COURT OF APPEALS OF VIRGINIA

Record No. 0657-25-1

RECYCLED PROPERTIES, LLC
v.
THE CITY COUNCIL OF THE CITY OF CHESAPEAKE, ET AL.

Present: Judges Beales, White and Duffan
Argued at Norfolk, Virginia

Opinion Issued October 13, 2026[*]

FROM THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE
David J. Whitted, Judge

Joseph V. Sherman (J. Bryan Plumlee; Lauren C. Rose; Nicole K. Pasho; Poole Brooke Plumlee PC, on briefs), for appellant.

Ellen F. Bergren, Chief Deputy City Attorney (Catherine H. Lindley, City Attorney; Jessica R. Turner, Assistant City Attorney, on brief), for appellees.

MEMORANDUM OPINION BY
JUDGE KEVIN M. DUFFAN

Recycled Properties, LLC appeals the circuit court's order sustaining the City Council of the City of Chesapeake's, the City of Chesapeake's, and Jay Tate's (the Director of Development and Permits) (collectively, "the City") demurrer to its complaint challenging the City's disapproval of its proposed site plan. On appeal, Recycled Properties argues that the circuit court erroneously sustained the City's demurrer. We disagree, and affirm the circuit court.

BACKGROUND

Recycled Properties operates a construction and demolition debris landfill and borrow pit in Chesapeake, Virginia. The property's operations are legally nonconforming. In May 2024,

[*] This opinion is not designated for publication. *See* Code § 17.1-413(A).

Recycled Properties submitted a site plan to the City's Department of Development and Permits to construct a warehouse and office building (collectively, "the buildings") on the property. In August 2024, the City disapproved the site plan. Grounds for disapproval were that: first, the buildings depicted in the site plan were an expansion to the legal nonconforming use existing on the property, in violation of Chesapeake Zoning Ordinance (CZO) § 15-104(A)(3); second, approval of the site plan would not be granted until further information on the buildings' use was provided; and third, a conditional use permit must be obtained for the lawfully nonconforming operations as a condition to approving the site plan.

After the City denied the site plan, Recycled Properties timely appealed under Code § 15.2-2260(E) and CZO § 18-303(B), and it attached the disapproval letter to its complaint. It first argued that the site plan's disapproval was not properly based on applicable ordinances and was arbitrary and capricious.[1] Second, it argued that conditioning the site plan's approval on obtaining a conditional use permit for the entire lawfully nonconforming operations was an unconstitutional condition.

The City demurred. The City contended that the CZO authorized the denial and that Recycled Properties had failed to show that the new building would not expand the nonconforming use or require additional information. The City also argued that Recycled Properties failed to plead any legally sufficient unconstitutional condition. Recycled Properties opposed the demurrer, arguing that the CZO did not require it to prove that the site plan is *not* an expansion of a lawfully nonconforming use or to provide "adequate information" about the proposed building. It also sought damages under Code § 15.2-2208.1, arguing that the City

[1] The allegations of arbitrary and capricious conduct were focused on the notices of past zoning violations, which the City withdrew as a ground for denial of the site plan.

unlawfully conditioned approval of the site plan on obtaining a conditional use permit for existing operations.

At the hearing on the demurrer, the City grounded its denial on the unlawful expansion of a nonconforming use and withdrew the preexisting zoning violations from part of its denial. According to the City, the "sole meaningful issue" was a lack of "adequate information received on whether the building[s were] an expansion of the legal nonconformity." On this issue, Recycled Properties argued that the City would "never accept the information [it would have] provided" and that nothing in the CZO authorized the City to "require adequate information." Recycled Properties also contended that the evidence would show there was no expansion of the nonconforming use and that it had a vested right to add buildings in support of its lawfully nonconforming use. Its position was that to survive demurrer, it only had to allege that the denial was arbitrary, capricious, and failed to accord with zoning ordinances.

After the hearing, the circuit court sustained the demurrer. The court found that based on the allegations and attachments, the City had authority to deny the site plan, and that the "City's action at this point was proper." The court held that Recycled Properties "failed to adequately plead its appeal on the requirement to submit additional information on the potential illegal expansion of a legal nonconformity." The circuit court ruled that Recycled Properties "may file a new site plan application." Recycled Properties appeals.

