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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Former Circuit Court Judge

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Case No. 2021-CP-1005255
Appellate Case No. 2022-000973

Teresa Melhado and Dane Neller……..……Appellants,

v.

City of Charleston, City of Charleston Board of Zoning Appeals, George Wallace, Erika Wallace, Erika R. Hayes, Trustee of the Erika R. Hayes Revokable Trust u/a/d 8-42016…… Respondents,

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APPELLANTS' RETURN TO THE MOTION TO DISMISS FILED BY RESPONDENTS GEORGE WALLACE, ERIKA WALLACE, ERIKA R. HAYES, AND TRUSTEE OF THE ERIKA R. HAYES REVOKABLE TRUST U/A/D 8-42016

Dated: October 21, 2024

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Appellants Teresa Melhado and Dane Neller ("Appellants") hereby submit this return to the motion to dismiss filed by George Wallace, Erika Wallace, Erika R. Hayes, Trustee of the Erika R. Hayes Revokable Trust u/a/d 8-42016 (the "Wallace Respondents").[1]

BACKGROUND

This appeal is a statutory zoning appeal, taken under the South Carolina Local Government Planning Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310, *et seq*. The matter on appeal is the circuit court's affirmance of a legally defective public hearing and incorrect decision by the City of Charleston Board of Zoning Appeals (the "Board"). The Board granted the Wallace Respondents a variance and special exceptions from the City's zoning ordinance, which legislatively protects the use of the historic properties at issue on Church Street in downtown Charleston. Appellants own 60 Church Street. The Wallace Respondents own 62 Church Street.

Appellants petitioned for a writ of supersedeas to stay the matter on appeal *three* times: to the circuit court initially on March 16, 2022, and on reconsideration on May 27, 2022, and then to this Court, together with the notice of appeal, on July 14, 2022. (Petition and Appendix, filed July 14, 2022). Appellants then proceeded to fully brief their appeal to this Court, filing their initial opening brief on December 28, 2022, and their initial reply brief on May 1, 2023, after the Wallace Respondents requested and were granted three extensions to file their initial response brief. The final briefs and record on appeal have all also been prepared and filed.

[1] The City of Charleston and its Board did not join the Wallace Respondents in making the motion to dismiss.

Recently, on September 11, 2024, the Court sent a letter to the parties requesting six additional bound copies of the briefs and the record. Next, on October 7, 2024, the Court sent a letter to the parties advising them that oral arguments for this appeal may be held this coming February. *Two days later*, on October 9, 2024, the Wallace Respondents filed their motion to dismiss. It is manifest that the Wallace Respondents have been lying in wait to decide if and when to file their motion to dismiss, and that they decided to file their motion only after it became evident that this Court is deliberating over the briefs and likely to hold an oral argument.

The Wallace Respondents' recent motion to dismiss is premised on a choice they made long ago, in the beginning of 2022, to proceed with a proposed use and project, which they have always known depends on the challenged variance and special exceptions from the zoning ordinance being upheld and continuing to exist – at their own risk of not prevailing in this statutory zoning appeal. Mr. Wallace admits this in paragraph 8 of his own affidavit attached to the motion: "Construction on our project at 62 Church Street began after the building permit was issued on January 31, 2022."[2] At that time, Appellants had already properly commenced their statutory zoning appeal with the circuit court on November 18, 2021. When Appellants saw out their windows that construction workers were starting to appear to do work next door, they were surprised, and promptly filed a petition for supersedeas with the circuit court on March 16, 2022, then timely moved for reconsideration on May 27, 2022, and then timely petitioned this Court on July 14, 2022. (Petition and Appendix, filed July 14, 2022).

[2] Mr. Wallace states in paragraph 9 of his affidavit that the construction he decided to begin in early 2022 was completed in late 2023. He does not explain why he waited to file his motion to dismiss until October 9, 2024.

Mr. Wallace is an experienced architect who understands zoning and building processes and is well-represented by counsel. During these statutory zoning appeal proceedings, he made an informed and calculated decision to move forward with building without a guaranty that the challenged variance and special exceptions from the zoning ordinance would be upheld and continue to exist. Confoundingly, Mr. Wallace now presents the risk he decided to undertake during the appeal as the reason the appeal should be dismissed.

