THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2024-001057
Case No. 2022-CP-02-1498

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 RESPONDENT AIKEN DESIGN REVIEW BOARD

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STATEMENT OF THE CASE

On July 5, 2022, the Appellants filed a Complaint against multiple governmental entities and individuals including the Respondent Aiken Design Review Board ("DRB") seeking only declaratory and injunctive relief with respect to the redevelopment project in downtown Aiken known as "Project Pascalis." There were several additional versions of the Complaint that were subsequently filed. At the time that the DRB's motion to dismiss was heard and decided, the First Amended Complaint filed June 29, 2023, was the operative pleading. (R. ___). The individual DRB members had been voluntarily dismissed from the action at that point.

Based on the First Amended Complaint, the non-FOIA-related allegations asserted against the DRB are summarized in Paragraph 135, which states:

> On March 1, 2022, the DRB ignored (a) its duties as a quasi-judicial entity, (b) all the above-referenced Sections of the Zoning Ordinance, (c) all the above-referenced Sections of the S.C. Code of Laws, (d) all the above-referenced guideline documents, and (e) all the above-referenced plans adopted by the City to approve a fatally flawed and incomplete application by granting the unprecedented and unauthorized form of "conditional" COA for demolition of a Contributing Structure in a Historic Site and three other Contributing structures based on very limited and biased information, in one meeting, with less than half an hour of total consideration and less than six minutes of deliberation. The structures approved for demolition are among the most prominent structures on the most prominent block in the City.

See, First Amended Complaint, ¶ 135. (R. ___). Similarly, in Paragraph 105 of the First Amended Complaint, the Appellants allege as follows:

> The DRB hastily approved, in its first Meeting on Project Pascalis, with less than six minutes of deliberation, a fatally flawed and incomplete application for demolition by using an unprecedented and unauthorized form of "conditional" COA that is not allowed by the Zoning Ordinance and is contrary to expressed provisions of the Zoning Ordinance Section 5.2.4(A)(3), which states that "the **application shall be denied**" (emphasis added). In approving the

> COA on March 1, 2022, the DRB ignored questions as to (a) the applicability of certain provisions of the Zoning Ordinance and certain guidelines and procedures and (b) pleas by its own members and by members of the public to slow the DRB process down and provide and review more complete information about RPM's demolition application.

See, First Amended Complaint, ¶ 105. (R. ___).[1]

Thus, in their non-FOIA-related causes of action, the Appellants are suing the DRB for declaratory and injunctive relief related to a vote taken at a March 1, 2022 DRB meeting to grant a conditional Certificate of Appropriateness ("COA") and proceedings leading up to that vote. It is undisputed that the Appellants never filed an appeal from the decision of DRB to the Circuit Court.

As discussed in more detail below, on August 29, 2022, the Respondent Aiken DRB filed a Motion to Dismiss the Appellants' First and Second Causes of Action on the basis that those causes of action do not state a justiciable claim for declaratory or other prospective relief because it is well settled under South Carolina law that an action seeking declaratory or injunctive relief under the Declaratory Judgment Act is not a substitute for a timely appeal. The Appellants filed a First Amended Complaint on February 27, 2023, raising the same claims. The Aiken DRB filed the same Motion to Dismiss on March 14, 2023. That motion was heard by Circuit Court Judge William P. Keesley, and on June 1, 2023, the trial court issued an Order denying the Motion to Dismiss.

[1] These verbatim allegations were included in the original Complaint and again later in the Second Amended Complaint filed June 29, 2023. (R. ___). The Second Amended Complaint was filed in compliance with the Order filed June 1, 2023, which gave the Appellants thirty days to amend the First Amended Complaint to provide "more specific averments as to how [the DRB] is alleged to have violated the FOIA, as opposed to the other defendants." (Order I, p. 10).

The Respondent Aiken DRB filed a filed a timely Rule 59(e) Motion to Alter or Amend Order and/or Motion to Reconsider on June 12, 2023. By Form Order filed July 31, 2023, the trial court established a briefing schedule for the Rule 59(e) Motion. That motion was then heard on May 9, 2024.