ANALYSIS

"A trial court's decision sustaining a demurrer presents a question of law which we review de novo." *Squire v. Va. Hous. Dev. Auth.*, 287 Va. 507, 514 (2014) (quoting *Harris v. Kreutzer*, 271 Va. 188, 196 (2006)). "In reviewing a trial court's order sustaining a demurrer, 'we are required to address the same issue that the trial court addressed, namely whether the [complaint] alleged sufficient facts to constitute a foundation in law for the judgment sought.'" *Eagle Harbor*

L.L.C. v. Isle of Wight County, 271 Va. 603, 611 (2006) (quoting *Hubbard v. Dresser, Inc.*, 271 Va. 117, 119 (2006)). "The purpose of a demurrer is to determine whether the pleading and any proper attachments state a cause of action upon which relief can be given." *Steward v. Holland Family Props.*, *LLC*, 284 Va. 282, 286 (2012). In reviewing a demurrer, all factual allegations pleaded in the complaint are treated as true; but the reviewing court need not "accept the veracity of conclusions of law camouflaged as factual allegations or inferences." *Coward v. Wellmont Health Sys.*, 295 Va. 351, 359 (2018) (quoting *AGCS Marine Ins. v. Arlington Cnty.*, 293 Va. 469, 473 (2017)).

A trial court must sustain a planning commission's decision approving or disapproving a plat unless the decision "was not properly based on the ordinance applicable thereto, or was arbitrary or capricious." *James v. City of Falls Church*, 280 Va. 31, 41 (2010) (quoting Code §§ 15.2-2259(D), -2260(E)). The Supreme Court of Virginia has defined "arbitrary and capricious" as an act that is "willful," "unreasonable," and "taken 'without consideration or in disregard of facts or law.'" *Id.* at 42 (quoting *Sch. Bd. of the City of Norfolk v. Wescott*, 254 Va. 218, 224 (1997)). "On appeal, 'the trial court's judgment is presumed correct and will not be set aside unless the judgment is plainly wrong or unsupported by the evidence.'" *Id.* at 41 (quoting *Bd. of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 277 (2006)).

Localities may require submission of site plans for review. *See* Code § 15.2-2260 and Code § 15.2-2259 (authorizing a designated agent to act on any proposed plat); Code § 15.2-2286(A)(8) (providing that a zoning ordinance may require "submission and approval of a plan of development prior to the issuance of building permits to assure compliance with regulations contained in such zoning ordinance"). The locality reviews the site plans for compliance with existing plans, ordinances, and standards identified in CZO § 18-204. If the locality denies the plan, it must identify reasons for disapproval and corrections that could permit approval. Code § 15.2-2259(A);

Code § 15.2-2260(C). If a locality's "designated agent disapproves a plat and the applicant contends that the disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious, he may appeal to the circuit court having jurisdiction" of such land. Code § 15.2-2259(D); Code § 15.2-2260(E).

I. There were no facts pled that the City's denial of the site plan was arbitrary, capricious, or outside applicable ordinance provisions.

Recycled Properties argues that the circuit court erred by sustaining the City's demurrer because it sufficiently pled that the site plan disapproval was not based on the applicable ordinance and that it was arbitrary or capricious. We disagree.

In its complaint, Recycled Properties stated that the disapproval of the site plan was erroneous because the CZO does not require applicants to: (1) prove that projects are not expansions or additional structures supporting a lawfully nonconforming use, (2) provide "adequate information" explaining the use of the site plan, and (3) obtain a conditional use permit to expand the existing lawfully nonconforming operation.[2]

[2] In the introduction of its opening brief, Recycled Properties claims that the circuit court's denial of its site plan was "unconstitutional." Its constitutional argument is not included in an assignment of error and is not argued otherwise in the opening brief. According to Rule 5A:20(e), the opening brief must contain "the argument (including principles of law and authorities) relating to each assignment of error." The effect of this omission is waiver. *Bartley v. Commonwealth*, 67 Va. App. 740, 744 (2017) ("Unsupported assertions of error 'do not merit appellate consideration.'" (quoting *Jones v. Commonwealth*, 51 Va. App. 730, 734 (2008))). For that reason, we do not reach Recycled Property's constitutional argument. We do note that this argument was raised in Count II of Recycled Property's complaint, but that has no bearing on the present determination by this Court on appeal because Rule 5A:20(e) applies to briefing in this Court—not to briefing that occurred in the trial court.

