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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 Benjamin H. Culbertson
Circuit Court Judge

Appellate Case No. 2024-000023
Circuit Court Case No. 2022-CP-22-00912

Michael T. Green and Carrie J. Green; Julian P. Rutledge and Melvin L. Rutledge; Patricia S. Grate; Carlethia B. Jenkins; Frances Jo Baker; Parkersville Planning & Development Alliance, Inc.; Keep It Green, Inc.; and Preserve Murrells Inlet, Inc., Plaintiffs

of which Michael T. Green and Carrie J. Green; Julian P. Rutledge and Melvin L. Rutledge; Carlethia B. Jenkins; Frances Jo Baker; Parkersville Planning & Development Alliance, Inc.; Keep It Green, Inc.; and Preserve Murrells Inlet, Inc. are the Appellants,

v.

Georgetown County; Laine CRE, LLC; TriStar Land, LLC; and Samuel J. Nesbit on behalf of the heirs of Will Nesbit, Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The narrow question 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."

II. *ULTRA VIRES* ACTIONS BY GEORGETOWN COUNTY COUNCIL

A. Site Plan Approval / Disapproval

The Georgetown County Council amendments to Ordinance 607 effectively eliminated the provisions in Sections 6-29-1150 and 6-29-1155 of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code 1976, §§ 6-29-310, et seq., (hereinafter "Enabling Act"). As indicated at pages 19-21 of Appellants' Brief, these amendments were *ultra vires* because they conflicted with the Enabling Act and eliminated rights granted by the Enabling Act.

The first sentence of Subsection 6-29-1150(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." (July 18, 2023, Order, p. 7; R. p. 9) (emphasis added). However, the Order does not address the conflict between the mandatory term *"must"* and the elimination by Georgetown County Council of the required role of the Planning Commission in site plan 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); see also 73 Am. Jur. Statutes §107 (1964) at pp. 365-366 ("The rule is that statutory words are to be given their natural, received, popular, everyday, approved, and recognized meaning. The intention of the legislature to use statutory phraseology in such manner

is presumed.") (footnotes omitted); Britannica.com ("MUST meaning: 1: used to say that something is required or necessary; 2: used to say that something is required by a rule or law.") (Google Search Aug. 9, 2024).

The Enabling Act grants the Planning Commission, not the County Council, the power of approving or disapproving site plans. Consequently, County Council lacks the power to approve or disapprove site plans.

Page 12 of Respondents' Initial Brief contains the following statement:

> The language of the statute also reflects an intent to leave the crafting of the procedural process for approving development plans to the governing bodies of counties. See S.C. Code Ann. § 6-29-1120(A) *[sic]* ("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).

Despite the clear mandatory language in Subsection 6-29-1150(A), Respondents claim that this provision "reflects an intent to leave the crafting of the procedural process for approving development plans to the governing bodies of counties." This assertion is logically absurd.

B. <u>The Sinkler Holding</u>

Respondents assert that *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010) has no application in the present case. Respondents emphasize a footnote in *Sinkler* 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 *Sinkler* specifically turned on the county's failure to comply with the Enabling Act. This holding 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 approval 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.

Respondents argue that this case is centered upon statutory interpretation and the bounds of a county's authority to make zoning decisions. Appellants agree with this description of the dispute. However, Appellants submit that the bounds of a county's authority to make zoning decisions must be 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. 13)

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.

C. Other Provisions of Ordinance 607 Eliminate Rights of Parties

The other provisions at issue in Ordinance 607 also eliminate rights granted by the Enabling Act in Sections 6-29-1150 and 6-29-1155. Georgetown County Council clearly lacks the power to nullify rights granted by the Enabling Act (See Appellants' Initial Brief, pp. 15-21).

III. OTHER MATTERS

A. Constitutional Deprivation

Respondents argue that a claim alleging the invalidity of a zoning ordinance must necessarily involve the denial of constitutional rights (Respondents' Initial Brief, pp. 7-8), and "any assertions by Appellants that they have been denied rights of some sort granted by the Planning Act are misplaced and are based upon a legal fiction." (Respondents' Initial Brief, p. 10).

First, a zoning ordinance can be invalid because it conflicts with state law regardless of constitutional deprivation. (See Argument II., above). Second, Argument 5.A. of Appellants' Initial Brief addresses this 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. 35). 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 and cites 31 specific paragraphs of the Complaint and seven Affidavits signed by the Plaintiffs that allege constitutional deprivation. (Appellants' Initial Brief, p. 36).

