

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

THIRTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

Garry and Carolyn Coulter, George and)
Betsy Zimmerman, Michael and)
Michelle Shain, and)
Frederick Eugene Jones,)

CA. No. 2012-CP-23-4676

Plaintiffs)

**ORDER APPROVING THE GRANT OF
A SPECIAL EXCEPTION PERMIT BY
THE BOARD OF ZONING APPEALS**

vs.)

City of Greenville Board of Zoning)
Appeals and the City of Greenville,)
Carol Stilwell,)

Defendants.)

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GREENVILLE CO. S.C.
PAUL B. WICKERSHAM
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Plaintiffs appeal the decision of the City of Greenville Board of Zoning Appeals ("BZA") to grant Dr. Carol Cline Stilwell ("Dr. Stilwell") a Special Exception to operate a Bed and Breakfast Inn in her home located at 2407 Augusta Street. For the reasons set forth below, the decision of the BZA is affirmed.

I. APPLICABLE LAW

The BZA has the authority to permit land uses by special exception. S.C. Code §6-29-800. An applicant seeking a special exception must demonstrate that the proposed use: (1) is consistent with the comprehensive zoning plan, (2) complies with any use specific standards, (3) is compatible with the surrounding lands, and (4) does not have a substantial adverse impact on surrounding lands regarding service and delivery, parking and loading, odors, noise, glare, or vibration, and does not create a nuisance. § 19-2.3.5(D)(1), Greenville City Code.

Dr. Stilwell's home lies within an R-6 (single family residential) district, which allows Bed and Breakfast Inns per special exception. §§ 19-3.2.2 and 19-4.1.2, Greenville City Code. "The R-6 district is intended to preserve and encourage single-family residential development

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with a minimum lot size of 6,000 square feet. Complementary uses customarily found in residential districts, such as community recreation facilities, places of worship, and schools may be allowed.” §19-3.2.2(A), Greenville City Code. The following uses are allowed by a special exception in R-6 districts: community services, schools, emergency response facilities, police sub-stations, religious institutions, golf courses, greenways, parks, communication towers, minor utility stations, and **Bed and Breakfast Inns**. §19-4.1.2, Greenville City Code.

The use specific standards for Bed and Breakfast Inns limit guest rooms to 10, prohibit location within 200 feet of another Bed and Breakfast Inn or **Group Living Facility**, and prohibit parking in front of the facility. §19-4.3.3(F)(1) and (2), Greenville City Code.

The zoning administrator is authorized to classify uses not specifically listed in the Land Use Management Code in accordance with the characteristics of the activity. §19-4.2.1(D), Greenville City Code.

II. STANDARD OF REVIEW

Pursuant to S.C. Code § 6-29-840(A) (Supp.2005), “[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.” A court must refrain from substituting its judgment for that of the BZA, even if it disagrees with the decision. Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999); Clear Channel Outdoor v City of Myrtle Beach, 372 S.C. 230, 642 S.E.2d 565 (2007).

“In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.” S.C. Code §6-29-840. This is “an extremely narrow standard of review,” for “local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.” Helker v. Zoning Bd. App. for the City of Beaufort, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001).

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III. FINDINGS

On May 21, 2012, Dr. Stilwell applied for a special exception to operate a Bed and Breakfast Inn in her home at 2407 Augusta Street. As required by the Ordinance she paid a \$250 application fee, completed the application and posted a sign to provide notice of the special exception hearing. Appellants have acknowledged that "public notice was presumably posted," at least 15 days prior to the hearing (Stilwell Affidavit) as the BZA found. In addition, notice was published in the Greenville News and mailed to the parties in interest.

Plaintiffs alleged they and other neighbors were denied the opportunity to hold a neighborhood meeting, but such meetings are discretionary, not mandatory. §19-2.2.4, Greenville City Code. Numerous residents in the neighborhood attended the BZA hearing.

The Staff Report and various emails demonstrate that extensive discussion and investigation of the special exception was undertaken in preparation for the public hearing. Planning and Zoning staff members advised the BZA that Dr. Stilwell's application complied with the standards. (Staff Report). After the June 21, 2012 public hearing, the BZA voted in open session with reasons stated for the decision, with certain conditions, all of which were included in the record on appeal. The board's secretary reduced the nature of the board's action to writing and sent it out to all parties.

