IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S23C1029

SHERRAN LYNN WASSERMAN,

Appellant,

v.

FRANKLIN COUNTY, GEORGIA

Appellee.

BRIEF OF APPELLEE FRANKLIN COUNTY, GEORGIA

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INTRODUCTION AND PROCEDURAL HISTORY

In this zoning and land use action, Appellant, based on alleged intent to sell her property to another, sought to seek redress of harms, which finds no support in the record. Appellant asserted a purported Equal Protection claim under the Fourteenth Amendment and 42 U.S.C. § 1983 against Appellee based on alleged unconstitutional discrimination against Appellant and Mr. Anthony Pham ("Mr. Pham"). (V2-5-64; 302-325; 1449-1461).

The trial court, after multiple hearings and extensive briefing, announced on the record its intention to enter judgment in favor of Appellee/Defendant. Yet, after approximately one year of understandable delays unrelated to the merits, and devoid of further argument or briefing, the trial court reversed itself, and entered an order denying summary judgment. (V2-1697-1727).

The Georgia Court of Appeals found that Appellant lacked standing to bring an Equal Protection claim as a protected class on behalf of the buyer (Mr. Pham); and, Appellant's Equal Protection "class of one" claim failed because she cannot establish a prima facie showing for that claim.

The Georgia Court of Appeals accordingly, reversed the trial court's order, and remanded the case with instructions for the trial court to enter summary judgment in Appellee's favor. Franklin Cnty. v. Wasserman, 367 Ga. App. 694, 699 (2023). Appellant then petitioned for certiorari.

Appellee objects to Appellant's Statement of Facts as it includes information not properly in the record, argumentative statements of belief which do not constitute facts, and alleged facts superfluous to this Court's review of the appellate court's opinion. Appellant has consistently relied on hearsay evidence, speculation and unsupported conclusions/musings from individuals outside of and not in the presence of the Board of Commissioners ("BOC"). Appellant has clearly sought to rely on these unsupported conclusions because the evidence in the record, corroborated by citizens and representatives of the City of Carnesville (the "City"), makes clear that no such evidence exists, thereby supporting the rulings of the Georgia Court of Appeals.

Before taking any action on Appellant's conditional use permit application ("CUP application"), the BOC heard presentations from Appellant's attorney, City officials, and a number of citizens. (V2-694-

700). Only after these presentations and relying on a complete, proper record did the BOC take any action. The record shows that there were legitimate, identified concerns with regard to the location of Appellant's property and the CUP application was ultimately denied based on the objective "Criteria to Consider for Conditional Uses" contained in Section 1607 of Appellee's Zoning Regulations and for the purpose of promoting health, safety, convenience, order, prosperity, and general welfare of the present and future inhabitants of the County. Id. Appellee identified these concerns, including among other purposes, the fifteen (15) purposes outlined in the Preamble and Enactment Clause of Appellant's Zoning Regulations. Id. Appellant failed to properly challenge the BOC's decision through mandamus or writ of certiorari.

This matter is simply a long-languishing case involving an ill-conceived constitutional challenge in which Appellant was required – but has continually failed – to point to specific evidence giving rise to a triable issue. The BOC, as the final policy making authority of Appellee, acted properly and did not violate Appellant's Equal Protection rights. As there is no evidence to support essential elements of Appellant's Equal

Protection claim, the appellate court appropriately reversed the trial court's order denying Appellee/Defendant's motion for summary judgment.

ENUMERATION OF ERRORS AND STATEMENT OF JURISDICTION

1. Under the Georgia Constitution, a plaintiff must allege a violation of the plaintiff's individual legal rights to invoke the judicial power of Georgia courts. See Sons of Confederate Veterans v. Henry County Bd. of Commissioners, 315 Ga. 39, 52 (2) (b) (880 SE2d 168) (2022).

2. In light of the facts bearing upon the first issue above, Appellant lacks standing under the Georgia Constitution to challenge the alleged violation of the equal protection rights of the alleged prospective buyer of the Appellant's property.

Accordingly, because standing is a jurisdictional issue, jurisdiction is improper before this Court.

