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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

Appellate Case No. 2023-001776
Circuit Court Case No. 2023-CP-22-00210

Kendrick A. Bryant and Keisha Bryant Sherman on behalf of the heirs of Ernest Bryant; Benjamin Dennison and Willie Dereef, Jr. on behalf of the heirs of Limerick Dennison; Lucille Grate; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlet, Inc.

Appellants,

v.

Georgetown County and Covington Homes, LLC

Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

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INTRODUCTION

This is an appeal of an Order dated September 19, 2023, dismissing Plaintiffs' Complaint pursuant to a Rule 12(b)(6), SCRCP, Motion to Dismiss for failure to state a cause of action, and an Order dated October 23, 2023, denying Plaintiffs' Rule 59(e) Motion to Alter and/or Amend. The narrow issue before the court is whether Plaintiffs' Complaint sufficiently sets forth a cause of action under the broad provisions of the Uniform Declaratory Judgments Act, S.C. Code 1976, §§ 15-53-10, *et seq.*, hereinafter "Declaratory Judgments Act."

The claim involves subsections of a Zoning Ordinance of Georgetown County, South Carolina, (hereinafter "Ordinance 607"), that Plaintiffs contend: (1) were *ultra vires* because they conflicted with the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code 1976, §§ 6-29-310, *et seq.*, (hereinafter "Enabling Act") Act and denied rights granted by the Enabling Act, and (2) constitute a denial of due process. (Complaint, pars. 1, 5-23, 70). Plaintiffs also contend that Georgetown County Council improperly approved a high density multi-family subdivision that Planning Commission denied as conflicting with the Georgetown County Comprehensive Plan and Maps. (Complaint, pars. 2, 26).

Appellants filed their Initial Brief on February 8, 2024. Respondent Georgetown County filed its Initial Brief on May 13, 2024[1]. This Reply Brief is filed on behalf of Appellants.

[1] Respondent Covington Homes elected not to brief the issues and instead chose the following approach:

> "Covington Homes and the County asserted the same legal grounds in support of their motions to dismiss. On appeal, Covington Homes and the County would have the same arguments as to why Judge Curtis' Orders should be affirmed. Rather than take up the Court's time with repetitious arguments, Covington Homes has decided not to file its own Brief, and instead Covington Homes has decided to incorporate those arguments made by the County as if repeated verbatim by Covington Homes. Should this case be set for oral argument, Covington Homes does not anticipate making oral argument."

(Brief of Respondent Covington Homes, LLC, filed May 13, 2024, at p 1.)

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Footnote 1 of Respondents' "Statement of the Case," states as follows:

> Appellants' Complaint also alleges a cause of action seeking to appeal Georgetown County Council's decision in the alternative. (R. p. __; Compl. ¶¶ 133-34. The circuit court dismissed this alleged appeal in the alternative in its Order and *Appellants have not appealed this decision.* (R. p. __; Order 14).

(Respondents' Initial Brief, p. 1, fn. 1) (emphasis added).

In reference to Count VIII of Plaintiffs' Complaint wherein Appellants appealed Georgetown County Council's decision to approve the subdivision in question, Respondents make the curious and erroneous representation that "Appellants have not appealed this decision." To the contrary, Appellants have appealed the *entire* decision of the circuit court that dismissed the *entire* case, which includes Appellants' appeal of County Council's decision.

Appellants' Initial Brief at page 37 specifically requests this court to "reverse the trial court's decision and permit Appellants to proceed . . . on *all counts and all paragraphs of their Complaint."* The "alternative appeal of County Council's decision" is also explicitly referenced by Appellants in their Initial Brief as one of the enumerated particulars that forms the basis of the "actual controversy" in this case. (Appellants' Initial Brief, p. 27).

