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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
J. Cordell Maddox, Jr., Circuit Court Judge

Civil Action No. 2021-CP-26-05002
Appellate Case No. 2022-000596

Horry County, a Political Subdivision of the State of South Carolina, ...Plaintiff/Appellant,

v.

Helicopter Solutions, Inc., d/b/a Helicopter Adventures,
Freddie Rick, and Burroughs & Chapin Company, Inc.....Defendants/Respondents.

APPELLANT'S INITIAL REPLY BRIEF

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Introduction

Respondents Helicopter Adventures and its owner Freddie Rick (collectively "HA") repeat, and compound, the errors HA made below. Ignoring clear law requiring a trial court to accept a plaintiff's fact allegations as true when ruling on a motion to dismiss, HA instead relies on the denials in responsive pleadings to insist that the County's allegations are "speculative." From this, HA argues that the County is not entitled to a declaration of its rights and liabilities as to HA under Ordinance 15-16, which became effective in April 2016. (Compl. Ex. B at 5.)

The Ordinance immediately rendered HA's use of Burroughs and Chapin's (B&C's) Property nonconforming, imposed restrictions on the Property, and started a seven-year amortization period which ends in 2023 and requires HA to terminate at its present location.

In 2021, after Rick told the County that HA intends to operate at its present location unless and until the County provides him a site at MYR—something that the County has no power to do—the County sought a declaratory judgment to settle the parties' obligations *before* the amortization period expires. HA says that the County has no right to such a declaration.

Putting the shoe on the other foot, however, shows that HA is wrong. If HA, whose business the Ordinance directly affects, had brought suit seeking a declaration that the Ordinance is preempted, unconstitutional, or otherwise invalid, there is no doubt that such a claim would be justiciable. No court would tell HA that it must wait until after January 1, 2024 and the closure of its business to determine whether the Ordinance that requires the closure of its business is valid.

Likewise, taking the County's allegation of Rick's stated intent to stay put at face value, there is no doubt that the County has a justiciable claim for a declaratory judgment on the same issues. By refusing to accept the County's factual allegations as true, and instead crediting HA's contrary assertions, the trial court plainly erred. Thus, this Court should reverse.

Reply to HA's Statements of the Case and of the Facts

As it did below, HA's brief emphasizes the denials of fact allegations contained in responsive pleadings. (Resp. Br. 1-2.) But those cannot be considered on a 12(b)(6) motion.

HA's discussion of its prior case against the County, *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015), only supports the County's position that the parties' dispute over the later-adopted Ordinance 15-16 is justiciable. This Court detailed the extent to which Rick and his company went to get HA established at its present location:

> After obtaining preliminary approval of site building plans from both Coleman and Mincey, Helicopter Adventures submitted an application for a building permit, which was issued on April 10, 2012. In addition, the Ricks made investments in the business, including: (1) entering marketing and public relations contracts; (2) commencing construction of the structure, building pads, and parking lot; (3) signing the land lease; (4) purchasing four helicopters; (5) leasing a fifth helicopter; and (6) hiring and training pilots to operate the helicopters.

Id. at 6, 776 S.E.2d at 756.

That Rick spent substantial sums to open his business—and engaged in years-long litigation to keep it in operation at its present site—is entirely consistent with the County's allegation that he intends to continue operating there unless and until the County provides him a site at MYR.

The *Hinde* case also supports the County's position that Rick's statement is one of intent to continue operating at HA's present site indefinitely, since Rick has already "contacted the Myrtle Beach and North Myrtle Beach airports to determine whether such a business could be conducted at either site; however, neither airport would allow this type of business." *Id*. at 4, 776 S.E.2d at 755. So not only does the County lack jurisdiction to meet the condition that Rick imposes to cease operating at his present site, but Rick knows that the condition cannot be met.

Rick's statement of intent to continue operating at his present site unless and until the County provides him a site at MYR, standing alone, creates a justiciable controversy between HA and the County regarding the validity and enforceability of the Ordinance. That controversy

exists regardless of whether HA and B&C formally execute a new lease as the County has alleged that they intend to do. (Compl. ¶ 32.) The theoretical possibility that B&C, which is reaping rents from HA, might pursue a remedy against HA's continued operation beyond the current lease term is not only contrary to B&C's business interest, but is also a factual scenario contrary to the allegations of the complaint, and thus must be ignored at this stage.

