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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Circuit Court for the Eighth Judicial Circuit

Frank R Addy, Jr., Circuit Court Judge

App. Case No. 2022-000276

Allen L. Murray, Christy Worthy Brown, Michael Adam Brown,................................ Appellants,

vs.

Newberry County, South Carolina,...Respondent.

APPELLANTS' INITIAL BRIEF

__s/S. Jahue Moore____________________
S. Jahue Moore, SC Bar #4063
Moore Bradley Myers Law Firm, P.A.
1700 Sunset Boulevard (29169)
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Jake@mbmlawsc.com
Attorney for Appellants

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STATEMENT OF ISSUES ON APPEAL

1. **DID APPELLANTS MEET THEIR BURDEN OF PROOF SHOWING THAT THE ZONING ORDINANCE IS UNREASONABLE, ARBITRARY, CAPRICIOUS AND/OR DISCRIMINATORY?**

2. **DID APPELLANTS MEET THEIR BURDEN OF PROOF TO ESTABLISH THEIR CAUSE OF ACTION FOR ESTOPPEL AGAINST RESPONDENT?**

3. **DID APPELLANTS MEET THEIR BURDEN OF PROOF TO ESTABLISH THEIR CAUSE OF ACTION FOR INVERSE CONDEMNATION?**

4. **DID APPELLANTS MEET THEIR BURDEN OF PROOF TO ESTABLISH A PRIOR LAWFUL, NON-CONFORMING USE?**

5. **DID APPELLANTS ALLEGE FACTS SUFFICIENT TO FORM A CAUSE OF ACTION; THEREFORE THE COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS?**

STATEMENT OF THE CASE

This case arises out of a county ordinance passed by the Respondent County of Newberry, South Carolina ("Respondent") which restricts who can house workers on their property in recreational vehicles. The ordinance was designed to restrict the ability to house temporary workers, which at the time would be working at the SCANA/SCE&G power plants. The ordinance does not apply to individuals who utilized a camper or recreational vehicle to stay on property when they were not temporary workers. Appellants Allen L. Murray, Christy Worthy Brown, and Michael Adam Brown ("Appellants") are all landowners in Newberry County, South Carolina who own/owned land which they planned to use by having temporary workers and others pay to park/keep their campers and recreational vehicles on their property.

Respondent informed Appellants that they could not use their land in this manner as their proposed use of their property (according to the Respondent) violated the county ordinance which forbids temporary workers from using recreational vehicles in Newberry County in the same manner that Newberry County residents could use them. Appellants took (and still take) the position that the County has passed an ordinance which discriminates against one class of people based solely on their occupation. Appellants took the position that the ordinance was passed solely to discriminate against a particular class of people, mainly temporary workers in Newberry County, South Carolina. (Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, R. ___).

Appellants commenced this action against Respondent on or about July 28, 2017. (Complaint filed July 28, 2017; R. ____). Appellants' Complaint sought, among other things, a declaratory judgment against Respondent seeking to declare the ordinance unconstitutional. (Complaint filed July 28, 2017; R. ____). Prior to the hearing which forms the basis of the Order on appeal, Appellants filed and served their Amended Complaint and Second Amended Complaint. (Amended Complaint dated November 13, 2017; R. ___) (Second Amended Complaint dated September 30, 2020; R. ___). This was the operative Complaint at the time of the January 15, 2021, hearing.

Although the Appellants originally requested a jury trial, counsel for the Appellants by email to the Court (Judge William P. Keesley) on January 10, 2019, agreed with the Respondent Newberry County (the "County") that the case should be tried non-jury. At a videoconference hearing before Judge Frank R. Addy, Jr. on January 15, 2021, counsel for the Appellants stated that the Appellants needed no further discovery and that the case was ready for trial. (Transcript of January 15, 2021, Hearing (hereinafter, "1-15-21 Tr."), p. 15, line 25 — p. 16, line 2). Counsel for both parties agreed, and the Court ordered that the matter would be submitted and decided on written motions and memoranda for final disposition "as to all of Plaintiffs' causes of action." (1-15-21 Tr., p. 27, lines 17-24; Form 4 Order by the Court issued and entered January 15, 2021; R. _______). Accordingly, the Appellants submitted Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss. (R. ___). Respondent submitted its Final Dispositive Motions of Defendant Newberry County, South Carolina ("County's Final Motions") with five exhibits and its Memorandum in Support of Final Dispositive Motions of Defendant Newberry County, South Carolina. (R. ___). The Respondent's Final Dispositive Motions of Defendant Newberry County, South Carolina sought:

