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SC Court of Appeals

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. 2021-000136

Robert DeCiero, a resident of Long Bay Estates Subdivision,
Myrtle Beach, South Carolina,.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Pursuant to Rule 208(b)(2), SCACR, Respondent reframes Appellant's first issue:

1. DID THE CIRCUIT COURT ERR IN DECLINING TO ISSUE A WRIT OF MANDAMUS DIRECTING HORRY COUNTY TO TAKE ZONING ENFORCEMENT ACTION?

Respondent defers to Appellant's framing of his second issue:

2. DID THE CIRCUIT COURT ERR IN FINDING THAT THE PLAINTIFF MADE NO INVESTIGABLE COMPLAINT TO THE COUNTY AND THEREFORE THERE WAS NO "ALLEGED VIOLATION" OF THE ZONING ORDINANCE?

STATEMENT OF THE CASE

Appellant filed his Complaint November 13, 2015. Respondent timely answered.

On June 22, 2016, the circuit court granted Respondent's Motion to Dismiss. Appellant appealed the dismissal and the case was remanded for trial as a mandamus case. *DeCiero v. Horry County*, 2018-UP-433 (Ct. App. 2018).

The parties tried the case August 20, 2020. The court considered the evidence presented at trial, took the matter under advisement, and on September 23, 2020, the circuit court issued its decision, dismissing the case. (R. pp. 3-5).

STATEMENT OF FACTS

Respondent defers to the evidence in the record and to the trial court's factual findings contained in its Order (R. pp. 3-5).To the extent Appellant alleges facts in his appellate brief not established at trial, Respondent craves reference to the trial transcript (R. pp. 15-144).

STANDARD OF REVIEW

The applicable standard of appellate review in this case is abuse of discretion. "The [trial court] exercises discretion in determining whether to issue a writ of mandamus,

and its decision will not be overturned on appeal absent an abuse of that discretion. *Carolina Ctr. Bldg. Corp. v. Enmark Stations, Inc.*, ___ S.C. ___ Op. No. 5804, p. 5 (Ct. App. Feb. 10, 2021) (citing *Steele v. Benjamin*, 362 S.C. 66, 70, 606 S.E.2d 499, 501 (Ct. App. 2004)). "An appellate court will not disturb the factual findings of the trial court on a mandamus petition if the trial court's findings are supported by any reasonable evidence." *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 179, 519 S.E.2d 567, 570 (1999). "Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion." *Id.* at 179, 570.

ARGUMENT

I. The Circuit Court did not err by declining to issue a writ of mandamus directing Horry County to take zoning enforcement action

Appellant's request for the court to direct Horry County to "enforce zoning" without alleging a zoning violation is unsupportable under the law, and the circuit court properly declined to issue a writ of mandamus. Mr. DeCiero, the Appellant, asks whether the court erred in "failing to require the county to abide by its ordinance requiring enforcement of zoning regulations." (Initial Brief of Appellant at 8.) Respondent Horry County submits this is a classic loaded question in that it implies as fact that the county did *not* abide by its ordinance, which was not the case.

The evidence before the court included the county's stipulation to inclusion of its zoning ordinances in the record and the extensive testimonies and correspondence of the current and former Planning Directors regarding the county's zoning authority, duties, and actions (See, e.g., R. pp 191-197; R. p. 86, lines 12-22; R. pp. 90-94; R. p. 121, lines 3-19; R. p. 125, lines 3-14; R. p. 115 lines 17-21). The trial court's decision was not that the

county need not enforce zoning regulations. Rather, the trial court found "the County has no duty to investigate in the absence of a complaint." (R. p. 4).

