



Spartanburg County

Planning and Development Department

Board of Zoning Appeals MINUTES

January 31, 2023

Members

Present:

Jack Gowan, Chairman
Angela Geter, Vice Chairman
Glenda Brady
Thomas Davies
Kae Fleming
James Langford
Michael Padgett
Stephen Wunder

Members

Absent:

Jason Patrick

Staff Present:

Joan Holliday, Director of Planning & Development
Leigh MacDonald, Current Planning Manager
Jeff DeWitt, Senior Planner
Laurie Oakman, Senior Planner
Jay Ford, Zoning Inspector
John Harris, County Attorney

NOTICE: Pursuant to Section 30-4-80 of the S.C. Code of Laws, written notice of its regular meeting schedule was provided at the beginning of this calendar year via the County website. In addition, the Agenda for this Meeting was posted on the bulletin board at the entrance to the Administration Building as well as on the County's website and was emailed to all persons, organizations, and news media requesting notice.

1. Call to Order

Chairman Jack Gowan called the meeting to order at 4:30 PM.

2. Approval of Minutes – December 20, 2022 Meeting

Angela Geter moved to approve the minutes of the December 20, 2022 BZA meeting. Thomas Davies seconded the motion. The motion carried with a vote of 8 to 0.

3. Unfinished Business – There was no unfinished business.

4. New Business

A. Appeal Request:

Adam W. Ballenger Memorial Park – 2294 Teaberry Rd, Spartanburg, SC

Tax Map Number: 7-010-00-062.01

Appeal of Issuance of Notice of Violation

Interim Appellant Counsel Mr. Ethan Jedziniak was recognized and requested a Continuance, due to the absence of Retained Lead Counsel Mr. Josh Hawkins, who was on a long-planned overseas trip.

Planning Director Joan Holliday was recognized and argued that this case was originally scheduled for the December 2022 meeting of the Board, but staff granted a continuance to until the January 2023 meeting. She requested that the Board deny the request for a continuance.

In response to Ms. Holliday's remarks, Jedziniak stated that legal notice requirements had not been met. Ms. Holliday countered that under the ULMO, no public notice is required for an appeal.

The Board conferred internally. Tom Davies moved to deny the request for continuance, and the motion died for lack of a second.

The Board continued to question Mr. Harris, Ms. Holliday, and Mr. Jedziniak, and discuss the issues among themselves. Mr. Davies again moved to deny the request for continuance. Motion was seconded by Angela Geter, and passed by a vote of 6-2. Padgett, Wunder, Davies, Gowan, Geter, and Brady voted in support of the motion, and Fleming and Langford voted against.

Robert Merting, Attorney for the Appellant, was then sworn by the Chair and presented the case for the Appellant.

In summary, the Appellant stated that the duties published on the Building Department website stated that it was responsible for enforcing the building code and local land use regulations. Mr. Merting stated that he inquired on six separate occasions as to whether Spartanburg County requires a permit to erect a flagpole. Appellant stated that on each of these six inquiries, County representatives stated that a permit was not required for flag pole. One of the exchanges was via email from County Building Codes Director Gregg Hembree, in which Mr. Hembree reportedly stated that a permit is not necessary for construction of a flagpole.

Mr. Merting represented that he had obtained all applicable permits from FAA and DHEC.

Mr. Merting again inquired with the Building Codes Department about the desire for an electrical permit to light the flagpole, where he stated that the County knew there was no building on the property. Mr. Hembree expressed concern with regard to trailers on the property and Mr. Merting assured him that was not the intention. He was then granted an electrical permit for decorative lighting for the flagpole and received an inspection on July 20, 2022.

The Appellant stated that the South Carolina flag was raised on August 06, 2022 and experienced no issued from the County for two months, during which time it was publicized the intention to raise a Confederate flag on October 22, 2022. The Appellant represented the intent to rotate flags related to South Carolina history.

Mr. Merting received the Notice of Violation of ULMO Section 1.07 on October 26, 2022 for not obtaining a permit. Mr. Merting did not find explicit requirements in the ULMO to obtain a permit for a flagpole or a principal use and stated his position that the Notice of Violation was an attack on free speech.

Mr. Merting stated that SC Code of Laws Section 6-29-800 (D) required notice be provided to the appellant 15 days in advance. They did not receive this notice 15 days in advance so were unable to call on desired witnesses.

The Appellant requested the Board find the Camp not in violation of the ULMO.

The County's position is summarized as follows. The Unified Land Management Ordinance clearly requires a Development Permit for any kind of land development or change-of-use. The Appellant never applied for a permit to develop the subject site, and still has not applied for any necessary permits.

