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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT

The Honorable L. Casey Manning
Fifth Circuit Judge

Case No. 2022-000389

UNIVERSITY HILL NEIGHBORHOOD ASSOCIATION,.....RESPONDENT,

v.

CITY OF COLUMBIA, CITY OF COLUMBIA DESIGN AND DEVELOPMENT REVIEW COMMISSION, AND TRINITAS VENTURES, LLC, ... APPELLANTS,

---

INITIAL REPLY BRIEF OF APPELLANT CITY OF COLUMBIA

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ARGUMENTS

The Association's Brief offers no real argument of substance in response to the City of Columbia's Brief. In this Reply, the City briefly raises five points concerning the Association's Brief.

1. The Association failed to address the City's arguments concerning standing and the public importance exception as to its claims against the City of Columbia.

In its Brief, the City argued that the Association, and in turn, the circuit court, erred in analyzing the standing issue solely from the standpoint of statutory standing under S.C. Code Ann. § 6-29-900(A), which is applicable to the Association's appeal of DDRC decision-making, not its causes of action against the City of Columbia. City Brief, p. 12. Further, the City argued that the Association failed to meet all three of the elements of constitutional standing to bring its claims against the City. *Id*. at p. 12 – 14. And that the circuit court erred in applying the public importance exception. *Id*. at p. 14 – 18. The Association failed to address these arguments. The City respectfully asks this Court to take the Association's failure to respond to the City's arguments concerning standing and the public importance exception as a concession by the Association that the circuit court ruled incorrectly. *See First Union Nat. Bank of S.C. v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part*, 328 S.C. 290, 494 S.E.2d 429 (1997) (noting that "First Union's failure to respond to … [Appellant's] argument in its brief could amount to a concession that the trial court ruled incorrectly.").

2. The Association's argument concerning mootness lacks merit.

The Association brought a claim against the City challenging section 3.5.4 of the GUIDELINES as invalid under S.C. Code Ann. § 6-29-1150(A) ("*Ultra Vires* Claim"). As argued in the City's Brief,

City Council enacted an ordinance that amended the GUIDELINES to delete section 3.5.4; thus mooting the Association's *Ultra Vires* Claim. In its Brief, the Association argues that:

> Even though Section 3.5.4 has been deleted from the Guidelines, there are other sections of the Guidelines which are designed to implement Section 3.5.4 by addressing the site plan review concerns. These sections require the DDRC to address items that would ordinarily be addressed by the Planning Commission pursuant to [Sections 17-582 – 17-589 of the City's land development regulations]. The provisions that have not been deleted include the following:
>
> (1) Subsection 5.4.1 of the Guidelines sets out a scheme to determine setbacks, which are also regulated by the planning commission.
> (2) Subsection 5.4.2 addresses "building orientation," which is also involved in planning commission review.
> (3) Section 5.5 addresses "open spaces," which are also a matter for planning commission review.
> (4) Section 5.10 addresses parking and screening, which are also reviewed by the planning commission.
>
> The legal status of these provisions is not clear. The City argues that the site plan provisions in the *Guidelines* will be applied by the Planning Commission. However, the City has not identified any official action or decision that adopts or implements such an approach. Association Brief, pp. 26-27.

There is nothing unclear about the legal status of Sections 5.4.1, 5.4.2, 5.5 and 5.10 of the GUIDELINES. With the deletion of Section 3.5.4 of the GUIDELINES that delegated site plan review to the DDRC, the DDRC lacks the authority to review site plans. Exh. 1 of Respondents' Trial Brief (City Ord. No. 2020-100 (Dec. 15, 2020)). Contrary to the Association's claim that Sections 5.4.1, 5.4.2, 5.5 and 5.10 of the GUIDELINES somehow require the DDRC to review site plans, site plans for group developments such as Trinitas' Project shall be submitted to the planning commission for review and approval." COLUMBIA MUNICIPAL CODE, § 17-581 (emphasis added). Sections 17-581 through 17-589 confer site plan review, including site planning considerations found in Sections 5.4.1, 5.4.2 and 5.5 of the GUIDELINES, to the Planning Commission, not the DDRC. No further

"official action or decision" is needed to adopt or implement this procedural change because the City's ordinances are clear. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature."). Because the DDRC no longer reviews site plans, the Association's *Ultra Vires* Claim is moot.