By Order filed June 5, 2024, the trial court granted in part the Rule 59(e) motion and significantly modified its earlier Order. (Order II). The Court ruled 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)." (Order II, p. 2). The trial court further ruled 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 [as] 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." (Order II, pp. 2-3). (Emphasis in original). The trial court also amended its June 1, 2023 Order as follows:

> The prior order is amended to delete the wording that deciding the issue of subject matter jurisdiction was premature and that jurisdictional facts must be construed in a "light most favorable to the Plaintiffs." (Order, pp. 6-7). Using a Rule 12(b)(1) motion is an appropriate vehicle to raise subject matter jurisdiction. On reconsideration, the court finds that the material facts on this issue were sufficiently developed. "[T]he question of subject matter jurisdiction is a question of law for the court, not a jury question." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993). Moreover, "[i]f the facts which give rise to a jurisdictional issue are in dispute, the court, not a jury, must find the facts." *Id*. It is also the Plaintiff's burden – not the DRB's burden -- to present jurisdictional facts to demonstrate the existence of subject matter jurisdiction. *See*, *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191, 197 (Ct. App. 1998).

(Order II, p. 4).

The Appellants did not file a Rule 59(e) Motion. Instead, they filed a timely Notice of Appeal to this Court appealing solely the June 5, 2024 Order issued by the trial court.

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning,* 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id*.

In *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993), this Court explained that "[t]he question of subject matter jurisdiction is a question of law for the court." 431 S.E.2d at 631. This Court reaffirmed the long-standing principle that "every court has the power and duty to determine whether it has jurisdiction which includes the power to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction." 431 S.E.2d at 632.

ARGUMENTS

In its Motion to Dismiss, the Respondent Aiken DRB sought the dismissal of the Appellants' First and Second Causes of Action on the basis that those causes of action do not state a justiciable claim for declaratory or other prospective relief because it is well-settled under South Carolina law that an action seeking declaratory or injunctive relief is not a substitute for an appeal. Accordingly, in the absence of an appeal, the Circuit Court lacks subject matter jurisdiction to hear the Appellants' challenges to the DRB decision, including any alleged procedural or evidentiary challenges, by way of a civil action brought pursuant to the Declaratory Judgment Act.

Initially, the trial court disagreed with the Aiken DRB's position. By Order filed June 1, 2023, the trial court found that the First Amended Complaint on its face raised a justiciable claim and that the action against the DRB was not a substitute for an appeal. (Order I, p. 9). The trial court also erroneously found that a decision regarding subject matter jurisdiction is premature and that at the pleading stage the jurisdictional facts must be construed in a "light most favorable to the Plaintiffs." (Order I, pp. 6-7). Moreover, the trial court opined that "dismissal at this stage is a drastic remedy to be cautiously invoked." (Order I, p. 7). The trial court made that initial ruling despite there being no case law identifying a dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) as a "drastic remedy."[2] In fact, as the Aiken DRB pointed out, the issue of subject matter jurisdiction should be addressed at the earliest stage of litigation – which is precisely why the issue is to be resolved by way of a Rule 12(b)(1) motion which by rule is supposed to be filed in response to a pleading.

[2] The only case law that addresses dismissal as a "drastic remedy" involves Rule 12(b)(8) motions, which are not at issue in this case. *See e.g.*, *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524, 532 (Ct. App. 2009).

At any rate, in response to the Order filed June 1, 2023, the Aiken DRB filed a timely Rule 59(e) Motion to Alter or Amend Order and/or Motion to Reconsider. The trial court held an additional hearing on May 9, 2024, and ultimately issued its Order filed June 5, 2024, granting in part the Rule 59(e) motion and significantly modifying the earlier Order. (Order II). With its June 5, 2024 Order, the trial court ruled 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)." (Order II, p. 2). The trial court further ruled 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 [as] 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." (Order II, pp. 2-3). (Emphasis in original). The trial court also amended its June 1, 2023 Order as follows:

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(Order II, p. 4).

The Appellants have appealed from the Order filed June 5, 2024, and contend on appeal that the trial court erred in dismissing their declaratory judgment claims against the DRB "when the [Appellant] did not seek to overturn the Board's decision on the Certificate of Appropriateness on appeal, but rather sought to have the Board's action declared to be in violation of law." *See*, Appellants' Brief, p. 6. While the Appellants' reasoning appears, at most, to be a matter of semantics, they attempt to argue that a declaratory judgment action may be used as a substitute for an appeal in practice if not in name. In effect, the Appellants contend that a declaratory judgment action may be used to declare the actions of the DRB, which is a quasi-judicial body,[3] to be in violation of the law without the necessity of appealing those actions under the appeals process created by statute. The Appellants' position is deeply flawed and contrary to existing authority.

