THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-CP-26-8179
Appellate Case No. 2016-002175

Robert DeCiero,.....Appellant,

v.

Horry County, State of South Carolina,.....Respondent.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

Respondent defers to Appellant's right to frame his own issues on appeal. Rule 208(b)(2), SCACR.

STATEMENT OF THE CASE

On November 13, 2015, Appellant filed his Complaint. (R.p. 11). On December 16, 2015, Respondent Horry County ("the County") timely filed and served its Answer, asserting defenses including Failure to State a Claim, Standing, and Ripeness, among others. (R.p. 15-18). Appellant served discovery March 7, 2016, to which the County timely responded.[1]

On April 14, 2016, the County filed Notice of Motion and Motion to Dismiss under Rule12(b)(6) and Motion for Summary Judgment under Rule 56. (R.p. 48). Along with the Motion, the County filed its Memorandum in Support of Defendant's Motion to Dismiss/Motion for Summary Judgment and supporting Affidavit.[2] (R.p. 50; R. pp. 69-87). Hearing on the County's motion was set for June 1, 2016.

On May 19, 2016, Appellant served a Memorandum in Opposition to the County's motions, without supporting affidavits. (R.p. 56). On May 25, 2016, the County filed a short reply brief. (R.p. 60).

The circuit court heard the county's motions June 1, 2016, and took the matter under advisement. The next day, the court wrote counsel with its decision. (R.p. 88). The same day, the court issued a Form 4 Order consistent with its instructions to counsel to prepare an Order granting the Rule 12(b)(6) motion. The court's written Order of Dismissal was filed July 19, 2016. (R.p. 3). The court dismissed the Complaint

[1] Discovery was not placed in the circuit court's record
[2] In compliance with South Carolina Supreme Court Order 2015-09-10-01

under Rule 12(b)(6) and stated "no matters outside the pleadings presented to the court were considered. Therefore... the...Motion for Summary Judgment is moot." (R.p. 5) Appellant timely served a Motion to Reconsider, (R.p. 62,) to which Respondent filed an opposing Memorandum. (R.p. 65). The Court denied the Rule 59(e) motion[3] by Order filed September 22, 2016. (R.p. 6). Appellant timely served Notice of Appeal of the September 22 Order Denying Plaintiff's Motion to Reconsider Order of Dismissal, including and identifying the September 22, 2016 Form 4 Order as the "order which is being challenged on appeal." (R.p. 67). With his Notice, *id.*, he submitted his request for the transcript of the June 1, 2016 hearing that resulted in the July 19, 2016 Order. Appellant has not filed or served a Notice of Appeal of the July 19, 2016 Order.[4]

STATEMENT OF FACTS

Appellant resides in Long Bay Estates[5]. (R.p. 11 para. 1). Long Bay Estates is located in Horry County Zoning District SF-6. (R.pp. 12 para. 8; 16 para. 8; 70 para. 11).[6] It is also subject to its own private subdivision deed restrictions. (R.pp.11 para. 5; 74).

The pleadings do not cite the Horry County zoning ordinance for SF-6. Although not cited, sections related to SF-6 may include §707: "It is the intent of [the SF6 residential] district to provide areas for medium density one-and two-family residential purposes." Along with golf courses and others, relevant permitted uses include one-family dwellings (excluding mobile homes) and duplexes. Dwellings are subject to

[3] Appellant did not cite Rule 59, SCRCP, in his motion, but it was treated as a Rule 59(e) motion by the county and the court.
[4] Respondent's Motion to Dismiss on this point was denied by this Court May 24, 2017.
[5] Not established, but not challenged.
[6] The circuit court limited its consideration to the pleadings. However, some materials included in the record are referenced here, responsive to Appellant's Brief.

various setback, lot coverage, and height requirements. §§707, 707.1, 707.2, Horry County Zoning Ordinance. A single-family dwelling is "a building designed, constructed and used for one dwelling unit" with one kitchen. A duplex is "a building designed, constructed, or reconstructed and used for two dwelling units that are connected by a common wall" with two kitchens. §§ 430.1, 430.2, Horry County Zoning Ordinance. Thus, a property owner seeking a residential building permit in SF-6 is limited to constructing or remodeling a single-family house or a duplex.