1. For summary judgment affirming the validity of the County's comprehensive zoning ordinance ("the Zoning Ordinance") under the authority of SCRCivP Rule 56 (citations omitted);

2. For summary judgment denying the purported second cause of action alleging estoppel against enforcement of the Zoning Ordinance based on unspecified reliance by Plaintiffs on unspecified representations by County officials under the authority of SCRCivP Rule 56 (citations omitted);

3. For summary judgment denying the purported third case of action alleging inverse condemnation and seeking damages and attorneys' fees under the authority of SCRCivP Rule 56 (citations omitted);

4. For summary judgment denying any claim that a plaintiff had established a lawful, non-conforming use prior to the effectiveness of the Zoning Ordinance and so has a right to continue that use post-effectiveness because (a) with respect to the Plaintiff (Appellant) Christy Worthy Brown, the matter has been fully adjudicated

and final judgment rendered against her in CA No. 2018-CP-36-00558 on December 18, 2019, and that judgment was not appealed so res judicata precludes her raising the issue again here; and (b) with respect to the Plaintiffs (Appellants) Allen Murray and Michael Adam Brown because neither has sought to have any such use recognized and confirmed as compliant with the Zoning Ordinance (citation omitted) and so have failed to exhaust their administrative remedies as required by *Dunbar v. City of Spartanburg,* 266 S.C.113, 221 S.E.2d. 848 (1976); and

5. In the alternative to the foregoing motions for summary judgment, for dismissal under Rule 12(b)(6) for failure to allege facts rather than conclusions of law (citations omitted).

(Final Dispositive Motions of Defendant Newberry County, South Carolina; R. ___). Neither party submitted nor sought leave to submit any response to the filings of the other party.

On January 27, 2022, Judge Addy issued his order. (Order Granted Defendant's Motion for Summary Judgment and Dismissal, dated January 27, 2022, R. ______). The Court found that each of the County's final motions were granted and summary judgment was entered in favor of the County on each of the Appellants' causes of actions. The Court also granted Respondent's Motion(s) to Dismiss. (Order Granting Defendant's Motion for Judgment and Dismissal dated January 27, 2022; R. ___). The case was dismissed with prejudice in its entirety.

On February 4, 2022, Appellants filed a Notice of Motion for Reconsideration of the Order Granting Defendant's Motion for Summary Judgment and Dismissal which was served on the Respondent's Counsel on January 27, 2022. (Motion to Reconsider; R. ___). The Court denied the Appellants' Motion for Reconsideration on February 8, 2022. (Order Denying Plaintiffs' Motion for Reconsideration; R. ___). Counsel for the Appellants then filed a Notice of Appeal on March 7, 2021, appealing the Orders of the Honorable Frank R. Addy, Jr., signed on January 27, 2022, and February 7, 2022. (Notice of Appeal; R. ___).

STATEMENT OF THE FACTS

This case arises out of a county ordinance passed by the County of Newberry on or around September of 2016 which restricts who can house workers on their property in recreational vehicles. (Final Dispositive Motions of Defendant; R. ____) (Order dated January 27, 2022; R. ___). The ordinance was designed to restrict the ability to house temporary workers, who at the time would be working at the SCANA/SCE&G power plants (often referred to as the VC Summer Nuclear Plant). These workers would come to the facility and work for a period of time during plant shut downs. (Transcript of Record, Page 25, Line 1-25; R. ___). The workers, many of whom have families at their permanent residences, are in need of a place to park their RVs and campers during their temporary residence in Newberry County. (Transcript of Record, Page 25, Lines 1-25; R. ___).

The ordinance at issue was passed to prohibit this type of use. The ordinance does not apply to individuals who use a camper or recreational vehicle to stay on property when they were not temporary workers. Appellants all own land in Newberry County which they use and planned to use by having temporary workers and others pay to keep their camper or other recreational vehicle on their property. (Summons and Complaint dated July 28, 2017; R. ___) (Second Amended Summons and Complaint; R. ___). Appellants procured the necessary permits to allow use of their property in this manner. (Transcript of Hearing, Page 13, Lines 4-11; R. ___). Appellants invested substantial time and money and effort into making their property suitable for temporary trailers. (Transcript of Hearing, Page 13, Lines 3-4; R. ___). In June of 2016 Appellants began using their property to allow temporary workers to park their RVs and campers on their property. This was approximately three (3) months before passage of the ordinance at issue in this case. The timing of the passage of this ordinance was not, as Appellants believe, a coincidence.