After extensive discussion and questioning by the Board, Joan Holliday was sworn in and presented the following staff report:

**APPEAL of ISSUANCE OF
NOTICE of VIOLATION**

Staff Report

Adam W. Ballenger Memorial Park			
Meeting Date: January 31, 2023			
Address	2294 Teaberry Road, Spartanburg, SC 29303	Ordinance	ULMO
	Notice of Violation Mailed		10/21/2022
Factual Dates	Appeal Application Received		11/07/2022
	Deadline for Appeal		11/22/2022
	Continuance Request Received		12/13/2022
Applicant	Robert K. Merting on behalf of Adam W. Ballenger Camp #68, Sons of Veterans, Inc.		
Applicant Status	Agent/Attorney		
Map Number	7-01-00-062.01		
Acreage	0.83 acres		
Staff	Joan Holliday		

Stated Reason for Appeal:

The appeal form from the Adam W. Ballenger Memorial Park project refers to the Ordinance being appealed as Unified Land Management Ordinance (ULMO) Sec. 1.07 and all other Ordinances cited for support of EESONEVIOL-1022-0339. Under Reason for Appeal, the Application also refers to an attached document entitled Appeal of Notice of Violation which largely resembles the lawsuit filed against Spartanburg County as Case No. 2022-CP-42-04582.

The Appeal of Notice of Violation attached to the appeal form requests the following:

Plaintiff seeks to declare the status of its Property in Spartanburg County including any grandfathered status as a non-conforming property, to estopp Spartanburg County from asserting that any further permits are needed for the work completed upon its Property, to seek damages for a civil conspiracy by John Doe and Spartanburg County to prevent Plaintiff from using its property, and to find that the Spartanburg County Zoning ordinance, as applied to Plaintiffs Property, is against the South Carolina Constitution.

Requests Pertinent to the Board of Zoning Appeals Case:

S.C. Code of Laws 6-29-800 gives the following powers to the Board of Zoning Appeals:

- (1) to hear and decide appeals where it is alleged there is an error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance.

The issues the Board of Zoning Appeals has jurisdiction over are:

1. The appeal of the Planning Staff's issuance of a Notice of Violation for the establishment of an Accessory Use without a Principal Use. The basic request is to overturn the Notice of Violation for the flagpole erected on their property in their appeal.
2. In the appeal, the Appellant asks that the flagpole be grandfathered. The Board may decide whether appropriate development permits were obtained in order for the use to be a legal nonconforming use.

Background Information:

On December 13, 2019, the Appellant submitted a plat in the name of William C. Berry to the Planning and Development Department dividing the property. The plat was stamped and recorded. A quitclaim deed was recorded on December 16, 2019 to transfer the property to the Adam Washington Ballenger Camp #68, Sons of the Confederate Veteran's Inc.

On June 3, 2022, G&S Electrical Services, LLC, on behalf of Adam Washington Ballenger Camp #68, submitted an electrical permit application to the Building Codes Department for "permanent power for decorative lights on pole." No development application was made nor did any conversations take place between the property owner or its agents and the Planning and Development Department regarding the placement of flagpole or any other land use associated with the property.

It was brought to the Planning and Development Department Staff's attention that a flagpole had been erected along Interstate 85. In researching the site, it was found that the flagpole was the only structure on the parcel. An Accessory Use cannot be placed without a Primary Use under the ULMO.

The Zoning Staff issued a Notice of Violation (NOV) on October 21, 2022. The NOV was sent by certified mail and the return receipt shows that it was picked up on October 26, 2022. The NOV and the certified mail tracking information are attached. The NOV states the following:

No building, structure or sign requiring a permit or any part thereof shall be erected, added to or structurally altered, nor shall any excavation or grading be commenced until the required permits have been issued.

No building, structure or land shall be used; nor shall any building, structure or land be converted, wholly or in part to any other use, until all applicable and appropriate licenses, certificates and permits have been issued certifying compliance with the requirements of this Ordinance.

AN ACCESSORY USE HAS BEEN ESTABLISHED WITHOUT A PRINCIPAL USE.
REMOVE FLAGPOLE OR OBTAIN PERMIT FOR A PRINCIPAL USE AND
LOWER FLAG POLE TO 30 FEET.

The Planning and Development Department received the form for appeal of the Notice of Violation on November 7, 2022.

The next Board of Zoning Appeals meeting was to be held on December 20, 2022. The County received a request for a Continuance on December 13, 2022. The staff granted the first continuance request and notified the Appellant that the new meeting date is January 31, 2023 (today).

County Zoning Ordinance Information:

The subject property lies in the part of the County where the ULMO is in effect.

The ULMO, in Sec. 1.07 states the following:

No building, structure or sign requiring a permit or any part thereof shall be erected, added to or structurally altered, nor shall any excavation or grading be commenced until the required permits have been issued.

No building, structure or land shall be used; nor shall any building, structure or land be converted, wholly or in part to any other use, until all applicable and appropriate licenses, certificates and permits have been issued certifying compliance with the requirements of this Ordinance.

The ULMO addresses Accessory Uses in Section 3.20 Accessory Buildings and Uses/Non-Residential. The language states: “Accessory uses shall observe the setback requirements for the principal use to which they are accessory when located contiguous to a residential use.”

Use, Principal – The primary purpose for which land is used.

Structure – (As defined by the Standard Building Code.)

The Standard Building Code defines “Structure” as “That which is built or constructed.”

