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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
William P. Keesley, Circuit Court Judge

Appellate Court Case No. 2024-001057

David W. Blake, Luis E. Rinaldini, Dudley Richard
Dewar, Jenne Stoker, Beatrice B. McGhee, Gail King,
Historic Aiken Foundation, Inc., Green Boundary
Foundation, and South Carolina Public Interest Foundation, Appellants,

v.

City of Aiken; Aiken Municipal Development Commission;
Aiken Design Review Board; Gary Smith,Defendants,

Of which City of Aiken; Aiken Municipal Development Commission;
and Aiken Design Review Board are Respondents.

INITIAL BRIEF OF APPELLANTS

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July 31, 2024

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STATEMENT OF THE ISSUE ON APPEAL

DID THE CIRCUIT COURT ERR IN DISMISSING THE PLAINTIFFS' DECLARATORY JUDGMENT CAUSE OF ACTION AGAINST THE AIKEN DESIGN REVIEW BOARD WHEN THE PLAINTIFFS DID NOT SEEK TO OVERTURN THE BOARD'S DECISION ON THE CERTIFICATE OF APPROPRIATENESS ON APPEAL BUT RATHER SOUGHT TO HAVE THE BOARD'S ACTIONS DECLARED TO BE IN VIOLATION OF LAW?

STATEMENT OF THE CASE

On July 5, 2022, the Appellants, who are citizens and citizens groups ("Appellants"), filed this declaratory judgment action in Aiken County challenging a downtown revitalization project undertaken by the City of Aiken in partnership with a private developer based on the failure of the City, its Redevelopment Commission, and its Design Review Board ("Respondent," or "DRB") to follow state statutes and local ordinances governing the development approval process. Summons and Complaint, July 5, 2022.

Appellants filed a First Amended Complaint on February 27, 2023, First Amended Complaint, and a Second Amended Complaint on June 29, 2023, removing all the defendants except the City of Aiken, the Aiken Municipal Development Commission, the Aiken Design Review Board, and Gary Smith. Second Amended Complaint.

On March 1, 2023, the Aiken Design Review Board (Respondent) filed its Motion to Dismiss in response to the First Amended Complaint. The Appellants filed a memorandum in opposition to the Respondents' arguments. A hearing was held on the motion on March 1, 2023. On June 1, 2032, the Circuit Court issued an Order denying Respondent's motion to dismiss.

On June 12, 2023, the Respondents filed a Motion to Alter or Amend Order and a Motion to Reconsider under Rule 59(e), SCRPC. On July 31, 2023, the Court issued an Order agreeing to consider the motion on written submissions and providing deadlines for filing additional materials and arguments by both parties. The Appellants submitted their memorandum on August 25, 2023, and Respondents submitted theirs on September 1, 2023.

On May 9, 2024, the Circuit Court heard oral arguments on the Motion to Alter or Amend.

On June 5, 2024, the Court issued its order granting in part and denying in part the Respondent's motion. The Court ruled:

- The prior ruling was amended to conclude that the Court lacks subject matter jurisdiction to review the decision by DRB to issue a conditional Certificate of Appropriateness (“COA”) because the Plaintiffs failed to file a timely appeal under S.C. Code Ann. §6-29-900(A). The prior Order was also amended to delete the finding that the “conditional” nature of the DRB’s decision meant that it was not a decision that was immediately appealable. The Court reversed its earlier decision and concluded that the DRB’s decision, announced on March 1, 2022, was a decision under §6-29-900(A) and the triggering point for filing an appeal.
- The Court disagreed with the Respondent's assertion that the Court improperly raised an issue *sua sponte*. The complaint being reviewed raised the incomplete nature of the Respondent's action (a “conditional” COA), and to evaluate whether there was compliance with the timeframe for filing an appeal, one would have to determine the triggering point.
- The Court agreed with the Respondent that the bar against bringing the current action for declaratory and injunctive relief applies not just to the ultimate merits of the decision to grant the conditional COA but also to any jurisdictional, procedural, or evidentiary irregularities or issues that arise in the issuance of that decision, including the composition of the DRB at that time.

Notwithstanding the Court’s view that it lacked subject matter jurisdiction over the DRB’s decision to grant a conditional COA, some issues were not dismissed when the June 1, 2023, order was issued. Those include:

- The Appellants' allegations of violations of the Freedom of Information Act (FOIA) by the DRB.

