property, and that the current state of the Property tended to show that its use as a Manufactured Home Community had been abandoned for a considerable amount of time. In other words, there was no information pertaining to two full calendar years which would tend to show that the Property's use as a Manufactured Home Community had been continued during that time.

On September 24, 2019, Greenway communicated his determination to Sample in an email which stated that "insufficient evidence exists . . . in order to establish this property as a legal non-conforming mobile home park" and that, therefore, the Property's use as a Manufactured Home Community had been abandoned.[29] In that email, Greenway also informed Sample that the email constituted an "official written determination and must be appealed within 30 days of receipt of this email."

[28] R. pp. 75, 167.
[29] *Id*.

D. Appeal of Greenway's Determination to the ZBOA

On October 24, 2019 Sample filed an Application for Appeals with the ZBOA. The ZBOA is authorized to serve as the appellate body for decisions on interpretations of all provisions of the CDC.[30] Appeals of an administrative agent are solely based on the materials available to the agent rendering the initial decision and advisory bodies prior to the decision and the ZBOA cannot consider new or altered plans.[31] The ZBOA must base its decision solely on the record of the appeal, as supplemented by arguments presented at the public hearing.[32] The CDC limits the ZBOA's findings in an appeal to the following:

> a. The decision-maker made an error in determining whether a standard was met. The record must indicate that an error in judgment occurred or facts, plans, or regulations were misread in determining whether the particular standard was or was not met;
>
> b. The decision-maker made the decision based on a standard not contained in this Development Code or other appropriate County ordinances, regulations, or state law, or that a standard more strict or broad than the standard established in this Development Code was applied. (This Development Code does not allow administrative decision-makers to consider or create standards not officially adopted); or
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> c. The decision-maker made an error in applying a standard or measuring a standard.[33]

The Application for Appeals stated that Sample was appealing Greenway's determination that "the legal nonconforming use of a mobile home park had been

[30] CDC § 7.3.70.B.1.e.
[31] CDC § 7.3.70.C.5.
[32] CDC § 7.3.70.C.6.(a)
[33] CDC § 7.3.70.D.1.c.

abandoned for a period of one year or longer."[34] The Application for Appeals claimed that the determination by Greenway was in error because it was arbitrary and capricious and was contrary to the explicit provisions of the CDC.[35] Sample asserted that Greenway ignored the language of the CDC and applied a "non-existence (*sic*) 'burden of proof' to [Sample's request]."[36]

Sample's appeal was heard by the ZBOA on November 21, 2019. During the hearing, the ZBOA considered (1) the arguments from Greenway and from counsel for Ballpark Place and Sample, (2) testimony from Sample, and (3) the documents contained in the Record on Appeal from page 88 to page 181. The ZBOA acknowledged that there had only been one manufactured home and one resident on the Property since at least 2013, as shown on the rent rolls.[37]

Sample testified that the extent of his work on the property had been "poking around trying to find [the] infrastructure."[38] When asked how many home sites on the property were in suitable repair for usage, Sample acknowledged that the use of the Property as a Manufactured Home Community had been abandoned. He stated "The stands have to be repaired. When the previous owner removed the homes, they messed up the stands."[39] Sample also acknowledged that over the preceding several years, he thought that there had been fewer than two home sites occupied.[40] There was no evidence presented during the hearing by Sample or otherwise which indicated that more than one mobile home or more than one space on which a mobile home could be placed had been available

[34] R. p. 100.
[35] R. p. 105.
[36] *Id.*
[37] R. pp. 64, 85, 199.
[38] R. pp. 62, 83,197.
[39] R. pp. 64, 85, 199.
[40] *Id*.

for rent during the several years preceding the hearing. No additional information was provided concerning the use of the Property during 2017 and 2018.

