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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Scott Sprouse,
Circuit Court Judge

Appellate Court Case No. 2023-000953
Circuit Court Case No. 2021-CP-07-00663

West Steet Farms, LLC and
Mix Farms, LLC,

Appellants,

v.

City of Beaufort, Beaufort
Inn, LLC, and 303 Associates, LLC,

Respondents.

REPLY BRIEF OF APPELLANTS

/s W. Andrew Gowder, Jr.
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I. THE APPELLANTS' ARGUMENTS ON COLLATERAL ESTOPPEL ARE PRESERVED AND DIRECTLY ADDRESS THE LOWER COURT'S ERROR IN RULING THAT THE ISSUES IN THIS DECLARATORY JUDGMENT ACTION AND THE APPEAL OF THE HISTORIC REVIEW BOARD ACTION WERE IDENTICAL.

In their brief, the Respondents argue that the Appellants raised, for the first time on appeal, an argument that the Circuit Court erred in ruling that this declaratory judgement action and an appeal of a decision of the City of Beaufort's Historic District Review Board ("HRB") were identical actions and that the Appellants were limited to pursuing their arguments and seeking their relief in the HRB appeal only. The Respondents argue that, as such, the Appellants did not preserve this argument on appeal. (Respondents' Brief, pages 18-25).

The Respondents' argument is incorrect.

This issue, whether this declaratory judgment action and the HRB appeal were identical and whether the HRB decision bars this action, was thoroughly briefed and argued before the court. Plaintiff's Pretrial Brief, pages 9-13; Transcript, pages 110-113, 121-122. Nevertheless, even though the Circuit Court used the language of "exhaustion of remedies[1]" rather than the rubric of collateral estoppel, the Circuit Court denied the Appellants the relief they requested based on the court's conclusion that the cases were identical, and the parties had an opportunity to litigate the issues in the HBR appeal. The Circuit Court decided, wrongfully in the Appellants' view, that the parties had already litigated those issues in the HRB appeal, and that is the basis of the Appellants' argument on the appeal to this Court.

[1] The Respondent City raised a different "exhaustion of remedies" argument at the trial, arguing that the Appellants needed to have requested a cease and desist of the zoning administrator and been denied and pursued that appeal first as an "exhaustion" argument. That is not the argument, though, that the Circuit Court adopted in its Order, using the term to mean instead that the HBR appeal process precluded relief in the declaratory judgment action. See Transcript, page 46.

In order to preserve an issue on appeal, the appellant must raise it to the lower court, *Wilder Corp. v Wilke*, 330 S.C. 71, 497 S.E.2d 731, 733 (1998). Once raised and ruled on by the lower court, the issue need not be raised again. "So long as the judge had an opportunity to rule on an issue and did so, it was not incumbent upon ... counsel to harass the judge by parading the issue before him again." *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E. 2d 882, 884 (Ct. App. 1995)(internal quotations omitted). The lower court must rule upon the issue for it to be preserved for review. *Wilder*, 497 S.E.2d at 734. Though a party need not use the exact name of a legal doctrine in order to preserve it, it must be clear that the argument has been presented on that ground. *State v. Russell*, 345 S.C. 128, 546 S.E. 2d 202 (Ct. App. 2001)(issued was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict).

Here, the Respondents argued at trial that the order issued by Judge Bentley Price in the Circuit Court in the appeal of the HRB decision barred the Appellants from obtaining relief in this action because the issues in both cases were identical and had already been decided by Judge Price. Transcript, pages 22-24, 45-46. Appellants contested that defense at the trial and briefed its counterargument before the trial court. Plaintiff's Pretrial Brief, pages 9-13; Transcript, pages 110-113, 121-122.

The Circuit Court adopted the Respondents' argument and ruled accordingly, though not characterizing its basis in terms of collateral estoppel but asserting that the cases were "identical" so the Appellants were required to complete their appeal of the HRB decision ("failure to exhaust administrative remedies") and that the declaratory judgment was not available since the Appellants had an HRB appeal remedy. Order, pages 4-5. However characterized, this argument asserted by the Respondents was central to their defense, was opposed vigorously by the Appellants at trial, and was the clear basis of the Circuit Court's decision. The issue was fully preserved for this appeal.

This is not a situation, as Respondent argues, where a court has failed to rule upon an issue raised by the losing party, requiring the filing of a motion to alter or amend the judgment in order to preserve the issue for appellate review, *I'On, LLC v Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). Clearly, the Circuit Court ruled on the issue of whether the HRB appeal decision barred this declaratory judgment action.

This is also not a situation where the trial court granted relief not requested or ruled on an issue that was never raised at trial. See, e.g., *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673(1993). Rather, the Circuit Court here adopted (erroneously, in Appellants' view) the Respondents' defense that the HRB appeal barred the declaratory judgment action. That issue was well preserved at trial and the court's error in ruling on that issue is the basis of Appellant's appeal.

Though the Circuit Court reasoned that, if the decisions were identical, a decision in the declaratory judgment action would violate the doctrine of *DePass v. City of Spartanburg, et.al.*, 234 S.C. 198, 107 S.E. 2d 350 (1959), since a Circuit Court judge had already ruled, the fundamental finding of the court supporting its decision that the Appellants were barred from obtaining relief in this action was that this action and the HRB appeal were identical. As that issue was raised, contested, argued, and decided against the Appellants, the issue was effectively and completely preserved under the law of South Carolina for review by this Court.

II. RESPONSE TO ADDITIONAL SUSTAINING GROUNDS

A. The Court's decision in the HRB appeal did not bar the Court from deciding this case on its merits where their issues in this case were not actively litigated or directly determined in the HRB appeal and were not necessary for a determination of that appeal.