So, too, must HA's quibbling about the details of the lease allegation be ignored. HA argues that the County did not allege Respondents' intent to enter "any renewal with an effective date on or after January 1, 2024." (Resp. Br. 5.) Of course, a new lease most likely would have an effective date of August 31, 2023 (the day the current lease is set to expire), so HA's argument about a 2024 effective date is irrelevant. The argument is also contrary to the logical inference—reasonably deducible from the facts alleged in the complaint—that any new lease term would continue into 2024.

Moreover, HA could remain on the Property after August 2023 as a holdover tenant, either with or without B&C's consent, and in either case B&C would be entitled to receive 150% of the rent amount applicable at the end of the lease term. (Compl. Ex. A, Lease Agreement at 14, ¶ 29.) HA could also purchase the Property, as the current lease gives HA a right of first refusal for purchase. (*Id.*, Lease Agreement at 17, ¶ 31(p).)

At bottom, HA's fact assertions are either irrelevant to the County's entitlement to a declaration of its rights and liabilities in enforcing the Ordinance as to HA, or are contrary to the County's clear fact allegation that "Defendant Rick informed the County that HA intends to continue operating at its current location unless and until the County provides him with a location at MYR, which is located in the City of Myrtle Beach." (Compl. ¶ 31.) That is the key fact allegation that the trial court wrongly refused to credit when ruling on the motion to dismiss.

Reply Argument

I. The County's pleadings show a justiciable controversy.

The County's opening brief showed that the trial court improperly relied on fact allegations in the defendants' answers and arguments, contrary to the rule that a motion to dismiss must be decided "based solely upon the allegations set forth on the face of the complaint." *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 338, 339 (1987); (*see* Aplt. Br. 5, 7-9.)

And HA admits that a motion to dismiss may be granted *only* "'when the pleadings are so defective that taking all the facts alleged as true, no cause of action . . . is stated. *Diminich v. 2001 Enterprises, Inc.*, 292 S.C. 141, 355 S.E.2d 275 (Ct. App. 1987).'" (Resp. Br. 6.)

Thus, HA's suggestion that a subset of a complaint's factual allegations, those HA deems "conclusory," can be ignored (Resp. Br. 6) is wrong—as shown by each case that HA cites on this point. *See HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 632, 635-36, 699 S.E.2d 699, 703, 705 (Ct. App. 2010) (reversing dismissal of complaint based on required acceptance of all fact allegations therein, and using the term "conclusory" only in reference to legal argument, e.g., "Because Appellants' argument concerning the Town's duty as a DMA [designated management agency] is conclusory, we deem it abandoned."); *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (holding that while a demurrer admits the facts pled in the complaint, a demurrer "does not admit conclusions of law"); *Brouwer v. Sisters of Charity of Providence Hospitals*, 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014) (reversing dismissal of complaint and reaffirming that Rule 12(b)(6) "requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory" of the case and that dismissal may be sustained only when "the facts alleged in the complaint do not support relief under any theory of law") (internal citation and quotations omitted).

The County's allegation that Rick intends to defy Ordinance 15-16 by continuing to operate HA at the Property unless and until the County secures him a site at MYR (i.e., indefinitely) is "deemed admitted for the purposes of considering a motion" under Rule 12(b)(6). *Russell*, 305 S.C. at 89, 406 S.E.2d at 339.

When Rick stated this intent, he created a bona fide controversy. So the County's first cause of action seeks a declaratory judgment that: the Ordinance is valid, Rick must obey it, and he is not entitled to compensation from the County. The second cause of action is for an injunction commensurate with that declaration. Plaintiffs commonly seek remedies that are contingent upon the success of other claims in the suit (e.g., an injunction based on a declaration, or attorney fees based upon a found constitutional violation). But it would be improper to dismiss say, an attorney fees claim on the basis that it is contingent on finding a constitutional violation.

The County would hope that if the trial court rules that the Ordinance is valid and HA must cease operations as the Ordinance requires, then Rick would honor that ruling, cease operations, and not follow through on his stated intent to continue operating until the County gives him something that it cannot give him. If Rick changes course from his stated intent and ceases operations, then the second remedy based on the declaration may prove to not be necessary. But while the gravamen of the complaint is the declaratory judgment claim, the trial court should not have dismissed either claim. The County is entitled to a declaration of the validity of its Ordinance and HA's obligations under it now, and if HA does not honor that declaration, an injunction should surely follow. Thus, as described below, the trial court erred as to both claims.

