THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable L. Casey Manning
Circuit Court Judge

RECEIVED
Dec 23 2020
SC Court of Appeals

Civil Action No. 2020-CP-40-03475
Appellate Case No. 2020-001586

UNIVERSITY HILL NEIGHBORHOOD ASSOCIATION ..... RESPONDENT,

v.

CITY OF COLUMBIA, CITY OF COLUMBIA DESIGN AND DEVELOPMENT REVIEW COMMISSION, AND TRINITAS VENTURES, LLC, ... APPELLANTS.

RESPONDENT'S REPLY TO APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

I. Introduction

This appeal involves decisions by the City of Columbia Design and Development Review Commission (DDRC) granting final approvals for the construction of "Trinitas," a proposed eight-story apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) the DDRC, a "Board of Architectural Review" established pursuant to S.C. Code §§ 6-29-880 et seq. and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), a real estate development company (with a home office in

Indiana) which received the approvals by the DDRC at issue herein. The DDRC, Trinitas, and the City each filed a motion to dismiss in the Circuit Court.

The proposed site for the apartment building is an "overlay" district within the City of Columbia. The district is termed as Columbia City Center Design/Development District of Columbia, South Carolina and is referred to as "-DD area" in Section 17-655(b) of the Columbia City Code. An overlay district like the -DD area is designed to impose design requirements in addition to the underlying zoning that already exists. The requirements for the -DD area are "set forth in design guidelines adopted by the City Council." Columbia City Code § 17-655(b)(2). The guidelines that are incorporated by this reference in the City Code are contained in a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [hereinafter *Guidelines*].

The *Guidelines* are unusual in that they contain only precatory terms like "non-binding" and "should" rather than mandatory terms like "must" and "shall." More specifically, the guidelines in Chapter 5 for private development provide "*non-binding general direction* for development" and "are meant to be *illustrative rather than prescriptive*." (Section 5.1 (emphasis added)). As a part of this scheme, the *Guidelines* adopt a flexible approach in which, for example, "the design of a building *should* be compatible with its function and its surrounding (context)." (Section 5.2 (emphasis added)). In terms of building height, the *Guidelines* provide "*non-binding* general direction for development within City Center . . . ." (Section 5.3.1 at 5–2 (emphasis added)).

The *Guidelines* adopt this approach because the *Guidelines* were drafted by planning specialists for the purpose of guiding the adoption of traditional zoning code provisions containing

mandatory provisions. Rather than draft such provisions, the City of Columbia simply adopted the precatory guidelines as the text of the "ordinance." (See Columbia City Code § 17-655(b)(2)).

A. Appeal Relating to DDRC Decisions

Section 6-29-930(A) includes the following standard for appeals from a board of architectural review:

> The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. 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.

The application of this standard of review was summarized in *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361, 362 (Ct. App. 2005) (citations omitted), as follows:

> In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by evidence. Furthermore, our standard of review of a board of architectural review's decision is the same as that of the trial court.

Respondent's Complaint alleges abuse of discretion in granting "design approval" for the Trinitas project at the July 2020 DDRC meeting. More specifically, the DDRC abused its discretion in applying the *Guidelines* in terms of: (1) commission of errors of law in addressing

concerns like the height of the building, and (2) findings that are not supported by the evidence. (Complaint ¶¶ 9–31). The Complaint also alleges that, because of the precatory nature of the *Guidelines*, the use of the *Guidelines* by the DDRC constitutes a violation of the nondelegation of legislative power doctrine. (Complaint ¶ 25b).

B. Ultra vires assignment of Site Plan Review to DDRC by City

The *Guidelines* note that "[s]ite plan review in Columbia is handled by the City's Planning Department, which has authority to approve site plans for building projects of 25,000 square feet or less; larger projects must go before the City's Planning Commission." (*Guidelines* at 3–12). In order to "streamline the overall development review process," the *Guidelines* state: "Within City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review." (*Guidelines* at 3–12). Section 5.4 of the *Guidelines* explicitly addresses site plan review by DDRC. As a part of this process, applicants with a project in the DD District must file a "City of Columbia Application for Site Plan/Subdivision Plat Review" with the DDRC, not the Planning Commission. As a result, the D/DRC and its staff have, in fact, displaced the Planning Commission insofar as site plan review in the –DD area is involved.

