

Russell M Adams
CLERK SUPERIOR COURT

**IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA**

CENTER FOR A SUSTAINABLE)
COAST and JEFF KILGORE,)
)
Plaintiffs,)
)
v.)
)
GLYNN COUNTY, GEORGIA, a political)
Subdivision of the State of Georgia and)
COMMISSIONERS, SAMMY)
TOSTENSEN, CAP FENDIG, WAYNE)
NEAL, BILL BRUNSON, ALLEN)
BOOKER, DAVID O'QUINN, WALTER)
RAFOLSKI, Individually, in their official)
capacities, and CHURCH WARDENS AND)
VESTRYMEN OF THE EPISCOPAL)
CHURCH OF THE TOWN OF FREDERICA,)
CALLED CHRIST CHURCH,)
)
Defendants.)

CIVIL ACTION NO. CE21-01136

**DEFENDANT CHRIST CHURCH'S MOTION AND BRIEF IN SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendant CHRIST CHURCH (“Defendant” or “Christ Church”) moves this Court for dismissal of Plaintiffs’ Second Amended Complaint and submits this Brief in Support of its Motion to Dismiss Plaintiffs’ Second Amended Complaint, with prejudice, pursuant to O.C.G.A. § 9-11-12(b)(6), for failure to state a claim upon which relief can be granted. Christ Church reincorporates and reasserts the grounds asserted in its prior motion to dismiss briefing filed in this Court on October 19, 2021. In further support, Defendant shows this Honorable Court as follows:

I. INTRODUCTION

On November 5, 2021, Plaintiffs filed their Second Amended Complaint (the “Second Amended Complaint”) against Glynn County, Georgia, Glynn County Board of Commissioners “individually, in their official capacities,” and Christ Church asserting additional claims against Glynn County. In the span of six weeks, Plaintiffs have now filed three complaints. Specifically, in this third complaint, Plaintiffs bring a new allegation that Glynn County violated the Establishment Clause in the First Amendment to the U.S.

Constitution and Article 1, Section 2, Paragraph VII of the Georgia Constitution based on Glynn County's Frederica Road Realignment Project and its real property exchange with Christ Church, which, according to Plaintiffs, constitute impermissible financial aid to a religious institution. [Pls.' 2nd Am. Compl. (Count 1) ¶¶ 7-38.].

In Count 2, Plaintiffs re-allege their previous claim, which was previously rejected by this Court during the October 25, 2021 hearing, that Glynn County's property exchange with Christ Church violated O.C.G.A. § 36-9-3(a). [Pls.' 2nd Am. Compl. (Count 2) ¶¶ 39-66; see also Pls.' Am. Compl. (Count 1) ¶¶ 48-52.]. Under this Count 2, Plaintiffs now attempt to join Christ Church pursuant to O.C.G.A. § 9-11-19, arguing Christ Church is an indispensable party to Plaintiffs' claims for declaratory relief against Glynn County related to the property exchange because Christ Church is a party to that agreement. [Pls.' Resp. to Def. Christ Church's Mot. to Dismiss p.3.].

Lastly, Plaintiffs again claim that pursuant to the Glynn County Tree Ordinance (see Glynn Cnty., Ga. Code of Ordinances Art. VIII, § 2-16-301 *et seq.*) County Commissioners allegedly have a non-discretionary obligation to nominate and appoint members to serve on the Tree Board, and because the Commissioners have failed to do so, Plaintiffs seek a writ of mandamus compelling the Commissioners to nominate and appoint seven members to the Glynn County Tree Board. [Pls.' 2nd Am. Compl. (Count 3) ¶¶ 67-85; see also Pls.' Am. Compl. (Count 2) ¶¶ 53-63; Pls.' Compl. (Count 2) ¶¶ 39-47.].

Plaintiffs' claims seek declaratory judgment (Count I and Count II) and mandamus (Count III). In their Prayer for Relief Plaintiffs again ask this Court to "grant injunctive relief to prevent further work on the Frederica Road Realignment Project during the pendency of this case" and to "award attorney's fees and litigation expenses to Plaintiffs under 42 U.S.C. § 1988." [Pls.' 2nd Am. Compl. p.14(e)-(f).].

Christ Church moves this Court to dismiss Plaintiffs' Second Amended Complaint, as it fails to state a cognizable claim related to the property exchange against Glynn County that requires Christ Church be joined as an indispensable party pursuant to O.C.G.A. § 9-11-19.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The standards for granting a motion to dismiss have been met.