B. <u>Substantive Rights</u>

Respondents claim at Page 10 of their Initial Brief:

> The Planning Act does not operate to grant substantive rights. There are provisions which permit certain parties the ability to file a suit contesting an ordinance or zoning decision, but such a provision works only so far as to provide statutory standing to those parties. *See* S.C. Code Ann. § 6-29-760; S.C. Code Ann. § 6-29-1150. Appellants have failed to appreciate the clarifying language provided by the General Assembly in enacting such provisions, however. "An owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, *this subsection does not create any new substantive right in any party.* "S.C. Code Ann. 6-29-760(C) (emphasis added). This express language, as well as the applied function of the other Planning Act provisions cited by the Appellants in their brief, make it clear that the General Assembly did not intend to create any new substantive rights through the enactment of the Planning Act.

This statement is both inaccurate and irrelevant. It is wrong because Article 11, Section 6-29-1510, *et seq.* of the Enabling Act establishes a scheme of substantive vested rights. It is irrelevant because Appellants have never claimed a substantive right in terms of Section 6-29-760(C).

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

D. The Doctrine of Unthinkability

The Order of the Court ignored the statutory phrase that "[zoning] regulations *must* be made in accordance with the comprehensive plan for the jurisdiction." (Enabling Act Subsection 6-29-720(B)) (emphasis added). Instead, the Order states: "This Court finds that a county's comprehensive plan exists to supply guiding principles in a county's zoning and land use decisions, but it is not, by itself, an authoritative standard which must be strictly construed and applied." (Order dated, July 18, 2023, p. 9; R. p. 11).

The Appellants' Initial Brief addresses the failure of the Order to apply traditional canons of statutory interpretation at pages 37-39.

In an article published in the November/December 1991 issue of the SOUTH CAROLINA LAWYER, Prof. Thomas Haggard discussed the South Carolina rules of statutory construction. The last rule addressed by Prof. Haggard is the "Doctrine of Unthinkability," which was adopted by the trial judge in *Simmons v. Robinson*, 399 S.E.2d 605, 611 (S.C. Ct. App. 1990), rev'd on other grounds, 409 S.E.2d 381 (1991). The Court of Appeals opinion gave the following example of a United States Supreme Court opinion utilizing the doctrine: "For example, in an opinion authored by Chief Justice Warren, the United States Supreme Court ordered the integration of the public schools of Washington, D.C., saying simply that to rule otherwise would be 'unthinkable.'" *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S.Ct. 693, 695, 98 L.Ed. 884 (1954). *Id*. at fn. 5, p. 611.

In effect, a version of the unthinkable doctrine is affecting the approach to the interpretation of the phrase "in accordance with the comprehensive plan." More specifically, it appears that there is a view that it is "unthinkable" to consider this statutory phrase as an authoritative standard to apply in assessing zoning proposals. Perhaps it is time to consider the

possibility that it is "thinkable" that the phrase "*must* be made in accordance with the comprehensive plan" is not mere surplusage and means exactly what it plainly says. (emphasis added). (See discussion of statutory term "must" at pp. 5-6, above.)

E. Issues of Fact

Respondents conclude that "the case solely 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. 18). 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. 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, p. 8) (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 where factual issues have been raised.

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 or constitutional deprivations, 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.

F. Timeliness of Appellants' Arguments

Respondents make the following representation on Page 9 of their Initial Brief:

> "Appellants did not raise a due process violation to the trial court on their motion to strike or on their motion to reconsider, and thus, the trial court did not rule on this issue. Appellants also did not allege in their Complaint that their due process rights were violated, nor did the Complaint allege any facts sufficient to state such a claim. Only now, do Appellants argue *for the first time* that they have been deprived of due process. Therefore, any such arguments are not preserved and should not be considered by this court."

(emphasis added). Respondents further state in footnote 3 that they "intend to file a motion to strike any materials and references related to Appellants' due process claim and requests *[sic]* the Court ignore and/or strike the portions of Appellant's *[sic]* brief that reference it."

Respondents' claim is erroneous. Even a cursory review of the Circuit Court record reveals that these issues were presented to the trial court on multiple occasions in multiple ways as follows:

1. Plaintiffs' Motion to Alter or Amend Judgment at page 1, specifically raises the following: "The denial of due process resulting from the adoption of the 2011 amendments to Section 607 of Georgetown County's 'General Residential

District' (GR) provisions." Appellants devoted six out of nineteen total pages of their motion specifically to the due process and *ultra vires* issues.

2. Arguments concerning due process, the *ultra vires* nature of Ordinance 607, and the application of *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 on Plaintiffs' Motion to Alter or Amend Judgment held in open court before the trial judge on November 7, 2023. (See Transcript of November 7, 2023, Hearing, p. 6, ln. 12 - p. 7, ln. 2; R. pp. 235-236).
3. Plaintiffs' Complaint alleges both traditional constitutional deprivation (Complaint, pars. 62-64, 68-69, and 71-76; R. pp. 40-42)), and that Plaintiffs' rights have been "affected" in ways that amount to constitutional deprivation as described in the Complaint and attached Affidavits. (Complaint, pars. 11-30; Exhibits 1-7; R. pp. 31-35, 62-78).

IV. CONCLUSION

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

Respectfully submitted,

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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.

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