Appellant's Complaint cites the zoning ordinance's definition of family: "an individual or two or more persons related by blood, marriage, or adoption, living together as a single household unit[7], or a group of not more than five persons not related by blood, marriage, or adoption, living together as a single household unit." §431 Horry County Zoning Ordinance. In his Brief, he alleges Horry County Planning Director Janet Carter "failed to address the...ordinance that restricts the number of persons allowed to reside in a single family home." (Brief of Appellant at 3.) There is no such ordinance in Horry County, with one exception: the county adopted an overlay district at Coastal Carolina University regulating occupancy to one person per bedroom. §723.13, Horry County Zoning Ordinance. Horry County has not enacted occupancy regulation in any other zoning district, including the beachfront properties or SF6. *See* Horry County Zoning Ordinance.

In 1998, Appellant filed an action under the private restrictive covenants against the Long Bay Property Owners. (R.pp. 11, 52 fn. 1).

On June 10, 2015, Attorney Thomas Brittain wrote the County "multiple homeowners in Long Bay advertise their property as...a "beach house" for weekly

[7] unlimited

vacation stays" and this "severely conflicts with the original intent of the subdivision" and its private "1958 deed restrictions." (R.p. 74). As to alleged violations of public zoning, he was non-specific: "we believe that several homeowners are in violation of the substance of the zoning and planning ordinances for that area." (*Id.* and R.p. 70).

On July 13, 2015, Appellant and his attorney met with county officials to discuss short-term rental ordinances adopted by other jurisdictions. (R.p. 71 para.13-16). The Horry County Council has not adopted an ordinance addressing short term rental. (*Id.* and R. p.72 para. 21-24).

Subsequently, Appellant filed suit against the County. (R.p. 8). Although he complains some houses "have 7 bedrooms," Appellant did not allege any houses or duplexes violate the construction standards in the zoning ordinance. *Id.* In dismissing the case under Rule 12(b)(6), SCRCP, the circuit court found the Complaint was deficient under Rule 8(a), SCRCP, and that Appellant lacked standing. The court did not—as stated by Appellant in his Brief--conclude "that the zoning ordinance would not prohibit heavy duty density." (Brief of Appellant at 4). To the contrary, the court concluded the zoning ordinance "restricts construction in Long Bay Estates to single-family homes or duplex dwellings..." (R.p. 4).

STANDARD OF REVIEW

When reviewing a dismissal pursuant to Rule 12(b)(6), SCRCP, "the appellate court applies the same standard of review as the [circuit] court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Dawkins v. Union Hosp. Dist., 408 S.C. 171,

176, 758 S.E.2d 501, 503 (2014); Doe v. Bishop of Charleston, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014).

ARGUMENT

I. Did the circuit court err in ruling Appellant's Complaint was deficient under Rule 8(a), entitling Respondent to relief under Rule 12(b)(6)?

Appellant's Complaint is deficient under Rule 8(a), SCRCP, and the circuit court properly so found. The Rule says a complaint "shall contain" (1) a short and plain statement of the grounds including facts and statutes,...(2) a short and plain statement of the facts showing the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." Rule 8(a), SCRCP. All three are the bare-bones requirements for a valid complaint. A Complaint fails to state a claim for relief when the requirements are not met.

Viewed even in the light most favorable to Appellant, the facts he alleged in his Complaint and inferences reasonably deducible from them do not make a case for relief. In its Order dismissing the Complaint, the circuit court referenced Appellant's allegation "*every home in Long Bay Subdivision is currently zoned as a SF6 residential district and, as such, is to be comprised of single family and duplex family dwellings.*" The court also referenced the only two zoning provisions cited in the Complaint: the §431 definition of Family and §1300, an enforcement provision, concluding: "There is no short and plain statement of the grounds or the facts showing Plaintiff is entitled to relief. There are no causes of action. Finally, there is no prayer for relief. The Complaint's deficiencies under Rule 8(a) entitle the defendant to relief under Rule 12(b)(6)." (R.p. 4).

First, under Rule 8(a) as to the grounds, there are arguably none. Appellant sued the County in a four-page complaint that cites no grounds and includes no causes of

action. To this point, Respondent craves reference to the Complaint. (R.pp. 11-14). As to the requirement he include statutes, Appellant correctly cites the Horry County definitional section for "family" but cites no application of that definition to any section of the zoning ordinance. A definition cannot be violated. The absence of a link of the definition of family to some uncited provision of the zoning ordinance related to his zoning district is fatal. The other section he references is Horry County's zoning enforcement section. (R.pp. 12-13 para. 10). Critically, however, the Complaint is devoid of any alleged statutory violation that supports enforcement. Even the use of the term "violations" is wrong. He states he is "prepared to show" there have been repeated violations and "County personnel have been aware of these violations," (R.p. 13 para. 11), but he never alleges what the violations might be, or of what section of the zoning ordinance.