Under O.C.G.A. § 9-11-12(b)(6), a complaint is due to be dismissed if it “[f]ail[s] to state a claim upon which relief can be granted.” O.C.G.A. § 9-11-12(b)(6). Courts grant a motion to dismiss under O.C.G.A. § 9-11-12(b)(6) when: the claimant fails to show it is entitled to some form of legal relief under the allegations in the complaint; and the movant establishes that the plaintiff will not be able to introduce evidence within the framework of the complaint sufficient to state a cause of action on which relief can be granted. See Norman v. Xytex Corp., 310 Ga. 127, 130-31 (2020) and Collins v. Athens Orthopedic Clinic, P.A., 307 Ga. 555, 560 (2019); cf. Rossville Fed. Sav. & Loan Ass’n v. Ins. Co. of N. Am., 121 Ga. App. 435, 438-39 (1970) (A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.). The allegations in Plaintiffs’ Second Amended Complaint do not support any legally cognizable claims against Defendant Christ Church and should be dismissed.¹

B. All counts of Plaintiffs’ Second Amended Complaint fail as a matter of law.

This Court need not reach the substantive merits of Plaintiffs’ constitutional claims because other non-constitutional bases exist for resolving this case by dismissal. See Ga. Bd. of Dentistry v. Brooks, 273 Ga. 852 (2001) (courts should not decide constitutional issues if there is a non-constitutional basis for resolving the case); Bd. of Tax Assessors v. Tom’s Food, 264 Ga. 309, 310 (1994) (“It is well established that this court will never decide a constitutional question if the decision of the case presented can be made upon other grounds.”). Should this Court reach the merits of the Plaintiffs’ claims, however, this Second Amended Complaint also fails on the merits as a matter of law for the reasons set forth below.

¹ Christ Church incorporates and asserts the grounds for dismissal regarding standing as asserted in Glynn County’s Motion to Dismiss Plaintiffs’ Amended Complaint filed in this Court on October 22, 2021, as if the same had been fully set forth herein.

C. Plaintiffs' constitutional claims fail as a matter of law and should be dismissed.

Plaintiffs seek a declaration that Glynn County provided financial aid to Christ Church by undertaking the Frederica Road Realignment Project, and the land exchange, and that this financial aid was in violation of the Establishment Clause in the First Amendment to the U.S. Constitution and in violation of Article I, Section 2, Paragraph VII of the Georgia Constitution. [Pls.' 2nd Am. Compl. p.14(b)].

1. Federal Establishment Clause (U.S. Const. amend. I)

The Supreme Court “has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is ‘to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.’” Lynch v. Donnelly, 465 U.S. 668, 672 (1984) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)). To determine whether there has been a violation of the Establishment Clause, “[r]ather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith . . . the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.” Lynch, 465 U.S. at 687 (citing Walz v. Tax Comm’n of N.Y.C., 397 U.S. 664, 668-69 (1970)). The Supreme Court has long held that a government act does not violate the Establishment Clause if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement of church and state. Lemon, 403 U.S. at 612-13 (1971); Aguilar v. Felton, 473 U.S. 402, 412-13 (1985) (entanglement inquiry now part of Lemon’s “effects” prong).

The County’s undertaking of the Frederica Road Realignment Project, and its land exchange with Christ Church satisfies these requirements as a matter of law. First, as was brought forth at the prior hearing, the project and the land exchange each has the secular purpose of “improve[ing] the safety and historic preservation for the citizens of Glynn County, Georgia.” [Agreement p.1.]. Second, the principal or primary effect of both the project and land exchange neither advances nor inhibits religion. Both the County and Christ Church acknowledge that it is in the best interest of the community to shift the roadway from County property to Church property. [Agreement p.1.]. In fact, at the October 25, 2021 hearing, Plaintiff Kilgore conceded, as any rational person would, that the road improvement project would improve safety.

Third, the land exchange agreement which effectuates the project and property conveyances does not constitute County sponsorship, financial support, or active involvement in Christ Church's affairs, and no reasonable observer aware of the circumstances of the sale could conclude that it constitutes the County's endorsement of Christ Church.

Where Glynn County has acted with a secular purpose and in a manner that does not primarily advance, endorse, or foster an excessive entanglement with religion, the Establishment Clause is not implicated. The challenged realignment project and land exchange meets all of those requirements. See Lemon, 403 U.S. 602.

2. State Establishment Clause (Ga. Const. Art. I, § 2, ¶ VII)

Plaintiffs similarly allege that the realignment project and land exchange violates Georgia's Establishment Clause which provides: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." Ga. Const. Art. I, § 2, ¶ VII. Under this provision, neither the state nor any of its political subdivisions, such as Glynn County, can own or control, or give monetary aid, to a church or religious institution.

