RECEIVED

Dec 19 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE CIRCUIT COURT
FOURTEENTH JUDICIAL CIRCUIT

The Honorable R. Scott Sprouse

Appellate Court Case No. 2023-000953
Unpublished Opinion No. 2024-UP-373 (S.C. Ct. App. Filed October 30, 2024)
Circuit Court Case No. 2021-CP-07-00663

West Street Farms, LLC and Mix Farms, LLC,..... Petitioners,

v.

City of Beaufort, Beaufort Inn, LLC, and 303 Associates, LLC..... Respondents.

PETITION FOR WRIT OF CERTIORARI

W. Andrew Gowder, Jr., Esquire
(SC Bar #7895)
Austen & Gowder, LLC
1629 Meeting Street, Suite A
Charleston, South Carolina 29405
(843) 727-2229
andy@austengowder.com

ATTORNEY FOR PETITIONERS
WEST STREET FARMS, LLC
AND MIX FARMS, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CERTIFICATION OF COUNSEL

I certify that a petition for rehearing was made and finally ruled on by the Court of Appeals on November 19, 2024.

s/W. Andrew Gowder, Jr.
W. Andrew Gowder, Jr.

ATTORNEY FOR PETITIONERS
WEST STREET FARMS, LLC AND
MIX FARMS, LLC

QUESTION PRESENTED

Did the Court of Appeals err in affirming the ruling of the Circuit Court that declined to issue a decision on the merits of this declaratory judgment action based on the presence of a prior pending proceeding when there was no such prior pending proceeding at the time this action was filed, the application for a certificate of appropriateness before the City of Beaufort's architectural review board was filed months after this action, and the narrow decision of the review board did not adjudicate the causes of action pled in the complaint?

INTRODUCTION

The Supreme Court should exercise its discretion to grant review because this appeal involves novel legal questions. Rule 242(b)(1), SCACR, provides that a case involving novel legal questions is a type of case that will be considered for the discretionary review sought in this Petition. *See* S.C. App. Ct. R. 242(b)(1); *see also Peagler v. USAA Ins. Co.,* 368 S.C. 153, 157, 628 S.E.2d 475, 477 (2006) ("In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right.").

The Court of Appeal's per curium opinion affirming the decision of the Circuit Court overlooked or misapprehended the legal issues below, specifically by applying the general rule that declaratory judgment actions should not proceed when there is a prior pending matter between the same parties on the same issue or when an administrative remedy exists that would resolve the matter. Here, there was no pending proceeding and no way for the Appellants to have their challenge heard except through a declaratory judgment action. There was no administrative or other proceeding pending that the Petitioners could have joined or used to address the numerous actions contrary to

law they alleged were being committed by the City of Beaufort in the process of permitting three large and impactful projects in the city's national historic district.

The Supreme Court should issue a writ of certiorari to review the decision of the Court of Appeals to provide necessary guidance to trial courts in applying the principle of *Med. Univ. of S.C. v. Taylor*, 294 S.C. 99, 102–03, 362 S.E.2d 881, 883 (Ct. App. 1987) and other cases cited by the Court of Appeals related to the presence of other pending matters or administrative remedies and a party's right to obtain a declaratory judgment. The per curiam opinion of the Court of Appeals, containing only case citations without further discussion, provides no answers to parties and litigants who are faced with challenging local government action and are evaluating whether they may use the declaratory judgment remedy as provided by South Carolina's statute when there are no other pending matters or available tribunals to provide them a remedy. Petitioners respectfully request this Honorable Court issue a writ of certiorari to review the issues presented by this appeal.

ARGUMENT

On October 30, 2024, the Court of Appeals issued an opinion affirming the Circuit Court's decision in this matter. On November 19, 2024, the Court of Appeals denied Petitioners' request for a rehearing. Based on the following two points, the Appellants petition this court to issue a writ of certiorari to the Court of Appeals under Rule 242, SCACR.

1. When the declaratory judgment action was filed, there was no proceeding pending in which the issues raised in that action could have been adjudicated. The declaratory judgment action was filed months before the Respondents sought final regulatory approval from the City of Beaufort Historic District Review Board (HDRB).

In its per curiam opinion, the Court of Appeals cites *Med. Univ. of S.C. v. Taylor*, 294 S.C. 99, 100-103, 362 S.E.2d 881-883 (Ct. App. 1987) for the proposition that "...a court will not entertain a declaratory judgment action 'if there is pending, **at the time of the commencement** of the declaratory action, another action or proceeding to which the **same persons are parties** [and] in

which are involved and may be adjudicated the **same identical issues** that are involved in the declaratory judgment action.'" (internal citation omitted)(emphasis added).

At the time of the commencement of the declaratory judgment action, the application for final approval from the HDRB had not been filed. The parties to the declaratory judgment action and the later appeal of the HDRB's action are different. The issues in the declaratory judgment action and the later appeal of the HDRB's action are distinct. The facts of this case do not satisfy the test articulated in *Taylor*, and in citing the above authority, the Court of Appeals may have misapprehended the sequence of events in this case.