A writ of mandamus is issued "only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy." *Carolina Ctr. Bldg. Corp.,* (Ct. App. Feb. 10, 2021) citing *City of Rock Hill v. Thompson*, 349 S.C. 197, 199, 563 S.E.2d 101, 102 (2002). 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). "Where for any reasons the duty to perform the act is doubtful, the obligation is not regarded as imperative, and the applicant will be left to his other remedies. *Gardner v. Blackwell,* 167 S.C. 313, 321 (1932). Whether to issue a writ of mandamus lies within the sound discretion of the trial court. *Charleston Co. School Dist., supra.* A petitioner for the writ must show:

(1) a duty of the opposing party to perform the act,

(2) the ministerial nature of the act,

(3) the 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*).

A. <u>The County owed no imperative duty to Appellant</u>

First, 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).

What is the "act" Mr. DeCiero wanted the court to force the county to perform? To the question "What are you asking the court to do?," he responded "We would like to bring it more or less back to a residential neighborhood....I really don't know what to do with these big seven bedroom...homes. Maybe some doctor or an attorney may want to buy it, make a law library or whatever." (R. p. 33, lines 12-20). "We want it to be residential;" To the question "...[T]hese big giant seven bedroom, seven bath houses shouldn't be allowed?" he responded "No, they shouldn't be there." (R. p. 47, lines 8-12); "...[T]hey came in there after Hugo and put in all of those big units in there."[1] (R. p. 44, lines 22-24; R. p. 33). Regarding what the case is about, he testified "weekly rentals."

> Q: I want to know about what you brought this case on.
>
> A: Brought this case on weekly rentals in a residential neighborhood. (R. p. 64, lines 16-19).

The record is replete with Mr. DeCiero's complaints that oceanfront owners in his neighborhood rent to vacationers. (*See, e.g.*, "The signs out in front of the homes. That is not residential." (R. p. 29, lines 17-18; ; R. pp. 171-176); Q: "...[Z]oning law is being ignored by rental agencies and property owners renting their properties as vacation rentals on a weekly basis in [y]our neighborhood. So this was your complaint to the County? A: Yes." (R. p. 56, lines 2-5); "We want everyone else out of there." (R. p. 62, line 9).). Mr. Deciero had alleged houses were rented on a weekly basis and prior to trial had cited the definition of "family" in §431 of the Horry County Zoning Ordinance: "an individual or two or more persons related by blood, marriage, or adoption, living together as a single household unit, or a group of not more than five persons not related by blood, marriage, or adoption, living together as a single household unit." (See, e.g., R. p. 3). But

[1] Appellant bought his home in 1991, after Hurricane Hugo. (*See* R. p. 38, line 14).

at trial, he offered no testimony about "families" or evidence that beach houses were rented to non-related individuals or non-families. Rather, he testified about construction size, short-term rentals, occupancy, and how much he dislikes the big beach houses (See, e.g., R. pp. 26-72). The only evidence he offered related to the definition of family came through an attorney memorandum.[2]

What is the imperative duty the County owed to Appellant? There was none. Article XIII, Section 1300 of the Horry County Zoning Ordinance has two components: (1) funding, and (2) enforcement. (R. p. 213).

> "The Horry County Council shall fund sufficient personnel to administer and enforce the provisions of this ordinance. If the Zoning Administrator shall find that any of the provisions of this ordinance are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of illegal use of land, buildings or structures; removal of illegal buildings or structures or of illegal additions, alterations, or structural changes, discontinuance of any illegal work being done; or shall take any other action authorized by this ordinance to ensure compliance with or to prevent violation of its provisions." *Id.*

As to funding, County Planning Director David Schwerd testified that as a department head, he makes the budget requests to County Council for funding to meet zoning enforcement needs, Council funds his requests, and his department employs zoning inspection staff that can meet the needs of zoning enforcement in the county. (R. p. 118, lines 21-25; p. 119, lines 1-12.) As to enforcement, the statutory prerequisite is finding a violation. The county does not dispute the evidence before the trial court that Mr. DeCiero pursued or threatened to pursue complaints about his neighbors on different occasions and in different forums over many years, including but not limited to: sending

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[2] The document was not authenticated, but admitted in part without objection (See R. p. 73, lines 10-25).