The Respondent has told the Appellants to not use their land in this manner as it violates the county ordinance which forbids temporary workers from using recreational vehicles in Newberry County in the same way that any citizen of Newberry County could use them. (Summons and Complaint dated July 28, 2017; R. ___) (Second Amended Summons and Complaint; R. ___). The County threatened Appellants with criminal prosecution. (Transcript of Record, Page 13, Lines 11-12; R. ___). In fact, Appellant Murray was criminally prosecuted for using/allowing use of the trailers on his property. (Transcript of Hearing, Page 13, Lines 6-11; R. ___). In essence the County has passed an ordinance which discriminates against one class of people based solely on their occupation. If an individual wanted to use the property for recreation or hunting, there is no limit on the amount of people who may stay on the property. This ordinance was passed solely to discriminate against a particular class of people, mainly temporary workers in Newberry County, South Carolina.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo* under the same standard as the trial court under Rule 56(c) SCRCP. *Wright v. PRG Real Est. Mgmt., Inc.,* 426 S.C. 202, 212, 826 S.E.2d. 285, 290 (2019); *Woodson v. DLI Properties, LLC,* 406 S.C. 517, 528, 753 S.E. 2d. 428 (2014). Under that standard, summary judgment is proper only, "if, viewing the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party, the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, show that there is no genuine issue of material fact and that the non-moving party is entitled to a Judgment as a matter of law." *Id.* "(T)he non-moving party is only required to submit a scintilla of evidence in order to withstand a motion for summary judgment. *Huffman v. Sunshine Recycling LLC,* 426 S.C. 262, 271, 826 S.E.2d. 609, 614 (2019) (quoting *Hancock v. Mid-S. Mgmt.,* 381 S.C. 326, 329-

31, 673 S.E.2d. 801, 802-803 (2009). "(We) hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Id*.

ARGUMENTS

I. THE APPELLANTS HAVE MET THEIR BURDEN OF PROOF SHOWING THAT THE ZONING ORDINANCE IS UNREASONABLE, ARBITRARY, CAPRICIOUS AND/OR DISCRIMINATORY.

The circuit court erred by finding as a matter of law in affirming the zoning ordinance at issue in this case and ruling that the zoning ordinance at issue in this case is reasonable, non-arbitrary, non-capricious, and non-discriminatory. The trial court erred in granting summary judgment as to the Appellants' claims that the zoning ordinance at issue in this case violated Appellants' substantive due process and equal protection claims. The ordinance prohibits temporary workers, who are not from the county, from utilizing a parcel of land in a certain manner. On the other hand, a citizen of Newberry County is permitted to use the parcel of land in the same exact way. Essentially, the County has passed a zoning regulation which discriminates against a class of people based upon their occupation and where and how they permanently reside.

The trial court erred in concluding and ruling as a matter of law that the zoning ordinance at issue in this case was not arbitrary or capricious. The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is found in the police power." *McMaster v. Columbia Bd. of Zoning Appeals,* 395 S.C. 499, 505, 719 S.E.2d 660, 663 (2011). "In reviewing substantive due process challenges to municipal ordinances, a court must consider whether the ordinance bears a reasonable relationship to any legitimate interest of government." *Id.*

"In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state

law." *Harbit,* 382 S.C. at 394, 675 S.E.2d at 782. "The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency." *Id.*

A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property." *Harbit v. City of Charleston,* 382 S.C. at 394, 675 S.E.2d at 782. "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action." *Knowles v. City of Aiken,* 305 S.C. 219, 222, 407 S.E.2d 639, 642 (1991). "In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable." *Id.* at 224, 407 S.E.2d at 642. In *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013), the South Carolina Supreme Court outlined what the Plaintiff must show to demonstrate that a zoning ordinance is arbitrary and capricious: "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Id*. at 297, 737 S.E.2d at 610. "The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency." *Id.*

In addition, the Equal Protection Clause provides "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Denene, Inc. v. City of Charleston,* 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) (" 'When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.' " (quoting *City of Cleburne v. Cleburne*

Living Ctr., 473 U.S. 432, 439–40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985))). Under the rational basis test, the Court must determine: 1) whether the law treats similarly situated entities differently; 2) if so, whether the legislative body has a rational basis for the disparate treatment; and 3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. *Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Rev.,* 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003).

