RECEIVED
Aug 02 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr.
Circuit Court Judge

Appellate Case No. 2023-001306
Circuit Court Case No. 2023-CP-22-00007

Elizabeth M. Powers and Edward A. Powers; Martha C. Green; Steven E. Basso; James R. Sherman; Alexander V. Picard and Jessica L. Picard; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlet, Inc.

Appellants,

v.

Georgetown County; and Alliance for Economic Development for Georgetown County

Respondents.

FINAL REPLY BRIEF OF APPELLANTS

/s/ F. Patrick Hubbard
F. Patrick Hubbard (SC Bar #12614)

1525 Senate Street
Room 312
Columbia, SC 29208
(803) 422-6762
phubbard@law.sc.edu
ATTORNEY FOR APPELLANTS

/s/ Cynthia Ranck Person
Cynthia Ranck Person (SC Bar #105126)

KIGA, INC.
P.O. Box 1922
Pawleys Island, SC 29585
(843) 325-7795
kig.advocacy@gmail.com
ATTORNEY FOR APPELLANTS

August 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

INTRODUCTION

This is an appeal of an Order dated May 31, 2023 (R. p. 7), 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 July 18, 2023 (R. p. 24), denying Plaintiffs' Rule 59(e) Motion to Alter and/or Amend (R. p. 328).

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 a challenge to approval of a zoning amendment that Plaintiffs contend was *ultra vires* because Georgetown County Council did not comply with a multitude of applicable provisions of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code 1976, §§ 6-29-310, *et seq.,* (hereinafter "Enabling Act") and local ordinances.

Appellants filed their Initial Brief on February 26, 2024. Respondent Georgetown County filed its Initial Brief on May 28, 2024, and Respondents Alliance for Economic Development for Georgetown County (hereinafter "Alliance") filed its Initial Brief on May 29, 2024. Appellants' Reply Brief is filed in response to the Initial Briefs of both Respondents.

ARGUMENT

The single issue in this appeal is whether Plaintiffs' Amended Complaint (R. p. 146) sufficiently stated a cause of action for Declaratory Judgment.

Pleadings are to be interpreted liberally. The Declaratory Judgments Act is to be applied broadly. Evidence has not yet been presented. Inquiry is limited to the face of the Complaint. All inferences are drawn in favor of Plaintiffs. For a Declaratory Judgments action, all the complaint must do is set forth an "actual controversy" that "affects" the Plaintiffs. The bar is not set high.

Respondents' Initial Briefs complicate the true issue by arguing facts not of record, applying presumptions before evidence has been presented, assuming answers to questions of fact that have not yet been determined, and drawing conclusions based on those assumptions that involve the *merits* of Plaintiffs' claims, not the *sufficiency* of the Amended Complaint. Respondents' Initial Briefs read as if this case has already been tried.

Appellants submit that the Complaint sufficiently states a claim that far exceeds the minimum pleading requirements for a Declaratory Judgment cause of action, and that the Order of dismissal was improper. Appellants Initial Brief thoroughly addresses the legitimate bases for appeal. While Respondents' Initial Briefs warrant no additional response by Appellants relative to the issues raised in Appellants Initial Brief, there are several new matters raised by Respondents that Appellants wish to address and clarify.

1. Appellants Preserved All Claims.

Respondents argue that Appellants have "abandoned" some or all of their causes of action (RIB of Georgetown County, p. 3, fn. 2 and 3) or "failed to preserve" their claims for appellate review. (RIB of Alliance, pp. 9, 20-28).

To the contrary, Appellants have appealed the *entire* circuit court decision that dismissed the *entire* case on the issue of sufficiency of the Complaint. Appellants' Initial Brief at page 44 specifically requests this court to "reverse the trial court's decision and permit Appellants to proceed ... on *all counts and all paragraphs of their Amended Complaint."* All arguments in Appellants' Initial Brief maintain that the dismissal of *all counts* of the Amended Complaint was improper for the various reasons stated within the respective Arguments. Appellants have never suggested that only certain counts of the Amended Complaint were improperly dismissed. (AIB, pp. 19-44).