A. The County has a present interest in having its Ordinance declared valid and enforceable against HA under the Declaratory Judgments Act.

The controversy between the County and HA is ripe for resolution under the Declaratory Judgments Act, as the Act specifically provides for the declaration of rights under an ordinance

such as Horry County Ordinance 15-16. S.C. Code Ann. § 15-53-30 (1976); *see also* Rule 57, SCRCP.

HA ignores that Ordinance 15-16 became operative when it was adopted in April 2016. (Compl. Ex. B, Ordinance 15-16 at 5, "13. **Effective Date:** This Ordinance shall become effective upon third reading," "AND IT IS SO ORDAINED, ENACTED AND ORDERED this 19th day of April, 2016.")

Upon the adoption of the Ordinance, HA's use of the Property became nonconforming, with all the restrictions that apply to nonconforming uses (no expansion of the nonconforming use, no extension, etc.). Likewise, the Ordinance immediately limited B&C's ability to lease the land to a business that could pay a prime rate. That the Ordinance has a 7.5-year amortization period does not erase the controversy. It is operative now, and every day that passes is one less day that HA has to operate on the Property.

The proper time for the County to settle its legal rights "without awaiting a violation of the rights," *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004), is now—during the last portion of the amortization period. *Cricket Store 17, LLC v. City of Columbia*, 676 F. App'x 162, 164 (4th Cir. 2017); *Indep. News, Inc. v. City of Charlotte*, 568 F.3d 148, 152 (4th Cir. 2009); *Cap. Outdoor Adv., Inc. v. City of Raleigh*, 446 S.E.2d 289, 298 (N.C. 1994). Rick simply ignores these authorities showing that it is appropriate to seek a declaration of rights before the end of the amortization period, rather than kick up the dust of litigation at the end of the period and effectively extend it until the judicial dust settles.

If HA had brought suit, there would be no doubt as to its justiciability. B&C's Property—and HA's ongoing use of it—was immediately restricted by the Ordinance when it took effect in April 2016. Rick invested considerable resources into marketing, construction of helipads,

purchasing of helicopters, etc., to establish HA. *Helicopter Solutions, Inc.*, 414 S.C. at 6, 776 S.E.2d at 756. The Ordinance restricts that business now, and requires its elimination at its present site at the end of next year. No court would require Rick to wait until 2024 to bring suit.

Nor should the trial court have required the County to wait to bring suit given Rick's stated intent to continue operating at HA's present site indefinitely.

In urging this Court to repeat the error made below, HA misreads *Waters v. South Carolina Land Resources Conservation Commission*, 321 S.C. 219, 467 S.E.2d 913 (1996), to argue that the "ripening seeds" doctrine is not recognized in South Carolina. It is.

The Supreme Court "declined to utilize" the doctrine in *Waters*, but only because it did not apply in that case. *Id*. at 228 n.7, 467 S.E.2d at 918 n.7. There, a company obtained a permit to conduct mining on a certain area of land. The company also owned acreage that neighbored the land covered by the permit. Nearby residents contended that a provision in the mining statute allowing a permittee to seek modification of a permit to cover additional land violated their procedural due process rights because there was no guarantee that they would receive notice *if* the company sought a modification. *Id*. at 227, 467 S.E.2d at 917.

The Court held that such a claim was not ripe because the company had not applied for a modification, "*nor is there any indication* it ever will." *Id*. at 228, 467 S.E.2d at 918 (emphasis added). Moreover, the company "is not required" to seek a modification "under the statute in order to gain permission to mine the neighboring land." *Id*. Thus, there was no occasion for the Court to invoke the doctrine because the company had never indicated an intent to trigger the condition that the residents were concerned about.

Here, in contrast, Rick has stated that HA is going to continue operating at its present site until the County meets an impossible condition.

The Supreme Court *did* invoke the "ripening seeds" doctrine eight years later in *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). In doing so, the Court relied on *Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951), which had recognized the doctrine more than 50 years prior. Thus, the doctrine is law in South Carolina.