A zoning ordinance is contrary to the Constitution if it is "aimed at transients." *Village of Belle Terre v. Borass,* 416 U.S. 1 (1974). An ordinance aimed at a specific class of people is illegal. *Shapiro v. Thompson,* 394 U.S.618 (1969). The application of this zoning ordinance is discriminatory against works at the nuclear power plant. There is simply no reason for this discrimination.

The ordinance imposes at least nine restrictions on the use of recreational vehicles as temporary accommodations. The most significant and burdensome of these require that the land parcel be located in R-2 rural district; that the property be a minimum of 10 acres in size; the maximum of five vehicles be placed on any given parcel, even if that parcel is larger than 10 acres; and that each recreational vehicle must be connected to separate agency approved water, sewer and electrical services.

Zoning ordinances must be made with reasonable consideration of various specific and typical purposes which underlie zoning, as are enumerated in S.C. Code Ann. §§ 6-29-710(A)(1)-(8) and 6-29-720. Among these specific purposes is "to regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes". S.C. Code Ann. § 6-29-710(A)(5).

More generally, "[z]oning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare". *Id.* § 6-29-710(A).

Assuming, as is the case with the recreational vehicles on the Appellants' property, that the vehicles are in compliance with all other governmental regulations, it is not apparent that the new ordinance serves any of the commonly accepted purposes for zoning ordinances. In particular, the requirement of having at least 10 acres, that is, 2 acres for each of the maximum of five vehicles allowed, is grossly excessive for any consideration having to do with density of uses and avoiding crowdedness. It is also impractical, unnecessary, and unduly costly to require that each recreational vehicle have its own separate services for water, sewer, and electricity. In combination, these and the other restrictions approach the prohibition of an otherwise lawful use, situated in a rural area where many of the usual considerations prompting zoning restrictions are not present.

The zoning power must be exercised reasonably and not arbitrarily, and zoning regulation is legal or valid only when it is reasonable. *Byrd v. City of North Augusta*, 261 S.C. 591, 201 S.E.2d 744 (1974). The validity of a particular zoning ordinance must be considered not in the abstract but in connection with the locality and surrounding circumstances. *McMaster v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, S.E.2d 660 (2011). The recreational vehicle ordinance in this case is invalid when considered in light of the nature of the affected locality, including the client's property, and all of the surrounding circumstances. Among these surrounding circumstances are the facts that there is a clear need for such temporary housing for workers at the nearby plant and that the recreational vehicles on the property of the Appellants and other similar properties are of good quality and are kept in good condition. There are neither aesthetic nor other

justifications for the onerous restrictions on this land use.

The legality of a zoning ordinance that totally prohibits a legitimate business from an entire community should be regarded with particular circumspection, and to be valid such ordinance must bear a more substantial relationship to public health, safety, morals, and general welfare than an ordinance that merely confines a business to a certain area in the municipality or county. *Exton Quarries, Inc. v. W. Whiteland Twp. Zoning Bd. Of Adjust.*, 425 Pa. 43, 228 A.2d 169 (1967). Courts examine with particular scrutiny those zoning ordinances that ban certain land uses or activities instead of delineating appropriate areas for those uses or activities. Zoning authority does not generally include the right to ban disfavored uses from all zoning districts. *Colo. Min. Ass'n v. Summit County Bd., of County Comm'rs*, 199 P.3d 718 (Colo. 2009). While the ordinance in question does not literally prohibit recreational vehicles as temporary living accommodations anywhere in Newberry County, the restrictions nearly achieve that result as a practical matter, thus warranting even closer scrutiny.

South Carolina cases on zoning treatment of similar land use consisting of mobile homes on private property are instructive, although there are apparent differences between recreational vehicles as defined in the ordinance and mobile homes. For example, mobile homes are not as portable, whereas the ordinance requires that recreational vehicles, with axles and wheels affixed, be maintained in a state of readiness for timely removal from the property.

