

RECEIVED

Aug 24 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge
Markley Dennis, Circuit Court Judge

Appellate Case No. 2022-001123

J. Doe Petitioner,

v.

Design Review Board (DRB) of the Town of Sullivans Island (S.I.), Svjetlana Bilic Damjanovic, Individually and d/b/a Alka Construction Co., Branko Damjanovic, Individually and d/b/a Alka Construction Co., Kenneth Craft, III, Individually and d/b/a Craft Design Co., and Alka Construction Co., Respondents.

RESPONDENT DESIGN REVIEW BOARD (DRB) OF THE TOWN OF SULLIVANS ISLAND (S.I.)’S MOTION TO DISMISS APPEAL, AND ALTERNATIVELY, RETURN TO PETITIONER’S MOTION FOR REMAND WITH ABEYANCE AND IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette & Linton, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200

Attorneys for Respondent Design Review Board
(DRB) of the Town of Sullivans Island (S.I.)

August 24, 2022
Charleston, South Carolina

Respondent Design Review Board of The Town of Sullivan's Island's ("DRB") respectfully submits this Motion to Dismiss this Appeal, and alternatively, a Return to Petitioner's Motion for Remand with Abeyance and in the Alternative, Petition for Writ of Certiorari filed August 15, 2022 ("Petition"). For the reasons stated herein, the appeal should be dismissed. Further, to the extent this Court considers the Petition to be a petition for writ of certiorari, the request for certiorari should be denied.

STATEMENT OF THE CASE

This action was commenced as an appeal from a decision of the Design Review Board of the Town of Sullivan Island.

Respondents Svjetlana Bilic Damjanovic, Individually and d/b/a Alka Construction Co., Branko Damjanovic, Individually and d/b/a Alka Construction Co, and Alka Construction Co. (the "Alka Respondents") were granted approval for demolition and construction of a new single-family residence by the DRB. **Ex. 1 (Order filed 8-19-19, at p. 1); Ex. 2 (Notice of Appeal filed 6-12-19, at ¶21).**¹

Petitioner J. Doe ("Doe" or "Petitioner"), who has alleged "Doe" is a property owner "in the vicinity" of 1616 Poe Avenue, Sullivan's Island, South Carolina (the "subject property"), appealed the DRB's approval to the circuit court, making various arguments and seeking an injunction. **Ex. 2-A and Ex. 2-B (Notice of Appeal and Petition, Jury Demand, Motion and Request for Declaratory Relief and Mediation filed 6-12-19, at ¶ 2).** The circuit court ruled in favor of Respondents, rejecting Petitioner's injunction request, in an order dated August 19, 2019. **Ex. 1, (Order filed 8-19-2019).** Petitioner filed an appeal to the South Carolina Court of Appeals

¹ Because Petitioner has not filed an Appendix, Respondent DRB has attached the relevant filings as exhibits to this filing.

on October 2, 2019. **Ex. 3-A (Notice of Appeal filed 10-2-2019)**. Petitioner has filed multiple additional notices of appeal purporting to appeal several orders of the circuit court referenced therein. **Ex. 3-B, 3-C, 3-D, and 3-E (Notices of Appeal filed 10-18-2019, 10-24-2019, 3-23-2020, 1-21-2021 and circuit court orders on file therewith)**.

As mentioned above, this appeal concerns the DRB's approval of the construction of a single-family residence on Sullivan's Island. The Alka Respondents have completed the construction that was approved by the DRB. **Ex. 4 (Alka Respondents' Motion to Dismiss filed 1-24-2022, at p. 3 of 9)** ("... the house has been fully and legally constructed and occupied for two years."). Because any issue concerning that approval is now moot, the Alka Respondents filed a motion to dismiss the appeal and the Court of Appeals dismissed the case. **Ex. 4 (Alka Respondents' Motion to Dismiss filed 1-24-2022); Ex. 5 (Order filed 3-31-2022)**. As explained by the Alka Respondents in that motion, they were issued a building permit, completed construction and were issued a certificate of occupancy on January 30, 2020. **Ex. 4 (Alka Respondents' Motion to Dismiss filed 1-24-2022, at p. 2-3 of 9 and Exs. 1 and 2)**. Petitioner filed a return to the Alka Respondents' Motion to Dismiss on January 31, 2022. **Ex. 6 (Return filed 1-31-2022)**.

