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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
B. Alex Hyman, Circuit Court Judge

Appellate Court Case No. 2024-000082
Circuit Court Case No. 2022-CP-02-01498

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.

FINAL REPLY BRIEF OF APPELLANTS

/s W. Andrew Gowder, Jr.
W. Andrew Gowder, Jr., (S.C. Bar #7895)
AUSTEN & GOWDER, LLC
Charleston, South Carolina 29405 Phone:
843/727-2229
andy@austengowder.com

Michael T. Rose, Esquire (S.C. Bar #4910)
MIKE ROSE LAW FIRM, PC
406 Central Ave.
Summerville, SC 29483
Phone: 843-871-1821
Facsimile: 843-478-7595
mike@mikeroselawfirm.com

James G. Carpenter
The Carpenter Law Firm, PC
819 East North St
Greenville, SC 29601
Phone: 864-235-1269
James.carpenter@carpenterlawfirm.net

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INTRODUCTION

The Appellants agree with the Respondent City that the filing of the action of the plaintiffs was successful in part. As the City says, the discontinuance of the project by the developer and the City and the dissolution of the AMDC following and resulting from the filing of this extensive and detailed complaint accomplished the halt of Project Pascalis. "The relief requested by Appellants, like the relief requested by the *Croft* plaintiffs, has already been obtained." City of Aiken's Respondents Brief, page 8.[1]

What the City wants to do, though, is to sweep away its patent failure to abide by the laws of the state and its own local ordinances both in conceiving this public private partnership and in implementing it. It is highly likely that this project would have proceeded on this illegal basis had the plaintiffs not filed their complaint. The City seeks to have its illegal acts forgotten, to avoid judicial declarations preventing repetition of those illegal acts and to otherwise escape the consequences of its actions by "moving on" by dropping the project as soon as the complaint was filed, and public scrutiny was focused on these acts. The City ignores the facts that it does not acknowledge that any of the acts described in the complaint were unlawful and reserves for itself the ability to repeat the same illegal acts described in the complaint for future projects, unless a court declares those past acts unlawful for future guidance for the City as requested by the appellants.

The rule of law and good governance in this state demand accountability. The Uniform Declaratory Judgments Act S.C. Code Ann. §§ 15-53-10 - 15-53-140 ("DJA") provides the tool for the courts to review these illegal actions, and hold the City to account, even if the City attempts to avoid accountability – to put the toothpaste back in its tube - by abandoning the project. The mootness

[1]. The City has conceded that the Plaintiffs were successful in obtaining part of the relief they sought (stopping the project). The Plaintiffs will seek reimbursement of their fees in bringing this action under S.C. Code Ann. Sec. 30-4-100
(B) and 15-77-300 at the conclusion of the litigation of all issues in the case.

doctrine does not and should not provide a cover for illegal or improper local government activity when the local jurisdictions are "caught" and want to avoid accountability and enable repetition by simply halting the complained about illegal activity.

The circuit court in this case erred in allowing the City to get off the hook when it argued, in essence "the project is over, there is nothing more to see here, move along " The project may be over, but the actions leading to it happened, and the courts are the place where parties, not the least of which this state's local governments, are made to account for actions they have taken contrary to law. Such an accounting is neither "contingent, hypothetical, or abstract." Rather, it supports the rule of law and provides future guidance for local governments and courts in analyzing the law and in evaluating similar situations in the future. This court should reverse the grant of summary judgment by the circuit court and send the case back for a full trial on the merits.

I. THE APPELLANTS' ACTION DID NOT SEEK ONLY TO STOP PROJECT PASCALIS, IT ALSO SOUGHT AN ADJUDICATION OF THE UNLAWFUL ACTIONS OF THE CITY IN PARTNERSHIP WITH A PRIVATE DEVELOPER, WHICH HAS NOT YET BEEN TRIED.

A. While Project Pascalis has been terminated, the underlying legal issues regarding the city's processes and decision-making remain unresolved.

The Respondents City of Aiken and Aiken Design Review Board both rely heavily on the case of *Croft v. Town of Summerville*, 433 S.C. 473, 860 S.E.2d 352 (2021), and put great emphasis on the fact that Croft's counsel was the same as Appellants' counsel in this case. As such, they must concede that Appellants' counsel is uniquely qualified to distinguish Croft from the facts of this case.

