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Jun 20 2023

SC Court of Appeals

Exhibit 2

May 23, 2023 Order Denying Appellant's
Motion to Reconsider

Appellant Justin O'Toole Lucey's Notice of Appeal

Justin O'Toole Lucey

v.

The Town of Mount Pleasant, South Carolina and WIN515, LLC

Charleston County Court of Common Pleas Case No. 2022-CP-10-03328

Appellate Case No. 2023-_____

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	
)	CASE NO.: 2022-CP-10-03328
Justin O’Toole Lucey,)	
)	
Plaintiff,)	
)	
v.)	ORDER DENYING PLAINTIFF’S
)	MOTION TO RECONSIDER
)	
The Town of Mount Pleasant, South Carolina)	RECEIVED
and WIN515, LLC,)	Jun 20 2023
)	
Defendants.)	SC Court of Appeals

This matter comes before the Court on Plaintiff Justin O’Toole Lucey’s Motion to Reconsider. For the reasons below, the Court DENIES the Motion.

On April 5, 2023, the Court issued an Order Granting Defendant WIN515, LLC’s Motion to Dismiss Plaintiff’s Appeal (the “Order”). On April 14, Plaintiff Justin O’Toole Lucey (“Lucey”) filed a Motion to Reconsider the Order (the “Motion”).

The Order dismissed Lucey’s zoning appeal (erroneously styled as a “Complaint”), with prejudice, because Lucey lacked statutory standing to appeal the Town of Mount Pleasant Commercial Design Review Board (“DRB”) unanimous approval of WIN515, LLC’s project, failed to name the DRB as a necessary party, failed to timely serve the DRB as required by Rule 74, SCRCP, and failed to exhaust certain mandatory administrative remedies.

The Motion seeks reconsideration of each of these rulings. After careful consideration of the Motion, the Court denies the Motion and reaffirms the Order, finding as follows:

1. Lucey lacks statutory standing to appeal the DRB decision in favor of WIN515, LLC.

The Order correctly found that Lucey lacked statutory standing based on a careful examination of the “Complaint” and the Record on Appeal. On August 24, 2022, the Town of

Mount Pleasant filed its Notice of Opposition and Submission of the Record before the Design Review Board.

In an appeal from a local government quasi-judicial zoning board, such as the DRB, the Court's review is limited to the Record on Appeal. S.C. Code Ann. § 6-29-920 ("the board must file with the clerk a duly certified copy of the proceedings held before the board of architectural review, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions"); S.C. Code Ann. § 6-29-930(A) ("The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence.").

The Court may not, and has not, considered allegations in the "Complaint" that do not have support in the Record on Appeal.

"Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020), *reh'g denied* (Aug. 7, 2020).

The Town's Zoning Code establishes the DRB and governs the procedure for appealing its decisions. Section 156.420(A)(1) confirms the DRB is a "board of architectural review" governed by the South Carolina Planning and Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310, *et seq.* (the "Act"). Section 156.422(C) provides that "[a]ny aggrieved party may appeal a decision of the Design Review Board to the circuit court, pursuant to the provisions of S.C. Code §§ 6-29-900, *et*

seq.” S.C. Code Ann. § 6-29-900(A) limits standing to parties with a “substantial interest” in the decision.

The South Carolina Court of Appeals applied the “substantial interest” test in *Spanish Wells Prop. Owners Ass’n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island*, 292 S.C. 542, 357 S.E.2d 487 (Ct. App. 1987), *rev’d on other grounds*, 367 S.E.2d 160 (1988). There, the Court held that owners of property “adjacent to and in the near vicinity of [a proposed development]” were persons with “substantial interest” in a zoning decision, and thus had standing to appeal the decision. 357 S.E.2d 487. *See also Momeier v. John McAlister*, 193 S.C. 422, 8 S.E.2d 737 (1940) (neighboring property owner alleging special injury and damage to his property because immediate neighbor was conducting funeral home in a residential district has a significant interest different from the public at large to support an action for injunction for violation of the city ordinance).

The “substantial interest” test was further clarified in *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001). There, the Court of Appeals found the South Carolina Coastal Conservation League lacked statutory standing to appeal a subdivision plat approval, observing as follows:

The League has not alleged that it or its members have suffered or will suffer an individualized injury as the result of the filing of the subdivision plats. Although the League alleges its members will suffer injury if the islands are developed, the injury is purely conjectural and hypothetical. There is no evidence in the record that either the League or its members have suffered any actual injury by the filing of the subdivision plats.

551 S.E.2d 589. The Court also stated that “[t]he word ‘aggrieved’ refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation.” *Id.* The Court of Appeals has described a “real party in interest” as one with “a real, material, or substantial interest in the outcome of the litigation.” *Hill v. South Carolina Dept. of Health and Environmental Control*, 389 S.C. 1, 698 S.E.2d 612 (2010). Someone who is a “real party in

interest” with “substantial interest” is not “one who has only a nominal, formal, or technical interest in, or connection with, the action.” *Stoney v. Stoney*, 425 S.C. 47, 819 S.E.2d 201 (2018).