The ZBOA asked Greenway if the Property was a parcel of land planned and improved for the placement of three or more manufactured homes for the use as residential dwellings.[41] Greenway stated that there was no of evidence of the same.[42] The ZBOA then asked Greenway if the Property still met the definition of a Manufactured Home Community as defined by the Old Code.[43] Greenway stated that there was no evidence that it did.[44]

The ZBOA then moved (1) to overturn the determination that the pre-existing legal nonconforming use was abandoned for more than one year and (2) to decide that the Property would remain as an existing legal nonconforming use for a mobile home park.[45] The motion was seconded and approved.[46] The ZBOA issued a written decision (hereinafter the "ZBOA Decision") that stated that Sample's appeal was granted and was based on the following findings:

> 1) The property continued to have pads available for rent and thus met the requirement of the former statute of the use of the property.
>
> 2) There was no interruption in the legal, pre-existing, non-conforming use.[47]

[41] *Id*.
[42] R. pp. 65, 86, 200.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] R. pp. 26, 79, 193.

E. Appeal of the ZBOA Decision

Greenway sought to overturn the ZBOA Decision on the grounds that its findings were arbitrary and unsupported by the evidence because they had no basis in the record of the appeal from Greenway's determination. In the Petition and during the hearing on the Petition, Greenway argued that, in order for Ballpark Place to meet the burden imposed by CDC § 8.1.30 and establish that the Property's use as a Manufactured Home Community lawfully existed, it would have been necessary for Ballpark Place to provide Greenway with information which showed that, without having been abandoned for a year or longer, (1) the Property was planned and improved for the placement of three or more manufactured homes for residential use **and** (2) more than one site on the Property was leased.[48] Greenway argued that the information considered by Greenway in making his determination and the record considered by the ZBOA showed that (1) the improvement of the property for the placement of three or more manufactured homes had been abandoned since 2016, at the latest, and (2) since 2011, only one site on the Property had actually been leased.

On July 31, 2020, counsel for the ZBOA filed a *Return of Beaufort County Zoning Board of Appeals to Appellant's Petition for Appeal from the Beaufort County Zoning Board of Appeals*. On August 5, 2020, counsel for Ballpark Place and Sample filed a R*eturn of Robert Sample, Jr. and Ballpark Place, LLC to Appellant's Petition for Appeal from the Beaufort County Zoning Board of Appeals*. With few exceptions, these returns were identical and will be referred to hereinafter as the "Returns." Much of the material

[48] R. p. 21; R. pp. 245–246, ll. 9-22.

contained in the Returns, on which the Respondents also relied during the hearing, was inaccurate and unsupported by the record, including the following:

a. "The parcels . . . presently contain nine improved sites intended for the placement of manufactured homes."[49]

b. "Currently, the parcels have access to water, sanitary sewer, and electricity."[50]

c. "Additionally, several of the sites continued to have active electrical service and only required electrical meters for active service."[51]

d. "Upon the purchase of the Park, Mr. Sample began work to prepare all the sites for the continued placement of manufactured homes."[52]

e. "Mr. Sample verified that utilities were still connected, such as sanitary sewer available to each site through functioning septic systems, and water available to each site via a well in the Park."[53]

f. "Mr. Sample also verified that electrical utilities were available to each site and functioning, and that the stands required to place new manufactured home were functional or repairable."[54]

g. "All sites were available for lease for home sites, with one site continually being leased by Mr. Pope."[55]

h. "Mr. Sample indicated the only issue with the sites was the condition of the 'stands' for the placement of incoming homes, which could be easily repaired."[56]

i. "However, the Park continued to operate and address any repair issues."[57]

j. "Mr. Sample testified that each of the sites had currently operating water supplies provided by an onsite well system, and sanitary sewer was provided to each site via functioning septic systems."[58]

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[49] R. p. 182
[50] *Id*.
[51] R. p. 184
[52] *Id*.
[53] *Id*.
[54] R. pp. 184-185
[55] R. p. 185
[56] R. p. 188
[57] R. p. 189
[58] *Id*.

k. "The functioning water, sewer, and electrical services were still available at the site."[59]

l. ". . . other sites are available for home placement."[60]

m. ". . . there was evidence of the continued existence of utility hook-ups."[61]

n. ". . . visible evidence of the continued Manufactured Home Community use."[62]

During the hearing, counsel for Greenway called to the court's attention the fact that these statements were inaccurate and unsupported by the record and objected to the court's consideration of the same.[63] Despite this, the Respondents continued to reiterate and rely on matter outside the record on appeal. The Respondents made no argument to rebut the fact that there was no evidence for the years 2017 and 2018 which would indicate that the use of the Property as a Manufactured Home Park had not been abandoned.