This declaratory judgment action was filed before the Respondent's application to the HDRB for final approval. Further, this prior-filed declaratory judgment encompassed issues and requested relief that exceeded the limited review of the issuance of a certificate of appropriateness that forms the basis of another related appeal, *Historic Beaufort Foundation v. City of Beaufort*, Appellate Court Case No. 2022-000300 (SC Court of Appeals, 2024).

This declaratory judgment action was commenced on April 6, 2021, by the Appellants, property owners within the City of Beaufort, challenging the City of Beaufort's issuance of permits, approvals, and certificates of appropriateness for three separate projects in violation of the City's zoning ordinances.

The declaratory judgment action asserts that the projects being pursued by the developer Defendants Beaufort Inn, LLC, and 303 Associates, LLC (the "Hotel Project," the "Parking Garage," and the "Apartment Project" as defined in the Amended Complaint) were allowed to proceed with permitting without the City's Zoning Board of Adjustment having first granted them Special Exceptions to these projects as required by the Beaufort Code. Special Exceptions are necessary for the permitting of any Large Footprint Building or building in the Historic District with a particular size footprint as defined in the Beaufort Code.

This declaratory judgment action requests that the court make several declaratory findings, as follows:

a. The Hotel Project, the Parking Garage Project, and the Apartment Project, as currently designed and submitted to the City, exceed 100 feet width frontage and, under the Beaufort Code, shall comply with the Large Footprint Building standards of Beaufort Code Sec. 4.5.10. (R. pp. 1006-1007),

b. Under Sec. 4.5.10, as the Hotel Project, the Parking Garage Project and the Apartment Project are in the Historic District Overlay, both are permitted only by the ZBOA's grant of a Special Exception.

c. Neither the Hotel Project, the Parking Garage Project, nor the Apartment Project have received a Special Exception from the ZBOA.

d. Neither the Hotel Project, the Parking Garage Project, nor the Apartment Project may proceed with any construction, alteration, or improvement on those project sites without receiving a Special Exception for each project from the ZBOA.

e. All prior approvals by the City issued without the prerequisite Special Exception permitting by the ZBOA are null, void, and of no effect. (R. p. 44, line 16-p. 45, line 7)

The matter that the trial court named a "parallel case" was, in fact, a subsequently filed appeal from an architectural review board decision by the HDRB.

On July 9, 2021, West Street Farms, LLC, and Mix Farms, LLC filed an appeal under S. C. Code Ann. Sec. 6-29-900 et al., and The Beaufort Code Sec. 9.10 of a decision of the HDRB. That appeal was a challenge to an award of a Certificate of Appropriateness by the HDRB to The Beaufort Inn, LLC, for the Hotel and Parking Garage projects (but not the Apartment project).

The parties in the two proceedings were different.

Defendant 303 Associates, LLC, a Respondent in this declaratory judgment case, was not an

applicant for that certificate of appropriateness and is not a party to that appeal.

The issues in the two proceedings were different.

The issues raised by the declaratory judgment action were (1) that the City was not following its ordinances in considering continuing applications by the applicants for the Hotel and Garage when the predecessor approvals had expired, and (2) the parcels were not properly zoned to allow construction of buildings of this size and character in the historic district.

The issues presented to the HDRB were design and aesthetic ones, and the decision was only a general grant of the certificate of appropriateness, with conditions.

Later, on appeal of the HDRB decision, the Circuit Court erroneously ruled on certain of the legal issues raised by the Appellants in the declaratory judgment action. However, those issues were not decided by the HDRB, and since the parties could not present evidence outside of the record of the HDRB decision to the court, the Circuit Court's appellate decision could not address the same issues raised in the declaratory judgment complaint.

The fact situation in this case, therefore, is very different from the *Taylor* case.

In *Taylor*, an employee filed a grievance with his employer's vice president for administration, acting under the State Employee Grievance Procedure Act, S.C. Code Ann. §§ 8-17-310 to 8-17-380 (1976). *Med. Univ. of S.C. v. Taylor,* 362 S.E.2d at 882. The employer refused to grant a grievance hearing. *Id.* The employee appealed to the Grievance Committee. *Id.* Before a hearing was set, the South Carolina Employment Security Commission for unemployment benefits found the employee had been discharged for cause. *Id.* The Committee then notified the employer it would hear the employee's appeal. *Id.* at 883. The employer, MUSC, instituted a declaratory judgment action, and the court in that action, enjoined the Grievance Committee from entertaining the employee's request for a hearing on his appeal. *Id.* The Court of Appeals reversed, holding that the trial court erred in granting the employer declaratory and injunctive relief where there were pending before the Committee the

cause of the employee's discharge. *Id.* at 885.

In this case, though, no pending action would have decided the issues raised by the declaratory judgment action at the time this case was filed, and the subsequent regulatory appeal did not involve the same issues.