STATEMENT OF MATERIAL FACTS

On September 22, 2016, Appellant entered into a "Purchase and Sale Agreement" with a prospective buyer, Mr. Pham, for the sale of Appellant's property contingent on Appellee approving the CUP application. (V2-627-639). Appellant did not personally know Mr. Pham; she only knew the buyer as a potential purchaser. Mr. Pham apparently intended to build and operate twelve (12) 54' by 500' broiler chicken/poultry houses on Appellant's property. Id. Mr. Pham's proposed use was much larger in scale than a typical poultry house operation. (V2-739). As the CUP application met the minimum requirements as far as setbacks necessary to operate a poultry house within the County, the Planning Commission staff ("PC staff") issued a preliminary, nonbinding approval which signified only that the CUP application could move forward to the Planning Commission's ("PC") review. (V2-742). It is not uncommon for the PC to vote contrary to the PC staff recommendation and Mr. Pham's proposal was certainly not a "typical" poultry house operation in terms of size and location. Id.

On October 20, 2016, the PC evaluated four CUP applications, including Mr. Pham's. (V2-640-641). The three other CUP applications were also submitted by Vietnamese/Asian applicants. Id. The four CUP applications were all objectively evaluated and analyzed. (V2-754). All four CUP applications were tabled until the next PC meeting. (V2-671-672). On November 8, 2016, the PC held a properly noticed work session to discuss poultry house regulations and a proposed building inspection program. (V2-654-670; 755). Although the four CUP applications were brought up as potential discussion topics, none of the four CUP applications were addressed in detail during the work session. Id.

On November 10, 2016, City Council Members ("City Council") unanimously voted to send a letter to the PC and BOC stating the City's opposition to Mr. Pham's CUP application due to Appellant's property being adjacent to Appellee's recently developed Recreation Department, recreation fields, and an elementary school. (V2-676). The identified public concerns had nothing to do with Mr. Pham's ethnicity. (V2-759; 777; 881). The City's opposition also was not directed at nor mentioned the three other pending CUP applications. (V2-676).

On November 17, 2016, the PC voted on the four tabled CUP applications. (V2-671-673). Two applications, Uyen Le's CUP application and Huy Anh Dinh and Nguyet Hang Dinh's CUP application were approved. Id. There is no allegation or evidence in the record that the alleged racial animus was also directed at these Vietnamese/Asian applicants. (V2-671-676; 755). Mr. Pham's CUP application was denied, and Anh Hoang's CUP application was ultimately withdrawn. Id. "The record shows that many Vietnamese individuals successfully applied for poultry farm permits in Franklin County." (V2-1723).

Mr. Pham's CUP application was denied by the PC based on the Criteria to Consider for Conditional Uses and the fifteen (15) purposes outlined in the Preamble and Enactment Clause of Appellant's Zoning Regulations. (V2-671-676). The CUP application was also denied because the operation of poultry houses on Appellant's property had the potential to have a significant adverse effect on the character of adjacent land uses and the general area – both in physical characteristics and reputation. (V2-671-676). It is undisputed that Appellant's property is located near an elementary school, recreation fields, and a park – all frequently used

by children and other counties. (V2-451; 882; 886). Additionally, Mr. Pham's CUP application was identified as deficient in that it did not provide a letter of intent from his poultry integrator, pit permit, or soil erosion and sediment control permit – although these factors were not fatal to the CUP application. (V2-756). The PC's denial of the CUP application was not final or binding. (V2-671-676).

On November 29, 2016, the BOC held a work session to evaluate a planning and zoning moratorium on new poultry house CUP applications. (V2-679-684; 1712-1714). The identified reasons for the proposed moratorium were whether larger poultry farms should be categorized differently from smaller, family farms, and whether there should be additional requirements concerning location and additional buffers. Id. During the public comment period, citizens again reiterated that poultry houses should not be near schools or recreation fields due to potential harm to children and damage to the County's reputation. Id. All of this information was presented to the BOC. Id.