F. The Lower Court's Ruling

The court issued its Order on October 6, 2020, upholding the ZBOA Decision. Much of the Order's findings of facts do not reflect the record on appeal and restated the inaccuracies stated in the Returns, including the following:

1. "The parcels were planned for and presently contain nine improved sites intended for the placement of manufactured homes."[64]

2. "Currently, the parcels have access to utility services for water, sewer, and electricity."[65]

[59] R. p. 189.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] R. p. 251, l. 15 – p. 254, l. 2.
[64] R. p. 2
[65] *Id.*

3. "During the time of the CSB's ownership of the Park, several of the nine pads were leased to manufactured homeowners . . ."[66]

4. "Upon the purchase of the Park, Mr. Sample began work to prepare all the sites for the continued placement of manufactured homes."[67]

5. "During his preparations of the Park, Mr. Sample verified that utilities were still connected, such as sewer available to each site through functioning septic systems, and water available to each site via a well in the Park."[68]

6. "Mr. Sample also verified that electrical utilities were available to each site and functioning, and that the stands required to place new manufactured home were functional or repairable."[69]

7. "All sites were available for lease for home sites . . ."[70]

8. "During their presentation to the Board, Mr. Sample and his counsel presented evidence of the continuous, uninterrupted use of the Park as a Manufactured Home Community . . ."[71]

9. "The Board received evidence showing the Park continued to meet the requirements of Section 106-1098 of the Old Code."[72]

10. "The evidence presented to the Board included . . . testimony from Mr. Sample that the sites had water and sewer services available."[73]

11. "When asked how many sites were not in suitable repair for usage, Mr. Sample indicated the only issue with the sites was the condition of the "stands" for the placement of incoming homes, which could be easily repaired."[74]

12. "The evidence presented to and elicited by the Board clearly addressed the seven criteria."[75]

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[66] R. p. 2.
[67] R. p. 3.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] R. p. 5
[73] R. p. 6
[74] *Id.*
[75] *Id.*

13. "However, the evidence presented to the Board clearly indicates that the Park continued to operate and address any repair issues."[76]

14. ". . . Mr. Sample's testimony that each of the sites had currently operating water supplies provided by an onsite well system, and sewer was provided to each site via functioning septic systems."[77]

15. "The functioning water, sewer, and electrical services were still available at the site."[78]

16. ". . . other sites [aside from the one rented by Pope] are available for home placement."[79]

17. ". . . there was . . . visible evidence of the continued Manufactured Home Community use."[80]

In stating its standard of review, the court stated that "The factual findings of the [ZBOA] must be affirmed by the Circuit Court if they are supported by any evidence and not influenced by an error of law."[81] It also stated that "[t]he factual findings of the [ZBOA] will not be disturbed unless a review of the record discloses that there is **no evidence** which reasonably supports the jury's findings."[82]

In its Analysis, the court applied the facts, as it stated them, to the considerations set out in CDC § 8.2.40(B). With regard to the first criterion, "[i]f steps have been taken by the property owner to resume the nonconforming use," the court found that the evidence presented to the ZBOA clearly indicated that the Property continued to operate and address

[76] R. p. 6
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] R. p. 4 (quoting *Stanton v. Town of Pawleys Island*, 317 S.C. 498, 502, 455 S.E.2d 171, 172 (1995)).
[82] R. p. 4 (quoting *Vulcan Materials Co. v. Greenville County Bd. Of Zoning Appeals*, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000).

