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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes III, Master-In-Equity

Civil Action No. 2021-CP-07-1507
Appellate Case No. 2022-000681

Beaufort County, Appellant,

v.

Adams Outdoor Advertising Limited Partnership and Bo Hodges, Respondents.

APPELLANT'S INITIAL BRIEF

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Preliminary Statement

Adams Outdoor Limited Partnership ("Adams") and its local real estate manager, Bo Hodges, wanted to replace the rotting wooden structural poles supporting two decades-old, nonconforming billboards on Trask Parkway so that they could reap profits from those billboards for another 50 years. And they determined that Beaufort County's Community Development Code ("CDC")—which prohibits rebuilding nonconforming billboards and prohibits *any* billboard repairs without County authorization—would not stop them.

Hodges told the County that Adams intended to replace the billboards' structural supports, and when staff responded that it must review and approve any work, Adams ignored them and started (on a weekend) to tear down and rebuild the signs. When the County Administrator went to the site on Saturday and told the supervisor to stop the work, Adams and its lawyer essentially told him to pound sand. On Monday, the County cited Adams and Hodges for the violations.

Three months later, the magistrate's court held a trial. Adams and Hodges were represented by counsel, presented witnesses and evidence, and cross-examined the County's witnesses. In its verdict, the magistrate court held that the CDC "clearly prohibits restoration of signs that have become structurally unsound." (Verdict at 5.) That court also found that "[i]t is clear that the Defendants had actual notice of the requirement that the County approve any work undertaken by them to the signs in question and that the Defendants chose to perform the work in spite of their failure to obtain proper approvals" from the County. (*Id.*)

The common pleas court reversed. Without disputing Adams's and Hodges's actual notice, and blatant disregard, of the CDC's prohibitions, the court held that the failure to send them a warning notice of violation or to include certain details on the citations offended due process and required the conclusion that they "are not guilty of the charged violations."

Statement of Issues on Appeal

In deciding this appeal, the Court need only address the following issue:

Actual notice. A due process claim based on lack of notice fails when one engages in conduct that he actually knows the law prohibits. It is undisputed that Adams Outdoor and Hodges replaced the rotting structural supports of two nonconforming billboards on Trask Parkway, despite having actual notice that Beaufort County's Community Development Code prohibited both that reconstruction and any billboard repair without County authorization. Do their claims based on lack of notice fail?

Statement of the Case

The County issued citations to Adams and Hodges on Monday, April 12, 2021. The cause was tried on July 14, and the magistrate issued her verdict the following week. The magistrate held a sentencing hearing on August 11, and imposed a fine of $1,087.50 for each citation on August 13. Adams and Hodges filed their notice of appeal on August 20. On August 24, the magistrate's court filed the return in the common pleas court.

On October 22, 2021, the County filed a memorandum of law opposing appellants' appeal arguments. Adams and Hodges filed their appeal brief on October 26, and the Court of Common Pleas conducted a hearing via video conference on October 27. The County filed a post-hearing brief on November 8, and the court held a subsequent hearing via teleconference on November 24. The parties submitted proposed orders on January 18, 2022.

The common pleas court issued its Order on Appeal on April 22. Beaufort County timely served and filed its Notice of Appeal to this Court on May 20, 2022.

Statement of the Facts

A. Relevant Community Development Code Provisions

Beaufort County's zoning regulations are embodied in the CDC, which is divided into several articles. Article 9 (Enforcement) explains in Division 9.1 (Purpose) that the article "sets forth the remedies and penalties that apply to violations of this Development Code." (DX-3[1] at 1, § 9.1.10.). That section explains that Article 9's provisions are "intended to encourage" the "voluntary correction of violations, *where possible*." (*Id.* (emphasis added).)

Yet under Division 9.5 (Remedies and Penalties), the CDC is clear that "[t]he remedies provided for violations of this Development Code, *whether civil or criminal* may be cumulative and in addition to any other remedy provided by law, and *may be exercised in any order*." (*Id.* at 6, § 9.5.40 (emphasis added).)

That division specifies in § 9.5.10 that: "Any person violating this Development Code shall be guilty of a misdemeanor and, upon conviction, shall pay such penalties as the court may provide, as prescribed by State law, not to exceed $500.00 or 30 days imprisonment for each violation." (*Id.* at 5, § 9.5.10.)

Defining a violation, § 9.2.20 (Violations Generally) states: "Any failure to comply with a standard, requirement, prohibition, or limitation imposed by this Development Code . . . shall constitute a violation of this Development Code punishable as provided in this Article. (*Id.*)

Section 9.2.30 (Specific Violations) outlines particular violations of the CDC:

It shall be a violation of this Development Code to do any of the following:

A. Develop land or a structure without first obtaining the appropriate permits or development approvals.

[1] At the trial, the County's exhibits were labeled with the prefix "PX-" and Adams's and Hodges's exhibits were labeled with the prefix "DX-".