Second, as to the requirement the Complaint contain a short and plain statement of facts showing he is entitled to relief, Appellant's Complaint fails again. Respondent is not arguing Appellant does not cite facts. To the contrary: the Complaint is filled with "facts," such as allegations the subdivision was once sleepy, that it has many retirees, that the Independent Republic of Horry County has a long, great standing as a body politic and a council-manager government, and that scores of owners support Appellant.[8] (R.pp. 11-12, para. 3, 4, 6, 8). Giving his pleading every benefit of the doubt, distilling it to the facts most likely to be related to some non-existent grounds or cause of action, he states "property owners have constructed larger homes and began [sic] to rent on a weekly basis to large numbers of individuals..." and that this is "clear." (R.p. 12, para. 7, 9). Because of the failure of the first requirement-- that Appellant cited no

[8] Although none have joined or been identified in this action

ordinance he alleges is violated by the weekly rentals (and there is no such ordinance)—this alleged fact is unrelated to any relief sought.

Lastly, Appellant's Complaint makes no prayer or demand for relief. Again, there are no causes of action. He does not seek a writ or declaratory judgment, and this was not a zoning appeal.[9] The Complaint is not for injunction. The last paragraph could be construed as seeking relief, but it has no basis; It is a non-sequitur, as it merely "seeks enforcement" by Horry County of its enforcement ordinance, §1300. (R.p. 14, para. 15).

The appropriate remedy for a deficient pleading is dismissal. As cited by the circuit court in its July 19, 2016, Order, (R.p. 3), Plaintiff's Complaint fails to allege facts sufficient to constitute a cause of action. Under Rule 12(b)(6), SCRCP, a Complaint will be dismissed if it fails "to state facts sufficient to constitute a cause of action." Carnival Corp. v. Historic Ansonborough Ass'n, 407 S.C. 67, 753 S.E.2d 846 (S.C. 2014.) In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. *Id.*, citing Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007).

Because the Complaint fails to meet the requirements of Rule 8(a), SCRCP, it fails to state a claim for relief. Respondent properly pled this defense in its Answer, R.p. 15, and asserted it by motion under Rule 12(b), SCRCP. The circuit court heard the motion and properly dismissed the Complaint.

II. Did the circuit court err in concluding the applicable Horry County zoning district SF6 restricts the types of dwellings that may be constructed, not whether they may be rented or to whom?

While the court addressed the would-be applicable construction standard subsections for SF6 and the absence of a restriction on short-term rental and

[9] Respondent raised the defense of Failure to Exhaust Administrative Remedies

occupancy in those sections of the Horry County zoning ordinance, its conclusion was correct but not necessary for its decision because the court decided the case on the pleadings, which *did not cite those subsections*.

The court's order addressed the two sections of the zoning ordinance cited in the Complaint: the definition of family (§431) and the enforcement provision (§1300). In citing both, the court correctly concluded Appellant had not made a statement of the grounds showing he was entitled to relief, nor did he raise any causes of action. (R.p. 4).

In its order, the court also concluded "as a matter of law the zoning ordinance upon which the plaintiff relies restricts construction in Long Bay Estates to single family homes or duplex dwellings, neither of which restricts short-term rental or the number of occupants." (R.p. 4). This conclusion was relayed to counsel in the court's letter regarding its decision on the motion, which had been taken under advisement. (R.pp. 88-89). It is factually correct that the Horry County zoning ordinance restricts construction in SF6 (Long Bay Estates' district) to single family homes and duplexes, and building permits require compliance with single-family or duplex construction standards. §§430.1, 430.2, 707, 707.1, 707.2, Horry County Zoning Ordinance. (*See* p. 3, *supra*.) It is also factually correct that Horry County has not regulated short term rental. (R.pp. 70 para. 10; p. 71 para. 14-15; p. 72 para. 21, 24). Horry County addressed occupancy in its zoning ordinance in Occupancy of Dwelling Units in the Coastal Carolina University Neighborhood Overlay Zone.[10] The phrase "the zoning ordinance upon which the plaintiff relies" might arguably refer either to the sections of the zoning ordinance that do apply to SF6, or just to the sections Appellant cited, but

[10] §723.13(E) Horry County Zoning Ordinance, not presented to the circuit court.

inexplicably Appellant did not cite the section(s) that included standards for his zoning district. The court's correct conclusion may not be relevant to dismissal on the pleadings because Appellant did not cite those sections.

