

Exhibit 1

ELECTRONICALLY FILED - 2023 May 17 9:57 AM - BEAUFORT - COMMON PLEAS - CASE#2022CP0701598

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

James Ware, Alisa Ware, Jason DuBose,)
and Amanda DuBose,)

Civil Action Number: 2022-CP-07-01598

Appellants/Petitioners,)

v.)

Beaufort County Zoning Board of Appeals)
and Robert Merchant, in his Capacity as)
Planning Director of Beaufort County,)

Respondents/Defendants.)

ORDER

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SC Court of Appeals

This case came before the Court for a hearing on Appellants’ Motion to Serve Supplemental Pleading filed October 24, 2022, and on the Motion to Dismiss by the Respondent Beaufort County Planning Director Robert Merchant filed October 25, 2022. The motions hearing was held on April 18, 2023, and counsel of record for all parties were present. For the reasons set out below, the Court denies Appellants’ Motion and grants Respondent’s Motion, with the effect of ending this case.

NATURE OF THE CASE

This case is an effort by Appellants to appeal from the decision and order of the Beaufort County Zoning Board of Appeals concerning the County’s operation of the Daufuskie Island public ferry from Buckingham Landing. According to Appellants’ Notice of Appeal and Petition, the issue for the Beaufort County Zoning Board of Appeals (“the Zoning Board”) was whether to affirm or reverse the written determination of the Planning Director that the County’s use of County-owned property at Buckingham Landing for a public ferry was lawful under County

zoning law. At the July 28, 2022, Zoning Board meeting, a motion to reverse the Planning Director's determination did not receive a majority vote.

Prior to issuance and mailing of a written decision and order from the Zoning Board, Appellants, on August 23, 2022, initiated this action by filing their Notice of Appeal and Petition in circuit court. This Notice of Appeal and Petition specifically alleges in the first paragraph of its first page that Appellants are appealing the decision of the Zoning Board made July 28, 2022, "[a]lthough the ZBOA has not as of the time of this filing, issued a written Notice of Action..."

According to the allegations of Appellants' Motion to Serve Supplemental Pleading, in its second paragraph, the Zoning Board's subsequent written Decision and Order was "dated September 16, 2022, mailed on September 20, 2022, and received by the undersigned counsel on September 24, 2022." (Emphasis supplied). The supplemental pleading sought to be filed by Appellants' Motion was a Supplemental Notice of Appeal and Petition that was attached to the Motion as an Exhibit. Paragraph 16 on page 4 of Appellants' proposed Supplemental Notice of Appeal and Petition provides that:

16. The Appellants have timely filed this appeal to Circuit Court by virtue of filing same within thirty (30) days of the ZBOA's actions taken in open forum on July 28, 2022, and by virtue of having filed a Motion to Supplement the original Notice of Appeal and Petition on October 24, 2022.

By his Motion to Dismiss, as argued at the hearing, the Respondent Planning Director moved to dismiss Appellants' Notice of Appeal and Petition pursuant to Rule 12(b)(1), SCRCP,¹ on the ground that the Court lacks jurisdiction over the subject matter because of Appellants' premature filing of an appeal under S.C. Code § 6-29-820(A). Similarly, in opposition to the

¹ At the hearing, Respondent Planning Director did not argue the additional Rule 12(b)(6) ground set out in his written motion that the Notice of Appeal and Petition failed to state facts sufficient to constitute a cause of action.

Appellants' Motion to Serve Supplemental Pleading, counsel for Respondent Planning Director argued at the hearing that the attempted appeal of the written decision and order of the Zoning Board, by way of the proposed Supplemental Notice of Appeal and Petition, was untimely because the Motion to file the Supplemental Notice of Appeal was filed after expiration of the thirty-day time period for appeal set out in S.C. Code § 6-29-820(A).

APPLICABLE LAW

The time period for appeals to the circuit court from decisions of zoning boards of appeal of local governments is prescribed by S.C. Code § 6-29-820(A). That subsection provides that “The appeal must be filed within thirty days after the decision of the board is mailed.” (Emphasis supplied). This appeal period differs from the time period for appeal to circuit court from a decision of a local planning commissions prescribed in S.C. Code § 6-29-1150(D)(1) (“within thirty days after actual notice of the decision”) and from a decision of a local architectural review board prescribed in S.C. Code §6-29-900(a) (“within thirty days after the affected party receives actual notice of the decision”).