On December 5, 2016, the BOC held a public hearing to discuss/evaluate the three pending CUP applications and the proposed

moratorium. (V2-685-700). During the hearing, Appellant's attorney presented evidence to the BOC and the public provided commentary. (V2-685-700). During the public portion of the hearing, five citizens spoke in opposition to Mr. Pham's CUP application, and no one spoke in opposition to the other two CUP applications. (V2-685-700; 1715-1716). None of the public citizens' comments were racially charged – suggestions of animus based on the applicant's Vietnamese race are unsupported and contradicted by the lack of any opposition to the Le or Dinh (also Vietnamese/Asian) applications. Id. Appellant's attorney was also afforded the opportunity to rebut the public comments. (V2-685-700). No member of the BOC commented on any of the applicants' ethnicity and did not make any offensive comments. (V2-770).

Following review of the PC's recommendation, the City's opposition, Appellant's evidence, public comments, and based on the best interests of Appellee – including public health and other needs of neighboring areas – the BOC voted to deny Mr. Pham's CUP application, approve the two other CUP applications, and enact the moratorium through March 2017. (V2-685-700; 1715-1716). Appellee was neither required to nor

conducted an investigation or scientific study to determine the adverse effect on the adjacent. Id. Appellant failed to offer any specific evidence which could support her claim that racial bias motivated either the PC or, more importantly, the BOC, other than her unsubstantiated, conclusory allegations which were contained in her initial complaint. (V2-5-64; 1716-1717). Appellant failed to properly challenge the BOC's decision through mandamus or writ of certiorari.

I. ARGUMENT AND CITATION OF AUTHORITY

A. Under the Georgia Constitution, a plaintiff must allege a violation of the plaintiff's own legal rights to invoke the judicial power of Georgia courts.

Appellant may only assert claims alleging an injury or violation of right that she personally suffered. Federal law does not control standing requirements in state courts. Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners, 315 Ga. 39, 43 (2022) (hereinafter "SCV"). Specifically, the "constraints of Article III" do not apply to state courts. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (holding that state judiciaries are able to craft their own standing requirements which are different than federal Article III standing). "As a general rule, a litigant

has standing to challenge the constitutionality of a law only if the law has an adverse impact on **that litigant's own rights**." Black Voters Matter Fund, Inc. v. Kemp, 313 Ga. 375, 381 (2022) (emphasis in original); Ambles v. State, 259 Ga. 406 (1989) (cit. omitted). Georgia courts do not have the authority to resolve a dispute where no rights are violated, or injury suffered. SCV, 315 Ga. at 62.

When a local government owes a legal duty to its citizens, residents, taxpayers, or voters (i.e., community stakeholders), the violation of that legal duty constitutes an injury that our case law has recognized as conferring standing to those community stakeholders, even if the plaintiff at issue suffered no individualized injury. Id., at 53. But if the plaintiff is not a community stakeholder, a local government's duty to follow the law is not owed to that plaintiff; the plaintiff suffers no cognizable injury as a result of a violation of that duty; and the uninjured plaintiff cannot bring suit for that violation. Id. A plaintiff who has no estate or interest in real property has no standing because he can show no substantial interest in a zoning decision. Stuttering Found., Inc. v. Glynn Cnty., 301 Ga. 492, 496–97 (2017) (holding tenet with a usufruct

does not have a substantial interest in a zoning decision to grant it standing to challenge the decision); Miller v. Fulton County, 258 Ga. 882, 883 (1989) (a husband who did not have an ownership interest in the property owned by his wife, which was allegedly injured by the zoning decision, lacked standing to join his wife in challenging the zoning decision, and this Court rejected the husband's argument that his marital status bestowed upon him an equitable interest sufficient to establish standing).

In the present case, Appellant asserted claims that she alleged had suffered an adverse impact on her own rights. See Wasserman, 367 Ga. App. at 698. (analyzing Appellant's equal protection "class of one" claim). The Georgia Court of Appeals found that Appellant's rights were not violated under any circumstance alleged by Appellant. Id. at 694 ("After a thorough review of the record, we conclude that Wasserman lacked standing to bring an equal protection claim as a protected class on behalf of the buyer. We further conclude that Wasserman's equal protection "class of one" claim fails because she cannot establish a prima facie

showing for this claim."). As such, Appellant's rights were certainly not violated based on racial discrimination against her.