a "legal notice" to his neighbors in 2002 (R. p. 199); complaining to county staff about a bus parked at a home in Long Bay, (*See* R. p. 54, lines 9-12); filing restrictive covenant litigation against his neighbors (*See* R. p. 43, line 12 - p. 44, line 3); pursuing a zoning amendment in 2004 (*See* R. p. 56, lines 15-21; p. 57, lines 12-21; p. 85, lines 8-15); following HOA covenant enforcement legislation in Columbia (*See* R. p. 42, lines 1-8; p. 47, lines 2-5); contacting county staff regarding how other local governments have addressed short-term vacation rentals (*See* R. p. 86, line 4 – p. 87, line 5); writing his neighbors, threatening to sue over weekly rental; and warning prospective buyers. (R. p. 204). However, as the trial court found, "[o]ther than one 2004 zoning complaint made by Plaintiff, resolved to his satisfaction, Plaintiff has not made a specific complaint regarding a zoning violation. Plaintiff did not offer any testimony that he had submitted any investigable complaint to the county." (R. 4). (See also, Sec. II, *infra*., and R. p. 64, line 14 – p. 65, line 10; p. 86, lines 7-8; p. 103, line 1 – p. 104, line 13; p. 115, lines 1-8; p. 129, lines 6-8).

Appellant failed to establish an imperative duty owed to him. As the trial court found, the County has no duty to investigate in the absence of a complaint. (R. p. 5).

Under the public duty rule and the broad concept of police power, county planning staff and code enforcement officials have investigative and prosecutorial discretion in the allocation of public resources. Absent some showing of selective enforcement, this is a governmental police power and county staff owes no imperative duty to Appellant or any other individual regarding zoning investigations. "Statutes that create or define the duties of a public office create no duty of care towards an individual member of the public." *Morris v. Anderson County*, 349 S.C. 607, 612, 564 S.E.2d 649 (S.C. 2002.) Although the

South Carolina Tort Claims Act is not applicable in this case, notably the General Assembly carved out an exception to government liability for "…enforcement, or compliance with any law or failure to…enforce any law, whether valid or invalid," and "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." S.C. Code Ann. 15-78-60(4) and (5), as amended. The public duty rule[3] was adopted by the S.C. Supreme Court in *Parker v. Brown*, 195 S.C. 35 (1940): "The law necessarily grants certain discretion to its officers in handling the public business. In one instance it may be wise for a public officer to pursue one course, in another instance, another course. Those charged with protecting the public interest…should be free at all times to prosecute the course that appears to be in the public interest.... It is well settled that an individual has no right of action against a public officer for breach of a duty owing to the public only…" *Id.* at 52.

B. There was no ministerial act to order county staff to perform

The exercise of public zoning enforcement authority in the face of a non-specific complaint—no matter how often repeated--is discretionary, and in this case, unfounded. This is distinguishable from, for example, an application for a building permit for a single family home in SF-6, compliant with zoning in every respect, but arbitrarily denied by staff. By way of example, using Appellant's own testimonial references to absentee landowners from far-flung places, if a Canadian landowner in Long Bay Estates made a building permit application for single-family zoning-compliant eight bedroom /eight bathroom home, to be built on the Atlantic Ocean with a sign saying "Paradise Found," the very kind

[3] Raised as an affirmative defense (*See also* R. p. 183-185).

of "big unit" to which Appellant objects, the refusal of that ministerial act might support a writ of mandamus *on behalf of the landowner*. This contrasts with deploying resources for zoning enforcement when no complaint for investigation into an actual zoning violation is made.

"The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer…or governing body in which the power is vested, and the performance of merely ministerial duties by subordinates." McQuillin, *Municipal Corporations*, § 10.41.

Both the current and former Planning Directors testified there is no ministerial act to undertake with respect to Appellant's complaints. According to former Planning Director / Counsel Janet Carter, "There really is nothing I know of that the County is called upon to do, that it could do as of a ministerial nature. Any kind of prosecution of zoning violation would be a discretionary act." (R. p. 99, lines 1-9.) The trial court properly concluded, "there is no ministerial act being sought, and none to direct, in the absence of a duty." (R. p. 4.).