The Order found that Lucey lacks statutory standing, but not solely because he lacks property physically adjacent to WIN515, LLC’s property. The Order also found Lucey does not possess a “substantial interest” because the Record on Appeal reveals (1) he does not own property *in the “near vicinity” of WIN515, LLC’s property* either and (2) he is not a real party in interest given his unsupported allegations of harm, which are in no way unique and individualized.

The sole allegation in the “Complaint” touching on standing is as follows: “Plaintiff resides and owns properties near the Crossing. Plaintiff and his minor children have utilized the Crossing for a decade and continue to do so.” (Compl. ¶ 10). The June 27, 2022 letter, attached to the Complaint but not included in the Record on Appeal, states: “As you may be aware, my main office building and annex are located at the corner of Mill and Lucas (and has been since 1999), which neighborhood is accessed by the subject intersection. My residence is on the edge of this neighborhood on Rue de Muckle.”

As an initial matter, the June 27, 2022 letter is not part of the Record on Appeal, and this Court may not consider it in this appeal. Both the “Complaint” and the Record on Appeal are entirely devoid of specific addresses and distances between Lucey’s properties and WIN515, LLC’s property. Such distances, appearing for the first time in the Motion cannot be considered by this Court. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied*, 113 S. Ct. 1302 (1993) (a party cannot raise an issue for the first time in a Rule 59, SCRCP motion). Furthermore, nothing in the “Complaint” or the Record on Appeal demonstrates how Lucey, as opposed to general members of the public, is uniquely impacted by WIN515, LLC’s project.

Lucey has fallen far short of carrying his burden of proof to establish that he owns property in the “near vicinity” of WIN515, LLC’s property or that he is a real party in interest. Lucey, as the appellant, has “the burden of presenting this Court with an adequate record.” *Harkins v. Greenville Cty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000)

The Order properly takes judicial notice of the following public records: Lucey’s law firm is located at 415 Mill Street, Mt. Pleasant, SC 29464 (the “Lucey Office”) and Lucey’s residence is located at 634 Rue De Muckle, Mt. Pleasant, SC 29464 (the “Lucey Home”).¹ These are the addresses identified in the “Complaint.” The Court further takes judicial notice of the location of and spatial relationship between the Lucey Office, Lucey Home, and WIN515, LLC’s property at issue in this appeal, according to the GIS Website for Charleston County.

¹ The Motion, for the first time ever in this litigation, claims Lucey owns two other properties relevant to this appeal, namely 510 Coleman and 510 Live Oak Drive. (Motion, Paragraph 1(a)). However, neither of these addresses appear anywhere in the “Complaint” and the Record on Appeal. Moreover, these properties were not discussed at the hearing on the Motion. As a result, neither of these properties can be considered for the first time on a Rule 59, SCRCF motion since these were not previously before the Court. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied*, 113 S. Ct. 1302 (1993).

is devoid of any evidence to support these claims. Even if there were evidence in the Record on Appeal supporting traffic related impacts, these issues are wholly irrelevant because DRB is a board of architectural review and traffic safety issues are outside its purview.

The Order also found that Lucey failed to articulate an “individualized injury.” The “Complaint” merely alleges “Plaintiff and his minor children have utilized the Crossing for a decade and continue to do so.” (Compl. ¶ 10). Lucey’s alleged harms, to the extent there are any, are indistinguishable from that of the general public. The area in question is one of the busiest intersections in the Town. The mere use of public infrastructure in this area fails to give rise to an “individualized injury.”

For these reasons, the Complaint’s alleged harms are purely “conjectural and hypothetical” and fail to articulate any “individualized harm.” *Beaufort Realty Co., Inc. v. Beaufort County, supra*. Accordingly, the Court concludes the Complaint and the Record on Appeal fail to establish Lucey has the required “substantial interest” to confer standing to bring this appeal.

Finally, the Motion argues the Order fails to consider the “public importance” exception to standing. The public importance doctrine does not apply.

South Carolina courts recognize an exception to the requirement that a plaintiff possess standing where “an issue is of such public importance as to require its resolution for future guidance.” *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). Whether the exception applies in a particular case turns on whether resolution of the dispute is needed for future guidance. *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). While the need for future guidance generally dictates when the exception applies, the application of the exception in a particular case does not turn on a rigid formula but rather is determined by the competing policy concerns underlying the exception. *Id.* Those competing concerns are that:

Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

In *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, the Supreme Court held that two neighborhood associations, an environmental non-profit, and a historic preservation non-profit lacked public importance standing in a zoning appeal brought against the City of Charleston and Carnival Cruise Lines over cruise ship operations in the historic district. 407 S.C. 67, 753 S.E.2d 846 (2014). There, the Court held as follows:

In our constitutional system of government with its separation of powers, courts exercise the limited constitutional function of the “judicial power.” S.C. CONST. ART. V, § 1. Accordingly, courts are limited to resolving cases and the powers inherent in that function. Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large, like those Plaintiffs allege here, are to be remedied by the legislative and executive branches. If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box.

Id. at 80-81, 753 S.E.2d at 853.