any repair issues.[83] This finding is inaccurate in that there was no evidence that the Property continued to operate as a Manufactured Home Community. That is to say there was no evidence before the ZBOA which showed that the Property had improved sites for the placement of three or more manufactured homes for residential use which were not abandoned for a year or longer and more than one site on the Property was leased. To the contrary, the latest time at which there possibly could have been sites improved for the placement of three or more manufactured homes for residential use was May 2016, when the evidence showed that there were three sites with electrical connections. From June 2016 to the time of Ballpark Place's appeal, the evidence showed that there were only two sites on the Property with electrical connections. There was no other evidence that any site on the Property was improved such that a third manufactured home could be placed on the Property. Likewise, the evidence was clear that only one site on the Property was ever leased subsequent to May 2011.

With regard to the second criterion, "[i]f utility services such as water, gas, and electricity to the property have been disconnected," the court found that the use as a Manufactured Home Community was not abandoned due to the "email from SC&G (*sic*) stating the status of electric hook-ups to the sites, and Mr. Sample's testimony that each of the sites had currently operating water supplies provided by an onsite well system, and sewer was provided to each site via functioning septic systems."[84] The email from Parks Moss of SCE&G to Sample indicated that there were only two sites with electrical connections for over three years prior to the hearing – the electricity for the remainder of the sites on the Property had been disconnected by June 2016. The court's statement that

[83] R. p. 6
[84] *Id*.

Mr. Sample testified to the ZBOA that each of the sites had currently operating water supplies and sewer was provided to each site via function septic systems is wholly fabricated and has no basis in fact. The ZBOA Hearing Minutes indicate that Sample spoke during that hearing a total of eight times and did not make the aforementioned statements that the court attributed to him.[85] Sample did state that there was a well on the Property but did not say that it was operating or supplying water to multiple sites.[86] Sample did not testify that there were functioning sewer systems servicing each site but instead stated that there were septic tanks on the Property that he was "trying to identify where they were" and that "are pretty good."[87]

With regard to the third criterion, "[i]f equipment or fixtures necessary for the operation of the nonconforming use have been removed," the court found that the SCE&G email and the statements attributed to Sample concerning water and sewer, discussed in the immediately preceding paragraph, somehow were evidence that no equipment or fixtures had been removed from the Property. The court stated that "[t]he functioning water, sewer, and electrical services were still available at the site," despite there being no such evidence in the record of the same.[88] It also made the inaccurate statement that "other sites (other than the one currently being leased) are available for home placement."[89] There is nothing in the record that indicates that more than one site was available for placement of a manufactured home.

[85] R. pp. 61–65, 82–86, 196–200.
[86] R. pp. 62, 83, 197.
[87] *Id*.
[88] R. p. 6.
[89] *Id*.

The Order did not address the fourth and fifth criteria, "[i]f signs advertising the nonconforming use have been removed" and "[i]f business licenses for the nonconforming use have expired or not been renewed," respectively.

With regard to the sixth criterion, "[i]f activities generally associated with the non-conforming use are no longer observed on the property," the court found that "there was evidence of the continued existence of utility hook-ups, Mr. Pope's home, property tax records, and other visible evidence of the continued Manufactured Home Community use.[90] There was evidence of the continued existence of utility hook-ups but, as stated above, not in the amount sufficient to constitute the existence of a Manufactured Home Community. The presence of Mr. Pope's home (the sole manufactured home on the Property) cannot be said to be an activity generally associated with Manufactured Home Communities. To the contrary, the existence of only one manufactured home for over eight years would tend to indicate that no "community" exists. Property tax records are not activities associated with Manufactured Home Communities. They are, instead, property tax records. The court does not state what the "other visible evidence" it references is and there is no such visible evidence reflected in the record.