The Supreme Court of South Carolina has held that a zoning ordinance excluding mobile homes from all areas except mobile home districts was valid and enforceable in the absence of the required clear and convincing evidence upon which the ordinance could be found to be arbitrary and capricious. *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991). Particular reasons for the mobile home ordinance in *Willoughby* are not discussed in depth in the opinion,

although the court noted that the zoning ordinance was enacted "for the purpose of promoting the health, safety, morals, and general welfare of the community". *Id*, at 422, 412 S.E.2d at 425. Unlike the ordinance in *Willoughby*, the recreational vehicle ordinance in the instance case lacks any rational relationship, promotion of health, safety, morals or general welfare of the community.

In the rural area at issue in the instant case, it cannot be argued that the recreational vehicle ordinance is necessary to provide a homogeneous and aesthetically harmonious development of single-family homes. Moreover, whereas a lot of at least 10,000 square feet, or about one-fourth acre, was required for the dwellings in *Holley*, a landowner in the instant case must have 10 acres, or 40 times as much land, to use recreational vehicles on the land.

Appellants invested money in property they own for the purpose of placing recreational vehicles on their property. If a party, other than temporary workers, wanted to use the land for their recreational vehicles, they would be allowed to do so. This zoning ordinance clearly targets temporary workers. The County has enacted a law that discriminates arbitrarily against a specific group of people.

The purposes of the zoning ordinance, as provided by the County are: lessening congestion in streets, fire safety, prevention of overcrowding, and avoiding undue concentration of population. Appellants are zoned in a R2 classification, which is designated for "low density residential uses." While these stated purposes are perfect for a high density urban setting, Appellants live on a parcel of land with few neighbors. Adding recreational vehicles to their land, which Appellants invested money with the intent of doing so, will not overly congest the streets, will not heighten the risk of fire safety, will not overcrowd the area, and will not provide for an undue concentration of the population.

The result of this ordinance is a total absurdity. The ordinance would allow five units per acre for a mobile home park. Thus, fifty permanent mobile homes could be located on ten acres while only five recreational vehicles rented to laborers would be allowed. Further, if recreational vehicles are being used by non-workers there is simply no restrictions at all. In other words, if the travel trailers and RVs were being rented out to hunters, there could literally be hundreds of them on Appellants' property. If the land is being rented out to temporary workers, there can only be one unit per acre. This has resulted in blatant discrimination against workers with no justification at all which would justify such a blatant discrimination.

The ordinance at issue in this case is clearly on its face unreasonable, arbitrary, capricious, and discriminatory. The trial court erred in granting Respondent's Motion for Summary Judgment. The Lower Court's Order should be reversed by this Court.

II. APPELLANTS HAVE MET THEIR BURDEN OF PROOF TO ESTABLISH THEIR CAUSE OF ACTION FOR ESTOPPEL AGAINST RESPONDENT

The Circuit Court erred by finding that the Appellants cannot show that any statement made by the County would estop the enforcement of the zoning ordinance. The South Carolina Supreme Court has found that when estoppel may lie against a government agency, a relying party must prove: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Quail Hill v. Cty. of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (citing *Grant v. City of Folly Beach*, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001)).

Here, the Appellants believed their land could be used the way they intended because they received permits to have the recreational vehicles on their land. The Appellants invested money on their property for the purpose of placing recreational vehicles on their land. Lastly, the

Appellants were criminally prosecuted for allowing the use of the recreational vehicles on their land.

The Appellants have undoubtedly met the burden of proof to establish their cause of action for estoppel against the Respondent. The trial court erred in granting summary judgment for the Respondent and the trial court's order upholding the zoning ordinance should be reversed.

III. APPELLANTS HAVE MET THEIR BURDEN OF PROOF TO ESTABLISH THEIR CAUSE OF ACTION FOR INVERSE CONDEMNATION

The zoning ordinance in question amounts to an inverse condemnation. The ordinance amounts to a taking of Appellants' property rights as they have historically used it. A property owner has suffered a taking when "the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave property economically idle." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895, 120 L. Ed. 2d 798 (1992).