Croft was a consolidated appeals of two approvals by the Summerville Board of Architectural Review of building plans submitted by the developer. *Croft*, 860 S.E.2d at 354-355. Those appellants argued that the Summerville board erred in approving those plans for various reasons. By the time the appeal of those building plan approvals came before the Supreme Court, the project had been abandoned by the developer. When the court explored that fact at oral argument, counsel for both

parties had to concede that the building plan approval appeal was likely moot. *Croft*, 860 S.E.2d at 356.

Very importantly, the only relief sought by the appellants in that case was the invalidation of the building plan approvals granted by the board. "At its core, the fight in this case is over whether the Developer can build the Project as currently approved by the Board, or whether the Developer must return to the Board and obtain new approval before building the Project. This controversy ended when the Developer decided not to build the Project." *Id.* If there were not a building project, invalidating the approvals fit the definition of mootness. "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Id.*, citing *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).

This case could not be more different. The major difference between those building approval appeals in *Croft* and this case is that this case is a declaratory judgment action challenging illegal actions by the City of Aiken in entering into a public / private partnership with a developer. The Second Amended Complaint seeks review and adjudication by the court of numerous instances of violation of the law by the City, in addition to a separate injunctive relief cause of action seeking to stop the progress of Project Pascalis. See, (R. p. 216, lines 3-7) (seeking a declaration of various violations of the South Carolina Community Development Law, the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, and the South Carolina Freedom of Information Act).

There is a real controversy (unless the City concedes it violated the law, which at this writing, it has not) and much work for the court to do in reviewing these facts and the law and deciding whether the City violated the law. Those issues are far from adjudicated or resolved, and the circuit court erred in prematurely calling an end to this case on the basis of the City's plea of mootness.

This is not a case like *Sloan* where the government body not only belatedly complied with its

legal obligations after the filing of the complaint (in *Sloan*, producing the documents, in this case, abandoning the illegal project) but also conceded it was wrong. *Sloan*, 630 S.E.2d at 477-478. The plaintiff in that case sought a declaratory judgement that the Friends group was an alter ego for the Hunley Commission and was a public body. After the filing of the complaint, the defendant Friends group not only produced the documents under FOIA but also conceded it was a public body. *Id.* Accordingly, there was no further relief the court could grant. Hunley. "Additionally, since the filing of this appeal, Friends has conceded that it is presently a public body as related to this litigation." *Sloan*, 630 S.E.2d at 478.

Likewise, in *Seabrook v. City of Folly Beach*, 337 S.C. 304, 523 S.E.2d 462 (1999) the plaintiffs brought an action against the city alleging that the city had no authority to impose conditions upon the development of their land. *Seabrook*, 523 S.E.2d at 462. After the trial court found in favor of the plaintiffs, the city removed the conditions and approved the plat. *Id.* In that case, though, there was a trial, the City was adjudged to have acted wrongly, and the City corrected its error. Here, there has been no adjudication of the City's wrongful conduct in this case, nor has the City conceded its violation of the law.

In this case, the City has not conceded anything, there has been no trial on the merits, and all of the instances of wrongdoing outlined in the Second Amended Complaint remain unaddressed. This Court, in the interest of supporting the rule of law, holding local government accountable to abide by state enabling legislation and its own local ordinances, and avoiding repetition of wrongdoing in the future, should reverse the decision of the circuit court and send this case back for a full trial.

Allowing a local government to avoid the consequences of its wrongdoing through the doctrine of mootness once the wrongdoing is publicly challenged through the initiation of litigation is bad public policy and could incentivize local governments to simply terminate controversial projects whenever they are legally challenged to avoid judicial scrutiny and enable repetition of their

processes. This, again, is not consistent with the rule of law and should not be supported by the courts of this state.

B. A declaratory judgment could provide guidance on the legality of the city's actions and prevent similar issues in future projects.

South Carolina's Uniform 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 [**889] 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).

Dismissing this case as moot at this point, before any discovery has been as completed and before there has been a trial on the merits, frustrates this purpose and is contrary with the intent and purpose of the DJA and the policy behind the law of mootness in this state. This case, as pled in the Second Amended Complaint, has not been decided by the City's sudden and unilateral abandonment of Project Pascalis, and this Court should allow the case to proceed to decision as envisioned by the clear language of the DJA, in the interest of justice, to avoid repetition by evading review and in support of the rule of law in this state.

II. THE CASE FITS CLEARLY WITHIN THE EXCEPTIONS TO THE MOOTNESS DOCTRINE INCLUDING EVADING REVIEW, PUBLIC INTEREST AND EFFECT ON FUTURE EVENTS.