- The Appellants' request for declaratory relief regarding whether members of the DRB are ineligible based on residency outside the City Limits of Aiken, South Carolina. The motion to dismiss these claims under Rule 12(b)(1) is denied.

The Court concluded that nothing in the Order prevented the filing of requests for any writ that might be applicable in this context or any appropriate action or amendment to address the DRB's alleged improprieties, provided that they do not seek to overturn the conditional COA issued in this case.

The Appellants timely filed their Notice of Appeal on June 25, 2024. Notice of Appeal, June 25, 2024.

STANDARD OF REVIEW

In a motion to dismiss under Rule 12(b)(1), SCRPC, the movant challenges the power of the court over the subject matter. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009.) "The question of subject matter jurisdiction is a question of law for the court." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993) (citing *Bargesser v. Coleman Co.*, 230 S.C. 562, 96 S.E.2d 825 (1957)).

The appellate court is free to review the lower court's order and decide questions of law without deference to the trial court. *Catawba Indian Tribe of S.C. v. State of South Carolina*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

STATEMENT OF FACTS

The First Amended Complaint states a civil action for declaratory and injunctive relief brought for violations of numerous state statutes and local ordinances¹ First Amended Complaint, ("FAC")

¹ Including the South Carolina Community Development Law, S.C. Code Ann. § 31-10-10 *et. seq.*; the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. § 6-29-310 *et. seq.*; the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.* ("FOIA"); the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10; and the City of Aiken Code of Ordinances

par. 1, by the City of Aiken, its redevelopment commission, its architectural review board, and private developers in pursuing a large redevelopment project in the historic downtown of Aiken.

The DRB made a practice of holding "Work Sessions" that are open to the public and subject to the South Carolina Freedom of Information Act's opening meeting laws ("FOIA") but generally do not allow for public comment. The DRB officially reviews, discusses, deliberates, and acts on applications for a Certificate of Appropriateness ("COA") at a monthly "Regular Meeting" or at a "Special Meeting" called when needed. The DRB provides agendas for Work Sessions and Meetings, and the agendas regularly contain the applications, with voluminous supporting materials supporting each application to aid the DRB in its deliberations about the applications. FAC, par. 103.

At the first DRB meeting on Project Pascalis, the developer presented the project to the DRB, though it was not on the agenda. The minutes of that meeting do not mention the discussion of that project. FAC, par. 107.

At that first meeting, after less than six minutes of deliberation, the DRB approved a flawed and incomplete demolition application by using an unprecedented and unauthorized form of "conditional" COA that is not authorized by the Zoning Ordinance and is contrary to Zoning Ordinance Section 5.2.4(A)(3). FAC, par. 105, 129, 135.

At another Work Session, the DRB visited the Project Pascalis location without the Project being listed on the agenda and without discussing it in the minutes, all violating FOIA. FAC, par. 108.

At a following Work Session on February 17, 2022, the developer made a presentation advocating for the demolition of a historic structure (the Hotel Aiken) as part of Project Pascalis, but Project Pascalis was not identified in the agenda as an item for discussion at this meeting, and the agenda made no reference to demolition, Project Pascalis, the developer (RPM) or the City's economic development authority, AMDC. Likewise, the subsequent meeting minutes did not mention Project Pascalis, RPM, or AMDC. FAC, par. 109.

The DRB accepted and acted on a limited and incomplete application for demolition, in violation of local ordinance, even though the application was for the Hotel Aiken, which is listed on the Aiken Historic Register as a Contributing Structure in a Historic Site and the three other structures are listed as Contributing Structures by the State Historic Preservation Office (“SHPO”) and is included in the Aiken Historic Resources Survey of 2010. In accepting and acting on the February 21, 2022, application, the DRB violated Section 6.1.3(E) of the Zoning Ordinance, which states that a complete application is required for the DRB to act. FAC, par. 112.

The DRB failed to consider many specific factors as required by Sections 2.6, 5.2, and 5.3 of the local zoning ordinance. FAC, par. 114-127.

The DRB never examined the question of demolition by neglect of this historic structure, the Hotel Aiken, in its March 1, 2022, review of the RPM February 21, 2022, application, in violation of Sections 5.2.4(A)(2) and 5.2.4(B) of the Zoning Ordinance. FAC para. 128.