3. There is nothing puzzling about the City's argument concerning the proper remedy for an invalid ordinance.

In its Initial Brief, the City argued that the circuit court erred in reversing the DDRC's site plan approval because the Association failed to timely appeal DDRC's site plan approval pursuant to S.C. Code Ann. § 6-29-900; therefore, the circuit court lacked the authority to reverse the DDRC's site plan approval. The Association finds this argument puzzling, claiming that the City's argument would deny the Association any relief. The Association ignores the fact that it could have sought reversal of the DDRC's site plan approval had it filed an appeal of the site plan approval within 30 days of the DDRC's decision. *See* S.C. Code Ann. § 6-29-900(A) (stating that an appeal of a DDRC decision "must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review."). Had the Association timely appealed the DDRC's site plan approval, it could have raised any error of law, including its theory that, under the South Carolina Local Government Comprehensive Planning Enabling Act (Enabling Act"), the DDRC lacked authority to review site plans. *See* S.C. Code Ann. § 6-29-950 ("No permit may be issued or approved unless the requirements of [the Enabling Act] are complied with."); S.C. Code Ann. § 6-29-930(A) ("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."). The Association's failure to do so left it without the remedy it seeks.

4. The Association failed to address the City's argument that the circuit court erred in deciding not to rule on the Association's Unlawful Delegation Claim.

Under the general jurisdiction of the circuit court, the Association brought a claim of unlawful delegation against the City of Columbia, not the DDRC. Association Trial Brief, p. 4. Its requested relief was for the circuit court to "hold that the adoption of the *Guidelines* as an ordinance was an unlawful delegation of the legislative power of the City and, therefore, void." *Id*. at p. 42. Citing to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999), the circuit court declined to decide this issue because it concluded that it had already disposed of the issues of site plan and design approval. Order, p. 54 (Dec. 7, 2021). In its Brief, the City argued that the circuit court erred in declining to rule on the Unlawful Delegation Claim because this claim was a separate and distinct claim against the City, which was not disposed of in the circuit court's order. City Brief, p. 30. The Association failed to address this argument. The City respectfully asks this Court to take the Association's failure to respond to the City's argument as a concession by the Association that the circuit court ruled incorrectly. *See First Union Nat. Bank of S.C. v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part*, 328 S.C. 290, 494 S.E.2d 429 (1997) (noting that "First Union's failure to respond to … [Appellant's] argument in its brief could amount to a concession that the trial court ruled incorrectly.").

5. The Association's unlawful delegation argument is flawed.

The Association bases its Unlawful Delegation Claim largely on statements made by a City employee, Lucinda Statler, concerning her view of the DDRC's overall process of decision-making. Association Brief, pp. 31 – 32. However, a claim that a legislative body has unlawfully delegated legislative power is decided by reviewing and interpreting the statute or ordinance that allegedly grants unbridled legislative authority. *See S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955) (… "it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform …."). (emphasis added). The Association's reliance on Ms. Statler's commentary is misplaced.

Moreover, the Association impermissibly isolates and emphasizes one sentence in Section 5.3.1 of the GUIDELINES stating that Section 5.3.1 provides "nonbinding general direction for development within the City Center, with the recommendation that the City's regulatory plans and codes be amended to reflect the guidance included here," while ignoring the applicable regulations as a whole. Association Brief, p. 31. In determining whether the City has violated the non-delegation doctrine, this court "must consider the administrative actions the act affirmatively permits and examine the entire act in light of its surroundings and objectives to ascertain express or implied standards." *Gale v. State Bd. of Med. Examiners of S.C.*, 282 S.C. 474, 479–80, 320 S.E.2d 35, 38 (Ct. App. 1984); *see also Helicopter Sols., Inc. v. Hinde,* 414 S.C. 1, 12, 776 S.E.2d 753, 759 (Ct. App. 2015) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole

considered in the light of its manifest purpose."). This Court should reject the Association's argument.

It is not difficult to identify the intelligible principles within Section 5.3.1 of the GUIDELINES. Section 5.3.1 states that the "overall objective of addressing building heights within the *Design/Development Guidelines* is to help achieve the desired urban character for City Center." GUIDELINES, p. 5-2. Section 5.3.1 sets a minimum height of two stories. *Id*. The maximum height, as a general rule, should be no more than five stories, but there are exceptions allowed based upon the surrounding context, in recognition of the fact that some buildings in the City Center are 25 stories tall. *Id*. at pp. 5-2 – 5-3. The GUIDELINES stress that the most important principle is that the height of a proposed development should be considered in relation to the context of the height of adjacent development. *Id*. at p. 5-3. Contextual standards such as this do not constitute an unlawful delegation of legislative power. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979).

CONCLUSION

For these reasons as well as arguments raised in the City's Brief, Appellant City of Columbia respectfully requests that this Court reverse the decision of the circuit court concerning the Association's causes of action against the City.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that, on September 1, 2022, I served the City of Columbia's Initial Reply Brief by electronic mail to all parties of record, as follows:

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Attachments: City Initial Reply Brief 9-1-22.pdf; COS City Reply Brief.pdf

Counsel,

Attached please find the City of Columbia's Initial Reply Brief and a Certificate of Service. You are served via electronic mail only.

Best,

Mullen

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