Plaintiffs contend they were denied a meaningful opportunity to speak and present evidence at the public hearing. However, the transcript reveals Mr. Coulter consented to the manner in which the hearing was conducted. While the Board was discussing how to divide the five minutes allowed each side (i.e. how many minutes to give each speaker), Mr. Coulter addressed the Board's chairman, stating in part: "Madame, that'll work on the opposition side, and we're prepared to just do it as a group to come in under time." (Transcript p. 16, ll.1-8). In fact his presentation took longer and the board did not cut him short. As pointed out by

Plaintiffs, “[a]ny person may appear at a public hearing and submit testimony, either individually or as a representative of a person or an organization.” § 19-2.2.18(A)(2), Greenville City Code (emphasis added). At the conclusion of Dr. Stilwell’s presentation, Mr. Coulter did not indicate he had further remarks and was not prevented by anyone from offering any additional comments (Transcript p. 27, ll. 13-18). The conduct of the hearing complied with the Greenville City Code.

After Dr. Stilwell presented her case, the Board invited those opposed to speak. Mr. Coulter addressed the Board and asserted two reasons that the Board should deny the application. He did “not agree with the staff report as far as its impact to the community” and did not “think it conforms to the Historic Comprehensive Plan for Augusta Road” (Transcript p.17, l. 24 – p. 18, l. 1). Additional opposition, both through individual testimony and as represented through Mr. Coulter, was also recognized.

Three supporters of Dr. Stilwell’s application presented testimony to the Board. Ken Padgett, a neighbor to the right of Dr. Stilwell’s property, stated that “if you sit on our rear porch, Carol’s –Dr. Cline’s – visitor parking is within 20 feet of our rear porch . . . I don’t think there is anyone in this room that is more subject to the impact of what she’s going to do than we are.” (Transcript p. 29, ll. 6-10). He went on to refute the opposition’s complaints regarding parking and public nuisances issues. He also addressed the concern that Dr. Stilwell could sell the property to someone less committed to the neighborhood by pointing out that “[m]y deed for the property says that she has to transfer to me all of her visitor parking as soon as she moves. She would have no ability to meet the (parking) requirements of the ordinance once she elected to sell. The property becomes mine.” (Transcript p. 30, l. 22 – p. 31, l.1). Notably, Mr. Padgett testified that he is the former City Planner for the City of Greenville and that “It [a Bed and Breakfast Inn] is the perfect transitional use for a neighborhood like that. The home is perfectly situated for it.” (Transcript page 31, ll.17 -19). At the conclusion of public comments, the Board

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deliberated the matter in an open forum and unanimously approved the application. (Transcript p. 48, ll. 20-52). The transcript of the hearing supports the BZA decision.¹

Plaintiffs allege that the grant of a special exception to Dr. Stilwell violated the Code's use specific standards for a Bed and Breakfast Inn because an adjacent property, Westminster Retirement Center, is a "Group Living Facility." The record reveals specific dialogue regarding this issue by Mr. Coulter, even before the hearing, with proper investigation being thereafter conducted. Since the a retirement center is not expressly defined or classified by the City Code, the Westminster Retirement Center was justifiably classified as an Institution, not a Group Living Facility. (See Development Planner Rhys Kear's 6/19/12 email).

A "**Group Living Facility**" is "characterized by the residential occupancy of a structure by a group of people who do not meet the definition of 'household.' The size of the group may be larger than the average size of a household. Tenancy is arranged on a monthly or longer basis. Generally, group living structures have a common eating area for residents. The residents may receive care, training, or treatment, as long as the caregivers also reside at the site. Common accessory uses include garages, storage buildings, etc. Examples include dormitories, fraternities, and sororities, monasteries and convents, and boardinghouses." § 19-4.2.2(B)(1) and (2), Greenville City Code.

¹ While the transcript of the BZA hearing allowed for meaningful review of the issues on appeal, the Court notes the transcript is far from desirable. This Court has previously suggested the BZA reform its transcript procedure. See C.A. No. 11-CP-23-0488, Donald v. City of Greenville Board of Zoning Appeals (Order filed June 30, 2011 at 7 n.6) (noting that the BZA transcript that failed to specifically identify speakers "does not comport with good procedure, and in the future the BZA and the court reporter should ensure that the identity of all speakers at the hearing is ascertained and clearly stated.") Similarly, the Court of Appeals has advised the BZA that its decisional process could benefit from more detailed written rulings. Austin v. Board of Zoning Appeals, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004) (Kittredge, J.). Some might say this even relates to government "transparency," the reigning buzzword. But the fundamental concept is that public bodies have an obligation to let those affected by their decisions know that some reasoning creature heard them. The Court is of course not in the business of running BZA meetings; like Cassandra, all it can do is warn of the perils of failing to observe standard practice. One wonders what downside could possibly befall the BZA for producing more professional transcripts, particularly since the BZA's decisions have significant impact upon the parties, the City and its citizens.