By expediting the process to favor the developer, the DRB unlawfully made decisions regarding Project Pascalis outside the regular and noticed public meetings of the DRB, for which there are no agendas, minutes, or records of notice, discussion, or deliberation of these decisions as required for a public meeting as required by the South Carolina Freedom of Information Act and the laws regulating the DRB. FAC, par. 131-133.

The DRB removed Member Knowles in retaliation for her vote against the conditional COA in violation of South Carolina law and did not follow the requirements of local ordinance or state law in naming her replacement. FAC, par. 141-144.

Later, it was discovered that the replacement member for Knowles was ineligible to serve because she was not a resident of the City of Aiken. FAC, par. 146.

In the controversy surrounding Member Knowles’ replacement, the DRB disclosed for the first time that two other longer-serving members of the DRB also did not live in the City and,

therefore, were not qualified to sit on and were not valid members of the DRB. FAC, par. 147. As a result, any decisions made by the DRB with the presence of one or more of these purported members for a quorum or the votes of one or more of these purported members causing a majority vote when in violation of Zoning Ordinance Section 7.1.7(B) are invalid. FAC, par. 148.

ARGUMENT

THE CIRCUIT COURT ERRED IN DISMISSING THE PLAINTIFFS' DECLARATORY JUDGMENT CAUSE OF ACTION AGAINST THE AIKEN DESIGN REVIEW BOARD WHEN THE PLAINTIFFS DID NOT SEEK TO OVERTURN THE BOARD'S DECISION ON THE CERTIFICATE OF APPROPRIATENESS ON APPEAL BUT RATHER SOUGHT TO HAVE THE BOARD'S ACTIONS DECLARED TO BE IN VIOLATION OF LAW.

A. The Appellants sought to have certain specific actions of the Aiken Design Review Board declared illegal.

The First Amended Complaint, which was the version of the Appellants' complaint reviewed by the Circuit Court in its original order on June 1, 2023, and its Order partially changing its ruling on June 5, 2024, contained numerous allegations related to misconduct, impropriety, and illegal actions by the DRB. These are described in paragraphs 104 to 155 of the First Amended Complaint and are summarized in the first cause of action's request for a declaratory judgment concerning the DRB's actions. FAC, par. 169.

Concerning this particular project ("Project Pascalis"), the Aiken Design Review Board (DRB) failed to follow its procedures, local ordinances, and state law in considering this project by holding numerous "Work Sessions" during which it heard and considered facts related to the project before receiving any application (FAC paragraphs 104-109), receiving and acting on a flawed application, and failing to follow the procedures and guidelines for decision-making required by city ordinance and state law (FAC paragraphs 104-127).

Following the “conditional” COA issuance on March 1, 2022, the DRB refused to consider calls by one of its members and citizens appearing before it to revise its procedures to comply with state law and local ordinances. (FAC paragraphs 134-137).

Also, following the issuance of the conditional COA, the DRB attempted to replace a member who questioned its procedures for reviewing Project Pascalis without following the procedures required by law for removing and replacing members (FAC paragraphs 142-147).

As part of this process, the public discovered that another two members of the DRB were not legally qualified to sit on the DRB, as they were not City residents and were not qualified to act on its behalf, though they did so on numerous occasions, including actions regarding Project Pascalis (FAC paragraphs 148-149).

The DRB's proceedings did not comply with the open meetings law portions of the state’s FOIA in that the agendas required to be published before the meetings did not comply with the Act. They did not put the public on fair notice of the actions to be taken by the DRB at the upcoming meeting (FAC paragraphs 154-155).

As a result, the complaint requests declaratory relief that the City and its DRB did not comply with the City’s zoning ordinance, the state’s Comprehensive Planning Enabling Act, and its Community Development Law as specified in paragraph 170 (a)-(s) and its Freedom of Information Act (paragraph 174).

These facts were pled in the First Amended Complaint before the circuit court. These facts, too, were the basis of the Appellants' request in the First Cause of Action for declaratory relief, declaring that the DRB had violated both state statute and local ordinances in numerous ways. FAC, para. 169(a)-(s).