This approach to site plan review is ultra vires because it conflicts with explicit language in the South Carolina Local Government Comprehensive Planning Enabling Act. Section 6-29-1150(A) of the Act states: "The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff." (emphasis added). The shifting of site plan review to the D/DRC pursuant to the *Guidelines* conflicts with the clear mandate of Section 6-29-1150(A) concerning the role of the planning commission.

II. Appellants' Return to Respondent's Motion to Dismiss

A. The Trial Court Order

Appellants' argue that the Trial Court's Order should not have noted that "the position of the DDRC concerning height was a mistake of law and that the grant by the City of the power of site plan review within the DD overlay area to the DDRC was *ultra vires*." (October 7, 2020, Order p. 32; see pp. 13–24).

Appellants also argue at page 6 of their Return to Respondent's Motion to Dismiss Appeal that the Order "ruled" on the nondelegation claim by Respondent. (See Part I-A above). This assertion misconstrues the Order. The Order's treatment of this issue is limited to the following: "[T]o the extent that the DDRC uses this approach [challenged by the Association], the Complaint has sufficiently pled this claim. See Complaint ¶¶ 23–25." (Order, p. 18).

B. Section 14-3-330 of the South Carolina Code

Subsections 14-3-330(1) and (2) of the South Carolina Code provide:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

The application of these sections involves the balancing of (1) such concerns as "avoiding piecemeal litigation,"[1] "judicial economy,"[2] and avoiding "circuitous litigation and needless appeals"[3] with (2) the right to a meaningful appeal of an order determining the merits of a case or affecting a "substantial right."[4] Because of the concerns of avoiding piecemeal litigation and needless appeals, the courts "construe section 14-3-330 narrowly."[5]

1. Subsection 14-3-330(1)

South Carolina has defined "an order which 'involves the merits' as an order which 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense. . . .'" *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777, 780 (1993) (citations omitted). In contrast, an interlocutory appeal is involved if "there is some further act which must be done by the court prior to a determination of the rights of the parties. . . ." *Id.*

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[1] *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 92, 529 S.E.2d 11, 13 (2000).

[2] *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777, 781 (1993).

[3] *Tillman v. Tillman*, 420 S.C. 246, 801 S.E.2d 757, 760 (Ct. App. 2017).

[4] *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) (disqualification of a party's attorney affects a substantial right).

[5] *Tillman v. Tillman*, *supra* at 760 ("[W]e construe section 14-3-330 narrowly, eying the nature and effect of the order, not merely the label."); *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155, 163 (Ct. App. 2014) ("'The provisions of [s]ection 14–3–330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.'" (citation omitted)).

Given these definitions and the canon of narrowly construing section 14-3-330, the Appellants' have filed an interlocutory appeal. The Order that is the subject of the appeal herein considers the merits of the Association's claims that: (1) the DDRC had made an error of law in approving the height of the Trinitas proposal and (2) the City's shift of site plan review from the planning commission to the DDRC was ultra vires. However, these determinations were made solely within the context of ruling on a motion to dismiss in order to assess public importance standing in terms of the satisfaction of the requirements of public importance and need for future guidance. (Order, pp. 8–13, 18–24, 29–32). In order to have a final order, there would need to be some further act.

2. Subsection 14-3-330(2)

Subsection 14-3-330(2) requires an "order affecting a substantial right." It is not clear what "substantial right" has been affected by the Order. Respondents have had ample opportunities to be heard. Three memorandums in support of motions to dismiss were filed and an oral argument was conducted. Following the issuance of the Order, two Rule 59(e) motions and memorandums were filed. Given the interlocutory nature of the language in the Order concerning height and site plan review, Respondents have not lost their right to appeal when a final order is issued.

III. Conclusion

For reasons given herein, Appellants' appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of Plaintiff/Respondent's Repy to Appellants' Return to Respondent's Motion to Dismiss Appeal is being served upon Lyndey R.Z. Bryant, W. Cliff Moore, III, and Kirby D. Shealy, III, attorneys for Trinitas Ventures, LLC, M. McMullen Taylor, attorney for City of Columbia and Peter M. Balthazor, attorney for City of Columbia Design/Development Review Commission at the primary e-mail address listed in the Attorney Information System on this 23rd day of December 2020.

Respectfully submitted by,

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