However, Recycled Properties also attached the City's denial letter, which cited CZO § 15-104(A)(3)[3] and § 18-302(A),[4] authorizing the denial of a site plan where a proposed building would alter or expand a nonconforming use or where more information would be necessary to evaluate conformity. *Bd. of Supervisors v. Cohn*, 296 Va. 465 (2018) (holding that a locality may preclude the expansion of a nonconforming use under Code § 15.2-2307(C)). The denial letter stated that approval would not be granted until Recycled Properties provided more information on the proposed building's use and obtained a conditional use permit to support expanding the nonconforming use.

The denial letter refutes Recycled Properties's legal conclusions "camouflaged as factual allegations or inferences." *Coward*, 295 Va. at 359. No allegations in its complaint refute the factual and legal grounds asserted in the letter—that the proposed building would alter or expand the nonconforming use and more information would be needed to evaluate the expansion. Consequently, the circuit court was correct in determining that Recycled Properties had not sufficiently pled facts supporting its legal conclusion that the denial was arbitrary, capricious, or outside ordinance provisions. Accordingly, we find no error in the court's ruling.

II. The circuit court did not convert the demurrer to summary judgment.

Last, Recycled Properties argues that the circuit court erred because it ruled on the merits of Recycled Properties's complaint on a summary judgment standard instead of the proper demurrer standard. We disagree.

[3] "No additional buildings or structures may be constructed to support a lawfully nonconforming use, or as provided for in subsection B of this section." CZO § 15-104(A)(3).

[4] "Each plan shall be reviewed for conformity with the approved preliminary site plan and with all other applicable provisions of this zoning ordinance and related ordinances, regulations and policies applicable to the site." CZO § 18-302(A).

Recycled Properties argues that the circuit court "took the [City's] bait" and ruled on the merits of its complaint through summary judgment. Summary judgment is a remedy available to litigants "when there are no material facts genuinely in dispute." *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 88 (2009). On the other hand, the purpose of a demurrer is to determine whether a litigant has sufficiently pled a cause of action, and in order to make this determination, the trial court must review the complaint's factual allegations. *Steward*, 284 Va. at 286; *Coward*, 295 Va. at 359. We find that it is Recycled Properties, not the circuit court, that improperly blends the standards for demurrer and summary judgment. Contrary to Recycled Properties's assertion, the City's argument on demurrer—that its denial was authorized under the CZO—reflects Recycled Properties's failure to adequately plead their claim. Nowhere in the complaint did Recycled Properties allege that, as a factual matter, there was no alteration or expansion of its nonconforming use and that it had provided adequate information of conformity. The City's argument on Recycled Properties's inadequate pleading does not equate to an argument about the absence of "material facts genuinely in dispute." *Fultz*, 278 Va. at 88.

Recycled Properties's argument that the circuit court "took [this] bait" is incorrect for the same reason. The circuit court explicitly stated in its order that the "Plaintiff *failed to adequately plead its appeal* on the requirement to submit additional information on the potential illegal expansion of a legal nonconformity." (Emphasis added). Neglecting this portion, Recycled Properties points to the portion of the order that "the City's denial of the Site Plan was proper" as evidence that the circuit court ruled on the merits. But that language alone does not transform the decision into a summary judgment ruling; it reflects the court's conclusion of Recycled Properties's failure to allege the City's improper disapproval.

In assessing a demurrer, courts are not bound by alleged legal conclusions and may disregard allegations contradicted by authentic documents attached to the pleadings. *Fox v.*

Curtis, 236 Va. 69, 71 (1988); *Theologis v. Weiler*, 76 Va. App. 596, 600 (2023). Here, the circuit court reviewed the complaint and its exhibits, and it held that they did not state a claim under Code § 15.2-2260(E) (for disapproval of the site plan) or Code § 15.2-2208.1 (for damages for the unconstitutional denial of the site plan). The denial letter attached to the complaint, outlining grounds that were not factually contradicted in the pleadings, supported the demurrer. Thus, the complaint did not allege facts stating a claim, and it was not error for the circuit court to sustain the City's demurrer.

CONCLUSION

For the foregoing reasons, the circuit court's judgment is affirmed.

Affirmed.