Further reflecting why the Wallace Respondents finally decided to try filing the motion to dismiss that they have been withholding, they concede on page 11 of their motion that the Board that rendered the challenged decision, recognizing a problem, has now changed and no longer employs its uniquely defective procedures and protocols (using software known as "Zoom® Webinar" and the Board's own so-called "Zoom® Meeting Protocol") – which led to Appellants being technologically gagged and ousted from a public hearing and unable to exercise their right by rule and statute to object, while the Wallace Respondents offered false and misleading evidence and testimony in an improper question and answer session with the Board, about Appellants' neighboring property, and how the Wallace Respondents' proposed use and project, which are not permitted without a variance and special exceptions from the zoning ordinance, would detrimentally affect Appellants. This central issue is more fully set forth in Appellants' briefs, incorporated here by reference. (Appellants' Brief at pp. 2-5, 7-14, 20-27; Appellants' Reply Brief at pp. 1-5).

The Wallace Respondents also note that the COVID-19 pandemic is largely in the past. But legal issues ushered in by the pandemic surrounding the widespread use of new

technologies, procedures, and protocols in this State to conduct remote public hearings are here to stay and require judicial guidance from this Court moving forward into the future. The legal issues are not moot. Neither is this particular case, where the public hearing that was held was defective. To be clear, as Appellants emphasized in their briefs, Appellants are not making a policy argument against remote hearings, in general. Rather, this appeal is focused on the particular ways in which the remote hearing held by the Board in this matter was defective and prejudiced them, under the Board's own rules, the statutory enabling Act, and fundamental due process. (Appellants' Brief at pp. 2-5, 7-14, 20-27; Appellants' Reply Brief at pp. 1-5). Nonetheless, as the Wallace Respondents also informed the Court in their motion, this particular Board has gone back to its pre-pandemic procedures of conducting its public hearings in-person. Appellants view that as a positive development and ask that this matter be considered anew by the Board in such an in-person public hearing, where they are confident that they will actually be heard.

The Wallace Respondents assert that such a fair hearing would merely be a hypothetical exercise at this juncture given their decision to press forward at their own risk. They assert nothing can be done. That is not the case, under the zoning ordinance at issue, detailed below.

LEGAL ARGUMENT

The Wallace Respondents' motion to dismiss relies on this Court's readily distinguishable decision in *Christ Central Ministries v. City of Columbia Bd. of Zoning Appeals*, 424 S.C. 358, 818 S.E.2d 30 (Ct. App. 2018). In that case, the appellant was a city, and it did not ask this Court for a stay, but instead decided to issue the very permit it was appealing to this Court. *Id*., 424 S.C. at 361, 818 S.E.2d at 31 ("The City did not

request this court stay the order pending the outcome of the appeal. Instead, the City issued CCM a permit to construct the billboard in question."). Here, Appellants are aggrieved neighbors, not a city. They asked this Court for a stay, as well as the circuit court. And of course they did not, nor could they (as could a city) approve the variance and special exceptions from the zoning ordinance that they are appealing. To the contrary, Appellants have asked *three* times that the matter be stayed. Further, different than in *Christ Central Ministries*, the building permit Mr. Wallace points to is not what Appellants are appealing, which is the zoning decision. The motion to dismiss otherwise relies on unpublished decisions by this Court, which should not have been cited, under Rule 268(d)(2), SCACR, which likewise rely on *Christ Central Ministries*, and which likewise are readily distinguishable. Similarly distinguishable, in the United States Supreme Court decision cited in the motion to dismiss, *Brownlow v. Schwartz*, 261 U.S. 216 (1923), a city official decided to issue a permit he had denied and was challenging in the appeal, as in *Christ Central Ministries*.

