

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Helicopter Solutions, Inc. d/b/a Helicopter)
Adventures)

Appellant,)

v.)

Richard Hinde and Horry County Zoning)
Administrator,)

Respondents.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-266987

ORDER
(REVERSING ORDER OF HORRY COUNTY
BOARD OF ZONING APPEALS)

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On December 11, 2012, a hearing was held before me on the merits of Helicopter Solutions, Inc. d/b/a Helicopter Adventures' (hereinafter "Appellant") appeal of the Order of the Horry County Board of Zoning Appeals (hereinafter "the Board") entered September 10, 2012 and mailed for service September 11, 2012 in the case of In re: Richard Hinde, Case No. 2012-07-008.

President at the hearing were Benjamin A. Baroody, Esq., counsel for Appellant, Emma Ruth Brittain, Esq., counsel for Respondent Horry County Board of Zoning Appeals, and Kenneth Moss, Esq., counsel for Respondent Richard Hinde. The record before me consists of the pleadings filed in this case and the Record on Appeal which was certified and filed with this Court on October 18, 2012.

BACKGROUND

This matter arises out of a determination by Horry County Zoning Administrator Renee Mincey on November 22, 2011 that "a helicopter tour facility is a permitted use in the AC zoning district." Appellant has operated a "helicopter/sightseeing tour facility" upon the property at issue in this case since May 25, 2011. On June 22, 2012, Richard Hinde, a resident of the Plantation

Pointe subdivision, filed an appeal to the Horry County Board of Zoning Appeals, "appealing the Zoning Administrator's decision that a helicopter/sightseeing tour facility is an allowed use in the Amusement Commercial (AC) zoning district and is ask[ed] the Board to reverse the determination of the Zoning Administrator."

Following a hearing on the merits of Mr. Hinde's appeal, the Board entered an Order on September 10, 2012 reversing the determination of the Zoning Administrator. Appellant filed a Notice of Appeal of the Order on September 12, 2012. At the hearing before me, Appellant informed the Court that it disputed no finding of fact made by the Board, and only disputed its two conclusions of law.

What follows are the Board's **FINDINGS OF FACT**¹:

1. The property in issue is owned by Burroughs & Chapin, Inc. (B&C) and is located between the NASCAR Speed Park and the City of Myrtle Beach Wastewater Treatment facility off of Highway 17 By-pas and 21st Avenue North, Myrtle Beach.
2. The property is 46.17 acres and the business in issue, Helicopter Adventures, is located on approximately 5.47 acres of the parcel directly behind the NASCAR Speed Park parking lot.
3. The property is split zoned Amusement Commercial (AC) and Limited Industrial (LI). The business in issue is located within the AC portion of the property.
4. The landing pads are approximately 1350 ft. from the property line abutting residential property. The property is buffered by a large berm covered in fully grown trees.
5. A helicopter sight-seeing tour facility is not specifically referenced in any of the zoning districts, however the AC zoning district allows a variety of outdoor amusements and specifically lists sight-seeing depots.
6. On November 18, 2011, Steven Strickland, P.E., contacted Deputy Planning Director Carol Coleman via email about locating a helicopter sight-seeing tour facility on the above referenced property. Ms. Coleman advised that the zoning looked good.

¹ The Board's Findings of Fact are misnumbered. This Order correctly numbers the findings of fact.

7. On November 22, 2011, Zoning Administrator Rennie Mincey, wrote a letter to Mr. Strickland stating that a helicopter tour facility would be allowed in AC.
8. From November 21, 2011 through March 28, 2012, a series of site plan reviews and revisions were conducted by the Horry County Planning & Zoning, Code Enforcement, Engineering, and Stormwater Departments. A Stormwater Permit was issued on February 17, 2012, and final site plan construction approval granted on March 28, 2012.
8. On March 16, 2012, Helicopter Adventures submitted an application for a building permit and the permit was issued on April 10, 2012.
9. Since a portion of the property upon which a part of the business parking lot is located is within the city limits of the Myrtle Beach, a hearing before the City's Community Appearance Board (CAB) was required, advertised and held on May 3, 2012. The CAB granted approval.
10. A Certificate of Occupancy was issued by the Horry County Code Enforcement Department on May 25, 2012.
11. On June 22, 2012, the applicant filed this appeal requesting that the Board overturn the Zoning Administrator's decision and determine that such use is not an allowed use in the Amusement Commercial (AC) district. The request was deferred at the August 13, 2012 Board hearing.
12. ZBA members observe and question whether a helicopter tour ride can be classified as an Amusement.

What follows are the Board's **CONCLUSIONS OF LAW:**

1. Based on the evidence presented, the Board finds that this appeal was filed within a reasonable time after the application knew or should have known of the November 22, 2011 decision by the Zoning Administrator. Although the plans and permits referenced above were maintained as records of the county and available for public inspection for months before the appeal was filed, the appellant had no reason to inquire and lacked actual knowledge of them.
2. The Board overturns the decision of the Zoning Administrator finding that a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses allowed in the AC zoning district. Therefore, the appeal is granted and the Zoning Administrator's decision is overturned.