Based on the undisputed fact that the subject property has been fully constructed with all required approvals, the Court of Appeals found the appeal is moot because any judgment, if rendered, would have no practical legal effect upon the existing controversy. **Ex. 5 (Order filed 3-31-2022)**. The Court of Appeals explained its ruling as follows:

. . . Appellant has appealed an order of the circuit court denying her motion for a preliminary injunction in 2019. The underlying issue involved a final decision of the Design Review Board approving plans for construction of a house. Appellant had sought the preliminary injunction to halt the construction of the approved house. Respondents have now informed this court that the building permit for construction of the house was issued in 2019, and a certificate of occupancy for the

house was issued in 2020. **The house has been fully built and occupied for two years. Because any judgment by this court will have no practical legal effect, Respondents' motion to dismiss is granted. . . .**

Ex. 5 (Order filed 3-31-2022) (bold added and citations omitted). On April 14, 2022, Petitioner filed a motion styled “Rule 240(j), SCACR, *De Novo* Panel Appeal and Motion to Hold All Time Limits in Abeyance” (“First Petition for Rehearing”) challenging the Court of Appeal’s decision to dismiss the appeal. **Ex. 7 (First Pet. for Reh’g filed 4-14-22)**. That motion was unanimously denied in a written order by a three-judge panel of the Court of Appeals on June 23, 2022:

Appellant has filed a motion for panel review and motion to hold time limits in abeyance, which we construe as a petition to rehear the dismissal of this appeal. After careful consideration of the petition, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Ex. 8 (Order filed 6-23-2022). As stated, the Court of Appeals construed Petitioner’s motion as a petition for rehearing.

On July 7, 2022, Petitioner filed another petition for rehearing, this time styled as “Rule 221, SCACR, Petition for Rehearing With Suggestion for Rehearing En Banc” (“Second Petition for Rehearing”). **Ex. 9 (Second Pet. for Reh’g filed 7-7-2022)**. The clerk responded to Petitioner’s counsel by letter July 15, 2022. In that letter, the clerk explained that because a petition for rehearing had already been denied, as specifically stated by the Court of Appeals in its June 23, 2022 order, no action would be taken on the successive petition for rehearing. **Ex.10 (Letter dated 7-15-2022)**. Petitioner then filed a third petition for rehearing, this time styled as an “Amended Rule 221, SCACR, Petition for Rehearing With Suggestion for Rehearing En Banc With Abeyance” (“Third Pet. for Reh’g”). **Ex. 11 (Third Pet. for Reh’g filed 7-25-2022)**. The Court of Appeals then issued an order on August 11, 2022 explaining:

Because this Court has already denied Appellant's petition for rehearing, this court will not entertain the subsequent petitions for rehearing. No further action will be taken on those filings.

Ex. 12 (Order filed 8-11-2022).

Petitioner filed the Petition with this Court on August 15, 2022. For the reasons explained herein, the appeal should be dismissed. Alternatively, if the Petition is to be construed as a petition for certiorari, the Petition should be denied.

ARGUMENT

I. The Appeal should be dismissed and/or certiorari denied because the appeal is moot.

As explained above, the Court of Appeals dismissed the appeal because it is moot. For all the reasons stated in the Alka Respondents' Motion to Dismiss, this Court should dismiss the Appeal in its entirety. **See Ex. 4 (Alka Respondents' Motion to Dismiss filed 1-24-2022)**. Specifically, this Court lacks subject matter jurisdiction to hear this action because the issues have been rendered moot by the construction of the approved residence during the pendency of this appeal.

Courts' jurisdiction is limited to actions in which there exist a justiciable controversy. See generally, Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character. Id. (citation omitted).

South Carolina appellate courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. Id. (citing Jones v. Dillon-Marion Human Resources Dev. Comm'n, 277 S.C. 533, 291 S.E.2d 195 (1982)). Mootness has been defined as follows: "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the]

reviewing Court to grant effectual relief.” Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (quoting Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

It has been uncontroverted that the Alka Respondents were issued a building permit, constructed a new residence at 1616 Poe Avenue, and were issued a certificate of occupancy and have occupied the subject property for years. Because the appeal concerns the DRB’s approval of the design of the now legally constructed building, the issue is moot, and this appeal must be dismissed.