Despite the foregoing, the court found "that there was sufficient evidence in the record of this appeal to support the decision of the Board, that the legal nonconforming Manufactured Home Community of the [Property] was not abandoned and continues to be a legal non-conforming use and the decision of the Board is correct as a matter of law."[91]

[90] *Id.*
[91] R. p. 7.

The court found that "the Board's decision was neither arbitrary nor capricious, and that the Board did not abuse its discretion in reversing Mr. Greenway's decision."[92]

The Order did not address the fact that there was nothing in the record before the ZBOA which tended to show that the Property's use as a Manufactured Home Community continued during 2017 and 2018. The Order did not address Greenway's objection to the consideration of material not in the record on appeal. The Order did not address whether a parcel of land which only leased one home site could be considered a Manufactured Home Community as that term was defined by the Old Code. It also did not address which party bore the burden of establishing that a nonconformity lawfully existed.

On October 16, 2020, Greenway filed a Notice of Motion, Motion for Reconsideration, and Memorandum in Support (hereinafter "Motion to Reconsider"). The Motion to Reconsider requested that the court alter or amend its judgment such that it:

1. Does not include matter that was not in the record on appeal;
2. Reverses its ruling on Greenway's objection to the consideration of material not in the record on appeal;
3. Finds that, pursuant to CDC § 8.1.30, the burden of establishing that the Property's use as a Manufactured Home Community was a legal nonconforming use which had not been abandoned was the responsibility of Ballpark Place, LLC;
4. Finds that a parcel of land which only leases one home site cannot be considered a Manufactured Home Community as that term was defined by the Old Code;
5. Finds that there was no evidence in the record on appeal to the ZBOA which reasonably supported the ZBOA's findings

[92] *Id*.

6. Overturns the decision of the ZBOA; and
7. Upholds Greenway's determination that the use of the Property as a Manufactured Home Community was abandoned for one year or more and therefore cannot be continued.[93]

No hearing was held on the Motion to Reconsider and, on January 26, 2021, the court issued a Form 4 Order summarily denying the Motion to Reconsider.[94]

STANDARD OF REVIEW

"The 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."[95] "The findings of fact by the [zoning] 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."[96] "The factual findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings."[97]

Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact.[98] Since the interpretation of an ordinance is a question of law, the appellate court need not give deference to the trial court's interpretation of the provision.[99]

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[93] R. pp. 234–235.
[94] R. pp. 9–10.
[95] *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997).
[96] S.C. Code Ann. § 6-29-840.
[97] *Vulcan Materials Co. v. Greenville County Bd. Of Zoning Appeals*, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000).
[98] *Eagle Container Co. v. Cty. of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008).
[99] *Atkins v. Wilson*, 417 S.C. 3, 11, 788 S.E.2d 228, 233 (Ct. App. 2016).

ARGUMENTS

I. The trial court erred by taking additional evidence that was not in the record on appeal.

As discussed, *supra*, much of the material contained in the Returns, on which the Respondents relied and which the Respondents reiterated during the hearing, was inaccurate and unsupported by the record. The trial court adopted this inaccurate and unsupported material as evidence, which it used for the basis of its findings.[100] The trial court also used material that was not in the record on appeal and not presented to it by the Respondents as a part of the basis for its findings.

S.C. Code Ann. § 6-29-840 states that, in hearing and passing upon an appeal on the certified record of board proceedings, "the court may not take additional evidence." "A zoning board's findings of fact are final and conclusive on appeal."[101] Here, the trial court largely ignored the certified record of board proceedings in favor of the Respondents' and its own erroneous claims. Accordingly, the trial court erred by taking additional evidence that was not in the record on appeal and making the same an integral part of the basis for its ruling.

II. The trial court erred in finding that there was evidence that reasonably supported the Decision of the Beaufort County Zoning Board of Appeals and in finding that the Decision was not arbitrary, was not unreasonable, and the Zoning Board of Appeals did not abuse its discretion.