ISSUES PRESENTED

1. Did Richard Hinde have standing to appeal the determination of the determination of the Zoning Administrator?²
2. If so, did Mr. Hinde file his Notice of Appeal within a timely manner?³
3. If so, was the decision of the board correct as a matter of law?

STANDARD OF REVIEW

While a reviewing court must treat the Board's factual findings as those of a jury and refrain from substituting its own judgment of those facts from that of the Board, a Court may reach a different conclusion of law. See Wyndham Enterprises, LLC v. City of North Augusta, 2012 WL 3828237 (SC App. Op. No. 5030, filed September 5, 2012) (reversing a Board's denial of a special exception to sell fireworks, finding the Board's decision was not correct as a matter of law, was not supported by "competent, substantial, and material evidence," and was, instead, based upon "opinion and speculation testimony.").

In reviewing the questions presented by an appeal from a Board of Zoning Appeals, "the court must determine only whether the decision of the board is correct as a matter of law." S.C. Code Ann. 6-29-840(A) (Code of Laws 1976, as amended). South Carolina courts applying this standard of review have overturned Boards of Zoning Appeals when the Board's decision "is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Wyndham, *infra*.

² This Court finds that Hinde had standing to appeal the determination of the Zoning Administrator.

³ This Court finds that the Board did not err in determining that Hinde filed his appeal of the determination within a reasonable time.

"Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." Mikell v. County of Charleston, 386 SC 153, 158, 687 SE2d 326, 329 (2009). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance." Id. (internal quotations omitted).

DISCUSSION

In this case, the third issue presented concerns the interpretation of a County ordinance, an issue of law, and such is the only issue before me.⁴ The Board found that Appellant operates a "helicopter sightseeing tour facility" upon the subject premises and that the subject premises is zoned Amusement Commercial (AC), as is found within Section 712 of the Horry County Code of Ordinances.

Therefore, the only issue for determination by me is whether the Amusement Commercial zoning district allows Appellant to operate a "helicopter sightseeing tour facility." Stated another way, this Court must determine whether the Board's finding that "a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses allowed in the AC zoning district" was an error of law.

Based upon the record before me, I find that Horry County Zoning Ordinance 712 permits the use of a helicopter sightseeing tour facility. This finding is based upon the following interpretive guidance within the Horry County Zoning Ordinance:

⁴ While Hinde presented arguments to the Board that the helicopters were a nuisance, I find those arguments and the evidence presented in support thereof irrelevant to the issue before me. Further, I find that the record is undisputed that Appellant's business is in compliance all applicable laws, including the Horry County noise ordinance.

1. "The intent of the Amusement Commercial District is to allow for the mixing of certain specified land uses in the county where both residential and limited business uses are competing for land and accelerated transition is in evidence." Section 712, Horry County Code of Ordinances.
2. Permitted uses include the following: **"Establishments providing entertainment primarily as a commercial activity, including but not limited to theaters, ... water slides, skating rinks, dance halls, shooting galleries, ... clubs, amusement parks, piers, arcades, miniature and par-three golf, driving ranges, ... and sight-seeing depots."** Id. At 712.1 (Emphasis added).
3. Neither the phrase nor any of the terms within the phrase "sight seeing depots" are defined within the Ordinance. Therefore, such words are to be given their **"customary dictionary definitions."** Section 400, Horry County Code of Ordinances.

It is undisputed in the Order of the Board and in the Record that Appellant provides a sight-seeing business. It is further undisputed that the purpose of the sight-seeing business is for entertainment and commercial/ business activity. It is further undisputed that the tours conducted originate and terminate upon the same subject property. The only issue with regard to interpreting this Ordinance raised by Hinde to the Board concerned the definition of the word "depot."

Based upon the facts in the record before me, I find that the common dictionary definition of the word "depot" is broad and contemplates a facility that is used for the purpose of transporting passengers by helicopter for such a sight-seeing tour. This finding is based upon the following:

1. Appellant submitted the Oxford Dictionary definition of depot as **“a place where vehicles are kept and maintained.”**
2. Hinde submitted the FreeDictionary.com definition, which included **“a station where transport vehicles load or unload passengers or goods,” “a railroad or bus station,” “a storage installation for military equipment and supplies,”** and the synonym **“air terminal,”** which it defined as **“a terminal that serves air travelers or air freight.”**
3. Hinde also submitted the online Wikipedia definition, which included **“train station,” “bus station,” “bus garage, where buses are stored when not in use,”** and **“Main Operating Base, an overseas base for the US military.”**

In addition to the foregoing, Appellant also presented into evidence a “SC Technical Advice Memorandum,” the subject of which was “Sight-Seeing Tours.” I find this Memorandum gives additional interpretive guidance. The Memorandum presented the following facts:

Tourist areas in South Carolina provide a variety of sight-seeing tours to our State’s visitors. The mode of tour includes boats, buses, motorized trollies, helicopters, airplanes and horse drawn carriages.....