***

J. Install, create, *erect, alter, or maintain any sign without first obtaining the appropriate permits* or development approvals.

***

L. Create, expand, replace, or *change any nonconformity* except in compliance with this Development Code.

(DX-3 at 1-12, § 9.2.30 (emphasis added).)

Under § 9.3.10 (Responsible Persons), "[a]ny person who violates this Development Code shall be subject to the remedies and penalties set forth in this article." (DX-3 at 2-3, § 9.3.10.)

Section 9.4.10 specifies that "[t]he County Administrator or [his or her] designee shall be responsible for enforcing the provisions of this Development Code." (*Id.* at 3, § 9.4.10.)

Consistent with the CDC's stated purpose of encouraging voluntary compliance, § 9.4.40 provides a mechanism to issue "a warning notice of violation." (*Id.*, § 9.4.40.) Section 9.4.50 provides for issuance of a Uniform Summons Ticket to a person given a warning notice of violation who fails to correct the violation. (*Id.* at 4, § 9.4.50.)

Nothing in the CDC, however, *prohibits* issuance of a Uniform Summons Ticket to a person violating the CDC, even if a warning notice of violation has not been issued. Indeed, after stating the general criminal penalty applicable to "[a]ny person violating this Development Code," (*id.* at 5, § 9.5.10), the next sentence of the CDC provides: "In addition, the County may use any combination of the following enforcement actions, remedies, and penalties *in any particular order* to correct, stop, abate or enjoin a violation of this Development Code." (*Id.*, § 9.5.20 (emphasis added).) The final sentence of Article 9 specifies that remedies and penalties, "whether civil or criminal," may be exercised "in any order." (*Id.*, § 9.5.40.)

Article 5, Division 5.6 (Sign Standards) contains the CDC's sign regulations, including those governing Off-Premises Signs, commonly known as billboards. (PX-7.) For decades,

Beaufort County has prohibited new billboards. (*Id*. at 1, § 5.6.50(A).) Billboards that preexisted the prohibition were rendered nonconforming uses, with the expectation that as they deteriorate over time they will be eliminated—not rebuilt.

Adams and Hodges were cited for violating § 5.6.50(E), which clearly prohibits any work that will "improve the structural integrity of the billboard structure." (PX-7 at 1-2, 5.6.50(E)(2).) The CDC's prohibitions in this regard are unambiguous:

- "*Any structural* or other substantive *maintenance to a sign shall be deemed an abandonment of the sign*, shall render the prior permit void and shall result in removal of the sign without compensation." (PX-7 at 1, CDC § 5.6.50(E)(2) (emphasis added).)

- "Extension, enlargement, *replacement, rebuilding,* adding lights to an un-illuminated sign, changing the height of the sign above ground, *or re-erection of the sign are prohibited*." (PX-7 at 2, CDC § 5.6.50(E)(3) (emphasis added).)

Even if a billboard face suffers damage in excess of normal wear and tear (e.g., damage from a storm event), *no work* can be done to that sign without "(a) Notifying the Code Enforcement Department in writing of the extent of the damage" and various details about the damage and the work to be done, and "(b) *Receiving written notice* from the Code Enforcement Department *authorizing the repair work*." (PX-7 at 2, § 5.6.50(E)(4)(a), (b) (emphasis added).)

Failure to obtain the County's written authorization terminates any lawful, nonconforming use of the sign: "*Any such sign that is repaired without the department's authorization shall be removed by the County*, and the costs and expenses of such removal shall be paid by that person or entity making the unauthorized repairs." (*Id*., § 5.6.50(E)(4)(c) (emphasis added).)

Finally, while the State of South Carolina, through the Highway Advertising Control Act ("HACA"), regulates billboards that are along highways, "Nothing in this [act] abrogates or affects the provisions of a lawful ordinance, regulation, or resolution which is more restrictive than the provisions of" the Act, such as the Beaufort County CDC. S.C. Code Ann. § 57-25-220.

B. Chronology of Events

April 6-12. On April 6, 2021, Hodges emailed County Code Enforcement Director Audra Antonacci a letter telling her that "Adams Outdoor Advertising *will be* performing repair work on two sign locations,"[2] specifying the locations as the signs under permits "06-07-740766 and 06-07-740884 . . . ." (DX-1; DX-2 at 1 (emphasis added).) Hodges enclosed letters and permits from SCDOT, which further identified the signs as being on Trask Parkway (US-21) between SC-116 and SC-280, specifically at milepost 20.707 and milepost 20.725. (DX-2 at 4, 6.)

The next day, Antonacci emailed Hodges back to explain that she had spoken with interim County Administrator Eric Greenway, who advised her "that prior to any repairs being done Zoning will need to review the billboards and give approval for any repairs." (DX-1.) She also asked Hodges: "[W]hat storm are you referring to that damaged the billboards?" (*Id*.) She then instructed Hodges to contact Hillary Austin, the Zoning Administrator, for any approvals. (*Id*.)

