

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-26-8179

Robert Deciero, a resident of Long Bay)
Estates Subdivision, Myrtle Beach,)
South Carolina,)

Plaintiff,)
v.)

Order
(ending action)

Horry County, State of South Carolina,)
Defendant)

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TRIAL DATE: August 20, 2020
PRESIDING JUDGE: Benjamin H. Culbertson
PLAINTIFF'S ATTORNEY: Thomas C. Brittain
DEFENDANT'S ATTORNEY: Elise F. Crosby
COURT REPORTER: Natalie Dahl

FEB 03 2021

SC Court of Appeals

This matter comes before the court on Plaintiff's Complaint, filed November 13, 2015. The Complaint was dismissed under Rule 12(b)(6), SCRCP, appealed. The South Carolina Court of Appeals remanded the case for trial as a petition for Writ of Mandamus. *DeCiero v. Horry County*, 2018-UP-433 (S.C. Ct. App. December 5, 2018.)

The parties were present at the non-jury trial and the court took testimony from the Plaintiff and the Defendant's two witnesses. Both parties introduced exhibits for the Court's consideration. After hearing the testimony and reviewing the evidence, the Court makes the following findings of fact and conclusions of law:

Plaintiff's neighborhood is zoned SF-6, which permits single family homes and duplexes. Under Horry County Zoning Ordinance Section 431, a "family" is "an individual, or two (2) or more persons related by blood, marriage, or adoption, living together as a single household unit, or a group of not more than five (5) persons not related by blood, marriage, or adoption, living together as a single household unit."

Plaintiff believes homeowners in his neighborhood rent their homes out on a weekly basis. He presented photographs of rental signs in front of beach houses. He believes some have "seven or eight bedrooms." Horry County's previous and current planning directors testified Horry County has no restriction on short-term rental in Plaintiff's zoning district. They also testified there

is no maximum occupancy in Plaintiff's zoning district, and five large families unrelated to one another meet the Horry County definition of family, as written.

Horry County Zoning Ordinance Section 1306 states "Whenever a violation of this ordinance occurs or is alleged to have occurred, any person may file written complaint. Such complaint stating fully the causes and basis thereof shall be filed with the Zoning Administrator." The Planning Director testified the county offers a voluntary form for complaint allegations, created while the case was pending, which complies with the requirement for a written report. He testified if the county receives an investigable complaint—whether on the form or otherwise in writing--about an address and date of an alleged violation, he would initiate an investigation.

Other than one 2004 zoning complaint made by Plaintiff, resolved to his satisfaction, Plaintiff has not made a specific complaint alleging a zoning violation. Plaintiff did not offer any evidence or testimony that he had submitted any investigable complaint to the county. He alleged houses were "rented on a weekly basis...to large groups of people, that greatly exceed the number of occupants allowed by this ordinance." The county has not received a complaint from the Plaintiff identifying a parcel, or a date, or a violation. Without a specific complaint, there is no basis for investigation, much less enforcement.

I find there was no specific allegation of zoning violation ripe for investigation at the time of filing or at trial. Thus, there was no failure to enforce for the court to review. "The existence of an actual, justiciable controversy is essential... a real and substantial controversy which is ripe and appropriate for judicial determination..." *Eagle Container v. County of Newberry* 666 S.E.2d 892 (2008.)

The Writ of Mandamus is available to this Court to direct a party to perform a ministerial act. Plaintiff made no request for a ministerial act. The county's testimony was there is no such act, and the court has not identified a duty to perform any ministerial act in this case. Mandamus "is the highest judicial writ known to the law.... The primary... function of a writ of mandamus is to enforce an established right, and to enforce a corresponding imperative duty." *Willimon v. City of Greenville*, 243 S.C. 82, 86-87 (1963). The petitioner must show: (1) a duty of the opposing party to perform the act, (2) the ministerial nature of the act, (3) the applicant's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy. *Redmond v. Lexington County School Dist. No. Four*, 314 S.C. 431, 437, (1994) (citing *Willimon, supra*). The duty to perform an act must be indisputable. *Central South Carolina Chapter, Society of*

Professional Journalists v. U.S. District Court, 551 F.2d 559, 562 (4th Cir. 1977). Whether to issue the writ lies within this court's sound discretion. *Charleston Co. School Dist. v. Charleston Co. Election Comm'n*, 336 S.C. 174 (S.C. 1999.)

First, the County has no duty to investigate in the absence of a complaint. Plaintiff supplied no information as to time, location, or basis for any alleged violation of the Zoning Ordinance. Second, there is no ministerial act being sought, and none to direct, in the absence of a duty. Third, the Plaintiff has no specific legal right to marshal county zoning inspectors to "enforce" without there being something specific to investigate and determine to be in violation. Lastly, the Plaintiff acknowledged he did not want to pursue other legal remedies, such as enforcement of private restrictive covenants, or zoning ordinance amendment.

The Plaintiff has made no investigable complaint to the County in 16 years. There is no "alleged violation" to remedy. This claim is not ripe. He has also failed to establish the county has an imperative duty enforceable by a writ of mandamus, and his petition is therefore DENIED and this case is DISMISSED.

Nothing herein is intended to prejudice the Plaintiff in making a written complaint about suspected specific zoning violations in the future, compliant with the County's Zoning Ordinance.

AND IT SO ORDERED.

Benjamin H. Culbertson
Presiding Judge, 15th Judicial Circuit

_____, South Carolina
September ___, 2020



Horry Common Pleas

Case Caption: Robert DeCiero , plaintiff, et al VS Horry County , defendant, et al

Case Number: 2015CP2608179

Type: Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148