Arguments 3, 4, 5 and 6 of Appellants' Initial Brief assert various reasons why the dismissal of the Complaint was improper. Appellants have never argued that only certain counts of the Complaint were improperly dismissed. Accordingly, the appeal of County Council's decision to approve the subdivision is included along with *all* counts of the Complaint that Appellants contend were improperly dismissed for the reasons stated within the respective Arguments. (Appellants' Initial Brief, pp. 24-36).

ARGUMENT

The Brief of Respondent Georgetown County consists of three subparts identified as (A), (B) and (C). These subparts contain a number of unrelated assertions concerning alleged flaws in Appellants' arguments. This Reply Brief will address each of these assertions.

A. REPLY TO RESPONDENTS' ARGUMENT PART (A)

Respondents make several claims in Part (A) of their Argument. (Respondents' Initial Brief, pp. 4-7).

1. Constitutional Deprivation

Respondents argue that: (a) the appropriate standard of review for a claim of denial of rights by a zoning ordinance *must* involve the denial of constitutional rights; and (b)

> Appellants have not properly alleged that Ordinance 607 has deprived them of their constitutional rights. Neither the Complaint itself, nor any of Appellants' arguments presented to the circuit court include any claims that their constitutional rights have been violated. More specifically, they have not alleged that they have been deprived of their property without due process.

(Respondents' Initial Brief, p. 6.) (emphasis added).

Argument 5 of Appellants' Initial Brief addresses this legal claim and cites cases clearly establishing that pleading a constitutional deprivation is not required to state a cause of action for Declaratory Judgment. (Appellants' Initial Brief, p. 32). Respondents' Initial Brief fails to address this well settled proposition of law and the cases cited by Appellants that support it.

Notwithstanding that constitutional deprivation is not a prerequisite to a cause of action for Declaratory Judgment, Appellants' Initial Brief nevertheless specifically enumerates the constitutional denials alleged in the Complaint (Appellants' Initial Brief, pp. 32-33). In addition, Argument 1 of Appellants' Initial Brief quotes Paragraph 70 of the Complaint as follows:

70. Georgetown County ordinances requiring site plans to be approved by County Council are void and unenforceable for the following reasons:

a. They are inconsistent with explicit provisions of state law as set forth hereinabove.
b. They violate the doctrine of separation of powers.
c. They reserve to County Council arbitrary power without the guidance of uniform rules and regulations.
d. They do not articulate any standards by which the County Council should decide to approve or disapprove the decision by Planning Commission.
e. They violate the South Carolina Planning Act and other law.

(Appellants' Initial Brief, p. 20). This list clearly contradicts Respondents' claim that Appellants failed to properly allege deprivation of their constitutional and statutory rights.

2. <u>Timeliness of Appellants' Arguments</u>

Respondents claim that the due process and *ultra vires* arguments by Appellants are not timely. More specifically, they assert:

> Appellants now, for the first time, attempt to present an allegation that their due process rights have been violated by Ordinance 607. (R. p. __; Appellants' Initial Brief Br. *[sic]* 21). As an initial matter, because this argument was never presented to the circuit court, it cannot now not *[sic]* be considered by this Court.

(Respondents' Initial Brief, p. 6).

First, Plaintiffs' Complaint alleges both: (1) traditional constitutional deprivation (Complaint, par. 70, 115-118), and (2) that Plaintiffs' rights have been "affected" in ways that amount to constitutional deprivation. (Complaint Pars. 29-38; Affidavits, Exhibits 1-7.) Further, as indicated in Argument (A)(1) above, pages 32-33 of Appellants' Initial Brief enumerate these paragraphs, and page 20 quotes Paragraph 70 of the Complaint, which lists constitutional and statutory violations of Appellants' rights. In addition, arguments concerning Ordinance 607 and *Schloss Poster Advertising Co. v. City of Rock Hill,* 190 S.C. 92, 2 S.E.2d 392 (1939) were

specifically addressed during the hearing held on July 13, 2023. *(See, e.g.,* Transcript of July 13, 2023, Hearing, p. 40, ln. 6 - p. 47, ln. 5). Finally, Appellants filed a fourteen-page Motion to Alter or Amend Judgment on September 29, 2023, over half of which was specifically devoted to this argument. This motion was denied by a Form 4 Order.