Hodges forwarded his correspondence to Austin on April 7 as a "notification," but did not request any approvals. (DX-5.) Austin emailed him back the same day, asking for pictures of the signs as they currently stood, so that she could review them before making any decision. (DX-5.)

Hodges never sent pictures or sought the County's approval. Rather, he was defiant in ignoring the County's ordinances: "I was not asking for approval. I didn't need approval." (Tr. 144:22-23.) But he admits that he understood Austin's and Antonacci's emails. (Tr. 148:3-6.)

On Saturday, April 10, subcontractors for Adams began tearing down the billboards and replacing their structural supports. Contrary to the CDC and the County's explicit instructions,

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[2] Hodges stated that SCDOT approved Adams's Storm Damage Applications to repair "damage suffered to both sign structures due to wind" (DX-2 at 1), but Hodges could not identify any wind event that caused damage. (Tr. 138:1-7.) Photos of the billboards, however, showed wooden structural poles rotting at their base from groundwater; these are the structural supports that Adams ultimately replaced. (PX-2 at 8-19.)

Adams removed the old sign poles, erected brand new 35-ft. poles, and re-installed the sign faces on the new poles. (PX-2 at 8-19; PX-1 at 11-14.)

That evening, interim County Administrator Eric Greenway was driving back into town between 6:00 and 7:00, and saw the crew rebuilding and re-erecting the decades-old billboards: "I saw cranes parked on the side of 21, in the right of way of 21, lifting poles into position in front of the McDonald's sign, and I knew that was not appropriate underneath the Community Development Code." (Tr. 104:13-20.) He stopped at the site and asked the project superintendent to show him any documents "that he had authorizing that work by the County and a copy of his business license to do business in Beaufort County. (Tr. 104:20-105:2.) But the superintendent could produce neither. (Tr. 105:2.) Greenway informed the superintendent that his letter from SCDOT "is not a local permit," and asked him to get Hodges on the phone. (Tr. 105:5-7.)

The superintendent could not reach Hodges, and tried to call a representative named "Romera," [*sic*] but he would not speak with Greenway while he was on site. (Tr. 105:18-13.)

Later that evening, Greenway emailed Hodges, copying other local Adams managers, Liz Mitchum and Joseph Romeo, explaining that he observed Adams "in the process of completely rebuilding two signs, located on both sides of Hwy. 21, near the address of 3589." (PX-5 at 3.) Greenway explained that the County "has issued no approvals for Adams to conduct this work and will not issue approval for the complete rebuild of these signs since doing so will violate the Community Development Code." (*Id*.) Greenway reiterated that a SCDOT letter "is not a local permit nor proper authorization to reconstruct an outdoor advertising display." (*Id*.) He stated:

> My attempts, through the onsite contractor, at getting Mr. Romero to stop the work failed repeatedly as did my attempted phone call to you [Hodges] and Ms. Mitchum so I am sending this email to you ordering you to immediately cease and desist from any additional work on these two sites until we have had a chance to discuss this matter and decide a proper course for further action.

(*Id.*)

Greenway also forwarded his email to Hodges, Mitchum, and Romeo to Ben Armitage, whom Greenway understood to be Hodges's supervisor. (PX-5 at 2-3; Tr. 114:13-16.) In his forwarding email to Armitage, the County Administrator wrote:

> Ben,
>
> I thought you should be aware of the below. This type of thing is very atypical of Adams Outdoor and I was honestly shocked at the blatant disregard for our approval process and my request for the work to stop. In the future, when I ask for work to stop it is probably in everyone's best interest for it to stop until we can resolve the issue and cooperate on a solution. Mr. Romero [*sic*] refused to talk to me this evening after me discovering that your Beaufort staff appears to have started work without proper permits.
>
> Thanks,
>
> Eric Greenway

(PX-5 at 2-3.)

Neither Hodges, Mitchum, Romeo, or Armitage responded to the County Administrator.

Instead, Adams's general counsel, Richard Zecchino, responded at 8:44 a.m. on Sunday morning, April 11. (PX-5 at 1-2.) After explaining that Greenway's emails had been forwarded to him for a response, Zecchino expressed his view that state law (the HACA) displaced local law (the CDC) as to these two billboards, and that the CDC is invalid. (*Id*.)

Although the first mention of construction work on the two billboards had first been mentioned to the County only five days prior, on April 6, Zecchino stated: "Rather than wait for continued delays from Beaufort County—which were obviously done with the hope to find a way around SCDOT's determination, or with some other hope to block what should be a straightforward approval—Adams performed the repairs approved by SCDOT." (*Id*. at 2.)

Zecchino—fully aware of the two billboards at issue and the County's instructions to obtain review and approval for any construction work under the CDC—then asserted:

> Your email below is not a proper "stop work order," and has no legal effect. Should you take any action to prohibit Adams from doing what it is legally entitled to do with respect to this work, all you will be doing is inviting a lawsuit by Adams against the County.
>
> *Adams intends to complete the work approved by SCDOT today*.