By way of background, the South Carolina Supreme Court has explained that the Declaratory Judgment Act clearly "has its limits." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462, 466 (2004). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Id*. As the Supreme Court has explained, "[a] justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Id*. "An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act." *Id*. The Supreme Court has held that "it is fundamental that the Declaratory Judgments Act does not eliminate the

[3] The trial court found, and the Appellants do not dispute, that the DRB is a quasi-judicial body created and operating under S.C. Code Ann. §§ 6-29-870 through 6-29-940. In fact, as the trial court noted, the Appellant admitted that the DRB is a quasi-judicial body in their pleadings. (Order II, p. 2). *See*, First Amended Complaint, ¶¶ 101, 104. (R ___).

case-or-controversy requirement." *Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371, 374 (2013). *See*, *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634, 637 (Ct. App. 2020) ("[t]he concept of justiciability encompasses the doctrines of ripeness, mootness, and standing").

In this litigation, the Appellants seek declaratory and injunctive relief based on their challenge to the DRB's decision at its March 1, 2022 meeting to conditionally approve Application #CERD22-001023 for a Certificate of Appropriateness. The Appellants challenge that decision on both procedural and substantive grounds. The Appellants, however, never filed an appeal from the DRB's decision pursuant to S.C. Code Ann. § 6-29-900, and their time for filing an appeal expired prior to the filing of this action. That is undisputed. Yet, the Appellants are clearly seeking to use this civil action for declaratory and injunctive relief as a substitute for an appeal, where the time for filing an appeal has expired and all appeal rights have been forfeited.

In effect, by allowing a person with a substantial interest to commence a civil action for declaratory and injunctive relief against a quasi-judicial body, it is no different than allowing an aggrieved party before a circuit court to sue the court for declaratory and injunctive relief instead of filing an appeal, the latter of which is the proper and *only means* to challenge a judicial or quasi-judicial decision. Importantly, as the trial court recognized, an appeal may be utilized to address not just the ultimate merits of a decision, but also any jurisdictional, procedural, or evidentiary irregularities or issues that arise, including the composition of the court or the quasi-judicial body. Thus, while the Appellants try to argue that they are not challenging the Aiken DRB's grant of a conditional Certificate of Appropriateness on March 1, 2022, their pleadings tell a much different story. The Appellants are challenging whether the DRB has complied with

statutory law and whether it properly received and reviewed evidence and other procedural issues. *See*, First Amended Complaint, ¶¶ 104-135. (R. ___). Specific relief is sought against the Aiken DRB on a number of alleged errors committed by the DRB in reaching its decision. *See*, First Amended Complaint, ¶ 169(a)-(q). (R. ___). Those are the very quasi-judicial acts that are no different than what a circuit court judge engages in, i.e., receiving evidence, evaluating evidence, applying statutory law and rules of procedure, etc. Yet, there is no doubt that this Court would not find that a Circuit Court may be sued for declaratory and injunctive relief rather than being subject solely to a timely appeal to a higher court when an aggrieved party seeks to challenge the court's rulings or authority. A quasi-judicial body should be treated no differently.

Moreover, the Appellants' position, if correct, would subject judicial and quasi-judicial bodies to virtually limitless review by way of declaratory judgment actions. Such review theoretically would be subject to a statute of limitations under the Declaratory Judgment Act and the application of laches for an injunctive claim, rather than complying with the statutorily-mandated thirty-day deadline for appeals, and that would unnecessarily result in delayed justice and uncertainty and lack of finality in judicial and quasi-judicial decision-making.

These are the very policy reasons that a declaratory judgment action as brought by the Appellants against the Aiken DRB is not jurisdictionally allowed or, at the very least, is contrary to established public policy. To that point, this Court has clearly held that "[a] declaratory judgment action is not a substitute for a new trial or an appeal." *Wessinger v. Rauch*, 288 S.C. 157, 341 S.E.2d 643, 644 (Ct. App. 1986).[4] Yet, each of the grounds raised by the Appellants in

[4] *See also*, *Ex Parte Sadisco of Greenville, Inc. v. Greenville County Board of Zoning Appeals*, 340 S.C. 57, 530 S.E.2d 383 (2000) (Rule 60 motion could not used to extent or expand the time for an appeal to be filed); *Burnett v. South Carolina State Highway Dept.*, 252

this ligation, including all procedural and evidentiary irregularities as alleged, could have and should have been adjudicated by way of a timely appeal to the Circuit Court pursuant to S.C. Code Ann. § 6-29-900. As a result, the trial court correctly ruled that the Circuit Court lacks subject matter jurisdiction to hear the Appellants' challenges to the DRB decision and decision-making process by way of a civil action under the Declaratory Judgment Act as a substitute for a timely appeal.