Plaintiffs' claim under Article I, Section II, Paragraph VII of the Georgia Constitution, regarding a prohibition against government aid to any church, fails for the same reasons as the federal claim. Whether this provision is interpreted in a manner similar to the federal constitutional claim, or in a more restrictive manner, if the expenditure of funds on the realignment project and land exchange does not in fact serve to aid religion, the Court's inquiry is at an end. Although there is little case law interpreting this section, courts have approved practices which arguably provide much greater assistance to religious causes than the facially neutral County conduct at issue here. For instance, in Birdine v. Moreland the court approved the practice of the Georgia Department of Transportation providing religious grave markers at the request of descendants. Birdine v. Moreland, 579 F. Supp. 412 (N.D. Ga. 1983); see also Mayor &c. of Savannah v. Richter, 160 Ga. 177 (1925) (approving "respect for Creator" portion of character education curriculum in Georgia).

Here, the public funds used to effectuate the land exchange and undertake the realignment project were expended by the County for the purpose of improving public safety, infrastructure, historic preservation, and aesthetics. These funds were not used by the County for the purpose of furthering Christ Church, and thus, do not constitute financial aid in violation of Georgia's Establishment Clause. For these reasons as well as those stated for the federal claim, Plaintiffs claim under Article I, Section II, Paragraph VII of the Georgia Constitution fails and should be dismissed.

D. Plaintiffs' requests for declaratory relief as to the land exchange between Glynn County and Christ Church and related constitutional claims fail as a matter of law.

In addition to the issues previously addressed herein, this Court should dismiss Plaintiffs' lawsuit because declaratory judgment is not an appropriate remedy to address matters that have already occurred. The Declaratory Judgment Act is designed "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." See O.C.G.A. § 9-4-1. The proper scope of declaratory judgment is to adjudge those rights among parties upon which their *future conduct* depends." SJN Props., LLC v. Fulton Cnty. Bd. of Assessors, 296 Ga. 793, 802 (2015) (emphasis supplied). A declaratory judgment action cannot serve as a vehicle to declare the legality of past conduct. Id.

Here, Plaintiffs seek a declaration that the land exchange agreement and ultimate conveyance, both of which have already occurred, was invalid and ask this Court to cancel and nullify the agreement and conveyances. Plaintiffs also seek a declaration that the land exchange and realignment project violated the U.S. Constitution and Georgia Constitution. Each request seeks to have this Court invalidate a past action—the approval of the Frederica Road Project and the 2020 exchange of property between Glynn County and Christ Church. This is precisely the type of past conduct that cannot serve as a basis for a declaratory judgment action. See SJN Props., LLC, 296 Ga. 802. Plaintiffs' claims for declaratory relief should be dismissed based on this clear law alone.

Plaintiffs again recite nearly the exact same allegations they previously pled, attempting to assert the same arguments that this Court flatly rejected during the October 25, 2021 hearing. At that hearing, Plaintiffs presented witness testimony and evidence related to the land exchange, but failed to show any

basis to support their claim that the exchange was illegal or that the appraisals were miscalculated. Nothing has changed between that hearing and the present date. The facts are the same, and Plaintiffs reasserted claims are once again insufficient and without legal basis.

Because Plaintiffs have not stated any legally cognizable claim related to the property exchange, Plaintiffs have failed to state a claim against Christ Church upon which relief can be granted. See O.C.G.A. § 9-11-12(b)(6). Accordingly, Plaintiffs' Second Amended Complaint should be dismissed with prejudice.

III. CONCLUSION

For the foregoing reasons, Defendant Christ Church respectfully requests that the Court enter an Order dismissing Plaintiffs' Second Amended Complaint, with prejudice. Defendant further requests any such other relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED, this 6th day of December, 2021.

GILBERT, HARRELL,
SUMERFORD & MARTIN, P.C.

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CERTIFICATE OF SERVICE

I, Mark D. Johnson, do hereby certify that we have this day served a true and correct copy of the above and foregoing **DEFENDANT CHRIST CHURCH'S MOTION AND BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT** by causing a copy of the same to be placed in the United States mail, postage prepaid, to:

Susan B. Shaw
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120 West Trinity Place
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*Attorneys for Plaintiffs Center for a
Sustainable Coast & Jeff Kilgore*

This 6th day of December, 2021.

/s/ Mark D. Johnson _____

Mark D. Johnson