Question: Are fees paid for sight-seeing tours conducted by carriage, bus, helicopter, airplane, trolley, boat, and other similar modes subject to the admissions tax...?

Conclusion: Fees paid for sight-seeing tours conducted by carriage, bus, helicopter, airplane, trolley, boat, and other similar modes are not subject to the admissions tax....

I also find interpretive guidance from the testimony on behalf of the Horry County Planning and Zoning Department, who testified at the hearing before the Board that Ms. Mincey correctly interpreted Section 712 of the Ordinance. At the hearing before the Board, Rennie Mincey, Horry County Zoning Administrator, offered the following testimony:

Helicopter sight-seeing tour facilities function as outdoor amusements. Historically, outdoor amusement uses that may create noise, such as outdoor gun ranges and outdoor motor sports facilities have been limited to the AC district. Years ago, this was determined to be the appropriate zoning district for these use types because it was the only commercial district that allows outdoor amusements and does not allow residential uses. Further, there are a very limited number of properties in the County zoned AC. Therefore, anyone desiring to establish a use of this type has been told they would either have to procure one of the few properties already zoned for it or initiate rezoning action that requires public notice and County Council approval. Thus, the AC zoning district historically has been regarded as one of the most intense zoning districts and commercial sight-seeing uses by land, water or air; and, other outdoor amusement commercial uses have been limited to this district.

Janet Carter, Director of Planning for the Horry County Planning and Zoning Department, testified as follows:

The decision that Rennie Mincey rendered in the November 2011 letter was not a new decision. We have been telling people in the planning and zoning department for a long as I have been here or as long as she's been there, that the only district you could have helicopter tours in would be Amusement Commercial. ...[T]hat decision was made long before I came to work here. Ms. Mincey has been here for 23 years. I think we've had zoning for 24. ... Like I say, as far back as either of us knows, the answer to anyone asking about having

helicopter tours or any type of sight-seeing tours, whether by land or water or whether by air, was that you had to locate them in the amusement commercial zones district.”


Amusement/Commercial has been considered one of our most intense zoning districts for as long as any of us can remember. You know, when Burroughs & Chapin wanted to or talked about building a NASCAR, not speed park, but a real race track, the full, I guess, Darlington 500 type deal, they re-zoned hundreds of acres between Conway and Aynor Amusement/Commercial for that purpose.

...[S]o basically anyone wanting to operate a helicopter touring facility or any sight-seeing touring facility or do any of these other things talked about; motor sports, outdoor firing ranges, or anything else, has been told, “you’ve got to find a piece of amusement/commercial property.”

CONCLUSION

Based upon the foregoing, I find the Board made an error of law in interpreting Section 712 of the Horry County Zoning Ordinance to exclude a helicopter sight-seeing tour facility as a permitted use within the Amusement Commercial District. As such, the decision by the Horry County Board of Zoning Appeals is hereby REVERSED.

IT IS SO ORDERED.


December 16, 2013

Conway, South Carolina



The Honorable Larry B. Hyman

Presiding Judge, Fifteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Helicopter Solutions, Inc., d/b/a
Helicopter Adventures,

Appellant,

vs.

Richard Hinde and Horry County
Zoning Administrator,

Respondents.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2012-CP-26-6987

ORDER

(Granting in part and denying in part
Respondents' Motions for Reconsideration
and to Alter or Amend)


HORRY COUNTY
13 APR 19 PM 1:38
HELANA J. JOHNSON-WARD
CLERK OF COURT

A hearing was held before me on February 13, 2013, upon Motion for Reconsideration of Respondent Richard Hinde, and upon Motion to Alter or Amend of Respondent Horry County, both filed on January 28, 2013. Present at the hearing were Kenneth Moss, Esq., representing Respondent Richard Hinde, Emma Ruth Brittain, Esq., representing Respondent Horry County, and Benjamin A. Baroody, Esq. and David B. Miller, Esq., representing Appellant Helicopter Solutions, Inc. db/a Helicopter Adventures. Based upon the record as a whole and arguments of counsel, and after being fully informed, I hereby grant in-part and deny in-part Respondents' Motions, and the Court's Order (Reversing Order of Horry County Board of Zoning Appeals), dated January 16, 2013, is hereby amended as follows:

The second sentence of footnote 4, found on page 5 of 10 of the Order, is deleted in its entirety. I find the remaining grounds asserted by the Respondents in support of their Motions to be without merit.

AND IT IS SO ORDERED.

APR 10, 2013
Conway, South Carolina


Honorable Larry B. Hyman
Presiding Judge,
Fifteenth Judicial Circuit