

NOTICE OF APPEAL FROM AN ADMINISTRATIVE TRIBUNAL

THE STATE OF SOUTH CAROLINA
In The Circuit Court

APPEAL FROM GREENVILLE COUNTY PLANNING COMMISSION

Jay Rogers, Chairman

Subdivision Application 2018-070

Julie Turner,

Appellant,

v.

Greenville County Planning
Commission and
Niemitalo, Inc.

Respondents.

NOTICE OF APPEAL

Julie Turner appeals Greenville County Planning Commission approval of the Ethan Richard Estates preliminary subdivision by vote on June 27, 2018.

January 15, 2020

s/ Michael Corley
SC Environmental Law Project
PO Box 5761
Greenville, South Carolina 29606
(864) 412-7921
Email: michael@scelp.org
Attorney for Appellant

| | | |
|---|---|--------------------------------------|
| STATE OF SOUTH CAROLINA |) | |
| |) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE |) | |
| |) | |
| Julie Turner, |) | Case No. 2020-CP-23-_____ |
| |) | |
| Appellant, |) | |
| vs. |) | APPEAL FROM GREENVILLE COUNTY |
| |) | PLANNING COMMISSION |
| Niemitalo, Inc. and the Greenville County |) | |
| Planning Commission, |) | |
| |) | |
| Respondents. |) | |
| _____ |) | |

Appellant Julie Turner, complaining of Respondents, Greenville County Planning Commission and Niemitalo, Inc., and appealing Planning Commission’s decision to approve Niemtalo, Inc.’s preliminary subdivision proposal entitled “Ethan Richard Estates,” would respectfully show unto the Court as follows:

JURISDICTION AND PROCEDURAL HISTORY

1. This matter has a long and unusual procedural history. Niemitalo owns approximately 24 acres of land in the Tigerville community north of Travelers Rest, which it is seeking to develop as a subdivision called “Ethan Richard Estates” (“the subdivision”).
2. On April 27, 2018, Niemitalo, Inc. submitted its application for preliminary subdivision plan approval to the Greenville County Subdivision Administration (Application #2018-070).
3. At its June 27, 2018 meeting, the Planning Commission considered Ethan Richard Estates and granted the subdivision conditional approval. (Approval letter, Exhibit A).
4. Julie Turner was in attendance at the meeting on June 27, along with many of her neighbors, and spoke in opposition to the subdivision.
5. South Carolina’s Local Comprehensive Planning Enabling Act provides a right to appeal

from Planning Commission decisions for any “party in interest,” including the subdivision developer and opponents of the subdivision. See S.C. Code § 6-29-1150; Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n, 426 S.C. 97 (Ct. App. 2019). Such appeal must be initiated “within thirty days after actual notice of the decision.” S.C. Code § 6-29-1150.

6. This circuit court has jurisdiction over appeals from the Greenville County Planning Commission. See S.C. Code § 6-29-1150(D)(1).
7. Julie Turner, along with her neighbor, intended to appeal the Planning Commission’s June 27, 2018 decision, and the deadline for them to do so would have been July 27, 2018. However, before that appeal deadline arrived, the Planning Commission reconsidered and reversed its approval of Ethan Richard Estates.
8. On July 17, 2018, invoking a previously unutilized procedure within the Planning Commission’s bylaws, Greenville County Council voted to authorize Planning Commission to reconsider its conditional approval of the subdivision. As to the basis for such vote, Council minutes reflect the following: “[Councilman Dill] stated the Land Development Regulations (Article 3.1) indicated a project must be compatible with surrounding land use density prior to approval. He added that some of the members of the Planning Commission have indicated they were not aware of the requirement and would like an opportunity to re-evaluate the item.” (Council minutes, Exhibit B).
9. On July 25, 2018, at the regular meeting of the Planning Commission, the commissioners acted on what they believed to be valid authority created by County Council’s vote and reconsidered Ethan Richard Estates. The Commission voted to revoke the original approval

and deny the subdivision application. (Denial letter, Exhibit C). The basis for denial was the subdivision's incompatibility with surrounding land use density under Article 3.1 of the Land Development Regulations ("LDR").