(PX-5 at 2 (emphasis added).)

The County Administrator replied to Zecchino at 8:53 a.m. Sunday morning, and again asked Adams "to hold off on any more construction until this issue can be appropriately resolved." (PX-5 at 1.)

Adams refused, and completed reconstructing and re-erecting the billboards on Sunday.

By the time that Greenway met with County staff on Monday morning, April 12, it was clear that obtaining Adams's voluntary compliance with the CDC was *not* possible.

By then, Hodges and Adams had: (1) told the County about the reconstruction work that it would be doing on the two specifically identified billboards, (2) refused to respond to the County's request for pictures, and refused to seek the required approval from the County, (3) proceeded to tear down and reconstruct the billboards on a weekend (when County staff are not working), (4) repeatedly refused to stop the illegal construction work when the Administrator asked Adams to do so at the construction site on Saturday, via email on Saturday, and again via email on Sunday, and (5) through its general counsel told the Administrator to stand down and threatened the County with a lawsuit, all while promising to finish the unpermitted construction work in derogation of the CDC's requirements and the County's explicit instructions.

So on April 12, the County enforced the CDC's regulations. The County issued a stop work order and uniform ordinance summonses (citations), together, to both Adams and Hodges via certified mail. (PX-6; Tr. 161:9-25.) The stop work order cited, and included a copy of, CDC § 5.6.50(E) (Maintenance Standards for Off-Premises Signs). (PX-6 at 1-1.) It further stated that

the unpermitted work was done "to billboards 7036/74062 and 74065/70091 located on Trask Parkway in Beaufort County," identifying the two signs by the ID tag numbers assigned to each face of the double-sided billboards. (PX-6 at 1; Tr. 13:9-19.)

The citations that were served along with the stop work order also cited Adams and Hodges for violating the off-premises sign restrictions in CDC § 5.6.50(E) as to the two billboards on Trask Parkway. (*Id*. at 4.) The citations identified the violation date as April 10, 2021—the date that the County Administrator stopped at the Trask Parkway site where Adams was reconstructing the two billboards referenced in Bo Hodges's April 6, 2021 correspondence to the County. (PX-6 at 1-4.) The stop work order, CDC § 5.6.50(E), and the citations were delivered to Adams on April 15, 2021 (Tr. 148:7-20; Tr. 161:9-162:4.)

Magistrate Court Trial and Verdict. At trial on the citations, Adams and Hodges were represented by counsel (Mr. Williams), presented evidence and testimony, and cross-examined County staff. (Tr. 7:4-185:4.) Antonacci, Greenway, and Hodges all testified. (Tr. 57:17-165:17.) Adams and Hodges did not dispute that they completed construction work on April 10-11, without County approval, on the two billboards that Hodges had written staff about on April 6.

Instead, Adams claimed that, while it was blatantly violating the CDC over the weekend, the County was required to first send Adams a warning notice of violation (e.g., via U.S. certified mail)—and that absent that futile act, the citations were invalid. (Tr. 176:19-25.)

Code Enforcement Director Antonacci, however, confirmed that "the purpose of the warning system" is "simply to give someone who may not know that they're engaged in a violation" the instruction "that they need to abstain until they get the proper approval" where that is possible. (Tr. 95:7-13.) This was not such a case, and Antonacci confirmed that blatant CDC violators are issued citations when the County's verbal directives are ignored. (Tr. 95:14-23.)

The magistrate court issued its Verdict on July 23, 2021. Based on the evidence presented at trial, the magistrate court found that the Defendants, Hodges and Adams, proceeded with the work to the two billboards, which "included replacing four structural poles which held up one sign and replacing six structural poles for the other sign." (Verdict at 4.)

Additionally, based on Hodges's testimony, the new poles were not in "the same spot as the original ones because there would have been cement footings in the ground where the original poles were located and it was impossible to put them back in the same location from which they were removed." (*Id*. at 4-5.)

While the summonses / citations themselves did not give the exact address or legal description of the property, the magistrate court found that "this failure is harmless in that the Defendants were served immediately after they had clear notice and warning that the signs at issue were the violation." (*Id*. at 4.) This clear notice was established by "[t]he communication between the parties (Defendant Hodges, other employees of Adams Outdoor Advertising, and administrative staff of Beaufort County) which began with Defendant Hodges' email to Ms. Antonacci on April 6, 2021, and continued until Mr. Zecchino's email to Mr. Greenway on the morning of April 11, 2021." (*Id*.) These extensive back-and-forth communications about the two signs that Hodges wrote about on April 6 "clearly show that the Defendants received actual notice of the violation and had actual knowledge of the location of the violation. The County's failure to adhere to the formal notice requirements were harmless errors on its part." (*Id*.)