Mr. Pham was also not a "resident" of Franklin County. He was also only a party to a conditional contract; he did not have any estate or interest in the subject property. V2-630-639. As such, Mr. Pham would not have standing to assert claims based on a public right or property. SCV, 315 Ga. at 62; Glynn Cnty., 301 Ga. at 496. Appellant should not be granted any cause of action that was not available to Mr. Pham. Accordingly, under the Georgia Constitution, Appellant may only have standing to assert claims alleging injuries or a violation of rights that she suffered personally. See Kemp, 313 Ga. at 381. However, in this case, the Court of Appeals correctly found that Appellant did not suffer any violation of rights or injury by Appellee,[1] under any circumstance alleged, and, as such, Appellant lacks standing and the Court of Appeals opinion should be affirmed. Wasserman, 367 Ga. App. at 698.

[1] Appellant conceded that the equal protection claims are the only ones upon which she was proceeding; she thus has abandoned any claim arising from an alleged injury based on interference with her contractual rights. Wasserman, 367 Ga. App. at 698.

B. Appellant does not have standing under the Georgia Constitution to challenge the alleged violation of the equal protection rights of Mr. Pham.

1. This Court may apply the federal standards of third-party standing to state law claims.

Assuming, arguendo, although Georgia courts are not bound to adhere to federal standing requirements, they possess the authority to render binding judicial decisions that rest on their own interpretations of federal law. Kadish, 490 U.S. at 617. "Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that 'the Judges in every State shall be bound' by federal law." Id. (cit. omitted). Generally, that is exactly what Georgia courts have decided to do.

This Court has clearly and repeatedly applied the federal standards of standing to state law claims. See Atlanta Taxicab Owners Assn. v. City of Atlanta, 281 Ga. 342, 354 (2006) (Benham, J. concurring in part, dissenting in part) (applying the federal jurisprudence found in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)); Granite State Outdoor Advertising, Inc. v. City of Roswell, 283 Ga. 417, 418 (2008); Oasis Good

Time Emporium I, Inc. v. City of Doraville, 297 Ga. 513, 518 (2015); In Re Haney, 845 S.E.2d 380, 383 (June 19, 2020). This Court has not minimized or discounted the federal standing requirements. In Aldridge v. Ga. Hosp. & Travel Assn., 251 Ga. 234, 304 S.E.2d 708 (1983), this Court adopted the federal test on associational standing after noting that there was no Georgia case law on the issue. See Travel Assn., 251 Ga. 234.

The federal test for third-party standing was developed in Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 434–35 (2007). That Court found that to successfully establish third-party standing, a federal litigant must have suffered an "injury in fact," thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests. Feminist, 282 Ga. at 434–35 (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)). As discussed above, the Court has the authority to adopt this test.

2. The Georgia Court of Appeals was correct in finding that Appellant lacks third-party standing.

Under both Georgia and federal standards, Appellant lacks standing to assert third-party claims. Appellant merely claims that she obtained third party standing simply because she entered into a contract to sell her property to Mr. Pham contingent on the CUP application being granted.[2] Appellant claims the contract created some sort of vendor/vendee or "close" relationship. However, there is no evidence to support Appellant's conclusory arguments.

Under the Georgia Constitution, "a litigant has standing to challenge the constitutionality of a law only if the law has an adverse impact on **that litigant's own rights**." Kemp, 313 Ga. at 381. In order for third-party standing to be permitted under the federal test, three

[2] Appellant's "contractual privity" argument is superfluous as: "Wasserman admitted she never spoke to the buyer prior to the BOC's meeting and its denial of the CUP application, and that her prior communications with him were through the realtor. Thus, Wasserman only knew the buyer as a potential purchaser. Additionally, Wasserman admitted she had no involvement in applying for the CUP application, testifying the buyer applied for it, and she never even saw the application; she had no involvement in procuring a poultry integrator; and she did not even realize the sale of her property was contingent upon approval of the CUP application." Wasserman, 367 Ga. App. at 697.

factors must be satisfied: (1) the litigant must have suffered an "injury in fact" providing an interest in the outcome of the dispute; (2) close relation to the third party; and, (3) there must exist some hindrance to the third party's ability to protect his or her own interests. Feminist, 282 Ga. at 434-436.