10. Pursuant to S.C. Code § 6-29-1150, Niemitalo, Inc. appealed the Planning Commission's July 25 denial and challenged the Commission's authority to reconsider its prior conditional approval of the subdivision (Case No. 2018-CP-23-04891). The only argument presented on appeal was that the Planning Commission did not have authority to reconsider its prior approval under the circumstances. Julie Turner intervened in that appeal.
11. On January 13, 2020, after briefing by the parties and a hearing, the parties were informed in writing by the Court that Judge Edward Miller had ruled in favor of Niemitalo, Inc. and had decided that "the Greenville Planning Commission's reconsideration of the Appellant's subdivision plan was improper."
12. Judge Miller's decision was not based on the substance of the Planning Commission's denial (i.e., the subdivision's incompatibility with surrounding land use density under Article 3.1 of the LDR). Rather, Judge Miller concluded that the Planning Commission did not have legal authority to reconsider its earlier approval.
13. The effect of Judge Miller's decision is to reactivate the conditional approval given to the subdivision on June 27, 2018. Ethan Richard Estates is now approved, on the basis of the rationale and decision expressed during the Planning Commission's meeting on June 27, 2018 and its approval letter mailed to the developer on July 2, 2018.
14. Appellant Turner is within the 30-day limitations period for appealing the Planning Commission decision, pursuant to S.C. Code § 6-29-1150. That limitations period was tolled

on July 25, 2018 when Planning Commission undertook reconsideration and voted to reverse its prior approval of Ethan Richard Estates. The limitations period was restarted on January 13, 2020, when Judge Miller decided that reconsideration was invalid and restored the July 25 decision.

15. If this Court were to decline to hear this appeal, the Appellant would be denied due process and equal protection. Ms. Turner intended to appeal the Planning Commission's approval of Ethan Richard Estates, on the basis that the subdivision did not comply with LDR Article 3.1. However, before that could happen, the Planning Commission purported to reconsider its decision and deem the subdivision inconsistent with Article 3.1. That reconsideration has now been invalidated, so the subdivision has approval, while the Appellant has not had an opportunity to present her challenge under Article 3.1. Acceptance of jurisdiction over this appeal is necessary to actualize the rights given to the Appellant under S.C. Code § 6-29-1150.
16. Venue is proper in this Court, as the property at issue in this appeal is located within Greenville County.

PARTIES AND STANDING

17. Appellant Julie Turner is a resident of the County of Greenville and owner of property adjacent to the proposed subdivision that will be significantly impacted by the decision of the Greenville County Planning Commission.
18. Ms. Turner has a significant interest in the outcome of the decision at issue here, and she has standing to bring this action on the basis of that interest. Ms. Turner owns a 13.7 acre property directly across Tigerville Road from the proposed subdivision. (Exhibit D, Turner

Affidavit, ¶ 2). In addition to residing on the property, Ms. Turner uses her property to operate a small horse farm. (Id. at ¶ 3). Ms. Turner’s driveway is immediately across from what would be the exit for the subdivision. (Id. at ¶ 4). Ms. Turner’s property is rural and agricultural, as is the general character of the surrounding area. (Id. at ¶ 5). Ms. Turner has grave concerns about the impact of the high density Ethan Richard Estates on her property.

19. If Niemitalo, Inc. is allowed to place 31 homes on its 23 acre property, it will: decrease Ms. Turner’s property value; diminish her use and enjoyment of her property; increase her traffic burden; increase sound and light intrusion onto her property and farm; increase the risk of intrusion onto her property and disruption to her horse farm; decrease the environmental quality of the area surrounding her home; and generally diminish the qualities that have led her and her neighbors to reside in this quiet rural community. (Id. at ¶ 6). On this basis, Ms. Turner is a party in interest with standing.