This issue was thoroughly briefed and argued before the Circuit Court and is argued in Appellants' Brief (App. Brief, starting p. 10), as outlined above in this Reply. The Appellants repeat and incorporate those arguments by reference here.

B. The failure by the HRB to apply the Beaufort Code and require the Respondent property owner to obtain a special exception as required by that Code was clear error by the Board and an abuse of its discretion.

The Respondents argue that the HRB's decision not to enforce the Beaufort Code by requiring the Respondent applicant to obtain a special exception as required by the Code was a matter of a discretionary interpretation by the local government which should be given deference and not disturbed if the municipality's decision is "fairly debatable." The Appellants do not dispute that statement of the law. The exhibits that are part of the record and Appellants' arguments at trial, though, demonstrate that failure the HRB's failure to enforce the Code by requiring the Respondent developer to obtain a special exception for the Hotel and Garage projects ignored the law and so amounted to an abuse of discretion, requiring reversal.

1. <u>The Beaufort Code applies to the Certificates of Appropriateness for the Hotel and Garage approvals by the HDRB.</u>

At trial, the Appellants presented evidence that The Beaufort Code applies to the COA applications for both projects. The Beaufort Code provides that only pending applications that have been accepted as complete as of the effective date of the Code (June 27, 2017) have the option of being approved under either the Code or the prior governing UDO. Code Section 1.4.2.

There is no indication that the City regarded the application for either COA as "complete" as of June 27, 2017. The first preliminary approval of the Hotel occurred on July 12, 2017, and the final COA was not issued until October 9, 2019. (R.___). Lauren Kelly, the City's planner, presenting the

preliminary approval application to the HDRB on July 12, 2017, stated that the then new Beaufort Code applied to the Hotel application. (R.___).

The Garage was considered by the HDRB for preliminary approval at that same July 12, 2017, meeting, but the HDRB determined that more work needed to be done on the design and it was not until September 20, 2017, that the preliminary approval was issued for the Garage. (R.___). The Garage then did not receive a final COA until June 9, 2021. (R.___). Though the City and the Developer now contend the UDO applies to both projects, it is clear that under the provisions of Beaufort Code 1.4.2, the applications for the COA were not complete until they were presented for final COA on October 9, 2019 (Hotel) and June 9, 2021 (Garage). (R.___). Under the terms of Code Sec. 1.4.2, the Beaufort Code clearly applies.

2. If the Beaufort Code applies to the Hotel and Garage projects, they require Special Exceptions from the BZA as Large Footprint Buildings prior to obtaining Certificates of Appropriateness from the HDRB.

Under the Beaufort Code, the Hotel and the Garage are "Large Footprint Buildings" and the Developer needed to obtain a Special Exception from the ZBOA to bring it into compliance with zoning BEFORE a preliminary approval of a COA could be issued.

The Hotel Project and the Parking Garage Project are located in the Downtown Core District (T5-DC) zoning district and within the Beaufort Historic District (HD) Overlay as defined by Beaufort Code Sec. 2.7.1 and as shown on the official Zoning Map of the City of Beaufort. In the T5-DC transect zoning district, buildings are restricted to 100 feet building width at the frontage. Beaufort Code Sec. 2.4.1(D)(3). Buildings that exceed 100 feet building width shall comply with the Large Footprint Building standards in Beaufort Code Sec. 4.5.10. Beaufort Code Sec. 2.4.1(D)(3), footnote 9.

The Beaufort Code defines Large Footprint Buildings as "a building that has a footprint greater than 20,000 square feet. It is a type often used by big-box, national retailers. In the T4 and T5 transect zones, they shall be integrated into the streetscape or screened with Liner Buildings (see Section 4.5.9)." Beaufort Code Sec. 4.5.10(A).

In fact, at trial, the Respondent applicant did not contest that if The Beaufort Code applies, the Hotel and the Garage are Large Footprint Buildings under the Code.

This Court should not adopt this additional sustaining ground asserted by the Respondents to uphold the trial court's ruling below.

C. The Respondent Developer does not have a vested right in either the Hotel or Garage project prior to obtaining a Certificate of Appropriateness under either the UDO or the Beaufort Code.

The Respondents argued at trial that the Developer's various activities with the City, including the granting of easements, entry into parking sharing agreements, demolition permits, and other activity gave the Developer "vested rights" to issuance of the Certificate of Appropriateness under the UDO, without regard to the timing of the applications and approvals.

This argument is not supported by the City's ordinances or state law. "Vested rights" under local and state law are narrowly defined to arise after the "final approval of a development plan, plat, or phased development plan," Beaufort Code Sec. 9.1.9, or a site-specific development plan or phase development plan. S. C. Code Ann. Sec. 6-29-1520(10) (Supp. 2021).

None of the activity cited by the Developer or City rises to the definition of a vested right under local or state law. Rather, the "vested right" provision of the Code provides time limits for matters that are not vested rights as defined in the ordinance at 9.1.9(C)(1), and that section refers specifically to a chart at 9.1.2 that provides that permits for COAs for Major Projects have a 24-month duration, with 5 possible one-year extension. Those will only apply after the issuance of an approval, however,

and as described above, the preliminary approvals granted by the HDRB were more than 24 months old when the COA was finally issued.

The activity between the Developer and City before the preliminary approvals were granted does not meet the statutory definition of a "vested right" and does not make the UDO applicable to the Hotel or Garage applications or extend the time between the preliminary approvals and final COA issuance.

This Court should not adopt this additional sustaining ground asserted by the Respondents to uphold the trial court's ruling below.

CONCLUSION

For the reasons stated in this Reply Brief and in the Appellants' Brief, the Appellants respectfully request that this Court reverse Circuit Court's Order.

Respectfully submitted,

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