Lucey’s “Complaint” airs similar policy grievances and alleged (and unsupported) harms befalling the public at large – not Lucey in any individualized manner. The “Complaint” raises no constitutional or other legal issues of public importance necessary for future guidance. Moreover, his objection is not even over the aesthetic design of WIN515’s project, which is the DRB’s sole purview. Rather, his objections are over the project’s use, height, and traffic implications. These are all issues addressed by the Town’s zoning and other development ordinances, which are legislative in nature. *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991) (“Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights.”). There is no dispute, based on the Record on Appeal,

that WIN515 LLC's project satisfied all applicable ordinances and was approved by the Town as a by-right use. In essence, the "Complaint" invites this Court to undue the legislative policy making of the Town. The Court respectfully declines. The "Complaint" falls far short of satisfying the public importance test in the context of a zoning dispute under *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*.

Lucey lacks statutory standing not merely because he lacks property physically adjacent to WIN515, LLC's property. Lucey also does not own property in the "near vicinity" according to the Complaint, the Record on Appeal, and the County of Charleston's public property records. Lucey's alleged harms are purely "conjectural and hypothetical" and do not constitute an "individualized injury" based on the general allegations in the "Complaint" and the lack of evidence in the Record on Appeal. Finally, the "Complaint" fails to establish public importance standing.

2. Lucey failed to name and timely serve the DRB – a necessary party.

Lucey's lack of statutory standing is fatal to his appeal and sufficient to dismiss the "Complaint" with prejudice. However, as an additional sustaining ground, the Order correctly found that the DRB was a necessary party in this appeal and Lucey failed to timely name and serve the DRB pursuant to Rule 74, SCRCF.

The Supreme Court has acknowledged Rule 19, SCRCF, applies in zoning appeals. *Spanish Wells Prop. Owners Ass'n v. Bd. of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988); Rule 74, SCRCF ("The proceedings in the circuit court shall be in accordance with these rules"). Rule 19(a), SCRCF, reads as follows:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action **shall** be joined as a party in the action if (1) in his absence complete relief cannot be accorded among

those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

(Emphasis added).

Both WIN515, LLC and the Town argued at the Motion to Dismiss hearing that the DRB is a necessary party in this appeal.² The statutory procedures governing appeals from the board of architectural review both contemplate and necessitate bringing the board itself within the circuit court's jurisdiction. *See, e.g.*, S.C. Code Ann. § 6-29-920 (“the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board. . .”); S.C. Code Ann. § 6-29-930(A) (“In the event that the decision of the board is reversed by the circuit court, the board must be charged with the costs which must be paid by the governing authority which established the board of architectural review.”). Therefore, to perfect his appeal Lucey was required to name and serve the DRB within the thirty (30) day appeal period. Rule 74, SCRCP (“Notice of appeal to the circuit court must be **served** on **all parties** within thirty (30) days after receipt of written notice of the judgment, order or decision appealed from.”) (Emphasis added).

The Motion cites *Owen Steel Co. v. S.C. Tax Comm'n*, 281 S.C. 80, 85, 313 S.E.2d 636, 639 (Ct. App. 1984) for the proposition that administrative bodies are not necessary parties on appeal. However, *Owen Steel Co.* does not involve a zoning appeal, and this case was not raised by Lucey prior to or at the Motion to Dismiss hearing. The Court may not consider it, as a matter of law. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied*, 113 S. Ct. 1302 (1993).

² Zoning appeals routinely include, as a respondent, the board itself in addition to the local government entity itself. *See, e.g., Croft v. Town of Summerville Bd. of Architectural Review*, 433 S.C. 473, 860 S.E.2d 352 (2021); *Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019); *Christ Cent. Ministries v. City of Columbia Bd. of Zoning Appeals*, 424 S.C. 358, 818 S.E.2d 30 (Ct. App. 2018).

Finally, the Motion erroneously argues that the Court should have allowed Lucey to amend the “Complaint” to add the DRB – not dismiss the case. This argument neglects the distinction between normal civil actions and zoning appeals. An appeal from the DRB must be “filed within thirty days after the affected party receives actual notice of the decision... .” S.C. Code Ann. § 6-29-900(A). A zoning appeal must be perfected within the statutorily defined thirty (30) day appeal period. *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 (Ct. App. 2000) (the timeliness of an appeal from the decision of a zoning board is jurisdictional). An appellant cannot amend an appeal outside the thirty (30) day appeal period to name a necessary party. *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004).

Lucey’s failure to name and timely serve the DRB within the thirty (30) day appeal window is a fatal, incurable jurisdictional flaw necessitating dismissal of the “Complaint” with prejudice.

CONCLUSION

Given the foregoing, the Court DENIES the Motion and reaffirms the ORDER.

IT IS SO ORDERED.

_____, 2023
Charleston, South Carolina

Judge R. Keith Kelly



Charleston Common Pleas

Case Caption: Justin O'Toole Lucey VS Win515 Llc , defendant, et al

Case Number: 2022CP1003328

Type: Order/Other

It is so Ordered.

s/ R. Keith Kelly - 2165