Under the Old Code a Manufactured Home Community was defined as:

> A parcel of land planned and improved for the placement of three or more manufactured homes for use as residential dwellings where home sites within the development are

[100] *See* Statement of the Facts, II.F., *supra* for a more detailed discussion of inaccurate and unsupported information used by the trial court in its Order.
[101] *Bishop v. Hightower*, 292 S.C. 358, 356 S.E.2d 420 (Ct. App. 1987).

> leased to individuals who retain customary leasehold rights . . . For purposes of this definition, a manufactured home is a residential dwelling built in accordance with the Federal Manufactured Home Construction and Safety Standards (FMHCSS). This does not include recreational vehicles, travel trailers or motorized homes licensed for travel on highways, nor manufactured housing units designed and built to meet applicable requirements of the South Carolina Modular Buildings Construction Act.[102]

During the ZBOA hearing and during the trial court hearing, Greenway conceded that the Property had been legally permitted and used as a Manufactured Home Community at some time in the past. The information presented to him tended to show that, as late as May 2011, there were multiple sites available for rent (and presumably improved such that they could be rented) and there were two sites actually being rented.[103]

With the adoption of the CDC, the Property was zoned T2R, a zone in which Manufactured Home Communities were not a permitted use.[104] Uses established before the adoption of the CDC which do not conform to the CDC's terms and requirements (such as use of a parcel as a Manufactured Home Community in a TRR zone) but which were properly permitted and legally established at the time of their establishment (such as the former use of the Property as a Manufactured Home Community, here), are known as Legal Nonconformities under the CDC.[105]

A legal nonconforming use may be continued on a parcel if that use is not abandoned.[106] However, "[i]f a nonconforming use is abandoned for a period of one year or longer, it shall not be reestablished and shall only be replaced with a conforming use."[107]

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[102] Code of Ordinances for Beaufort County, Sec. 106-1098 (as amended by Ord. No. 2014/2, 1-13-2014)
[103] R. pp. 34, 174.
[104] CDC §3.1.60
[105] CDC § 10.1.140
[106] CDC § 8.2.40(A)
[107] *Id*.

The burden of establishing that a nonconformity lawfully exists, i.e., it has not been abandoned, is the responsibility of the owner of the land on which the nonconformity is located.[108] The Director of the DCD is charged with determining whether a legal nonconforming use has been abandoned for a period of one year or longer.[109] In determining whether the use has been abandoned for more than one year, the Director must consider "all of the facts and circumstances regarding the nonconforming use, including, but not limited to the following:

1. If steps have been taken by the property owner to resume the nonconforming use;

2. If utility services such as water, gas, and electricity to the property have been disconnected;

3. If equipment or fixtures necessary for the operation of the nonconforming use have been removed;

4. If signs advertising the nonconforming use have been removed;

5. If business licenses for the nonconforming use have expired or not been renewed;

6. If activities generally associated with the nonconforming use are no longer observed on the property; and

7. Other actions which, in the opinion of the Director, demonstrate an intention on the part of the owner to abandon the nonconforming use."[110]

Since there was, at one time, a legally established Manufactured Home Community on the Property, that use was a legal nonconformity for the property pursuant to CDC § 10.1.140. However, to continue using the Property as a Manufactured Home Community, it was incumbent upon Ballpark Place to establish that the use had not been abandoned for

[108] CDC § 8.1.30.
[109] CDC § 8.2.40(B).
[110] CDC § 8.2.40(B).

a period of one year or longer.[111] So, Ballpark Place had to prove to Greenway that, subsequent to the adoption of the CDC in December 2014, (1) there was no one-year or longer period during which there were fewer than three sites on the Property improved for the placement of manufactured homes for use as residential dwellings **and** (2) there was no one-year or longer period during which home sites within the development were not leased to individuals.