20. Respondent Greenville County Planning Commission is an appointed local planning commission as defined in the South Carolina Local Government Comprehensive Planning Enabling Act, S.C. Code § 6-29-310, *et seq.*, and was created pursuant to that legislation.

21. Respondent Niemitalo, Inc. is a business entity incorporated in South Carolina and doing business in Greenville County. Niemitalo, Inc. is a necessary party to this appeal.

22. This Court has personal jurisdiction over the parties due to their location or activities in Greenville County.

STANDARD OF REVIEW

23. A Planning Commission decision “will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or

unreasonably, or where, in general, the [commission] has abused its discretion.” Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in Kurschner v. City of Camden Planning Commission, 376 S.C. 165, 173-74, 656 S.E.2d 346, 351 (2008) (applying Zoning Board standard of review to a Planning Commission decision). Further, a decision of the planning commission will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

GROUND FOR APPEAL

Incompatibility under LDR Article 3.1

24. Pursuant to Greenville County’s Land Development Regulations, no plat of a subdivision shall be filed or recorded until it has been submitted to the Planning Commission and approved. LDR Article 1.1. Article 3.1 of the LDR provides the “Review Criteria” for proposed subdivisions and specifies that a subdivision may be approved only if it meets all criteria in the Article.
25. As is particularly relevant here, Article 3.1 provides that a proposed subdivision must be consistent with surrounding land use density and with the surrounding environment:

Submitted developments may be approved if they meet all of the following criteria:

- Adequate existing infrastructure and transportation systems exist to support the project;
- The project is compatible with the surrounding land use density;
- The project is compatible with the site’s environmental conditions, such as but not limited to, wetlands, flooding, endangered species and/or habitat, and historic sites and/or cemeteries.

Article 3.1

26. Ethan Richard Estates would have a residential density drastically higher than the surrounding community and a lot size orders of magnitude smaller than what is typical in this community.
27. Ethan Richard Estates is not compatible with the surrounding land use density, and the Planning Commission was presented with ample evidence to demonstrate this fact in advance of its approval of the subdivision.
- a. Planning Commission minutes reflect that Rick Sumerel, former president of Verdae Development, appeared in opposition to the subdivision, and Mr. Sumerel submitted a written copy of his comments. (June PC Minutes, Exhibit E). Sumerel offered his opinion, based on 35 years as a developer, that the subdivision was not compatible with surrounding land use and should be denied under Article 3.1.(Sumerel comments, Exhibit F). He supported his conclusion with Planning Commission staff's own calculations, which reveal the average lot size in the subdivision as 0.5 acres and the average lot size of surrounding properties at 5.31 acres. (Id.).
 - b. Planning Commission also received written and oral comments from Brian Campbell, who resides on a 10.2-acre property adjoining the subdivision. Mr. Campbell emphasized the rural nature of the community surrounding the subdivision, which existing residents chose for privacy, peace and quiet, including the ability to raise livestock and horses without disturbance. (Campbell comments, Exhibit G). Mr. Campbell presented the Commission with a detailed report quantifying the incompatible density of the subdivision. (Density report, Exhibit H). Of note, among

the 196 parcels within one mile of the proposed subdivision: 61.74% are larger than 2.5 acres; nearly 40% are larger than 5 acres; and only 4.59% are comparable in size to what is proposed in the subdivision. Campbell also reported, with a thoroughly documented calculation methodology, that the average lot size of non-vacant (containing a structure) properties within a mile of the proposed subdivision is 9.61 acres, while lots in the subdivision would be 0.5 acres.