C. Appellant did not show he was entitled to a specific legal right for which discharge of any duty by the county was necessary

The trial court properly found "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." (R. p. 5). The analysis of this element is similar to the public duty analysis.

Horry County Council has elected not to regulate short-term rental in SF-6, a decision squarely within its province. "The governing body of a…county may adopt a zoning ordinance… [creating] zoning districts…as the governing authority determines to

be best suited to carry out the purposes of this chapter." S.C. Code Ann. 6-29-720, as amended. County Council has not adopted a short term rental ordinance.[4] The testimony before the court was, despite short-term rental ordinances becoming a trend, including—as Mr. DeCiero shared with staff—in the City of Myrtle Beach, elected officials have not supported such a zoning change in the county. *See* R. p. 128, line 21 – p. 129, line 5).

Further, County Council has not established a maximum residential occupancy number in any district outside of an overlay around Coastal Carolina University. (R. p. 94, lines 24-25). Both the former and current Planning Directors clarified any misunderstanding of the difference between density and occupancy in a zoning context:

Q: There is still an ordinance that deals with occupancy and density that limits the amount of people that can be in a particular house in SF-6, isn't there?

A: (Ms. Carter) No, I don't agree with that. (R. p. 101, lines 10-14)

Q: Is there a maximum occupancy limit?

A: (Mr. Schwerd) In terms of the number of individuals in the house, no. (R. p. 120, lines 17-19)

Q: ...[Y]ou use the term "density" as a planning and zoning term of art, what does that mean?

A: Density is in terms of the number of dwelling units. (R. p. 127, lines 17-20)

Mr. DeCiero did not testify at all regarding "families." Ms. Carter was questioned about the definition of "family." She testified it is included in the definition section of the zoning ordinance. (R. p. 90, line 8 – p. 91, line 7; p. 94, lines 5-19). "I'm familiar with that language, but what degree of relationship? Can they all be cousins? And what authority does the zoning inspector have to require that information?" (R. p. 94, lines 8-13).

[4] Notwithstanding COVID-19 emergency ordinance(s) restricting short-term rental in spring 2020

The petitioner for a writ of mandamus asking the court to direct certain action by local government carries the burden to show he or she is entitled to a specific legal right. The County never quarreled in its pleadings, motions, or testimony of its witnesses that Appellant has a subjective basis for dissatisfaction with his absentee oceanfront neighbors. To the contrary, his testimony about the cars, fireworks, rental signs, and noise was uncontroverted, and his photos admitted without objection. But the question is not whether his neighborhood, in a busy part of unincorporated Myrtle Beach,[5] is ideal for an older retiree desiring quiet living. The question is whether Appellant can get changes he wants in his neighborhood by "...bring[ing] the county before the court to fix the mess." (R. p. 46, line 25 – p. 47, line 1). Fatal to his case is that zoning authority lies exclusively with his local governing body, and private restrictive covenants are private. The circuit court properly found there was no specific legal right for the court to enforce through judicial writ of mandamus to Horry County.

D. Appellant had other legal remedies

Where, in a mandamus case, "...the duty to perform the act is doubtful, [and] the obligation is not regarded as imperative,...the applicant will be left to his other remedies. *Gardner* at 321. In this case, the trial court noted "Plaintiff acknowledged he did not want to pursue other legal remedies, such as enforcement of private covenants, or zoning ordinance amendment." (R. p. 5).