As the Georgia Court of Appeals correctly found: (1) Appellant cannot show that she had a close relationship to Mr. Pham such that she could represent his interests/no agency relationship exists; (2) any alleged injury based on loss of the sale of the property is a claim separate from, and incidental to, one Mr. Pham could assert for racial discrimination based on a protected class; and, (3) Appellant cannot show that Mr. Pham was somehow unable to protect his own interests and bring his own Equal Protection claim as the person allegedly discriminated against. Wasserman, 367 Ga. App. at 697. As such, Mr. Pham is readily identifiable and available and is "uniquely positioned" to vindicate his rights and of future Vietnamese individuals and third-party standing was properly denied as to Appellant. Id.; Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir. 1994).

Accordingly, Appellant has not provided any evidence in the record that the Georgia Court of Appeals' analysis was flawed or that error exists in the record. Wasserman, 367 Ga. App. at 697–98 ("Wasserman lacks standing to pursue an equal protection claim as a protected class on behalf of the buyer, and the trial court erred in denying the BOC's motion as to this issue."). Accordingly, this Honorable Court should affirm the court of appeals' rulings and deny this appeal. See Henderson v. State, 304 Ga. 733 (2018) (appellant not entitled to review of claims supported by vague assertions of error).

3. Under the Georgia Constitution, Appellant's Equal Protection claim is barred by sovereign immunity.

To the extent Appellant's claims arguably fall within the protections afforded by the Georgia Constitution, Appellant's claims against Appellee are barred by sovereign immunity. The doctrine of sovereign immunity extends generally to suits against the "State, its departments and agencies, and its officers in their official capacities," including suits arising from official acts that are alleged to be unconstitutional. Lathrop v. Deal, 301 Ga. 408, 409 (2017). The

extension of sovereign immunity to "the State and its departments and agencies" includes counties. Id. at 421; See Toombs Cty., Georgia v. O'Neal, 254 Ga. 390 (1985). Sovereign immunity can only be waived by a legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver. Id. at 425.

In Lathrop, physicians brought suit against twenty state officers in their official capacities, claiming a violation of the Due Process and Equal Protection Clauses of the State Constitution. Id. at 410-11. The physicians sought an injunction and declaratory judgment that certain provisions of a bill that was to go into effect which limited the circumstances under which abortions may be performed violated the State Constitution. Id. at 408. The Court held that sovereign immunity acts to bar suit against a State and its departments and agencies for official acts that were alleged to be unconstitutional. Id. Therefore, unless the State and its departments and agencies consented to suit, suits claiming a violation of the Due Process and Equal Protection Clauses are barred by the doctrine of sovereign immunity. Id. Consent to suit can only be given by the Constitution itself, or by an act of the

General Assembly. Id.; See SJN Properties, LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 799 (2015).

This is the real issue underlying Appellant's claims. Appellant failed to properly assert/maintain a mandamus claim or seek a writ of certiorari of the BOC's decision to the trial court. As such, she was left with an Equal Protection claim without evidence to support it.

In the present matter, Appellant claims a violation of her Equal Protection rights. It is clear that such state law claims are barred by sovereign immunity. Lathrop, 301 Ga. 408. Appellee has certainly not consented to suit, and Appellant has not alleged that any consent exists in the Constitution itself or by an act of the General Assembly. Accordingly, Appellant's state law Constitutional claims are barred by sovereign immunity.

II. CONCLUSION

WHEREFORE, for all the reasons herein, Franklin County respectfully requests that this Court affirm the court of appeals opinion reversing the trial court for the reasons stated above. Injury/violation of rights is a clear requirement for standing under Georgia law and, because

Plaintiff cannot show so here as it relates to her racial discrimination equal protection claim, she does not have standing. To remove the injury requirement would create a public policy crisis which would effectively flood the court systems, bankrupt municipalities, and undermine the clear public good served by requiring a person to show some particularized, direct injury as a basis for suit.

This 3rd day of September, 2024.

Respectfully submitted,[3]

BUCKLEY CHRISTOPHER & HENSEL, P.C.

/s/ Timothy J. Buckley III

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[3] **This submission does not exceed the word limitation imposed by Rule 20**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this the 3rd day of September, 2024, served the foregoing BRIEF OF APPELLEE FRANKLIN COUNTY, GEORGIA upon all parties to this matter via USPS First Class Mail with proper postage addresses as follows:

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