The magistrate court also held that the ordinance at issue is not ambiguous, but clear in stating the prohibitions that Adams and Hodges violated:

> The Beaufort County Code clearly prohibits restoration of signs that have become structurally unsound. It states that any structural or other substantive maintenance to a sign shall be deemed an abandonment of the sign and it prohibits "replacement, rebuilding, . . . or re-erection of a sign." The code does allow for repairs to damage in

> excess of normal wear and tear, but only upon notification to the Code Enforcement Department of the damage and upon receipt of written notice from the Code Enforcement Department authorizing the repairs.

(Verdict at 5.)

> The magistrate Court found that:
>
> *It is clear that the Defendants had actual notice of the requirement that the county approve any work undertaken by them to the signs in question and that the Defendants chose to perform the work in spite of their failure to obtain the proper approvals from Beaufort County*.
>
> I therefore find the Defendants guilty of the two violations of the Beaufort County Development Code section 5.6.50E.

(Verdict at 5 (emphasis added).)

At the sentencing hearing, counsel (Mr. Tibbals) for Adams and Hodges argued due process for the first time, as due process had not been mentioned at all during the trial. The Court later imposed only fines for the Defendants' violations. (Notice of Sentence.)

Common Pleas Court Decision. After hearing argument on the record established in the magistrate's court, the common pleas court *did not disturb* the trial court's findings that:

- The CDC's prohibition against replacing the structural supports of billboards is clear, that is, unambiguous;
- "Defendants received actual notice of the violation and had actual knowledge of the location of the violation." (Verdict at 4); and
- "Defendants had actual notice of the requirement that the county approve any work undertaken by them to the signs in question and that the Defendants chose to perform the work in spite of their failure to obtain the proper approvals." (*Id*. at 5.)

(*See* Order on Appeal at 11 ("The Court declines to rule on, or does not find merit in, Appellants' other grounds for appeal not specifically addressed herein.").) Nevertheless, the lower court reversed, and announced that "Appellants are not guilty of the charged violations." (*Id*.)

It ruled that Adams and Hodges have "the right to receive a warning notice," (*id*. at 8), despite having actual notice that their proposed conduct violated the CDC *and* despite

disregarding the County Administrator's repeated, explicit instructions to stop that conduct while it was in progress. The lower court held that "CDC Sections 9.4.40 and 9.4.50 are designed to provide the information and notice necessary to comport with due process," (*id*. at 9), but never explained how Adams's and Hodges's due process rights were allegedly violated.

The lower court also held that, no matter the situation, "the County must first issue a warning notice" before issuing "a citation ticket in order to prosecute" a CDC violation, (*id*. at 10), and that failure to do so nullifies the conviction. It held that a conviction must be reversed, even if the violator has actual notice of the charges and exercises the full panoply of due process protections (i.e., obtains counsel, presents evidence, an cross-examines witnesses).

Because the CDC's prohibition against reconstructing the billboards is clear, the lower court did not need to engage in any construction of the CDC's language. Yet that court held that "in the context of strict *construction* of a penal statute," (*id.* at 11 (emphasis added)), the magistrate court wrongly concluded that the County's failure to list details on the summonses (details already known to Adams and Hodges) was harmless error. (*Id*.) Yet the lower court's opinion does not cite any harmless error cases or engage in harmless error analysis.

Law and Argument

I. Standard of Review

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." *State v. Williams*, 417 S.C. 209, 218, 789 S.E.2d 582, 587 (Ct. App. 2016) (internal citation and quotation marks omitted). In such appeals, "the circuit court is bound by the magistrate court's findings of fact if *any evidence* in the record reasonably supports them." *State v. Taylor*, 411 S.C. 294, 300, 768 S.E.2d 71, 74 (Ct. App. 2014) (emphasis added).

Similarly, "[t]his court will review the decision of the magistrate court for errors of law only," and is bound by the magistrate court's findings of fact unless they are clearly erroneous. *Id*. Legal determinations, however, "are subject to *de novo* review" and this Court is "free to decide [such issues] without any deference to the court below." *Id*. (internal citation and quotation marks omitted).

II. The lower court erred in reversing the verdict because due process was satisfied.

In reversing the verdict and pronouncing Adams and Hodges not guilty, the lower court erred in multiple ways. First, because Adams and Hodges had actual notice that reconstructing the billboards, or doing any work without County approval, violated the CDC, there was no due process violation. So even if the CDC requires warning procedures, failure to follow those procedures (because the goal of obtaining voluntary compliance is impossible) does not amount to a deprivation of due process or require reversal of the convictions.

Second, the lower court erroneously invoked the rule of lenity—which says that when a penal statute is ambiguous, it must be strictly construed in a defendant's favor—to reverse the convictions. The rule stems from the due process void-for-vagueness doctrine and is founded on the concept of fair notice, i.e., the idea that one who is trying to conform his conduct to the law should have fair notice of how to do so. The rule of lenity has no application here because the CDC is not ambiguous and the court thus had no need to construe it. Moreover, Adams and Hodges were flouting the law, not seeking to abide by it.

