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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 Kristi F. Curtis
Circuit Court Judge

Civil Action No. 2023-CP-22-00210

Appellate Case No. 2023-001776

Kendrick A. Bryant and Keisha Bryant Sherman on behalf of the heirs of Ernest Bryant;
Benjamin Dennison and Willie Dereef, Jr. on behalf of the heirs of Limerick Dennison; Lucille
Grate; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells
Inlet, Inc.,.....

Appellants,

v.

Georgetown County and Covington Homes, LLC,..... Respondents.

RESPONDENT’S PETITION FOR REHEARING

Respondent Georgetown County (“Respondent”) respectfully petitions this Court for rehearing under Rule 221, SCACR. This Court’s June 10, 2026, Opinion (“the Opinion”) fundamentally misconstrues well-established caselaw and the standard of deference to be applied to declaratory judgment actions challenging a county-enacted ordinance as well as overlooked material facts lacking in Appellants’ Complaint. The Opinion also misapprehends the long-standing caselaw regarding the interplay between a county’s comprehensive plan and its properly enacted zoning ordinances. Further, the Opinion erred regarding the material fact that the action

being challenged by Appellants was not a decision, but rather a recommendation, such that S.C. Ann. § 6-29-1150 was not triggered in this instance. The serious and far-reaching consequences of these holdings warrant reconsideration.

DISCUSSION

Plaintiffs' Complaint seeks declaratory judgment. As the Circuit Court's Order ("the Order") at issue pointed out, to establish a cause of action under the Uniform Declaratory Judgments Act, the pleadings must establish the existence of a justiciable controversy. *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 553 (1970). For there to be a justiciable controversy, there must be a concrete issue, a definite assertion of legal rights, and a positive legal duty with respect to those rights which are being denied by the defendant. *Id.* at 153–54, 177 S.E.2d at 553. The Order also noted that cases that present legal questions, and do not involve factual disputes, are well-suited for dispositive motions such as Respondent's Motion to Dismiss. *See Bi-Lo, Inc.*, 366 S.C. 426, 434, 622 S.E.2d 564, 568 (Ct. App. 2005).

However, the Opinion misapprehended several key legal points and misconstrued material facts of the Order. Respondents will explain why each of these misapprehensions warrants immediate review in turn.

I. The Opinion misapprehends well-established caselaw and the standard of deference to be applied to declaratory judgment actions challenging a county-enacted ordinance as well as overlooked material facts lacking in Appellants' Complaint.

A. The Order correctly cited the standard of deference

The Order correctly noted the deference courts are to apply in cases challenging an ordinance. Relying on *Knowles v. City of Aiken*, the Order stated, "Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is 'so unreasonable as to impair or destroy a citizen's constitutional rights.'" *Knowles*, 305 S.C. 219, 224, 407 S.E.2d

639, 642 (1991) (quoting *Hampton v. Richland Cnty.*, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct. App. 1987)). The Order further stated, “Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of constitutional rights.” *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642. The Order noted that an individual’s constitutional rights are violated when a zoning ordinance deprives an individual of their property without due process of law. *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 243-44 (2002). It went on to state, “Of course, if the court finds a violation of constitutional rights, it may invalidate the ordinance. A court may not, however, substitute its judgment for that of the local zoning ordinance.” *Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 141-42, 459 S.E.2d 883, 886 (Ct. App. 1995).

The Order focused on the fact that “It is not the function of the courts to pass upon the wisdom or folly of municipal ordinances or regulations.” *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 300, 37 S.E.2d 601, 611 (2013). It cited *Sloan v. Greenville Cnty.* for the proposition that, “In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives.” *Sloan*, 356 S.C. 531, 555, 590 S.E.2d 338, 351 (Ct. App. 2003). The Order noted “There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application” *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965), and that “[a] municipal ordinance is a legislative enactment and is presumed to be constitutional.” *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992).

Citing *Knowles* again, the Order acknowledged that zoning ordinances must be upheld so long as the propriety of the local governing body’s decision is “fairly debatable.” *Knowles*, 305 S.C. at 223, 407 S.E.2d at 642. The Court noted “The 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.” *Dunes*, 401 S.C. at 298, 37 S.E.2d at 610 (quoting *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425).

B. The Opinion overlooks the well-established standard of deference

The Opinion held the Circuit Court erred in its reliance on *Knowles* because the action at issue was the approval or denial of the subdivision application and was not a challenge to Ordinance 607 itself but, rather, “has the indirect effect of invalidating Ordinance 607.” However, the Opinion states, “Appellants filed this declaratory judgment action . . . contending sections of Ordinance 607 . . . were invalid because they conflicted with the . . . Enabling Act.” Thus, the Opinion misapprehends the effect Appellant’s challenge to a subdivision application decision that has the ultimate effect of invalidating a properly-enacted ordinance.