In the context of appeals from decisions of local zoning board decisions, adherence to the statutory time requirements for appeal to circuit court is viewed as “a jurisdictional requirement” that the court cannot extend or expand. Sadisco of Greenville, Inc. v. Greenville County Board of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000).

ANALYSIS

At the motions hearing, counsel for Appellants argued that the filing of the appeal in circuit court was proper since Appellants had actual notice of the decision by the Zoning Board prior to issuance and mailing of the written order of the Zoning Board. However, it appears clear to the Court that the filing of the appeal in circuit court on August 23, 2022, prior to the mailing of the

Zoning Board on September 20, 2022, was contrary to the plain language of § 6-29-820(A) that ties the beginning of the time period for appeal to the mailing date of the zoning board order. This plain and specific statutory time period for appeal in § 6-29-820(A) is indicated by the State Code editors as having been the language in the subsection in existence since its enactment, in 1994, as part of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994.

Appellants' appeal in August was premature and untimely. Because adherence to the statutory time period for appeal to the circuit court is a jurisdictional requirement for the circuit court, the untimely filing of the August appeal also was insufficient to vest this Court with subject matter jurisdiction. Based on the allegations of Appellants' own pleading, this Court lacks jurisdiction of the subject matter of Appellants' appeal from the Zoning Board.

However, Appellants further contend, in essence, that their appeal is "saved" by the filing of their Motion to Serve Supplemental Pleading, with its proposed Supplemental Notice of Appeal and Petition, that challenge the mailed decision and order of the Zoning Board. Appellants also argued, at the motions hearing and in their hearing Memorandum, that, based on the provisions of Rule 6(e), SCRCPP, the addition of five days to the prescribed thirty-day appeal period after the mailing date of the Zoning Board order on September 20, 2022, causes their Motion to Serve Supplemental Pleading, filed on October 24, 2022, to become a timely appeal of the Zoning Board's written order.

In support of this argument, Appellants cited and relied on the unpublished opinion of the Court of Appeals in Dortch v. City of Columbia Planning & Development Services/Zoning Division, Op. No. 2015-UP-535, 2015 WL 7686970 (S.C. Ct. App. filed Nov. 25, 2015). Appellants assert, in argument and in their Memorandum at the hearing, that the Court in Dortch held that Rule 6(e), SCRCPP, applied to the calculation of the time for appeal pursuant to § 6-29-

820(A). However, as read by this Court, the Court of Appeals in Dortch made no such express or implied holding, and the opinion merely remanded to the lower court for a ruling, in light of Rule 6(e) and other authorities, on the motion to reconsider not previously ruled on by the circuit court. To this Court's knowledge, Dortch has not been cited by any subsequent cases for any such holding as urged by Appellants. Of course, even if Rule 6(e), SCRCP, applied to this appeal, Appellants' Motion is merely a request to the court to be allowed to serve and file a Supplemental Notice of Appeal, and is not, in itself, a Supplemental Notice of Appeal.

This Court concludes that Appellants filed this appeal to circuit court prematurely before mailing of the written order of the Zoning Board and then, after mailing of the Zoning Board's written order, failed to amend timely or initiate a new appeal action within the required time period of thirty days after the mailing. Appellants' own pleadings plainly show that Appellants did not wait for mailing of the written order of the Zoning Board before commencing this action in circuit court, did not file a new Notice of Appeal in circuit court or amend the initial Notice of Appeal after they learned the date of mailing of the Zoning Board order, and did not even file their Motion to Serve a Supplemental Notice of Appeal within thirty days after the known mailing date of the Zoning Board order. By denying Respondent's Motion or granting Appellants' Motion, this Court would be extending and expanding the statutory time period for appeal.

ORDER

Based on the above reasons, **IT IS ORDERED** that Appellants' Motion to Serve Supplemental Pleading is **DENIED**, that Respondent Planning Director's Motion to Dismiss this action pursuant to Rule 12(b)(1) is **GRANTED**, and that this action is **DISMISSED**.

AND IT IS SO ORDERED.

R. Keith Kelly, Circuit Court Judge

Dated: _____



Beaufort Common Pleas

Case Caption: James Ware , plaintiff, et al VS Beaufort County Zoning Board Of Appeals , defendant, et al
Case Number: 2022CP0701598
Type: Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165