For one, Mr. DeCiero could bring an action against the homeowners he complains about. His neighborhood is subject to private restrictive covenants as well as county zoning. (*See, e.g.,* R. p. 3; p. 42, line 1 – p. 43, line 7). In 2002, Plaintiff notified his

[5] Adjacent to Pirateland, across highway from Harley-Davidson (R. p. 45, lines 8-13).

neighbors he secured a court order that their recorded restrictive covenants applied to all lots in Long Bay Estates. (*Id.*; and R. p. 199). While South Carolina courts strictly construe restrictive covenants, favoring unrestricted use of land,[6] a property owner in a development where deeds are subject to recorded covenants has standing to bring an action in equity to establish that. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001). Appellant testified he did that. (R. p. 43, line 12 – p. 44, line 3). He knows the oceanfront owners are subject to private covenants, and he knows how to sue on those covenants. (*See Id.* and R. p. 47, lines 2-5). For whatever reason, he chose to pursue county staff rather than his wealthy oceanfront neighbors. The evidence at trial was he took pictures of their homes and renters regularly, to the point his neighbors hired a security guard to secure their properties against *him*. (R. p. 46, lines 1-10).

For another, Mr. DeCiero could seek to modify covenants with his fellow homeowners. He has a long history of sending notices via certified mail to not only his neighbors, but also to prospective buyers. (R. p. 199; p. 204; p. 50, line 5 – p. 51, line 8).

For another, Mr. DeCiero is aware of the administrative mechanism to challenge a decision of the Zoning Administrator. (*See* R. p. 40, lines 23-25). Under state law, the local zoning board of appeals is empowered "to hear and decide appeals where it is alleged there is error in a...determination made by an administrative official in the enforcement of the zoning ordinance." S.C. Code Ann. 6-29-800(A)(2), as amended.

For another, Appellant is knowledgeable about the legislative process and can pursue zoning change, overlay, or text amendment. He knows how; He did so in 2004.

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[6] *See, e.g., Charping v. J.P. Scurry & Co., Inc.*, 372 S.E.2d 120, 296 S.C. 312 (S.C. App. 1988).

(R. pp. 200-203; p. 56, line 15 – p. 57, line 21). Horry County Council did not take action at that time. (R. p. 84, line 6 -p. 85, line 15). Mr. DeCiero chooses not to try to persuade his elected officials through the legislative process to see things his way. R. p. 62, lines 6-21). "We don't want to rezone the neighborhood. *We want everyone else out of there*.... We're not going to change any of the ordinances. Why would we want to do that?" *Id.* (emphasis added).

At trial, Appellant "failed to establish the county has an imperative duty enforceable by writ of mandamus," (R. p. 5). The trial court did not abuse its discretion in considering the evidence and denying Appellant's petition.

II. The circuit correctly found Appellant made no investigable complaint to the county, therefore there was no alleged violation of the Zoning Ordinance ripe for investigation

The circuit court concluded Appellant "has made no investigable complaint to the County in 16 years. There is no "alleged violation" to remedy. This claim is not ripe." (R. p. 5).

§1306 of the Horry County Zoning Ordinance 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 Zoning Administrator shall record properly such complaint, immediately investigate, and take whatever action is necessary to assure compliance with the ordinance. "

"When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." *SC Public Int Foundation v. Courson et al,* 420 S.C. 120, 123, 801 S.E.2d 185, 186 (S.C. App. 2017).

The explicit prerequisite for initiation of zoning enforcement in Horry County under §1306 is an allegation that a zoning violation occurred. It may be written, it must state

"fully the...basis thereof," and it "shall be filed with the Zoning Administrator." (§1306, *supra*.) The testimony and evidence of complaints Mr. DeCiero made to the county about his neighbors followed the following timeline:

1. April 2004: Mr. DeCiero testified he complained about a ball team staying at a beach house. (R. p. 30, line 19 – p. 31, line 2).

> Q: And you made a complaint to the County about what you suspected was a specific –"
>
> A: And he came over and saw the bus parked on the side of Dogwood Drive..., and he went down there and cited them[7] because they had a busload of kids in there. (R. p. 54, lines 13-18).

This allegation was specific and timely as to date and location of a ball team bus. It was investigated, resolved to Appellant's satisfaction[8], and was not a basis for this case.