The Opinion conflates the challenge to the decision on the subdivision application and the challenge of a zoning ordinance and what the Order ruled: Ordinance 607 is a zoning ordinance, and as such, *Knowles*, and other cited cases, apply to challenges of that zoning ordinance. Appellants are challenging the zoning ordinance, not solely the subdivision application decision. In fact, Appellants’ Prayer for Relief specifically requests the Court invalidate “Georgetown County Ordinances” and “bring zoning ordinances into compliance with the Comprehensive Plan.” (emphasis added). The Record on Appeal shows Ordinance 607 was enacted in 2011. Thus, the Opinion fails to take into consideration that the statute of limitations applies to prevent Appellants challenge to Respondents’ Ordinances.

The Order ultimately found that Ordinance 607 did not conflict with the provisions of the Enabling Act. The Order noted the enumerated purpose of Article Seven of the Planning Act is to provide counties with the ability to create regulations with broad authority in order to carry out the

stated purposes of the Planning Act, such as the promotion of public health and safety, good order, and “progressive development of land.” S.C. Code § 6-29-1120. The Order noted the provisions of Article Five of the Planning Act state that zoning ordinances are to serve similar purposes which are to “further the public welfare in any other regard specified by the governing body.” S.C. Code § 6-29-710. The Order went on to state that such purposes are directly within the purview and responsibility of the governing body of a county and that the governing body of Georgetown County is the County Council, not the Planning Commission.

The Order went on to find, “It is within the County Council’s authority to determine the terms of the development regulations and zoning ordinances used to carry out the purposes enumerated in the Planning Act. *See* S.C. Code § 6-29-760, 1130.” It also noted that it is within the authority of County Council “to enact zoning ordinances which include additional procedural safeguards, such as a requirement for additional oversight and approval for larger developments, where such safeguards function to protect and promote the intended purposes of the Planning Act and good land use principles within the County.” Thus, the Order found no conflict between the zoning ordinances purportedly complained of and the Planning Act.

The Opinion, in finding that there was a conflict, overlooked the bulk of cases cited in the Order for the deference courts give to legislative decisions by county councils such as Ordinance 607’s alleged conflict with the Enabling Act. Moreover, the Opinion failed to consider the broad powers given to counties under the Enabling Act via S.C. Code Ann. §§ 6-29-760 & -1130 in finding the narrow construction of § S.C. Code § 6-29-1150 prevented Respondent from enacting an ordinance to allow for additional subdivision application approval. Thus, this issue needs to be reheard by the Court.

C. The Opinion overlooked the factual allegations of Appellants’ Complaint

The Opinion also held Appellants sufficiently stated a constitutional deprivation sufficient to withstand a Rule 12(b)(6) motion. However, in so doing, the Opinion overlooked several critical facts. First, an allegation of arbitrariness alone is not sufficient to challenge a zoning ordinance pursuant to *Knowles*. Moreover, the Opinion ventures outside of the Order and interjects allegations not contained in the Complaint regarding an alleged disparate impact. Nowhere in the Order or Appellants Complaint is there any facts supporting – nor even alleging – a disparate impact claim relating specifically to this subdivision application approval. Appellants’ Complaint, Paragraph 87, utterly fails to allege this action was made with discriminatory intent as required. *See Abbeville Cnty. Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d (1999). As summarized by a South Carolina District Court:

With regard to a disparate treatment or disparate impact analysis, under the McDonnell Douglas framework, “the initial burden rests on the plaintiff to make out a prima facie case of discrimination.” *Laing v. Fed. Exp. Corp.*, 703 F.3d 713, 719 (4th Cir. 2013) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Only if the court finds that a plaintiff established a prima facie case for discrimination does “the burden shift[] to [the defendant] to articulate a nondiscriminatory reason for its action.” *Id.* At that point, the burden returns to the plaintiff to prove the defendant's explanation “was in fact pretext” for discrimination. *Id.* (quoting *McDonnell Douglas Corp.*, 411 U.S. at 804).

Bowman v. Bank of Am. N.A., No. 3:13-CV-3436-TLW, 2016 WL 8943266, at *5 (D.S.C. June 16, 2016), *aff’d sub nom. Bowman v. Bank of Am. NA*, 676 F. App’x 216 (4th Cir. 2017), and *aff’d sub nom. Bowman v. Bank of Am. NA*, 676 F. App’x 216 (4th Cir. 2017). Thus, this matter needs to be reheard by the Court.

Finally, the Opinion notes allegations in Appellants’ Complaint of general negative impacts on property such as increased traffic, stormwater drainage issues, and lack of supporting infrastructure. These are simply not sufficient allegations of harm to challenge a zoning ordinance when viewed against the exhaustive caselaw cited in the Order. As such, the Opinion both

misunderstands material facts and overlooks principles of law and a rehearing is necessary.

II. The Opinion misapprehends the long-standing caselaw regarding the interplay between a county's comprehensive plan and its properly enacted zoning ordinances.