Here, there is much more than the "ripening seeds of a controversy"; the controversy is in full bloom. HA never responds to the County's argument that, accepting the County's fact allegations as true, the County has a strong interest in obtaining a declaration now—before the amortization period ends—that HA must comply with the Ordinance. (Aplt. Initial Br. at 10.)

Instead, HA simply repeats: (1) arguments about its lease with B&C that are irrelevant to the justiciability of the controversy between the County and HA concerning the Ordinance, (*see supra* at 2-3), and (2) reliance on denials in the answers that are not part of "the allegations set forth on the face of the complaint," and are thus not considered on a motion to dismiss. *Brown*, 291 S.C. at 366, 353 S.E.2d at 339.

Next, HA points to a boilerplate provision in its lease that requires the tenant to comply with all laws and ordinances. (Resp. Initial Br. at 12.) But such a provision does not guarantee HA's lawfulness, and does not undo Rick's statement that triggered this lawsuit. And just as having a lease is not necessary for Rick to follow through on his threat, neither is a lease provision a bulwark against him doing so. He could continue HA's operations at its present site without a lease, as a holdover tenant (with or without B&C's consent) paying 150% of the last rent amount, or as the owner of the Property upon exercising its right of first refusal to purchase. (Compl. Ex. A, Lease Agreement at 14 ¶ 29, 17 ¶ 31.)

Again, Rick and HA had opportunity to resolve this litigation with a consent decree negating Rick's May 2021 threat and stating that HA would cease operations at its present site by

January 1, 2024. But HA refused to enter into a consent order without the following bolded conditions: "**So long as Ordinance 15-16 is legally enforceable**, the HA defendants agree to cease their helicopter operations on the property no later than 12:01 a.m., January 1, 2024, **unless the lease is extended beyond that date."** (January 25, 2022 Hrg. Trans. 19:13-25.)[1]

Finally, HA also insists that the Court should not consider the County's "unpled factual assertions" in its opening brief. But what HA calls "unpled factual assertions" are just expositions on the controversy and inferences from the County's allegations. It is a reasonable inference, for example, that a helicopter sightseeing business with a fleet of helicopters, *Helicopter Solutions*, 414 S.C. at 6, 776 S.E.2d at 756, is a multi-million dollar business.

In any event, the County's allegations establish the justiciability of its declaratory judgment.

B. The County has a justiciable claim for injunctive relief because HA proposes to use the Property in violation of the Ordinance.

The County's allegations also establish the justiciability of its injunction claim. The zoning statute provides that:

> In case a building, structure, or land is or is *proposed to be used* in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer . . . may in addition to other remedies, institute injunction . . . to prevent the unlawful . . . use.

S.C. Code Ann. § 6-29-950(A) (emphasis added).

Here, the County has stated a claim for injunction by alleging (1) that it has an Ordinance that restricts heliports to public use airports; and (2) Freddie Rick stated that HA will violate it. A proposed violation of an ordinance can be enjoined as a matter of law, S.C. Code Ann. § 6-29-950, so Rick's threat to violate the Ordinance is the proper subject of an injunction.

[1] Counsel for HA opened the door by informing the Court of the negotiations to resolve the suit. (January 25, 2022 Hrg. Trans. 13:16-20.)

HA misreads *Strong v. Winn-Dixie Stores, Inc.*, which held that to get an injunction against a public nuisance "the evidence must show that a nuisance is inevitable from the proposed use of the premises or will necessarily result." *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 254, 125 S.E.2d 628, 633 (1962) (emphasis added.)

In *Strong*, property owners sued a landowner who was proposing to erect a supermarket. They argued that the proposed supermarket would be a nuisance by "creat[ing] greatly increased traffic, noise, confusion, dust, trash and general unsanitary conditions, resulting in injury to their health and depreciation in value of their property." *Id*. The court declined to impose an injunction because it was not inevitable that the grocery store would become a nuisance—that is, the defendants could possibly operate their *lawful* business without it becoming a nuisance. *Id.* ("If the proposed business may be operated in such a way as not to constitute a nuisance, an injunction will not be issued.")

Here, by contrast, the proposed use of the premises is a heliport that violates the Ordinance because it is not in a public use airport. The nuisance is inevitable and flows from HA's proposed violation of the Ordinance. HA contends that the nuisance is "entirely speculative," but that is based on disputes with fact allegations in the Town's pleadings, which disputes are irrelevant.