2. May 6, 2004: Mr. DeCiero appeared at a County Council subcommittee meeting regarding "group housing and enforcement." The motion to empower staff to make a decision regarding a zoning change died. (R. p. 201)

> Q: you did bring your desire for zoning changes and amendments to the County?
>
> A: Right. Right. Yet, we had one other county councilman that wanted to address it, and she[9] pushed it off....and it died. (R. p. 57, lines 12-21).

Appellant did not identify any basis for alleging a zoning violation.

3. July/August, 2005: Appellant and others wrote "some property owners are renting their properties as vacation rentals on a weekly basis...marketed as income producing weekly summer rentals. That should not be allowed in an R-7 district." County

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[7] No "citation" issued (R. p. 187).
[8] "In what way, if at all, were you disappointed in the County's response?" "I wasn't disappointed..." R. p. 54, lines 10-12).
[9] Council chairperson Liz Gilliam (R. p. 57, lines 2-5)

I & R counsel replied that an ordinance change could address short-term rentals but the elected officials had so far not opted to pursue such a change. (R. p. 193). Despite the statement weekly rentals were a "zoning violation," they were not. The language in the 2005 letter--that construction of large homes to be marketed as vacation rentals "*should* not be allowed" (emphasis added)--is not the same as them *not* being allowed. This complaint did not identify any basis for alleging a zoning violation.

4. June 2015: Appellant's trial lawyer wrote the Planning Director and County Attorney,[10] asked the county to "please immediately investigate" "multiple homeowners in Long Bay advertis[ing]...a "beach house" for weekly vacation stays in Myrtle Beach.. (T)his is a direct violation of the law." (R. p. 189). This letter did not identify any basis for alleging a zoning violation.

5. August/September 2015: Appellant's lawyer wrote, citing the definition of "family" and stating homeowners "are renting to large groups of people, many unrelated, that greatly exceed the number of occupants allowed by this ordinance." Mr. DeCiero testified he attended a meeting with staff. (R. p. 65, lines 4-6) Questioned at trial, Ms. Carter testified:

> Q: If you have a SF-6 zoning and certain people are having 12 cars, a bus, a team on a regular basis renting those properties, isn't that worth the zoning officials for Horry County to go and investigate that circumstance? I mean, isn't that something that you ought to have someone go down there and ask questions about and all?...I mean, you would want to do that, wouldn't you?
>
> A: If a specific complaint was received about an ongoing, like, current violation that could be checked into, then, you know, there is a good likelihood that someone would be sent out to see what is going on...So, you know, they can go out and observe the conditions and come back...and determine if there is enough going on there to bring an action,

[10] There was no testimony the letter was on Mr. DeCiero's behalf, but it was admitted without objection.

but we've not received any complaints of that type or -- I mean, this is all speculation.

Q: …It looks to me like you could investigate a consistent complaint of a zoning violation…Why wasn't it done? I know you said "no specific complaint."

A: It wasn't done -- well, for I -- I mean, the primary reason it wasn't done is because we've never received a specific complaint of the current violation with regard to any particular property. (R. p. 102, line 5 – p. 103, line 13).

Appellant did not make any investigable complaint as to any time and place, or the basis for his allegation that vacationers staying together were "unrelated," or *any zoning violation at all*.

That is it. As the trial court found, Mr. DeCiero did not make a "specific complaint about a zoning violation" and "did not offer any evidence or testimony that he had submitted any investigable complaint to the county." (R. p. 4). He testified to as much at trial and implicitly concedes this on appeal.

At trial, Mr. DeCiero testified his complaints were about vacation rentals, as they had been over the years. Regarding a specific complaint of a zoning violation county staff could investigate, he offered:

Q: If you could just testify to the specific reports you made of zoning violations to the County…I want to know about what you brought this case on.

A: Brought this case on weekly rentals in a residential neighborhood. (R. p. 64, lines 14-19).