II. The Appeal should be dismissed and/or certiorari denied because counsel for Petitioner failed to make the required certification that a petition for rehearing was made and finally ruled on by the Court of Appeals.

Rule 242(d)(1), SCACR requires that every petition for writ of certiorari shall contain a “[c]ertification by counsel for petitioner that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.” The Petition includes the following “Certificate of Counsel:”

Petitioner certifies that a Rule 221, SCACR, petition for rehearing was timely made. Pursuant to the attached copy of correspondence, the Court of Appeals clerk negotiated the check for that filing fee, procrastinated until the eleventh hour thereby prejudicing the case, and then wrongfully refused to file it.

(Pet. at 5). “C. Holmes” signed the Petition “For Petitioner.” **(Pet. at 20).** The certification by counsel for Petitioner does not include a certification that a petition for rehearing was ruled upon by the Court of Appeals. In fact, based on the certification it would appear Petitioner is only seeking certiorari to review a letter from the clerk indicating the Second Petition for Rehearing

would not be considered.² Such a request is procedurally improper and therefore the Appeal should be dismissed and/or certiorari denied.

III. The Appeal should be dismissed and/or certiorari denied because no appendix was filed with the Petition.

The appellate court rules require that an appendix be filed with any petition for certiorari. See Rule 242(e), SCACR. With regard to a petition for certiorari when the appeal has been dismissed by the Court of Appeals, the rule requires the appendix include “any documents relevant to the dismissal including any motion to dismiss and any return or reply that may have been filed” Rule 242(e)(2), SCACR. Further, “If the Appendix contains any of the documents specified in (2) above, a copy of the Appendix must be served on the opposing counsel and proof of service of the Appendix must be filed when the petition for writ of certiorari is filed.” Rule 242(e), SCACR. Here, no appendix has been filed or served on counsel. For that additional reason the appeal should be dismissed.

IV. The Petition should also be denied because Petitioner has not shown any recognized basis for certiorari is present, nor any special circumstances justifying certiorari.

In addition to the reasons discussed above, the request for certiorari should be denied for the additional reason that none of the considerations for granting a petition for certiorari are present in this case and there are no special circumstances justifying the granting of certiorari. South Carolina Rule of Appellate Procedure 242(b) provides the applicable considerations for the granting of a petition for writ of certiorari:

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring

² To be sure, the Court of Appeals did deny the First Petition for Rehearing in its June 23, 2022 Order quoted above. While the Petition asserts, at times, that the June 23, 2022 Order was wrongfully decided, the certification does not mention that order.

the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

SCACR 242 (b). Simply put, none of the above are present here. As explained herein, while the Petition references a violation of “due process,” and an alleged “lack on constitutional authority,” and other alleged constitutional principles, the Petition does not induce any argument that rises to a constitutional level. Therefore, certiorari should be denied.

Additionally, for numerous additional reasons explained below, Petitioners arguments fail, and certiorari should be denied.

(a) The Court of Appeal’s Order dated June 23, 2022 was not improper.

Petitioner asserts that the Court of Appeal’s decision denying Petitioner’s First Petition for Rehearing was somehow procedurally improper. Petitioner cites to S.C. CODE § 14-8-220, which addresses the power of the Court of Appeals and its judges to administer oaths and issue writs. That section states that “[a]n appeal shall be allowed from decision of any one judge to a panel of the Court.” S.C. CODE § 14-8-220. Putting aside whether the statute addressing remedial writs and oath is applicable here, the June 23, 2022 Order was issued by a panel of three judges of the Court of Appeals. A panel did consider the request for review of a single judge. As such, Petitioner has already received the review Petitioner argues they are entitled to receive.

The Petition also cited to Rule 240(j), SCACR, which states as follows: “Except where these rules require the concurrence of two or more members of an appellate court, an individual judge or justice may grant or deny any motion or petition on behalf of the court. Any review of an order issued by an individual judge or justice shall be by petition for rehearing.” As noted above, three judges signed the June 23, 2022 Order. Consistent with Rule 240(j), SCACR the Court of Appeals stated in that Order that it was addressing the First Petition for Rehearing as a petition for rehearing. Simply put, Petitioner received the review by a panel of the Court of Appeals.