The subject site is located within the area subject to the ULMO as it relates to development applications. To date, the Staff has received no application for a Development Permit for this property.

Appellant Allegations:

The allegations contained in Appellant’s appeal include the following legal and equitable claims that were included in the complaint filed against Spartanburg County in Case No. 2022-CP-42-04582.

Count I - Declaratory Judgment: Minor Improvement on Vacant Land Does Not Change the Use of Said Land

Count II - Declaratory Judgment: Camp's Flag Project is a Grandfathered Non-conforming Use

Count III - Equitable Estoppel and Detrimental Reliance: Spartanburg County Issued a Building Permit for the Flag Project and is Now Estopped From Alleging Prior or Other Permits Were Needed

Count IV - Civil Conspiracy: John Doe alerted Spartanburg County to the Flag Project Prior to the Nonconforming Date Expiring and the County, in conjunction with John Doe, Delayed Action to Purposefully Prevent the Camp from Meeting the Nonconforming Date.

Count V - As Applied S.C. Constitution Violation: The Spartanburg County Performance Zoning Ordinance as applied to Camp violates Camp's Right to Free Speech under S.C. Constitution, Art. I, § 2.

Count VI - As Applied S.C. Constitution Violation: The Spartanburg County Unified Land Management Ordinance as applied to Camp violates Camp's Right to Free Speech under S.C. Constitution, Art. I, § 2.

Staff Position:

The pertinent information for the Board of Zoning Appeals to hear and decide is whether the Staff erred in issuing a Notice of Violation for establishing an Accessory Use without a Principal Use on the subject property without appropriate approvals/permits. The Appellant did not contact the Planning and Development Department about placing the flagpole nor building the memorial park (referred to in their appeal form under the project name) and, thus, has no development permit to change the use of this site. The project name on the application is Adam W. Ballenger Memorial Park. No such application has been made to the Planning and Development Department to date, so the Planning Staff does not know the intentions for the site.

In Count I, the Appellant contends that a minor improvement on vacant land does not change the use of said land. However, Sections 1.07 and 1.13 of the ULMO require permits to be obtained prior to commencing a land use or erecting a structure. In fact, the definition of vacant land referenced by the Appellant is from State statutes for Tax Increment Financing. This statute does not apply to zoning issues.

In Count II, the Appellant is requesting that the flagpole be grandfathered. To be a legal nonconforming use, a use must have been legally established. There were no development approvals or permits issued for any use on the subject parcel. Thus no use has been legally established.

In Counts III through VI, the Appellant asserts claims for equitable estoppel, civil conspiracy, and the South Carolina Constitution. The Board of Zoning Appeals does not decide such matters. The BZA is tasked with determining whether the staff erred in its issuance of the NOV.

The Appellant's appeal demonstrates the propriety of the NOV. The Appellant claims that Spartanburg County issued a building permit to Camp for the flagpole project. In actuality, the Building Codes Department issued an electrical permit for "permanent power for decorative lights on pole." The Appellant cites SC Local Government Comprehensive Planning Enabling Act (§ 6-29-950) in its appeal. The Statute states that any permit obtained without the approval of the Zoning Administrator is unlawful, or invalid. This demonstrates the necessity of the absent development permit.

The Appellant states that a private park is not subject to zoning since it is not called out in the Ordinance. There is no exemption for private parks within the ULMO. The ULMO has a category called "All Other Uses" where any land use not specifically identified is reviewed.

The Staff recommends the denial of the appeal and upholding the Staff's decision to issue the Notice of Violation. Since there has been no development application in this case, the Staff also asks that the flagpole not be considered a legal nonconforming use. It is further requested that an application for the desired land use be submitted through the appropriate process, along with a site plan, so an appropriate assessment of the requirements for this site may be made.

Attachments:

Figure 1: Adam Ballenger Memorial Park Application for Appeal with attachments:

- Acting Agent Authorization Form
- Notice of Violation from Spartanburg County
- Appellant's Appeal Document

Figure 2: Notice of Violation

Figure 3: Tracking Information for Certified Mail Containing NOV

[END OF STAFF REPORT]

The Board then discussed all of the testimony offered during these proceedings, as well as the information presented in the Staff Report.

Mike Padgett made a motion that the Notice of Violation was issued in error based on the fact that Appellant obtained an Electrical Permit and that the Unified Land Management Ordinance does not specifically address permits for flagpoles; the motion was seconded by Glenda Brady. Tom Davies asked for a clarification of the motion, and Jack Gowan said that the motion is to find that staff made an error in issuing the NOV. Padgett, Fleming, Gowan, Brady, and Langford voted in favor of the motion; Wunder, Davies, and Geter voted against the motion.

The Board discussed additional issues about the effect of ‘grandfathering’ on the present decision and what effect the County-wide rollout of the Performance Zoning Ordinance may have on this case.

4. Other Business – *There was no Other Business.*

5. Adjourn

The Chair called for a motion to adjourn. Tom Davies moved to adjourn, the motion was seconded by Kae Fleming, and carried unanimously. Meeting adjourned at 6:17 PM.