The declaratory judgment cause of action in the Second Amended Complaint is not moot, as argued above. Even if the City's unilateral abandonment of Project Pascalis after it was exposed by the filing of this legal action did render the action moot, however, there remain sound policy reasons, embodied in the exceptions to mootness as developed in this state's jurisprudence, compelling this case to be tried on the merits.

The *Curtis* court identified three general areas of exception to the mootness doctrine in this state. *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

An appellate court could take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. *Curtis*, 549 S.E.2d at 596, citing *Byrd v. Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996); *Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc.*, 185 W. Va. 168, 406 S.E.2d 65 (W. Va. Ct. App. 1991) (holding an appellate court could consider newspaper's appeal from trial court's injunction compelling newspaper to publish political action advertisement even though case was moot, because issue was capable of repetition yet evaded review).

An appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. *Id.*, citing *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (the court recognized that questions of public interest originally encompassed in an action should be decided for future guidance however abstract or moot they may have become in the immediate contest).

Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. *Id.*, citing 5 AM. JUR. 2D Appellate Review § 649 (1995).

All three exceptions apply to this case and provide sufficient grounds to reverse the circuit court's dismissal of this case.

First, though the Respondents attempt to factually distinguish *Byrd v. Irmo High School,* 321 S.C. 426, 468 S.E.2d 861 (1996)(this case involved short-term school suspensions and established that issues which are inherently short in duration may qualify for this exception) and *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017)(the court applied this exception to a case involving bridge inspections that were too short in duration to be fully litigated before becoming moot), the "capable of repetition yet evading review" exception should apply to this case, where the City initiated and then abandoned a controversial project before legal challenges raised could be fully litigated. This exception applies to the very situation this exception is meant to address, i.e., the City's attempting to end the period available for review by unilaterally ending its wrongful behavior once it was challenged in an action filed in court. Not applying this exception and dismissing rather than trying this case deprives citizens of the ability to obtain judicial review and to avoid repetition of wrongdoing by the City.

Second, there is a strong public interest in clarifying the legal requirements for major development projects and ensuring government transparency. Even if this specific project is over, a ruling would provide important guidance for future projects. See *Curtis*, 549 S.E.2d at 596 (outlining the public interest exception); and *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (the court applied the public interest exception to address issues of public importance regarding state procurement procedure). In this case, the "public interest" exception supports deciding this case given the allegations of FOIA, ethics, and public contracting violations by the City in the Second Amended Complaint.

The South Carolina Supreme Court, almost 80 years ago, recognized the need to address matters of public importance in local governance even where the actions complained of in the

pleadings might be considered moot:

> [T]he case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are earnestly argued public questions of importance. The last stated factor brings into play the principle, now generally established, that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest.

Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 96, 44 S.E.2d 88, 96-97 (1947).

Allowing the City to avoid review under the cloak of mootness could invite future misconduct by this or other municipalities and should not be allowed by this court.

Finally, there may be ongoing effects or consequences from the city's alleged unlawful actions in pursuing Project Pascalis, even if the project itself is terminated. A declaratory judgment could still provide meaningful relief. See *Curtis*, 549 S.E.2d at 596 (the third exception allows deciding a case if collateral consequences flow from the challenged conduct). Here, the alleged ethics, transparency, and contracting violations have implications for public trust and government integrity beyond just the City of Aiken or the abandoned Project Pascalis and should be litigated and adjudicated for the benefit of this and other local governments in this state.

CONCLUSION

In summary, dismissal of this case prior to trial frustrates government accountability and transparency regarding development projects, particularly those in which local government is a "partner." This case raises issues of substantial public importance regarding municipal governance, ethics, and compliance with state laws that warrant judicial resolution despite the City's termination of Project Pascalis. This declaratory judgement action is an opportunity for guidance and must be allowed to proceed to trial in the interest of good local governance and the rule of law in this state,

and to avoid repetition of wrongdoing by the City of Aiken and other municipalities and counties. For these reasons, the Appellants respectfully request that this Court reverse the lower court and remand this case for trial.

Respectfully submitted,

/s W. Andrew Gowder, Jr.
W. Andrew Gowder, Jr., (S.C. Bar #7895)
AUSTEN & GOWDER, LLC
Charleston, South Carolina 29405 Phone:
843/727-2229
andy@austengowder.com

Michael T. Rose, Esquire (S.C. Bar #4910)
MIKE ROSE LAW FIRM, PC
406 Central Ave.
Summerville, SC 29483
Phone: 843-871-1821
Facsimile: 843-478-7595
mike@mikeroselawfirm.com

James G. Carpenter
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819 East North St
Greenville, SC 29601
Phone: 864-235-1269
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