Third, even if Adams and Hodges could somehow establish a deprivation of due process, the error was harmless. The court below concluded that the magistrate erred on this point, but gave no analysis or authority to support its conclusion. Because the guilt of Adams and Hodges is conclusively proven by competent evidence such that no other rational conclusion can be reached, their convictions should not have been reversed. Thus, the verdict should be reinstated.

A. Adams and Hodges had actual notice that reconstructing their two billboards on Trask Parkway violated the Community Development Code.

The court below invoked the due process principle of fair notice to invalidate the convictions, but ignored that Adams and Hodges had actual notice that their conduct was illegal. Thus, that court should be reversed and the magistrate court's verdict affirmed.

"Procedural due process requirements are not technical; no particular form of procedure is necessary." *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). Due process "is a flexible concept that calls for such procedural protections as the situation demands." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). In general terms, "[d]ue process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) (internal citation omitted).

When a party has *actual* notice, its due process claim based on lack of notice fails. *Clear Channel Outdoor*, 372 S.C. at 234, 642 S.E.2d at 567. "Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him. 58 Am. Jur. 2d Notice § 5." *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998).

When a government establishes a procedure that goes beyond what due process requires, its failure to follow that procedure is not a due process violation and does not require undoing the government's action. *Riccio v. County of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990) ("[T]o hold that a state violates the Due Process Clause every time it violates a state-created rule regulating the deprivation of a property interest would contravene the well-recognized need for flexibility in the application of due process doctrine. . . . *If state law grants more procedural*

rights than the Constitution would otherwise require, a state's failure to abide by that law is not a federal due process issue.") (emphasis added).

Thus, a government's failure to follow self-imposed notice procedures does not require undoing the government's action as long as the minimums of constitutional due process are met. *Stogsdill v. S.C. Dep't of Health & Hum. Servs.*, 410 S.C. 273, 281-82, 763 S.E.2d 638, 642 (Ct. App. 2014) ("While such notice would fall short of the requirements of § 431.210, Stogsdill cites to no authority suggesting that this failure, in the absence of prejudice, requires any action."); *see also Jones v. S.C. Dep't of Health & Envtl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (finding that the plaintiffs' due process claim failed when they had notice enabling them to obtain a hearing providing them the opportunities required by due process).

Under these rules, Adams and Hodges were properly convicted of unlawfully rebuilding and re-erecting the two billboards on Trask Parkway that Hodges wrote about to the County.

As an initial matter, the CDC does not mandate a warning notice of violation in every case. Rather, § 9.3.10 states that "[a]ny person who violates this Development Code shall be subject to the remedies and penalties set forth in this Article." (DX-3 at 3.) The general penalty section provides that "[a]ny person violating this Development Code shall be guilty of a misdemeanor and, upon conviction, shall pay such penalties" as the court may decide as prescribed by State law. (*Id*. at 5, § 9.5.10.) Under a straightforward reading of these provisions, a person violating the CDC can be cited and, after conviction, be fined. That is what happened here.

It is true that the goal is to encourage voluntary compliance "where possible," and to that end, the CDC provides for a written warning mechanism. But the CDC is clear that remedies for violating its provisions, "whether criminal or civil," may "be exercised in any order." (DX-3 at 6, § 9.5.40.) Thus, the County properly cited Adams and Hodges, who were blatantly violating the

CDC's prohibition against reconstructing billboards and were recalcitrant in ignoring the County's instructions to obtain approval for any work that they would do on those billboards.

But even if the CDC is understood to require all the particulars of § 9.4.40 and § 9.4.50 in every case, neither a prior written warning nor those particulars are *constitutionally* required. *Riccio*, 907 F.2d at 1469 (holding that where state law grants more procedural rights than the Constitution would otherwise require, a state's failure to abide by that law is not a due process violation); *Stogsdill*, 410 S.C. at 281-82, 763 S.E.2d at 642 (holding that where notice fell short of statutory requirements, no authority "suggest[s] that this failure, in the absence of prejudice, requires any action").

The common pleas court recognized that the cited sections of the CDC are designed to give a violator fair notice in order to "comport with due process for violations of the CDC." (Order on Appeal at 9.) But it is only fair notice of the charges, not the technical requirements of the CDC, that due process requires. Due process is a "flexible concept," *Legg*, 416 S.C. at 13, 785 S.E.2d at 371, not one of "technical" requirements, such that the constitution prescribes "no particular form of procedure." *In re Vora*, 354 S.C. at 595, 582 S.E.2d at 416.

Adams and Hodges received all that due process requires: (1) adequate notice; (2) a hearing; (3) the right to introduce evidence; and (4) the right to cross-examine witnesses. *Clear Channel Outdoor*, 372 S.C. at 235, 642 S.E.2d at 567. And where one has actual notice, there is no violation of due process based on lack of notice. *Id*., 375 S.C. at 235, 642 S.E.2d at 567-68.