Respondents' arguments are without merit.

2. <u>Appellants Properly Raised All Claims</u>

Respondents argue that Appellants have raised a new claim for the first time on appeal and state as follows:

> Appellants invoke Section 6-29-760(A) of the Planning Act as their basis for seeking a declaration that the 2022 Ordinances are invalid. ... Appellants never once raised a violation of Section 6-29-760(A) of the Planning Act to the circuit court as the basis for declaring the 2022 Ordinances invalid. In fact, there is not one citation to or mention of Section 6-29-760(A) in the Complaint, Memorandum of Law in Opposition to Defendants' Motion to Dismiss, or Motion to Alter or Amend. Not one. Appellants now argue for the first time that County Council adopted the 2022 Ordinances without first allowing the Planning Commission to review and make a recommendation (which is factually inaccurate), rendering the 2022 Ordinances *"ultra vires* and therefore, void." Because appellate courts will not consider issues not raised in the pleading and will not allow litigants to raise issues for the first time on appeal, the Court cannot consider Appellants' new argument for why the 2022 Ordinances were *ultra vires.*

(RIB of Alliance, p. 22) (citations omitted) (emphasis omitted).

Contrary to Respondents' assertions, Appellants' Amended Complaint *repeatedly* claims that approval of the zoning amendment of the Mercom Technology Park Planned Development

was *ultra vires* because it violated the Enabling Act prescribed procedure regarding Planning Commission recommendation, (Amended Complaint, pars. 15(c), 96, 102, 104, 115(c), 115(d); R. pp. 150, 170-172, 176-177), and Section 6-29-740 of the Enabling Act was cited as the legal basis for this claim. Paragraph 96 of the Amended Complaint specifically states: "Planning Act, Section 6-29-740, explicitly provides that Planned Development District amendments constitute zoning ordinance amendments *and must follow prescribed procedures for the amendments."* (emphasis added) (R. p. 170).

Section 6-29-740 of the Enabling Act addresses the requirements governing Respondents' request to amend the Mercom Technology Park Planned Development as follows:

> Amendments to a planned development district may be authorized by ordinance of the governing authority after recommendation from the planning commission. These amendments constitute zoning ordinance amendments and *must follow prescribed procedures for the amendments.*

(emphasis added). The "prescribed procedures for the amendments" referenced in Section 6-29-740 of the Enabling Act are set forth in subsection 6-29-760(A) as follows: "No change in or departure from the text or maps as recommended by the local planning commission may be made pursuant to the hearing unless the change or departure be first submitted to the planning Commission for review and recommendation."

The Planning Commission did not recommend approval of the requested amendment to the Planned Development District. (Amended Complaint, pars. 102-104; R. pp. 171-172). The County Council ignored the Planning Commission's decision to recommend denial of the amendment and voted to approve the amendment. (Amended Complaint, pars. 110(f), 113, 115(c); R. pp. 174, 176).

The approval by the County Council was *ultra vires* because it did not follow the procedures set forth in Section 6-29-740 and 6-29-760(A). This is the exact claim raised by Appellants multiple times in the Amended Complaint and that was presented to and considered by the Circuit Court.

The discussion of the *ultra vires* effect of the failure to comply with the Enabling Act is addressed in Appellants' Initial Brief at pages 19-21.

3. 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. 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. (RIB of Georgetown County p. 12, fn. 5). 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 with regard to a Planned Development. This is squarely on point with the facts in the present case.

4. Role of Enabling Act

Respondents argue: "The heart of this case is centered upon statutory interpretation and the bounds of a county's authority to make zoning decisions." (RIB of Georgetown County, p. 16). 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, Respondents argue 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. (RIB of Georgetown County, p. 6, 8, 12 fn. 5, 16; RIB of Alliance, p. 17, 27)

In effect, Respondents claim 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.