At the hearing, the court queried Appellant's counsel on construction versus occupancy:

> The Court: "So you disagree that the ordinance when it says single family and duplex that that deals only with the construction and not—and does not—so you're saying it only limits two, two families in a home."
>
> Mr. Brittain: "That's right..."[11]
>
> The Court: "So what is the exception for a vacation where you invite your son, daughter, parents, let's get to our house for Christmas?..."
>
> Mr. Brittain: "...What distinguishes that from this is that's not a commercial enterprise..."
>
> The Court: "Well where does the ordinance say a commercial enterprise?" (R.p. 43, lines 20-25; R.p. 44 lines 1-6.)

Respondent submits even though Appellant did not cite any zoning sections regarding the permitted structures in his Complaint, the court reached a legally and factually correct conclusion regarding the Horry County Zoning Ordinance provisions, and included it in its order. The Horry County Council has elected not to regulate short-term rental, a decision squarely within its province. "The governing body of a...county may adopt a zoning ordinance... [creating] zoning districts of such number, shape, and size as the governing authority determines to be best suited to carry out the purposes of this chapter." §6-29-720, S.C. Code. The determination of legislative intent is a matter of law. Charleston County Parks and Recreation Common v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841 (1995.)

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[11] That's wrong.

Lastly, in response to Appellant's citation of Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct.App. 1995) for the proposition that a cause of action should not be struck merely because the court doubts the plaintiff will prevail, (Brief of Appellant, 12), Respondent submits that, while that is a correct statement of law, Appellant identified no causes of action at all, so there are none on which to prevail. (*see* argument I, *supra*.)

III. Did the circuit court err in finding Appellant lacked standing?

The court properly concluded Appellant failed to establish standing because he failed to plead a particularized injury. (R.p. 5). "A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing." Joseph v. S.C. Dep't of Labor, Licensing, & Regulation, 417 S.C. 436, 790 S.E.2d 763 (2016.) The United States Supreme Court set forth the "irreducible constitutional minimum of standing," which has three elements: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Joseph at 449; Sea Pines Ass'n for Prot. of Wildlife, Inc., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992). A party seeking to establish standing carries the burden of demonstrating each element. *Id.*

For a plaintiff to possess standing in South Carolina, all three elements must be satisfied. First, he must have suffered an injury-in-fact which is a concrete, particularized, and an actual or imminent invasion of a legally protected interest. Second, a causal connection must exist between his injury and the challenged conduct. Third, it must be likely that a favorable decision will redress his injury. Carnival Corp,

citing Sea Pines. The Court in Carnival, in its original jurisdiction, dismissed a nuisance-related Complaint on the grounds of lack of plaintiffs' standing under the three-pronged test. *Id.* at 850.

First, Appellant alleges no injuries particular to him. Standing is "a personal stake in the subject matter of a lawsuit." Joseph, *supra*. citing Sea Pines at 600. A specially-damaged adjacent or neighboring property owner may seek a remedy for a zoning violation. §6-29-950, S.C. Code. The special damage requirement "incorporates the particularized injury requirement of general standing doctrine as a requirement." R.pp. 4-5, citing Carnival at 852.) The Complaint does not cite §6-29-950 nor seek a remedy under it, but Appellant now alleges on appeal he "is a neighboring property owner." (Brief of Appellant at 13.) His Complaint did not establish that. He alleged only that he is a "resident" of Long Bay Estates and does not allege proximity to any particular properties. (R.p. 11 para. 1). This is analogous to the plaintiffs in Carnival, residents of the Ansonborough neighborhood on peninsular Charleston who complained of a host of negative effects of cruise ships, and whose case was dismissed on the pleadings for lack of standing. While that case was not brought by individuals, the Court recognized no distinction between an organization and an individual so long as "one or more of its members will suffer an individual injury..." Carnival at 850. However, like Appellant, the Ansonborough neighbors alleged only that they were residents—not property owners. In its analysis of §6-29-950, S.C. Code, the Court held "Section 6-29-950 only permits "an adjacent or neighboring *property owner*" to bring suit. Here, Plaintiffs have made no allegations that they own adjacent or neighboring property." *Id.* at 852. Appellant alleges

"nuisance to the homeowners in the area..." (R.p. 12, para. 9.) (emphasis added.) But, he failed to allege he is one. Consequently he lacks standing under §6-29-950.