The only argument here is about the adequacy of the notice, but it is undisputed that Adams and Hodges had actual notice of the charges against them. Hodges identified with specificity the two billboards on which Adams would do construction work and the nature of the work. Yet after being told in writing to submit documentation and get County approval for any billboard

work, *and* after being repeatedly told to stop the work begun on those billboards over the weekend without approval, they ignored CDC § 5.6.50(E)'s requirements and the County's instructions. "Defendants received actual notice of the violation and had actual knowledge of the location of the violation." (Verdict at 4). They "had actual notice of the requirement that the county approve any work undertaken by them to the signs in question and that the Defendants chose to perform the work in spite of their failure to obtain the proper approvals." (*Id*. at 5.)

Adams and Hodges were thus properly convicted for violating CDC § 5.6.50(E), and the court below erred in reversing the convictions and declaring them "not guilty of the charged violations." (Order on Appeal at 11.) This Court owes no "deference to the court below" on this erroneous legal conclusion, *Taylor*, 411 S.C. at 300, which should be vacated with instructions that the magistrate court's verdict be reinstated.

B. The court below erred in relying on the rule of lenity to reverse the convictions.

In overturning the convictions, the lower court relied on the rule of lenity, which is a due process doctrine founded on the concept of fair notice and holds that an ambiguous penal statute must be construed in the defendant's favor. The rule has no application here.

"When a *genuine* ambiguity exists as a result of the proposed application of [a penal statute] to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor." *Bryant v. State*, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) (emphasis in original). "But the rule of lenity is not a device to create ambiguity, nor should a court invoke it before considering the words of the statute in context." *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017).

The rule is founded on "the concept of fair notice—the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality." *Id*. Thus, it "'applies only when, after consulting traditional canons of statutory

construction, we are left with an ambiguous statute.'" *Bryant*, 384 S.C. at 533, 683 S.E.2d at 284 (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)). Absent such genuine ambiguity, it does not apply because "the 'touchstone' of the rule of lenity 'is statutory ambiguity.'" *Id.* (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

The rule of lenity does not apply because the CDC's prohibitions are not ambiguous. The court below did "not find merit in" the vagueness arguments advanced against the CDC, and had no need to construe it. And as detailed in the facts, the magistrate court's verdict, and subsection I.A. above, "the concept of fair notice" was satisfied because Adams and Hodges had actual notice that their conduct violated the CDC's prohibitions. This was not a case in which they were "trying to walk the straight and narrow" and needed to know "where the line is drawn between innocent conduct and illegality." *Miles*, 421 S.C. at 164, 805 S.E.2d at 210.

Rather, this was a case of a defiant corporation and its real estate manager who rejected the County's instructions to comply with the CDC: "I was not asking for approval. I didn't need approval." (Tr. 144:22-23.)

The common pleas court's order attempts to convert the rule of lenity from a rule about "strict construction" of an ambiguous statute to one about "strict compliance" with the particulars of the CDC notice provisions. (Order on Appeal at 7, 10 (headings describing alleged errors of law as failing to hold the County to "Strict Compliance" with CDCs procedures for notice of violation or issuance of summons).) But the rule of lenity is about the former, not the latter—and the authority cited in the order shows it.

The order's conclusion rests on this Court's recent decision in *Town of Sullivan's Island v. Murray*, 435 S.C. 22, 864 S.E.2d 909 (Ct. App. 2021). But that case does not support the order because the case shows that the rule of lenity is about fair notice, and because it is inapposite.

Murray invalidated a conviction that was based not on the language of the ordinances at issue, but on a building inspector's interpretation of them that added a "noncodified requirement" and therefore "did not provide fair warning of criminal liability." *Id.* at 28, 864 S.E.2d at 912. So interpreted, the ordinances "were vague as applied here," "did not provide Murray with sufficient fair notice," and "lacked proper standards for adjudication." *Id.* at 29, 864 S.E.2d at 913.

In *Murray*, the town's ordinances prohibited only the construction of a dock that "extends into the channel or extends so far as to interfere with navigation." *Id.* at 28, 864 S.E.2d at 912. The building inspector interpreted the ordinances to prohibit the construction of any dock that extends beyond an adjacent dock. *Id.* at 26, 864 S.E.2d at 911. Ultimately, a marina owner was convicted of violating the ordinance because his dock extended past adjacent docks—even though his dock did *not* "extend[] into the channel or extend[] so far as to interfere with navigation." *Id.*

In short, Murray was convicted for creating a condition that the ordinance did not proscribe. *Id*. The ordinance, as applied by the building inspector, was unconstitutionally vague in failing to provide fair notice of criminal liability. *Id.*, 435 S.C. at 28, 864 S.E.2d at 912.

The contrast here is clear. Unlike the marina owner in *Murray*, Adams and Hodges were convicted because they stubbornly reconstructed the two billboards despite the CDC's clear prohibition against doing so. No official added any condition to the CDC's text to create the offense of which they were convicted. The lower court improperly relied on the rule of lenity to throw out their convictions.