There was no other "special statutory remedy ... provided," or ... more . . . appropriate under the circumstances." *Id.* at 883–84 (internal quotes omitted) to resolve the relief sought by the Appellants. Further, at the time this action was filed and thereafter, there was no "... administrative agency... vested with primary jurisdiction of the question in issue. " *Id.* at 884 (internal quotations omitted).

2. The HDRB's erroneous issuance of final approval and a certificate of appropriateness months after this declaratory judgment action was filed and underway did not adjudicate the issues in this action. As such, the Circuit Court abused its discretion in ruling that another Circuit Court's decision, reviewing the HDRB's decision on appeal, prevented it from deciding this declaratory judgment action on the merits.

Though the Circuit Court, in this case, based its decision on exhaustion of remedies and the "two-judge rule," those decisions presume that the Circuit Court's decision in the separate HDRB appeal and the declaratory judgment action it was trying were equivalent. This is clear when the Circuit Court, in its Order, characterizes this case as a "parallel case" to the HDRB appeal. This was a decisive legal error.

Because the Respondents chose to continue to seek approval of their project from the HDRB even though the declaratory judgment action challenging the legitimacy of their ongoing entitlements was pending, they confronted the Appellants with a "Hobson's Choice" of either not appearing and challenging the ongoing HDRB approvals and being argued to have waived their rights, or appearing, as they did in a limited fashion to preserve their arguments and face the subsequent argument that their appearance precludes them from a full and fair opportunity to litigate the issues in the Declaratory Judgment action in Circuit Court. The latter is what the Respondents persuaded Judge Sprouse to

decide here, and that was error.

The issues of whether the Hotel or Parking Garage were Large Footprint Buildings under The Beaufort Code and required obtaining Special Exceptions before seeking further city approvals or whether the time for converting the preliminary approvals to final COAs was neither actively litigated nor directly determined in the circuit court's limited appeal hearing and was not necessary to support the decision in the board of architectural review appeal.

The appeal proceeding to the Circuit Court that the Court found was a "parallel proceeding" is an appeal, not litigation on the merits. By statute, review in this appeal is limited only to the certified record below. There is no discovery, and no additional facts can be submitted. The hearing, too, is expedited and scheduled as soon as possible after the board's decision. It does not allow for the development of the issues, discovery of facts, or other aspects of routine civil litigation under our Rules of Civil Procedure.

This case is akin to cases involving default judgment hearings and administrative hearings that our courts have determined cannot support collateral estoppel. See, e.g., *Kunst v. Loree*, 404 S.C. 649, 658, 746 S.E.2d 360, 364 (Ct. App. 2013).

It is clear from reviewing the briefing of the City of Beaufort and the developer Defendants and from the court's Order written by them that the issue of whether these buildings met the definition of Large Footprint Buildings under The Beaufort Code and required a prior Special Exception from the ZBOA before proceeding with other approvals **was not a necessary or appropriate issue squarely presented for decision before the HDRB or before the Court on appeal.** The City and Developers' arguments centered on whether the approvals for these projects had already occurred, the appeal was therefore not timely or waived, and whether the Developer had already vested rights in the projects such that the HDRB could not deny them approval. Secondarily, the City and Developers argued that the decisions on the merits were supported by the evidence before the Board.

This case is unlike the facts of *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582–83 (1994), cited in this Court's opinion for the principle that parties must exhaust administrative remedies before proceeding in a civil matter in Circuit Court. *Hyde* is another employee grievance case, like Taylor cited above, and in her case, she proceeded with a claim for damages under the Whistleblower Statute, S.C. Code Ann. § 8-27-30 (Supp. 1992). *Hyde*, 442, S.E.2d at 582–83. The Department raised Hyde's failure to pursue as her administrative remedy a grievance proceeding under the State Employees Grievance Procedure Act, as a bar to proceeding before the Circuit Court. The trial court struck the defense, but the Supreme Court reversed, finding that "administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Id* at 583.

Again, as with *Taylor*, this case is different because the Appellants had no administrative process available to them either when they filed it (the final permit application had not been filed) or thereafter. The final approval proceeding before the HDRB was a limited one that did not encompass the issues in controversy in this declaratory judgment action.

CONCLUSION

The Court of Appeals erred in affirming the ruling of the Circuit Court. Because the matters herein present novel questions of law, Petitioners respectfully request this Honorable Court issue a writ of certiorari to review the issues presented by this appeal.

Respectfully submitted,

s/W. Andrew Gowder, Jr.

W. Andrew Gowder, Jr., Esquire (SC Bar #7895)
Austen & Gowder, LLC
1629 Meeting Street, Suite A
Charleston, South Carolina 29405
(843) 727-2229
andy@austengowder.com

ATTORNEYS FOR APPELLANTS
WEST STREET FARMS, LLC
AND MIX FARMS, LLC

December 19, 2024