Contrary to the assertions made in Respondents' Initial Brief, these matters have been "presented to the circuit court" on multiple occasions and in multiple ways.

3. <u>Miscellaneous "Arguments"</u>

A pattern of the use of poor logic and irrelevant points begins with footnote 2 at page 6. In this footnote, Respondents proclaim their intent

> to file a motion to strike any materials and references related to Appellants' due process claim and request the Court to ignore and/or strike the portions of Appellants' brief that reference it. *See* Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.*" S.C. Dept' of Trans. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence.").

(Respondents' Initial Brief, p. 6, fn. 2). The parenthetical from *S.C. Dept' of Trans. v. Thompson,* is an outrageous non sequitur because it ignores that arguments by counsel are clearly permissible where legal claims are involved. *See, e.g.*, Webster's New Collegiate Dictionary, p. 782, defining non sequitur as follows:

> non sequitur 1: an inference that does not follow from the premises; *specif:* a fallacy resulting from a simple conversion of a universal affirmative proposition or from the transposition of a condition and its consequent 2: a statement (as a response) that does not follow logically from anything previously said.

This non sequitur is repeated at page 8 and in footnote 6 at page 13.

Another non sequitur is found at page 12 where Respondents argue: "Nowhere in § 6-29-340 does the General Assembly dictate that planning commission shall have exclusive power to

conduct site plan reviews or make development decisions. S.C. Code Ann. Section 6-29-340(B)." This statement is accurate. It is also totally irrelevant. The relevant provision of the Enabling Act is Subsection 6-29-1150(B), which states in the first sentence: "The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff." (emphasis added).

Finally, footnote 3 at pages 7-8 states:

> In fact, the General Assembly took care to restrict any perceived granting of substantive rights, except in the narrowest of circumstances. *See* S.C. Code Ann. Section 6-29-760(C) (making clear "this subsection does not create any new substantive right"); *see also* S.C. Code Ann. Section 6-29-1550 (clarifying that vested rights described in the Planning Act are "not a personal right" but instead are attached to the property and, in practice, take shape as the right of a developer or property owner to develop their property as approved in a site specific development plan).

(Respondents' Initial Brief, p. 7-8). At no point in this litigation have the Appellants claimed these two statutory provisions granted them rights.

Subsection 6-29-760(C) recognizes standing for an adjoining property owner. Appellants do claim this right.

4. <u>Lack of Limits On Council's Power to Approve or Disapprove</u>

Respondents claim to distinguish *Schloss Poster Advertising Co. v. City of Rock Hill* by arguing that, because Ordinance 607 contains requirements for filing forms with a request for approval, the County Council is limited in its power to approve. (Respondents' Initial Brief, pp. 6-7). However, none of the provisions granting the power of approval or disapproval to the County Council contains language or terms limiting or structuring approvals or disapprovals by

the County Council. The net effect is that there is no limit on the Council's power to approve or disapprove a request.

B. REPLY TO RESPONDENTS' ARGUMENT PART (B)

1. Rights Granted by Enabling Act

Respondents argue that the statutory provisions in unrelated parts of the Enabling Act indicate that no substantive rights are granted by the Act. (Respondents' Initial Brief, p. 7, fn. 3). As indicated in Part A(3) above, Appellants have never made claims based on the quoted provisions. In addition, this argument totally misses the point that important *procedural* rights are eliminated by the provisions of Ordinance 607 at issue. (See Appellants' Initial Brief, pp. 19-20).

The Order of the Court does not address any of the procedural rights in the Enabling Act that are eliminated by Ordinance 607. For example, the Order acknowledges that § 6-29-1120(A) of the Enabling Act states: "The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff." (Order. p. 7) (emphasis added). However, the Order fails to consider the conflict between the mandatory term *"must"* and the elimination of the required role of the Planning Commission in approvals and disapprovals. *See, e.g., South Carolina Police Officers Retirement Sys. v. City of Spartanburg*, 301 S.C. 188, 391 S.E.2d 239 (1990) (noting that "must" is considered mandatory under principles of statutory construction).