C. The court below erred in failing to recognize that any procedural error was harmless.

Adams and Hodges had actual notice that their conduct was prohibited, so they were not deprived of due process. Any procedural error was harmless, as competent evidence conclusively shows their guilt and supports no other rational conclusion. Their convictions are valid.

"'[M]ost constitutional errors can be harmless.'" *State v. Odom*, 412 S.C. 253, 268, 772 S.E.2d 149, 156 (2015) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). Harmless error rules serve "a very useful purpose" insofar as they prevent "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of a trial." *Id*. (quoting *Chapman v. California*, 386 U.S. 18, 22 (1967)). When there is a defect in a criminal case, the error is harmless beyond a reasonable doubt and does not contribute to the verdict if it is "unimportant in relation to everything else" that the trier of fact "considered on the issue in question, as revealed in the record." *State v. Lyles*, 379 S.C. 328, 345, 665 S.E.2d 201, 210 (2008) (internal citations and marks omitted). When an error is harmless, "the conviction should not be reversed." *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

Thus, "[w]hen guilt is conclusively proven by competent evidence such that no other rational conclusion can be reached, [the appellate court] will not set aside a conviction because of insubstantial errors not affecting the result." *Lyles*, 379 S.C. at 345, 665 S.E.2d at 210.

Adams and Hodges seek to shirk liability for flagrantly violating the CDC's ban on reconstructing billboards on the grounds that the County failed to follow the particulars of its self-imposed warning notice and summons procedures. But even assuming such a failure, the error is harmless under governing law.

Based on the trial evidence, the magistrate correctly found that "this failure is harmless in that the Defendants were served immediately after they had clear notice and warning that the signs at issue were the violation." (Verdict at 4.) "The communication between the parties (Defendant Hodges, other employees of Adams Outdoor Advertising, and administrative staff of Beaufort County) which began with Defendant Hodges' email to Ms. Antonacci on April 6, 2021, and continued until Mr. Zecchino's email to Mr. Greenway on the morning of April 11,

2021," all "clearly show that the Defendants received actual notice of the violation and had actual knowledge of the location of the violation. The County's failure to adhere to the formal notice requirements were harmless errors on its part." (*Id*.)

The order reversing the conviction says that the magistrate's conclusion was incorrect, but gives no reason why. It cites no authority on harmless error, and does not conduct any harmless error analysis. Instead, the order proceeds in doing exactly what the harmless error doctrine aims to prevent: "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of a trial." *Odom*, 412 S.C. at 268, 772 S.E.2d at 156.

Hodges had identified with specificity the billboards that Adams would work on, and the nature of the construction work. Thus, the failure to repeat those details back to Adams and Hodges was "unimportant in relation to everything else" that the trier of fact "considered on the issue" of notice that their conduct violated the CDC. *Lyles*, 379 S.C. at 345, 665 S.E.2d at 210. At best, these are "insubstantial errors not affecting the result," *id.*, so "the conviction[s] should not be reversed." *Thompson,* 352C. at 562, 575 S.E.2d at 83. Rather, the verdict of the magistrate's court should be reinstated.

Conclusion

Adams and Hodges implemented a plan to illegally rebuild two of Adams's dilapidated billboard structures in Beaufort County so that Adams could keep making money on those nonconforming signs for decades. They openly flouted the CDC's requirements and the County's repeated instructions to follow those requirements, and completed the work over the weekend when County offices were closed. The magistrate's court properly convicted them of the CDC violations, but the common pleas court erroneously reversed their convictions and excused their blatantly illegal conduct. Therefore, Beaufort County respectfully requests that this Court reverse the common pleas court decision and reinstate the verdict of the magistrate court.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes III, Master-In-Equity

Civil Action No. 2021-CP-07-1507
Appellate Case No. 2022-000681

Beaufort County, Appellant,

v.

Adams Outdoor Advertising Limited Partnership and Bo Hodges, Respondents.

PROOF OF SERVICE

I certify that on June 20, 2022, I have served all counsel in this action with a copy of **Appellant's Initial Brief**, via electronic mail, to the following addresses:

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June 20, 2022

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(sent via electronic filing only – ctappfilings@sccourts.org)
South Carolina Court of Appeals
Honorable Jenny Abbott Kitchings
1220 Senate Street
Columbia, South Carolina

In re: Beaufort County v Adams Outdoor Advertising
Appellate Case No.: 2022-000681

Dear Ms. Kitchings;

Please see the enclosed Appellant's Initial Brief and the Designation of Record for filing. Pursuant Rule 267(f), and to the Order issued by the Supreme Court of South Carolina on August 25, 2021, we will only be filing these documents electronically, unless otherwise requested by the Court. Should the Court need anything additional, please do not hesitate in contacting our office at (843) 255-2053.

Respectfully sent,

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