None of the above allegations seek to reverse or appeal the "conditional" COA issued by this flawed DRB sitting with at least two ineligible members. Rather, the complaint seeks a

declaration, on numerous counts, that the DRB failed to follow the ordinances of the City of Aiken or the state's statutes in how it operated concerning Project Pascalis. It is critical that the court review and adjudicate these unlawful actions to guide future conduct by the boards and agencies of this City, as well as other jurisdictions in South Carolina.

B. Declaratory relief is available by statute and rule to review and make findings related to the legality of local government action.

The SC Declaratory Judgment Act allows challenges to unlawful government conduct in precisely these circumstances.

Courts of record within their respective jurisdictions shall have **power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.** No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S.C. Code Ann. § 15-53-20 (emphasis added).

“The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing *Williams Furniture Corp. v. Southern Coatings & Chemical Co.*, 216 S.C. 1, 56 S.E.2d 576 (1949)); S.C. Code Ann. § 15-53-130 (1977).

C. The Court erred in deciding on the motion for reconsideration that the First Amended Complaint attempted to make an untimely appeal of the DRB's decision on the Certificate of Appropriateness.

The Circuit Court, in its June 5, 2024, Order, reversed course from its Order issued (correctly) a year earlier and granted in part the Respondent’s motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. The court reasoned that the Appellants had not appealed the DRB's

issuance of the "conditional" COA, so the court had no jurisdiction to make any declaration under the First Cause of Action related to the issuance of the COA.

Respectfully, this is an error.

The Court found: " The prior ruling is amended in that the court now finds that it lacks subject matter jurisdiction to review the decision by DRB to issue a conditional Certificate of Appropriateness ("COA") because the plaintiffs failed to file a timely appeal under S.C. Code Ann. §6-29-900(A)." Further, the Court added that the bar against bringing the current action for declaratory and injunctive relief applies not just to the ultimate merits of the decision to grant the conditional COA but also to any jurisdictional, procedural, or evidentiary irregularities or issues that arise in the issuance of that decision, including the composition of the DRB at that time. (emphasis original). Order, June 5, 2024, pages 2-3.

The Court did not, though, grant the motion to dismiss related to the causes of action and requests for relief based on violations of the Freedom of Information Act or the seating of ineligible members of the DRB, except to the extent that it affects the decision on the "conditional COA."

S.C. Code Ann. § 6-29-900(A), upon which the Respondents and the Circuit Court solely relied for this ruling, provides simply as follows:

A person who may have a substantial interest **in any decision of the board of architectural review** or any officer or agent of the appropriate governing authority **may appeal from any decision of the board** to the circuit court in and for the county by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.

S.C. Code Ann. § 6-29-900(A)(emphasis added).

In this instance, the DRB decided to issue the conditional COA. The Appellants did not appeal that decision, which stands.

What the decision did not encompass, however, were the many procedural and substantive violations leading up to and following the decision on the "conditional COA" that the complaint and this Appellant's Initial Brief describe in detail and which serves as the basis of the Appellants' cause of action for declaratory judgment against the DRB. Each one of the allegations listed above and the requests for declarations in the complaint is entirely appropriate subjects for the court to address under S.C. Code Ann. § 15-53-20 because the statute provides courts with the "**power to declare rights, status and other legal relations whether or not further relief is or could be claimed.**"

If the underlined portion of the statute means anything, it means that parties with a claim may ask the court to declare rights even if the subject matter also gives the party the ability to appeal a regulatory ruling, as S.C. Code Ann. §6-29-900(A) does.

Here, the circuit court did correctly recognize that the Appellants may proceed to prove their case for a declaration for FOIA violations and a determination of the effect of the ineligibility of non-residents to serve on the DRB, but the Circuit Court erred in limiting any further declarations if those could have been the subject of an appeal of the conditional COA issuance.

No law cited by the Court requires that, and certainly the zoning appeals statute, S.C. Code Ann. § 6-29-900(A), does not so limit the Declaratory Judgment Act, S.C. Code Ann. § 15-53-20.

This Court should clarify the scope and breadth of the Declaratory Judgment Act and reverse the Circuit Court's erroneously narrow reading of it in its Order granting the Respondent's motion to dismiss.

CONCLUSION

Appellants respectfully request this court reverse the Circuit Court's decision and remand the case for trial.

Respectfully submitted,

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