Going far beyond this Court's sensible decision in *Christ Central Ministries*, the motion to dismiss urges this Court to create new precedent that would effectively deprive parties with standing of their statutory right to take zoning appeals, and likewise, deprive this Court of its statutory jurisdiction to hear zoning appeals, pursuant to the South Carolina Local Government Planning Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310, *et seq*. That is, because it typically takes multiple years for a zoning appeal to be heard and decided by this Court, virtually any zoning appeal could be mooted simply by completing the proposed project at issue in less time than the zoning appeal process takes to run its course. Discretionary denial of supersedeas would effectively dismiss possibly meritorious appeals

on the law. That is not consistent with the statute, which makes it clear that the right to appeal continues, if discretionary supersedeas is denied. *See* S.C. Code Ann. § 6-29-830(B) ("The filing of an appeal in the circuit court from any decision of the board does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper."); S.C. Code Ann. § 6-29-840(A) ("In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law."); S.C. Code Ann. § 6-29-850 ("A party in interest who is aggrieved by the judgment rendered by the circuit court upon the appeal may appeal in the manner provided by the South Carolina Appellate Court Rules."); *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004) ("On appeal, we apply the same standard of review as the circuit court below.").

Moreover, it should not be the new rule that an appellant in a zoning appeal should be required, no less incentivized, to appeal each and every single incidental decision, approval, or permit from any board or administrator that depends on the zoning decision already appealed or merely relates to the same general project in one form or another. That would clog the courts, and burden municipalities and other litigants, with a multiplicity of incidental appeals, having no separate and independent basis from the zoning matter already appealed. Here, Appellants appealed the decision on the application for a variance and special exceptions from a zoning ordinance that were required for the Wallace Respondents to proceed, unless at their own risk of not prevailing on appeal. Appellants should not additionally be required and incentivized to object to incidental and trivial decisions, approvals, or permits from various boards and administrators – such as

architectural material and color selections, electrical plan submittals, permits authorizing certain licensed contractors to perform the work, or certificates indicating that the work has been performed in manner that allows safe occupancy – which would only breed wave after wave of multiplied, wasteful, and frivolous proceedings.

Lastly, the motion to dismiss incorrectly suggests that Appellants can no longer be afforded any practical relief. With a remand or reversal by this Court, the appealed variance and special exceptions would no longer exist (unless reinstated by the Board after a fair public hearing) and the use of the property would no longer comply with the zoning ordinance. The City of Charleston can and should enforce its own zoning ordinance, under Section 54-950, and even if the City is not inclined to do so in this case, Section 54-950 also allows Appellants, as neighboring property owners, to enforce the zoning ordinance in a court, and in such a suit, Appellants can seek to prevent the use, and to correct or abate the violation, in addition to monetary damages:

> In case a building, structure, or land is used, or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land. Each day the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use continues is considered a separate offense.

(City of Charleston Zoning Ordinance, Section 54-950).

As explained above, the Wallace Respondents knowingly proceeded at their own risk during these statutory zoning appeal proceedings. This Court's decision should not be swayed, as the Wallace Respondents urge, by the costs they have incurred for construction, or the costs they may have to incur for deconstruction. It is certainly not impossible to restore the property to its prior legislatively protected state under the zoning ordinance. Further, Appellants believe the cost to them, in terms of the detrimental impact on the use and fair market value of their property, outweighs any cost that the Wallace Respondents undertook the risk to bear. And if the property is not restored to its prior legislatively protected state under the zoning ordinance, the cost to Appellants, in terms of the detrimental impact on the use and fair market value of their property, would constitute their monetary damages.

CONCLUSION

This zoning appeal is not moot. The Wallace Respondents' motion to dismiss should be denied and Appellants should not be deprived of their statutory right to have this zoning appeal heard and decided by this Court as a matter of law.

Dated: October 21, 2024

Respectfully submitted,

/s/ Jason S. Smith

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PROOF OF SERVICE

I, Jason S. Smith, certify that Appellants' Return to Motion to Dismiss was served on the following counsel of record by e-mail on this day, October 21, 2024:

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October 21, 2024

Via E-Mail

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RE: *Melhado v. City of Charleston*
Appellate Case No. 2022-000973

Dear Ms. Kitchings:

On October 7, 2024, the Court sent a letter to the parties advising them the Court may consider this case for oral argument during the February 2025 term of court. As counsel for Appellants, we confirm that we are available for all such dates.

With kindest regards, I am

Sincerely yours,

Jason Smith

cc:

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