5. 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." (RIB of Georgetown County, p 18;

RIB of Alliance, p. 15, 25, 29, 31, 34, 39). Ironically, notwithstanding this conclusion, throughout their briefs 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. 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." (RIB of Alliance p. 17; RIB of Georgetown County, p. 6) (citations omitted).

It is a basic tenet of hornbook law that presumptions and burdens of proof are *evidentiary* in character. It is axiomatic that claims cannot be properly dismissed for failure to overcome an evidentiary presumption *before* there has been an opportunity to present evidence.

The following are examples of factual questions raised by the claims in Plaintiffs' Complaint that can be answered only after evidence is presented, weighed and considered by the fact-finder: Are the ordinances in question arbitrary and capricious, or are they fairly debatable? Has there been a constitutional deprivation, and if so, what is the nature and extent? Did the actions of the county in approving the ordinances conflict with the Enabling Act? 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 "in accordance with the comprehensive plan" as required by the Enabling Act?

Respondents' Initial Briefs assume answers to these questions and make arguments based on those answers that involve the *merits* of Plaintiffs' claims, not the *sufficiency* of the Complaint. These are not legitimate arguments to support dismissal on a Rule 12(b)(6) motion.

6. Inappropriate and Irrelevant Matters

Respondent Alliance spends a significant portion of its brief denigrating the Plaintiffs, representing "facts" that are neither accurate nor of record, making derogatory mischaracterizations about the nature of this case, and inserting personal remarks and political commentary. (RIB of Alliance, pp. 8, 9, 11, 12, 42). These matters are not relevant to the legal issues raised on appeal and should not be included in an appellate brief for consideration by this court.

CONCLUSION

For the reasons set forth herein and in Appellants Initial Brief, Plaintiffs' Amended Complaint viewed in the light most favorable to Plaintiffs, clearly sets forth an "actual controversy" that "affects" Plaintiffs, and sufficiently states a claim under the broad provisions of the Declaratory Judgments Act that far exceeds the minimum pleading requirements.

Respectfully submitted,

/s/ F. Patrick Hubbard
F. Patrick Hubbard (SC Bar #12614)

1525 Senate Street
Room 312
Columbia, SC 29208
(803) 422-6762
phubbard@law.sc.edu
ATTORNEY FOR APPELLANTS

/s/ Cynthia Ranck Person
Cynthia Ranck Person (SC Bar #105126)

KIGA, INC.
P.O. Box 1922
Pawleys Island, SC 29585
(843) 325-7795
kig.advocacy@gmail.com
ATTORNEY FOR APPELLANTS

August 2, 2024

RECEIVED
Aug 02 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr.
Circuit Court Judge

Appellate Case No. 2023-001306
Circuit Court Case No. 2023-CP-22-00007

Elizabeth M. Powers and Edward A. Powers; Martha C. Green; Steven E. Basso; James R. Sherman; Alexander V. Picard and Jessica L. Picard; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlet, Inc.

Appellants,

v.

Georgetown County; and Alliance for Economic Development for Georgetown County

Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that the Final Brief of Appellants and Final Reply Brief of Appellants comply with SCACR 211(b) and are identical to the briefs previously served except for revised references to the Record on Appeal and pagination changed thereby.

/s/ F. Patrick Hubbard
F. Patrick Hubbard (SC Bar #12614)
1525 Senate Street
Room 312
Columbia, SC 29208
(803) 422-6762
phubbard@law.sc.edu
ATTORNEY FOR APPELLANTS

/s/ Cynthia Ranck Person
Cynthia Ranck Person (SC Bar #105126)
KEEP IT GREEN ADVOCACY, INC.
P.O. Box 1922
Pawleys Island, SC 29585
(843) 325-7795
kig.advocacy@gmail.com
ATTORNEY FOR APPELLANTS

August 2, 2024