By contrast, the term "Institution" "include[s] a variety of facilities, including buildings that primarily provide meeting areas for religious activities; housing and care for the elderly or disabled; and housing related to treatment programs." Examples include "churches, temples, synagogues, and mosques; nursing, convalescent, and assisted living homes; hospices; rehabilitation centers; some group homes for physically disabled, mentally retarded, or emotionally disturbed; some residential programs for drug and alcohol treatment; and alternative or post-incarceration facilities (halfway houses)." §19-4.2.3(F)(1) and (2), Greenville City Code.

Plaintiffs also alleged no evidence existed regarding the absence of "other" such facilities. However, Dr. Stilwell stated in her application that no other similar facility exists within 200 feet. Moreover, there is no allegation, even on appeal, that such a facility exists. Consequently, the BZA's finding that "The Use Will Comply With the Use Specific Standards" is supported by the evidence and the record adequately supports the findings of the BZA.

Similarly, Plaintiffs argue that Dr. Stilwell's business should be classified as a "Boardinghouse." A "Boardinghouse" is defined as "[a] building other than a use classified as 'visitor accommodations' where, for compensation and by prearrangement for definite periods, lodging or lodging and meals are provided for three or more persons." §19-11.2., Greenville City Code. A Boardinghouse is thus a much different entity than an "owner-occupied" Bed and Breakfast Inn.

Plaintiffs concede in their Brief that the BZA made specific findings of fact and conclusion of law in all other areas. The Court agrees. Review of the entire Record including the Staff Report, the sworn testimony of Dr. Stilwell, Mary Ellen Wilkinson, and Ken and Victoria Padgett, amply supports the finding that that the proposed use is consistent with the comprehensive plan, compatible with the character of the surrounding lands and does not have

substantial adverse impact. Moreover, the "conditions" imposed are uniquely tailored to address the neighborhood concerns.

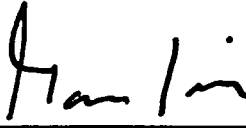
IV. CONCLUSION

Dr. Stilwell properly applied for a special exception to operate a Bed and Breakfast Inn at her home located at 2407 Augusta St. The City's planning and zoning staff analyzed the application and concluded, with recommended conditions, that it complied with the standards for a special exception. At a properly noticed hearing and after allowing adequate opportunity to be heard, the BZA determined that the use of Dr. Stilwell's home as a Bed and Breakfast Inn (1) is consistent with the comprehensive zoning plan, (2) complies with any use specific standards, (3) is compatible with the surrounding lands, and (4) does not have a substantial adverse impact on surrounding lands regarding service and delivery, parking and loading, odors, noise, glare, or vibration, and does not create a nuisance. With tailored conditions, the special exception was appropriately granted pursuant to § 19-2.3.5(D)(1), Greenville City Code. Nothing in the record indicates that the BZA acted arbitrarily or committed an abuse of discretion in approving the application under the "any evidence" standard; the record is replete with evidence to support its decision.

THEREFORE, for the reasons set forth in detail above, the Plaintiff's Appeal is DENIED and the decision of the BZA is AFFIRMED.

IT IS SO ORDERED.

February 19, 2013



D. Garrison Hill
Circuit Judge

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2012CP2304676

IN THE COURT OF COMMON PLEAS

Garry Coulter vs. Board Of Zoning Appeals Greenville City Of

FILED IN THE COURT OF COMMON PLEAS GREENVILLE CO. S.C. BY PAUL B. WICKENSIMER 2013 FEB 20 A.A. 30

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other:
ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other:
DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

NOTICE

This is a notice to you that an Order Approving the Grant of a Special Exception Permit by the Board of Zoning Appeals in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to cnoblitt@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this 20th day of February, 2013.

Court Reporter:

PRESIDING JUDGE -

R. Mills Ariail Jr. 11 North Irvine St., Ste., 11 Greenville, SC 29601

John Patrick Riordan Smith Moore Leatherwood P.O. Box 87 Greenville, SC 296020087 Robert Patrick Coler Assistant City Attorney P.O. Box 2207 Greenville, SC 296022207

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ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court