2. Application of *Sinkler* Case

Respondents assert that *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010) has no role in the present case. In support of this claim, Respondents argue that "because the holding in the case is not applicable to this case, the circuit court rightly did not delve into

great detail as to that case's holding." (Respondents' Initial Brief, p. 13). However, the failure to "delve into great detail" to determine whether *Sinkler* is applicable resulted in a total failure to address whether the Ordinance provisions at issue are *ultra vires.*

Respondents emphasize a footnote stating that the South Carolina Supreme Court found no error in the standard of review used by the Court of Appeals. (Respondents' Initial Brief, p. 13). It is important to note, however, that the Supreme Court's assessment in this footnote was as follows:

> "To the extent Petitioners assert the Court of Appeals applied the wrong standard of review, we find no error. The Court of Appeals found Petitioners failed to show the ordinance conflicted with state law or the ZLDR or that County Council had exceeded its lawfully delegated authority. We conclude the cases cited by the Court of Appeals are correct statements of the law in this area. However, *because we agree with Petitioners that the circuit court properly invalidated the ordinance on the basis it violated the Enabling Act, we need not reach the remaining arguments that the ordinance also violated the ZLDR.*

Sinkler, 387 S.C. at 78, fn. 3; 690 S.E.2d at 782, fn. 3. (emphasis added).

The Supreme Court made it abundantly clear that the failure of County Council to comply with the requirements of the Enabling Act was *ultra vires:*

> [W]e hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD *as contemplated by the terms of the Enabling Act*, and we reverse the Court of Appeals' determination on this point.
>
> Based on the foregoing, we reverse the decision of the Court of Appeals and hold the circuit court properly invalidated the ordinance rezoning the Walpoles' property from AG-15 to a PD district *because the requirements for a PD district under the Enabling Act were not met.*

Sinkler at 78, 782 (emphasis added).

The holding in that case specifically turned on the county's failure to comply with the Enabling Act. This is squarely on point with the present case wherein Appellants claim that Ordinance 607 is invalid because Georgetown County failed to comply with the requirements of the Enabling Act. The fact that the failure to comply in *Sinkler* involved a Planned Development and the failure to comply in the present case involves a site plan is of no consequence. The point of the *Sinkler* holding is that the county's failure to comply with the Enabling Act is *ultra vires,* which is the precise claim raised in Plaintiffs' Complaint.

C. REPLY TO RESPONDENTS' ARGUMENT PART (C)

1. Role of Enabling Act & Due Process

Respondents argue: "The heart of this case is centered upon statutory interpretation and the bounds of a county's authority to make zoning decisions." (Respondents' Initial Brief, p. 15). Appellants agree with this description of the dispute. However, Appellants submit that "the bounds of a county's authority to make zoning decisions" are determined by reference to relevant provisions in the Enabling Act and the requirements of procedural due process. In contrast, Georgetown County argues that, regardless of what the Enabling Act and due process require, if the adoption of the Ordinance provisions at issue and the decisions based on those provisions are "fairly debatable," then the Ordinance provisions and the approvals are valid. (Respondents' Initial Brief, p. 16)

In effect, the County claims that a "fairly debatable" local ordinance can supersede a state statute. Appellants strongly disagree with this claim. Requirements in state statutes cannot be superseded so easily.

2. Legally Binding Nature of Enabling Act

Respondents argue that the requirement that zoning "regulations must be made in accordance with the comprehensive plan for the jurisdiction" has no legally binding force. (Respondents' Initial Brief, pp. 10-12). Appellants address this issue in Argument 6 of their Initial Brief at pp. 34-36.)