Since CDC § 8.1.30 placed the burden of establishing that the nonconformity lawfully existed on the property owner, the burden of proof here was totally on Ballpark Place such that neither the County nor any other person had to prove that the nonconformity did not lawfully exist.[112] Ballpark Place wholly failed to meet that burden. For the full calendar years 2017 and 2018 (and much of 2016 and 2019 as well), the only information Ballpark Place provided in support of establishing the continuance of the nonconforming use was that there were two active electrical accounts with SCE&G and there was one manufactured home on the Property that was leased. There was no evidence that, in that more than two-year time frame, there were sites improved such that three manufactured homes could be placed on the Property. Instead, there was evidence that one site was improved for the placement of a manufactured home and another was partially improved. As such there was **no evidence** that there were three sites on the Property improved such that a manufactured home could be placed thereon without interruption for a year or longer.

Likewise, since the Old Code's definition of Manufactured Home Community requires that more than one home site be leased ("where home *sites* within the development

[111] CDC § 8.1.30 (as to Property owner's burden) and CDC §8.2.40A. (as to proscription of continuance of a nonconforming use after abandonment).
[112] *Restaurant Row Assocs. v. Horry County*, 327 S.C. 383, 390, 489 S.E.2d 641, 645 (Ct. App. 1997).

are leased to *individuals*") the information provided to Greenway and the ZBOA is dispositive of the fact that, for an uninterrupted period of at least eight years, only one home site on the property was leased.

Almost all of the information provided by Ballpark Place dealt with events that took place on the Property during the early 2010s and subsequent to the conveyance of the Property to Ballpark Place. If this information has any bearing on the years of abandonment, it is supportive of the fact that the Property's use as a Manufactured Home Community was discontinued in 2011 and never reestablished. For example, the Rent Rolls show that the number of manufactured homes on the property decreased from five in 2009 to one by May of 2011 and all times subsequent thereto.[113] Sample's emails to Greenway regarding his, Sample's, assessment of the condition of the Property indicate that it had not been used as a Manufactured Home Community for some time.[114]

The ZBOA Decision was that the Property "continued to have pads[115] available for rent and thus met the requirement of the former statute of the use of the property" and that "there was no interruption in the legal, pre-existing, non-conforming use."[116] As to the first finding, there was no evidence that the Property continued to have *pads* available for rent. The evidence was that it only continued to have *one* site available for rent and thus did not meet the requirement of the Old Code to rent more than one site. Likewise, there was no evidence that there was no interruption of the use of the Property as a Manufactured Home

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[113] R. pp. 32–38, 172–179.
[114] *See, e.g.*, Exhibit to Certification of Record on Appeal, R. pp. 58, 67–68, 180–181 (Sample claims that utilities are "evident" on the property but does not claim that they are functional); pp. 163–164, 171, 204 ("The previous owner a bank took possession of the property back in 2010. They soon after began removing the homes from the property leaving only one . . ."); pp. 72, 169, 202 (Sample expresses uncertainty about the location of home sites other than the one currently occupied).
[115] Meaning sites for the placement of manufactured homes in this context.
[116] R. pp. 26, 79, 193.

Community. On the contrary, *all* of the evidence supported the fact that the use of the Property as a Manufactured Home Community had been abandoned for years.

Since there was no evidence which could have reasonably supported the findings of the ZBOA, its decision was arbitrary, capricious, had no reasonable relation to a lawful purpose, and was an abuse of the ZBOA's discretion. The trial court's failure to find the same is error and, as such, its decision and the ZBOA decision must be overturned.

III. The trial court erred in finding that a parcel of real property which is improved for the placement of fewer than three manufactured homes and on which only one home site is leased is designated a Manufactured Home Community, as defined by Section 106-1098, Code of Ordinances for Beaufort County, Zoning and Development Standard, Supp. No. 24.