Even in the light most favorable to Appellant, his factual allegations do not come close to supporting a particularized injury to him. The sum totals of his complaints are the "increasing impact *on the neighborhood*" of traffic, noise, and trash. (R.p. 12, para. 7-8, emphasis added.) These types of issues with neighbors would not be brought against the government in circuit court except under limited circumstances contemplated by §6-29-950 not present here, but even if he had standing under the statute, Appellant's allegations do not support standing under the law. His complaints are a smidgen of what Ansonborough residents claimed in Carnival, where the Supreme Court found increased congestion, large crowds, visual blight, noise pollution, air pollution, road closings, "major traffic congestion"[12] and a host of other horribles would not support standing:

> "Lacking from these allegations is any claim that Plaintiffs themselves...have suffered a particularized harm. All members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons residing in or passing through the [neighborhood] and therefore, Plaintiffs fail to establish the first element of standing." *Id.* at 852.

In order for an injury to be particularized, it must affect the plaintiff in a personal way. Carnival at 851. The circuit court reviewed the pleadings in this case, cited the statutory and caselaw, and concluded "the Complaint alleges no injuries particular to the plaintiff. I find as a matter of law the plaintiff fails to allege a particularized injury and therefore fails to establish standing." (R.p. 5). Because Appellant's allegations of issues

[12] Id. at 849

in the neighborhood do not rise to the level of personal harm required for standing, the court properly dismissed the Complaint.

The second element for standing is a causal connection to the claimant's injury. In this case, the Appellant's Complaint contains no causes of action, challenges no conduct, and cites no injury—at least no particularized injury that could survive a standing challenge. Similarly to the Ansonborough neighbors, he alleges impacts to the neighborhood in general, "only generalized grievances...and fail[ing] to allege any particularized harm." Carnival at 582.

The third element of standing requires a favorable decision be likely to redress the individual's injury. Arguably, because of the failure of the first two elements, the third need not be reached. Appellant cites no personal injury, alleges no causation, and no "favorable decision" can redress any injury. However, even in the light most favorable to him, there is no zoning section pled in his Complaint to be enforced. He does not cite a noise ordinance, or a traffic ordinance, or a trash ordinance and, as argued in I, *supra*., the Horry County Zoning Ordinance does not contain the provisions he wishes it to, and the sections cited by him do not support any remedy under law.

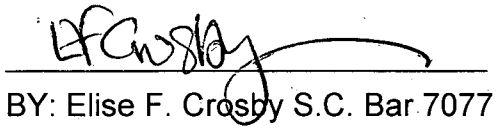
For these reasons, his case fails to meet the requirements for standing under the law and the circuit court was right in so finding.

CONCLUSION

The circuit court dismissed the Complaint under Rule 12(b)(6) for its failure to state a claim for relief. The court found Appellant failed to allege facts sufficient to constitute a cause of action, that his Complaint was deficient under Rule 8(a), that the Horry County Zoning Ordinance does not support his Complaint, and lastly, that

Appellant lacked standing. These conclusions were based solely on the contents of the pleadings. (R.pp. 3-5). Because the court's decision was soundly based in fact and law, its dismissal of the Complaint was proper and the circuit court should be affirmed.

CROSBY LAW FIRM, LLC



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June 1, 2017

CERTIFICATE OF COMPLIANCE

The undersigned certifies the Final Brief of Respondent complies with Rule 211(b), SCACR. Other than as noted, no changes were made other than as authorized by the Rule. Respondent's Motion to Dismiss, pending at the time of the Initial Brief, was decided prior to the Final Brief, which amends footnoting to reflect the Court's decision rather than the then-pending motion.Your undersigned attorney understands this is compliant with Rule 211(b).

The undersigned further certifies she has complied with the Supreme Court's Order of August 13, 2007 regarding personal identifiers.