

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jan 31 2022

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Bentley Price
The Honorable R. Markley Dennis, Jr.

App. Case No. 2019-001671

J. Doe,

Appellant,

v.

Design Review Board (DRB)
of the
Town of Sullivans Island (TOSI),
Alka Construction Co.,
Svjetlana Bilic Damjanovic,
Individually and d/b/a Alka
Construction Co., Branko
Damjanovic, Individually and
d/b/a Alka Construction Co.,
Kenneth Craft, III, Individually and
d/b/a Craft Design Co.,

Respondents.

RETURN

C. Holmes
P.O. Box 187
Sullivans Isd.,
SC 29482-0187
(843)883-3010
For Appellant

Appellant timely enters objection to respondents' motion to dismiss (MTD) and respectfully submits the motion should be denied or deferred for consideration after filing of the record on appeal (ROA) and all final briefs. To date, the record reflects respondents have had more than sufficient time including months of delay for filing their initial brief. Now, respondents elect to file a MTD at the eleventh hour consistent with lack of meritorious defense. Accordingly, appellant respectfully requests the MTD be denied.

As a threshold matter, appellant objects to respondents' MTD including, but not limited to, its misstatements, mischaracterizations, and Exhibits attached to the MTD which are incomplete and/or inaccurate. They should be disregarded. Accordingly, the MTD should be denied or deferred until the ROA and all final briefs have been filed.

As a threshold matter, the issue of jurisdiction can be raised on appeal. A ruling regarding a jurisdictional question, as in this case, based on facts requires review of the record on appeal (ROA) which will be filed with the final briefs. When deciding a jurisdictional question based on facts, a reviewing court has the power and the duty to review the entire record, find the jurisdictional facts within the entire record, and decide the jurisdictional question in accord with the preponderance of evidence. *Canady v. Chas. Cty. Sch. Dist.*, 265 S.C. 21, 216 S.E.2d 755 (1975). Accordingly, the MTD should be denied.

Moreover, the appeal is not moot. The zoning ordinances (ZO) speak to this issue loud and clear. If an owner elects to proceed prior to the expiration of the appeal period or prior to resolution of an appeal filed within the appeal period, whichever is later, the owner shall do so at the risk of reversal. TOSI ZO, Art. XII, Sec. 21-109(F)(10). On page 2 of their MTD, respondents admit that appellant timely filed appeal before issuance of the building permit. Thereafter, developer knowingly elected to proceed. If developer proceeds after appellant files the notice of appeal, developer proceeds at his own risk. Respondent's argument would nullify the appeal process, would make the Legislative enactments

superfluous, and would lead to an absurd, if not unconstitutional, result. It is respectfully submitted the Legislature is presumed to enact Legislation that is not absurd. Developer's interpretation would lead to an unconstitutional result, including but not limited to, denial of meaningful judicial review. Developer could have requested relief from the lower court but did not. He has only himself to blame. Accordingly, the MTD should be denied.

Respondents' MTD cites outmoded, inapposite case law and fails to even mention recent controlling precedent in *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019). A discerning review of that case as well as others finds that the Legislature intended to and did statutorily provide that the Circuit Court has no jurisdiction to summarily dismiss until and unless the herein timely requested **pre-litigation** mediation is unsuccessful. Accordingly, the MTD should be denied.

Further, Professional Civil Engineer (PE) reports document no other drainage along the affected block of Poe Avenue on Sullivans Island. PE reports to be included in the ROA. Statutory rights regarding roadway drainage include but are not limited to, S.C. Code § 5-31-450:

SECTION 5-31-450. Drains for surface water.

Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person.

HISTORY: 1962 Code Section 59-224; 1952 Code Section 59-224; 1942 Code Section 7301; 1932 Code Section 7301; Civ. C. '22 Section 4449; Civ. C. '12 Section 3026; 1902 (23) 1038; 1953 (48) 272.

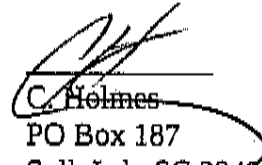
See also *South Carolina Law of Torts* (4th Ed. 2011), Hubbard and Felix state that an owner can sue the municipality for an on-going nuisance caused by an affirmative act based on, including but not limited to, statutory authority. *Id.*, pp. 245-270; S.C. Code 5-31-450; S.C. Code 15-43-20; South Carolina Constitution, Art. I, Sec. 13; U.S. Const, 5th Amendment. The PE reports/surveys document the developer's property is at a higher elevation with his stormwater drainage adversely affecting the neighboring property owners in the immediate vicinity including, but not limited to, appellant at a lower elevation in a flood zone and causing flooding/aggravation of flooding and on-going nuisance with damages. The Zoning Ordinances provide that existing property owners are not allowed to add fill, in this case to relieve the ponding and flooding. In order to add fill, the Zoning Ordinances require that the existing home be demolished. Fill is only allowed with new construction; however, it is strictly limited to no more than one foot in this flood zone. TOSI, ZO, Art. II, Sec. 21-13. Unfortunately, one foot of fill would not be enough. Accordingly, the MTD should be denied.

CONCLUSION

For the reasons stated and for substantial justice affecting substantial rights, appellant respectfully requests denial of respondents' MTD.

Respectfully submitted,

Dated 1/20/2022


C. Holmes
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843.883.3010

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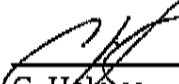
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PROOF OF SERVICE

I certify that a true copy of the above was served upon the respondents by regular first class mail postage pre-paid on this date at this address: Ben Traywick, 171 Church St., Ste. 340, Chas., SC 29401; GT Walker, 66 Hasell St., Chas., SC 29401; and Kenneth Craft III, 204 Spooner Ln., Mt. Pleasant, SC 29464.

Dated 1/30/2022


C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

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SC Court of Appeals

Hand copy
available
on request -

Frank

Fax Cover:

C. Holmes, M.D.

P O Box 187

Sullivans Island, SC 29482-0187

843.883.3010