As discussed above, the trial court included material in its ruling which was not a part of the certified record of the ZBOA proceedings. Even so, none of the "facts" cited in the Order evidenced a continual use of the Property as a Manufactured Home Community without a period of abandonment of greater than one year. Even if it were proper for the court to consider those items included in its Order which were outside of the certified record of the ZBOA proceedings, there would still be no evidence that (1) there was no one-year or longer period during which there were fewer than three sites on the Property improved for the placement of manufactured homes for use as residential dwellings and (2) there was no one-year or longer period during which home sites within the development were not leased to individuals. So, it is clear that the court's interpretation of the Old Code's definition of Manufactured Home Community is that there is no requirement for the presence of three improved sites for the placement of manufactured homes and no requirement that more than one home site to be leased. Its interpretation of the ordinance appears to be that use of property as a Manufactured Home Community exists (1) if the

property was, at some point, planned and improved for the placement of three or more manufactured homes regardless of the property's current condition and (2) at least one home site on the property is leased.

This, or an even broader interpretation of the ordinance, seems to be the one advocated by the Respondents during the hearing before the trial court.[117] Counsel for the ZBOA advanced an interpretation of the ordinance that would provide for infinitely interminable use of property as a Manufactured Home Community so long as the property at some point was planned and improved for the placement of manufactured homes, with no requirement that sites ever actually be leased.[118] It is clear that these are misinterpretations of the ordinance.

In construing ordinances, the terms used must be taken in their ordinary and popular meaning.[119] Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.[120] "In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute."[121] A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.[122]

First, an interpretation of the Old Code's definition of Manufactured Home Community such as the one used by the trial court and advanced by the Respondents – which provides for the existence of the use so long as the property was planned and

[117] R. p. 260, l. 20 – p. 261, l. 19; R. p. 265, l. 19 – p. 266, l. 21; R. p. 274, ll. 11–18; R. p. 275, l. 11 – p. 276, l. 9.
[118] R. p. 275, ll.1 – p. 276 1. 9.
[119] *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995).
[120] *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010).
[121] *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011).
[122] *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995).

improved for the placement of three or more manufactured homes regardless of the property's current condition – leads to a result so plainly absurd that it could not have been intended by the County Council. Under this interpretation, decades could pass, improvements could fall into disrepair or be removed, manufactured homes could be absent for indefinite periods of time and, as long as there was planning and improvement at some time in the past, the use as a Manufactured Home Community would still exist. If this were County Council's intent, it could have easily been made clear in the ordinance. It could have read "A parcel of land *that was* planned and improved . . ." to indicate that, so long as the improvement took place at some point, the use continues unabated.

A much less forced and sensible interpretation is that the requirement of improvement is ongoing. That is to say, the ordinance requires the property to be *currently* improved for the placement of three or more manufactured homes. Otherwise, the result would be that any vacant property that was once a Manufactured Home Community would remain so forever.

Second, the trial court's interpretation of the ordinance does not require the lease of more than one home site. However, the ordinance's use of plural nouns (where home *sites* . . . are leased to *individuals*) without the inclusion of singular nouns makes clear its requirement that more than one home site be leased. If this was not County Council's intent, it could have easily adopted an Ordinance that required, for example, "*one or more home sites* to be leased to *one or more individuals*."

The ZBOA argued that the ordinance's phrase requiring the leasing of home sites was only descriptive of the purpose for which the manufactured homes could be leased.[123]

[123] R. p. 261, ll. 6–19.

However, the language of the ordinance immediately preceding that phrase makes it clear that the manufactured homes in the community are to be used as residential dwellings. A second statement that the homes be used as residences would be surplusage and superfluous. As such, it is necessary that this phrase be construed to mean something. It plainly requires that more than one home site on the property actually be leased. Accordingly, the trial court's findings were in error and should be reversed as they were based on a misinterpretation of the definition of Manufactured Home Community in the Old Code.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the Court reverse the findings of the Order and overturn the findings of the ZBOA Decision.

Respectfully submitted,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master in Equity

_____

Appellate Case No. 2021-000139
Case No. 2020-CP-07-0112

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Eric Greenway, as Agent for Beaufort County...……..Appellant,

v.

Beaufort County Zoning Board of Appeals, Robert Sample, Jr., and Ballpark Place, LLC……..……...Respondents.

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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that the Final Brief of the Appellant complies with Rule 211(b), SCACR .

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