28. The record reflects that the Planning Commission fundamentally misunderstood its charge under Article 3.1 to assess the subdivision's compatibility with surrounding land use density.
 - a. This misunderstanding is apparent first from the staff report to the Planning Commission. (Staff report, Exhibit I). The staff's confounding conclusion on compatibility is as follows: "The project is **compatible** with the surrounding land use... However, the average lot size of 0.5 acre pre lot is **not consistent** with the development pattern of adjoining lots which average 5.31 acres per lot." (emphasis added). The staff report specifically notes the conclusion "Land Use Density – Incompatible," but staff nevertheless recommended approval.
 - b. The misunderstanding of Article 3.1 is also reflected in the transcript of Planning Commission's decision. The discussion among the commissioners reflects significant confusion regarding the Commission's ability to limit development on unzoned land, with multiple Commissioners expressing that they were constrained to approve the project because the land was unzoned. (June PC transcript, Exhibit J). The Commission misapprehended the fact that Article 3.1 is specifically intended to impose conditions on the subdivision of unzoned land. The transcript also contains

the following telling statement from Commissioner Shockley: “I don’t know that it’s compatible, but it does meet all of our regulations, in the subdivision regulations and the development regs.” This statement is of course fundamentally inconsistent.

- c. Finally, the Commission’s misunderstanding of Article 3.1 is reflected directly and explicitly in the minutes of County Council. (Exhibit B). It was Councilman Joe Dill who, after the Planning Commission’s approval, moved for County Council to vote on authorizing reconsideration. His explanation for the motion was as follows:
“[Councilor Dill] stated the Land Development Regulations indicated a project must be compatible with surrounding land use density prior to approval. **He added that some of the members of the Planning Commission have indicated they were not aware of the requirement and would like an opportunity to re-evaluate the item.**” (Id. at 7, emphasis added)).

29. All evidence before the Planning Commission, including the evidence generated by its own staff, indicated that Ethan Richard Estates was incompatible with the density of surrounding land use. Planning Commission’s decision to the contrary is necessarily without evidentiary support, arbitrary, an abuse of discretion, and based on a misunderstanding of law.

30. Of course, the most telling indication that Planning Commission erred in its approval of the subdivision is that the Commission attempted to go back and reverse its decision on land use density and deny the subdivision.

31. County Council’s vote merely authorized Planning Commission to reconsider Ethan Richard Estates, if the commissioners were so inclined. (See Exhibit B, p. 7). Planning Commission chose to reconsider and then reverse the subdivision because the Commission recognized an

error had been made in relation to Article 3.1. As the minutes from the second Planning Commission reflect, the subdivision was denied on second look based on incompatible density. (July PC minutes, Exhibit K, p.).

32. Planning Commission's decision that Ethan Richard Estates is incompatible with surrounding land use density has been invalidated based on the procedure the Commission used in reconsidering the subdivision, but the substance of that decision is valid and consistent with all of the evidence before the Commission.

33. As it stands now, Ethan Richard Estates will be constructed, despite its recognized incompatibility with Article 3.1, because of a procedural misstep by the County. The Appellant had nothing to do with the County's error, yet she will suffer because of it, barring relief in this appeal.

34. Under the circumstances of this case, the error in Planning Commission's June 27, 2018 approval of Ethan Richard Estates is uniquely apparent and in dire need of correction. The circumstances of this case are undoubtedly the embodiment of why an appeal right is provided in S.C. Code § 6-29-1150.

35. The Appellant requests that this Court make a finding that the Planning Commission abused its discretion, acted arbitrarily and unreasonably, and made a mistake at law by ignoring and misapprehending the applicable legal standard.

WHEREFORE, the Appellant requests that this Court:

- a. issue an order reversing the decision of the Greenville County Planning Commission to approve Ethan Richard Estates, and
- b. for costs of this action and such other and further relief as this Court finds just and

appropriate.

Respectfully submitted,

s/ Michael G. Corley
Michael G. Corley
S.C. ENVIRONMENTAL LAW PROJECT
Post Office Box 5761
Greenville, SC 29606
Telephone: (864) 412-7921

Attorney for the Appellant

Greenville, South Carolina
January 15, 2020