Despite the proper review by the Court of Appeals (as Petitioner had requested), Petitioner now asserts some violation of procedural due process. There is simply no evidence of any such violation when as here—Petitioner’s opposition to the appeal being dismissed was considered and ruled upon. There is no evidence that Petitioner had a lack of notice or opportunity to submit arguments. See generally, Kurschner v. City of Camden Planning Com'n, 656 S.E.2d 346, 350, 376 S.C. 165, 171 (2008) (explaining the general rule that procedural due process requires notice, an opportunity to be heard in a meaningful way, and judicial review). Here, there is no basis for Petitioner, who claims to be a property owner in the vicinity of a an approved and completed construction project, whose arguments have been rejected by the circuit court and Court of Appeals, to claim a lack of due process.

- (b) The clerk of the Court of Appeals properly informed counsel for Petitioner that the Court would not be acting on an improper second petition for rehearing.

Petitioner does not appear to assert that successive petitions for rehearing are allowed or should be considered by the Court of Appeals. However, Petitioner asserts that the Clerk of the Court of Appeals acted in an arbitrary manner by sending a letter to Petitioner’s counsel informing them that the second petition for rehearing would not be entertained. It is worth noting at the outset that the Court of Appeals, through a written order, rejected both the Second and Third Petitions

for rehearing. See Ex. 12 (Order filed 8-11-2022) (“Because this Court has already denied Appellant’s petition for rehearing, this court will not entertain the subsequent petitions for rehearing. No further action will be taken on those filings.”).

The clerk’s letter regarding the Second Petition for rehearing was both accurate and appropriate. Petitioner seems to suggest that the clerk incorrectly interpreted the June 23, 2022 Order as a denial of a petition for rehearing. Much to the contrary, the clerk did not misinterpret anything—it was the three-judge panel of the Court of Appeals that determined Petitioner’s First Petition for Rehearing was a petition for rehearing. **Ex. 8 (Order filed 6-23-2022)**. (“Appellant has filed a motion for panel review and motion to hold time limits in abeyance, which we construe as a petition to rehear the dismissal of this appeal. . . . the petition for rehearing is denied.”).

The letter from the clerk following the Second Petition for Rehearing simply reiterated what had already been stated in a court order. Further, as noted above, the Court of Appeals also addressed the Second and Third Petitions for Rehearing in an order filed on August 11, 2022, which reiterated that the Court of Appeals had denied the First Petition for Rehearing and ruled that it would not entertain the Second or Third Petitions for Rehearing. See Ex. 8 (Order filed 6-23-22). Neither the clerk, nor the Court of Appeals made an error in handling the many motions and petitions filed by Petitioner. Therefore, the Petition should be denied.

(c) The Court of Appeals did not error by dismissing the appeal when the undisputed facts showed the appeal was moot.

Petitioner claims that the Court of Appeals erred in dismissing the appeal without a full record on appeal. Petitioner overlooks that the Alka Respondents’ Motion to Dismiss was fully supported with exhibits demonstrating to the court that the appeal was moot. As noted above, courts lack jurisdiction to handle cases that are moot. Further, there is no requirement that an appeal only be dismissed based upon a full record on appeal. In fact, the appellate court rules

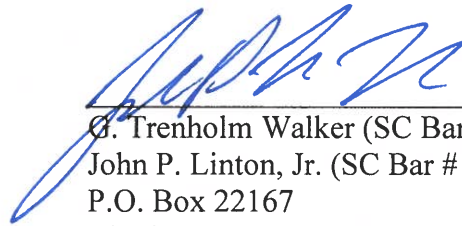
contemplate the dismissal of an appeal for procedural or *other reasons* without a full record. See e.g., Rule 242(e)(2) (discussing that “If the matter was dismissed by the Court of Appeals for procedural or other reasons, the Appendix [that must be filed and served with a petition for certiorari] shall include any documents relevant to the dismissal including any motion to dismiss and any return or reply that may have been filed.”). For this additional reason, the Petition should be denied.

CONCLUSION

For all these reasons the appeal should be dismissed and/or the Petition denied.

Respectfully submitted,

WALKER GRESSETTE & LINTON, LLC



G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
Linton@wglfirm.com
Walker@wglfirm.com

Attorneys for Respondent Design Review Board (DRB) of
the Town of Sullivans Island (S.I.)

August 24, 2022
Charleston, South Carolina