As a matter of fact and law, weekly rentals are not prohibited in his neighborhood. On appeal, Appellant concedes this, arguing the short-term rental issue was "a distraction." (Initial Brief of Appellant at 9.) Despite his consistent and repeated trial testimony that his problem was precisely with vacation rentals of big beach houses and

the consequential effect on his neighborhood, if this was only a "distraction," what was the real issue? He argues at length on appeal, yet never identifies the nature of the zoning violation he says he alleged: "Appellant made many complaints, both verbal and written to the County regarding *this issue*;" "Appellant made verbal complaints to the county alleging *zoning violations*..." (Initial Brief of Appellant 10-11, emphasis added.) He repeats the phrases "this issue," "alleged zoning violations," "multiple verbal complaints alleging zoning violations," "zoning issues," "said allegations," and "complaints," never actually naming the violation, much less arguing he provided a basis for investigation, which is what the ordinance requires. (*Id.* 10-13.)

Respondent submits Appellant's argument regarding a written complaint requirement is the actual distraction. He erroneously argues "The County's reason for failing to take action is that Appellant's complaints were not written." (*Id.* at 12, emphasis added.) Neither the former nor current Planning Director testified there was any deficiency in Appellant's complaints related to whether they were written.[11] §1306 of the Zoning Ordinance was in evidence. (R. p. 213). Ms. Carter, Planning Director at the time, testified again and again that Appellant had not made a specific, investigable complaint of any violation of the Horry County Zoning Ordinance. She said nothing about whether his complaints were written. "I have not, to the best of my knowledge, *had any specific complaint at all*, and certainly not one that is ongoing at the time to where the County could go down and try to, you know, gather information and see what was happening." (R. p. 111, lines 17-22) (emphasis added); "There's been no case to work in this situation. So everything we're talking about is speculation." (R. p. 104, lines 16-17. *See also* R. p.

[11] The letters were obviously written.

86, lines 7-8; p. 93, lines 18-20; p. 97, lines 18-20; p. 102, lines 13-14; p. 103, lines 11-14; p. 104, lines 5-13; p. 107, lines 8-9 and lines 15-17; and p. 115, lines 5-8). Mr. Schwerd testified his department now offers a written complaint form. (R. p. 122, line 16.) He read the ordinance into the record. To the extent he or the court interpreted a requirement for a written complaint, where the ordinance says a person may file a written complaint, which shall be filed prior to investigation, it matters not. For Appellant's "complaints" under Ms. Carter's tenure were either made in writing or fully responded to in writing, she alleged no defect in the form of his complaints, and he made no complaints to Mr. Schwerd.

Mr. DeCiero complained about "density" related to the size of the houses. "I was complaining because they were building eight bedroom, eight bathroom homes down on Ocean Boulevard." (R. p. 28, lines 10-12.) He introduced photographs he has been taking "since 1991" of vehicles parked at beach houses. (R. p. 53, line 15 p. 54, line 1). He misapprehended the difference between occupancy and density. ("There is...an ordinance that deals with occupancy and density that limits the amount of people that can be in a particular house and SF-6, isn't there? "No, I don't agree with that."[12]) (R. p. 101, lines 10-14.) Maximum occupancy is not regulated in Long Bay. As explained by the Planning Director, "[Zoning] does not limit the total number of occupants. It limits the total number of unrelated family. So if you have one family -- for instance, my family and my wife's family goes on vacation together and rent a beach home and we're all related, we all have kids, there could be 25 people in an individual structure, but we're all family...there is still more than 25 people, but we're all related, so it is not a violation." (R.

[12] discussed at p. 9, *supra.*

p. 136, lines 7-17). Mr. DeCiero offered zero evidence regarding relationships by blood or marriage of beach house occupants in any location, or at any time.

> Q: Have you ever gone up to any person on your walks that you don't know and asked them questions about where they are staying?
>
> A: Well, no. (R. p. 68, lines 3-6).

Ms. Carter testified the same rules are applicable in all SF-6 zoning districts in the county, whether Long Bay or Garden City (See R. pp. 211-212):

> A: …I mean, you ride through Garden City and you'll see the realty signs. I think it is common knowledge that the beach houses in the Garden City area are rented. They are vacation rentals. It is not a secret.
>
> Q: I'm talking about density, occupation density. Garden City, everybody over there wants that to happen; isn't that right? (R. p. 109, lines 15-21).