The Opinion misapprehends the Order's findings as to the legal authority of a comprehensive plan and the application of those findings to this case. As noted in the Order, Appellants' Complaint challenges the validity of the decision to approve the subdivision application as it conflicts with Respondent's Comprehensive Plan ("the Comprehensive Plan"). The Order held that challenge insufficient because a mere conflict with the Comprehensive Plan cannot provide a legal basis upon which to deny or approve a subdivision application as established by Ordinance. The Opinion overlooks that without the Comprehensive Plan serving as a legal basis to challenge the County's decision, there can be no justiciable controversy. *See Powers, supra*. Moreover, the Opinion overlooks that fact that the Planning Commission would not have legal authority to deny an subdivision application in the first instance merely because it conflicted with the Comprehensive Plan.

As the Order stated, the goals and objectives of a county's comprehensive plan are effectively implemented through the county's zoning ordinances and land use regulations. *See Sinkler v. County of Charleston*, 387 S.C. 67,75-76, 690 S.E.2d 777, 781 (2010); *see also* S.C. Code § 6-29-720(A). The Order went on to note, "But the comprehensive plan itself does not set the standard by which a planning commission or a county council must make its land use decisions. Approval or denial of an application for a zoning amendment must be made on the basis of the existing zoning ordinances and applicable land use regulations."

The Opinion specifically found, "At the Planning Commission's August meeting, it denied the subdivision applications because they did not comply with the County's Comprehensive Land Use Plan." Thus, the Opinion overlooks the legal principle that it is the zoning ordinances that

control and not the Comprehensive Plan. The Order cites *McClanahan v. Richland Cnty. Council* for the principle that the Comprehensive Plan is a guideline, not binding law. *McClanahan*, 350 S.C. 433, 441, 567 S.E.2d 240, 243 (2002). Inasmuch as the Opinion overlooks this principle of law, rehearing is appropriate.

III. The Opinion errs regarding the material fact that the action being challenged by Appellants was not a decision, but rather a recommendation.

The Opinion’s “Facts/Procedural History” Section mischaracterizes the facts with the Record on Appeal, resulting in a misunderstanding of what the Planning Commission decided and, as a result, what this Court is reviewing on appeal. Specifically, this section of the Opinion states that “the Planning Commission voted to recommend denial of the application.” However, the Opinion goes on to find that this was a decision that was improperly overturned by Respondent by public vote. This description of the Record on Appeal is in error as the Planning Commission made no *decision* denying the subdivision application. Rather, the Planning Commission made instead made mere *recommendations* denying the subdivision plan (which the applicants followed before submitting the applications to Georgetown County Council). Thus, Respondent did not “reverse” any final decision of the Planning Commission. Rather, Respondent approved the subdivision application in its February 2023 meeting. This distinction is acutely important as it affects how the statutes at issue are interpreted and applied, particularly S.C. Code Ann. § 6-29-1150. Thus, rehearing is appropriate.

The Opinion correctly cites S.C. Code Ann. § 6-29-1150 as requiring appeals from a decision of the Planning Commission to be appealed to the circuit court; however, as outlined hereinabove, the Planning Commission did not make any final decision but only made recommendations. Those recommendations were reviewed by Respondent and approved. As a result, Georgetown County Council’s approval of the subdivision applications is not *ultra vires* as

concluded by the Opinion because the Planning Commission did not make any final decision denying these applications at the Planning Commission level. Due to this misapprehension of the facts, rehearing should be granted.

CONCLUSION

Respondents respectfully ask this Honorable Court to grant rehearing and reconsider its Opinion reversing the lower court's Order granting Respondents' Motion to Dismiss. Reconsideration is warranted because the Opinion overlooks well-established caselaw and the standard of deference to be applied to declaratory judgment actions challenging a county-enacted ordinance as well as overlooked material facts lacking in Appellants' Complaint. The Opinion also misapprehends the long-standing caselaw regarding the interplay between a county's Comprehensive Plan and its properly enacted zoning ordinances. Lastly, the Opinion errs regarding the material fact that the action being challenged by Appellants was not a decision, but rather a recommendation. For these reasons, rehearing is appropriate pursuant to Rule 221, SCACR.

RESPECTFULLY SUBMITTED,

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SC Court of Appeals

RE: *Kendrick A. Bryant and Keisha Bryant Sherman on behalf of the heirs of Ernest Bryant; Benjamin Dennison and Willie Dereef, Jr. on behalf of the heirs of Limerick Dennison; Lucille Grate; Parkersville Planning & Development Alliance; Keep it Green; and Preserve Murrels Inlets, Inc., vs. Georgetown County and Covington Homes, LLC,*

Dear Ms. Kitchings:

Enclosed for filing please find the Respondents' Petition for Rehearing in the above-referenced matters. Please note that the \$50.00 filing fee required pursuant to SCACR 240(d) will be forthcoming. By copy of this electronic correspondence all counsel of record are being served with this Petition.

Thank you for your attention to this matter.

Respectfully submitted,

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