The requirement of "in accordance with a comprehensive plan" has been a basic part of the South Carolina approach to planning and zoning for nearly a century.[2] To treat the requirement as mere surplusage rather than a legally binding standard conflicts with the requirement that "full effect must be given to each section of a statute and words should not be added or taken away." *South Carolina National Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562, 563 (1987); *Hartford Accident & Indemnity, Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979).

The purpose of the "in accordance with" language is to align zoning regulations with the adoption of comprehensive plans which is a fundamental concept of planning. The South Carolina legislature intentionally and specifically included this requirement as part of the Enabling Act. It cannot simply be brushed aside as having no significance or binding effect as Respondents suggest. Appellants submit that the clear and unambiguous statutory language means exactly what it plainly says, *i.e.*, that zoning "regulations must be made in accordance with the comprehensive plan." Appellants should be permitted to proceed with their claim that county zoning and land development regulations were not in accordance with the county comprehensive plan.

[2] S.C. CODE § 1924 (33) 1066; *See also Johnston v. City of Myrtle Beach*, 283 S.C. 288, 292, 321 S.E.2d 627, 629 (Ct. App. 1984).

3. Issues of Fact

Respondents conclude that this case "involves a dispute as to the interpretation of the law and does not involve a dispute as to the underlying facts." (Respondents' Initial Brief, p. 16). Ironically, notwithstanding this conclusion, throughout their brief Respondents argue facts not of record, weigh evidence, apply presumptions, and consider matters beyond the four corners of the Complaint. They assert that the concepts of "presumption of legislative validity" and "fairly debatable" support dismissal of the Complaint (Respondents' Initial Brief, p. 5). They argue that "[t]he burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent upon [the challenger] to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." (Respondents' Initial Brief, pp. 5-6) (citations omitted).

In making these arguments, Respondents fail to recognize that presumptions and burdens of proof are *evidentiary* in character and claims cannot be properly dismissed for failure to overcome an evidentiary presumption *before* there has been an opportunity to present evidence. These are not legitimate arguments to support dismissal on a Rule 12(b)(6) motion.

The following are a small number of examples of the many factual questions raised by the claims in Plaintiffs' Complaint that may be answered only after evidence is presented, weighed and considered: Is the ordinance in question arbitrary and capricious, or is it fairly debatable? Has there been a constitutional deprivation, and if so, what is the nature and extent? Does the ordinance conflict with the Enabling Act? Did the actions of County Council go beyond the scope of its authority? Does the approved subdivision comply with local ordinances and state statutes? Did the approval process comply with local ordinances and state statutes? Were there due process violations, and if so, what is the nature and extent? Are the applicable zoning

ordinances and land development regulations "in accordance with the comprehensive plan" as required by the Enabling Act?

Respondents' Initial Brief assumes answers to these questions and makes arguments based on those answers that involve the *merits* of Plaintiffs' claims, not the *sufficiency* of the Complaint.

4. Claims are not Statutorily Barred

Respondents further argue that challenges to the validity of Ordinance 607 are statutorily barred." (Respondents' Initial Brief, pp. 14, 16). Appellants thoroughly addressed this issue in their Initial Brief at pages 29-30.

CONCLUSION

Plaintiffs' Complaint viewed in the light most favorable to Plaintiffs, clearly sets forth an "actual controversy" that "affects" Plaintiffs. As a result, the Complaint sufficiently states a claim that far exceeds the minimum pleading requirements.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that APPELLANTS' INITIAL REPLY BRIEF was served this 10th day of June, 2024, upon Respondents by emailing a copy of same to the primary email address of counsel of record listed in the AIS system as set forth below. Copies of said emails are attached hereto in accordance with SC Appellate Court Rules and related orders.

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June 10, 2024

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Bryant v. Georgetown County, Appellate Case No. 2023-001776

1 message

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Dear Tommy, Sydney and James:

Attached please find Appellants' Initial Reply Brief and Proof of Service which are hereby served upon you and will be filed with the Court of Appeals today.

Thanks,
Cindy

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2 attachments

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133K

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