Respondent submits that whether "everybody" in Garden City wants to live among vacation rentals is 1) probably not true, and 2) irrelevant. It is zoned SF-6. County staff urged Mr. DeCiero over the years to seek a zoning change through the legislative process or a private solution through his subdivision's covenants.

There is such a thing as an investigable complaint regarding zoning violation. But, Appellant did not make one. The trial court heard testimony about instances where the county investigated occupancy complaints related to the definition of family: One was Appellant's 2004 complaint about the ball team bus parked at a home; the other was after 2018, regarding a single-family home being rented by the room to adult summer guest workers with "individual leases." (R. p. 121, lines 8-19.) Both were investigable as to time and place, and with a basis to support that occupants were unrelated. Lastly, by way of another example of an investigable complaint, Mr. Schwerd testified staff investigated a specific zoning complaint against Mr. DeCiero's neighbor involving an improperly lit sign

which was identified, investigated, and enforced against. (R. p. 129, lines 16-21). Mr. DeCiero's complaint that oceanfront houses are too "big" and being rented out to vacationers is distinguishable. His complaints were not ignored; they were not investigable.

As the Planning Director testified, the county will investigate a ripe case, or a specific complaint, or something capable of being investigated.

> Q: [Y]ou are telling me that if Mr. DeCiero fills out that form, you will perform a conscientious investigation of his complaint about there being more than two family units in these homes?
>
> A: Yes. (R. p. 133, lines 6-11).

Appellant did not bring a ripe case. "[T]here 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." (R. p. 4). "The existence of an actual, justiciable controversy is essential to jurisdiction to render a declaratory judgment... A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination. . . ." *Eagle Container Co. v. Cnty. of Newberry*, 366 S.C. 611, 622 S.E.2d 733, 744 (Ct.App.2005), *rev'd on other grounds*, 379 S.C. 564, 666 S.E.2d 892 (2008), citing *Orr v. Clyburn*, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982).

Appellant argues ripeness ought not be a consideration because "the ordinance does not use the term investigable. This is...a term the county has come up with." (Initial Brief of Appellant at 11.) The ordinance uses the term "investigate." (R. p. 213). It absolutely requires a complaint be capable of being investigated—i.e. "investigable." He falsely states the ordinance "does not require any specific details, including current violation, particular property, etc." (Initial Brief of Appellant at 11.) To the contrary, a

complainant must (1) allege a violation of the zoning ordinance actually occurred; and (2) "state fully the causes and basis" for the allegation being a zoning violation. §1306, *supra*. The Planning Directors used the term "specific complaint:" "If a specific complaint was received about an ongoing…current violation that could be checked into;" (R. p. 102, lines 13-15), and "If there was a specific complaint." (R. p. 134, line 10). The trial court found "Plaintiff did not offer any evidence or testimony that he had submitted an *investigable* complaint…" or "ripe for investigation." (R. p. 4, emphasis added).

Mr. DeCiero established his neighbors rent out their beach houses. But, his case is not ripe without an *investigable complaint* of a violation of the Horry County Zoning Ordinance. There was nothing to investigate or enforce. The court found he failed to establish any "basis for investigation, much less enforcement." (R. p. 4).

CONCLUSION

The circuit court correctly found Horry County owed no imperative duty to take zoning enforcement action in the absence of a specific, ripe complaint alleging facts to support a zoning violation. Because the court's decision was soundly based in fact and law, its dismissal after the trial was proper and the circuit court should be affirmed.

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July 9, 2021

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SC Court of Appeals

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. 2021-000136

Robert DeCiero, a resident of Long Bay Estates Subdivision,
Myrtle Beach, South Carolina,.....Appellant,

v.

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

CERTIFICATION OF COUNSEL

I certify the Final Brief of Respondent complies with Rule 211(b), SCACR, and the Order(s) of the Supreme Court regarding personal identifiers.

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