The hope is that the Court will issue a declaratory judgment that HA must cease operating, and that Horry County owes no compensation. The further hope is that, consequently, HA will retreat from its threat and not violate the Ordinance. But the fact of the proposed violation of the Ordinance remains—and is deemed admitted at the motion to dismiss stage. That an injunction remedy may ultimately not be necessary after the County obtains a declaratory judgment does *not* mean that the injunction claim must be dismissed as not justiciable before the declaration is entered. Under the statute, the County has sufficiently pled its claim for injunctive relief.

II. HA's preemption argument proves the existence of the controversy; it also fails because the Ordinance is a land-use regulation that is not preempted.

HA's "additional sustaining grounds" are meritless. Its preemption argument is a preview of the challenge that it could file at the last minute if the County's complaint does not proceed, and only proves that there is a justiciable controversy between the parties.

The County asserts that the Ordinance prevents HA from operating a heliport on the Property, and HA asserts that it need not follow the Ordinance because federal law preempts it.

On the merits, HA is wrong. Federal law does not preempt land-use regulations of airports.

Federal preemption arises from the Supremacy Clause of the U.S. Constitution. U.S. Const. Art. VI, cl. 2. State preemption of local law is evaluated under the same framework as federal preemption of state law. *South Carolina State Ports Authority v. Jasper Cnty.*, 368 S.C. 388, 397-401, 629 S.E.2d 624, 628-630 (2006). Preemption of a local law occurs through (1) express preemption, (2) implied field preemption, or (3) implied conflict preemption. *Id*.

"Express preemption occurs when [Congress or] the General Assembly declares in express terms its intention to preclude local action in a given area." *Id.* at 397, 629 S.E.2d at 628. "Under implied preemption, an ordinance is preempted when the . . . statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates [national or] statewide uniformity." *Id.* "Conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." *Id.* at 401, 629 S.E.2d at 630.

Under the Federal Aviation Act, "[t]he United States government has exclusive sovereignty of *airspace* of the United States." 49 U.S.C. § 40103(a)(1) (emphasis added). This sovereignty over airspace has been applied to regulations pertaining to aircraft operations and safety such as aircraft noise, flightpath, times of operation, qualifications for pilots, etc. *See City of Burbank v.*

Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (aircraft noise regulations); *Hoagland v. Town of Clear Lake, Indiana*, 344 F. Supp. 2d 1150, 1156 (N.D. Ind. 2004) (collecting cases).

But federal preemption does not extend to state and local land-use regulations, even if those regulations pertain to the locations of airports. *Broadbent v. Allison*, 155 F. Supp. 2d 520, 524 (W.D.N.C. 2001) ("[D]eciding whether to allow planes to land and takeoff from a certain location is a quintessential land use issue over which state and local governments possess near-plenary authority."); *see also Gustafson v. City of Lake Angelus*, 76 F.3d 778, 790 (6th Cir. 1996) (upholding ordinance prohibiting the landing of seaplanes on a lake because "[f]ederal preemption of airspace under [the Federal Aviation Act] does not limit the right of local governments to designate and regulate aircraft landing areas").

Thus, HA's argument that the Ordinance is preempted fails because the Ordinance is a land-use regulation, not a regulation of airspace or aviation. More importantly, the preemption argument shows that a controversy exists, as plainly HA disputes the validity of the Ordinance.

Conclusion

HA confirms that the trial court ignored the plaintiff's factual allegations and credited the defendants' contrary allegations in resolving a motion to dismiss. For the reasons stated above, this Court should reverse the trial court's erroneous dismiss of the case.

Respectfully submitted,

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PROOF OF SERVICE

I certify that on September 26, 2022, I have served all counsel in this action with a copy of **Appellant's Initial Reply Brief**, via electronic mail, to the following addresses:

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September 26, 2022

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In re: *Horry County v. Helicopter Solutions, Inc. et al.*
Appellate Case No. 2022-000596

Dear Ms. Kitchings:

Please see the enclosed Appellant's Initial Reply Brief for filing in the above-captioned matter. Under Rule 262(a)(3), SCACR and the Order issued by the Supreme Court of South Carolina on May 6, 2022, we will be filing this document only electronically, unless the Court requests otherwise. Should the Court need anything additional, please do not hesitate in contacting our office at (423) 899-3025.

Respectfully,

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