The Supreme Court has similarly rejected the use of a declaratory judgment action to select a forum or to circumvent an existing statutory or appeals process. Specifically, in *Williams Furniture Corp. v. Southern Coatings & Chemical Co.*, 216 S.C. 1, 56 S.E.2d 576 (1949), the Supreme Court held that "ordinarily the Court will refuse a declaration where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances." 56 S.E.2d2d at 578-579. "Gratuitous interference with the orderly processes of special statutory tribunals should be avoided." 56 S.E.2d at 579. Moreover, "[t]he wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum." 56 S.E.2d at 578. *See*, *Garris v. Governing Board of South Carolina Reinsurance Facility*, 319 S.C. 388, 461 S.E.2d 819, 821 (1995) ("[d]eclaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances").

The Appellants counter by focusing on S.C. Code Ann. § 15-53-20, which states in part: "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." S.C. Code Ann. §

S.C. 568, 167 S.E.2d 571 (1969) (circuit court did not have authority to extend time for landowner to appeal from a decision of the board of condemnation after the statutory time limit for appeal had expired).

15-53-20. Similarly, Rule 57, SCRCP states: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Rule 57, SCRCP. However, neither S.C. Code Ann. § 15-53-20 nor Rule 57 has been interpreted to override the scenario where the General Assembly has vested jurisdiction in a specific administrative body or a quasi-judicial tribunal, or where as here, the Circuit Court is vested only with appellate jurisdiction in reviewing decisions of a quasi-judicial body such as a board of architectural review.

In addition to the cases previously cited, this proposition of law is also confirmed by this Court's decision in *Medical University of South Carolina v. Taylor*, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987), where a university sought a declaratory judgment and injunctive relief to bar a former employee from proceeding with his appeal before the State Employee Grievance Committee. This Court explained that the State Employee Grievance Procedure Act vested in "the Grievance Committee alone the power to sustain, reject, or modify a grievance hearing decision of an agency." 362 S.E.2d at 884. Recognizing that the Circuit Court possesses only appellate jurisdiction in such a process, this Court further explained that "[t]he circuit court may become involved only when and if there is an appeal from the final decision of the Grievance Committee by either the employee or the agency." *Id*. "To hold otherwise would permit the legislative intent made evident by the enactment of the act to be frustrated and would interject an unnecessary and potentially confusing element into an otherwise well-defined area of the law." *Id.* (Citations omitted). Ultimately, this Court concluded that the Circuit Court erred in hearing and adjudicating the action brought under the Declaratory Judgment Act.

This Court also reached a similar result in the later case of *Smith v. South Carolina Retirement System*, 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999), in which the former wife of a

university professor brought a declaratory judgment action against the South Carolina Retirement System. While that case turned primarily on the failure to exhaust administrative remedies, this Court also explained that a declaratory judgment may not be utilized to circumvent an established administrative process and that the Circuit Court's "judicial review is appropriate only when appeal is from a final agency order." 520 S.E.2d at 351. In effect, this Court recognized that the Circuit Court should decline to exercise jurisdiction under the Declaratory Judgment Act when established statutory process vests only appellate jurisdiction in the Circuit Court.[5]

In sum, the Circuit Court has jurisdiction over decisions of an architectural review board, but that jurisdiction is limited to *appellate jurisdiction* as statutorily granted pursuant to S.C. Code Ann. § 6-29-900. There is no precedent that the Appellants have cited to allow a quasi-judicial body to be sued for declaratory or injunctive relief after the appeal time has expired or to merely challenge the procedures generally employed by a quasi-judicial body. Importantly, as the appellate courts have made clear, the Declaratory Judgment Act may not be invoked to circumvent the administrative or judicial processes as provided by state statutory law and local ordinances and thereby seek a judicial determination by means of a declaratory judgment action. In land use matters, the Circuit Court typically serves only an appellate role providing judicial review of decisions of zoning boards of appeal, planning commissions, and boards of architectural review, and in such appeals, there is a limited standard of review. Those administrative processes and that standard of review cannot be cast aside or avoided by the use of the Declaratory Judgment Act – either as an act of procedural fencing or to resurrect a stale

[5] Notably, these principles of justiciability are also codified in S.C. Code Ann. § 15-53-70, which states: "The court may refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." S.C. Code Ann. § 15-53-70.

appeal that was never pursued. For all of these reasons, the decision of the trial court is correct and should be affirmed on appeal.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Aiken Design Review Board requests that this Court affirm the June 5, 2024 Order issued by Circuit Court Judge William P. Keesley dismissing the Appellants' non-FOIA-related declaratory and injunctive relief claims as set forth in that Order.

Respectfully submitted,

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