Here, the Appellants have historically used their property to allow temporary workers to rent their land to utilize recreational vehicles. The zoning ordinance clearly took the Appellants' rights away to be able to rent their land so temporary workers could park their recreational vehicles. Since the zoning ordinance has gone into effect, it has deprived Appellants of all economically beneficial uses. Appellants have met their burden of proof to establish their cause of action for inverse condemnation. The trial court's Order should be reversed by this court.

IV. APPELLANTS HAVE MET THEIR BURDEN OF PROOF TO ESTABLISH A PRIOR LAWFUL, NON-CONFORMING USE

Appellants have shown that a non-conforming use was lawfully established at the time the zoning ordinance was established. Regarding "nonconformities", S.C. Code Ann. § 6-29-730 states as follows:

> The [zoning] regulations may provide that land, buildings, and structures and the uses of them which are lawful at the time of the enactment or amendment of zoning regulations may be continued although not in conformity with the regulations or amendments, which is called a nonconformity. The governing authority of a municipality or county may provide in the zoning ordinance or resolution for the continuance, restoration, reconstruction, extension, or substitution of nonconformities. The governing authority also may provide for the termination of a nonconformity by specifying the period of periods in which the conformity is required to cease or be brought into conformance, or by providing a formula where the compulsory termination of nonconformities may be so fixed as to allow for the recovery or amortization of the investment in the nonconformity.

The burden of proving a nonconforming use is on the party claiming such sue. *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1999). The Appellants in the instant case can meet the burden, as they have owned the subject property and have used it continuously to rent spaces for recreational vehicles as temporary living accommodations since before the new ordinance went into effect. The Appellants also secured the necessary septic permits for having such vehicles on their property before the ordinance was enacted. This should suffice to establish a nonconforming use. The Appellants also have no plans or desire to have more than the current three spaces rented for recreational vehicles, so there is no aspect in which the landowner wishes to expand the nonconforming use.

Essentially, a nonconforming use and vested right refer to the same concept: A use of property that existed lawfully before the enactment of a zoning ordinance may continue afterward even though the use does not comply with the zoning restriction. *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000). A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continued use would constitute a detriment to the public health, safety, or welfare. *Lake Frances Props. v. City of Charleston*, 349 S.C. 118, 561 S.E.2d 627 (Ct. App. 2002). Here, the Appellants' renting of three spaces for

recreational vehicles, as temporary living accommodations, in a rural area, is not detrimental to the public health, safety, or welfare.

In another South Carolina case, a City of Greenville zoning ordinance requiring discontinuance of nonconforming uses was held unconstitutional in its application to a landowner whose land, before incorporation into the City, had been used as a trailer camp. After incorporation, the land was zoned residential. *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955). The owner of the trailer camp argued successfully that the ordinance, as applied to him, was arbitrary and deprived him of property without compensation or due process. The opinion in *James* indicates that when there were unoccupied spaces, the trailer camp owner sometimes rented for short-term stays to tourists who owned their trailers, although generally the 25 spaces were occupied as residences for longer periods of time. A concurring opinion in *James* explained the court's decision, while drawing upon supportive case law from other states:

> In the case before us we have nothing to uphold the ordinance in its application to appellant unless it be found in its entitlement as 'An Ordinance To Promote The Health, Safety, Morals And The General Welfare', etc., and the statement in Section 1 of Article XVII that 'in interpreting and applying the provisions of this ordinance, they shall be held to be the minimum requirements for the promotion of the public safety, health, convenience, comfort, morals, prosperity and general welfare'. If this be taken as a legislative declaration that appellant's business is detrimental to the public safety, health, morals and general welfare, it is, as pointed out in the opinion of Chief Justice Baker, wholly without support in the evidence; on the contrary, it is thoroughly refuted by the facts as disclosed by the contradicted testimony. *As applied to the particular locus the ordinance presents a clearly invalid exercise of the police power*. Cf. State ex rel. Warner v. Hayes Investment Corp., 13 Wash.2d 306, 125 P.2d 262, where an ordinance prohibiting the continued operation of an established trailer camp by restricting the use of the land was held invalid, there being no evidence that it was, as applied to the particular business involved, in promotion of the public health, safety, morals or welfare. To the same effect is Richards v. City of Pontiac, 305 Mich. 666, 9 N.W.2d 885, 889, where the court said: 'In our opinion the operation of a trailer park is not a nuisance per se. If the trailer park proves to be a nuisance per accidents, then regulation may be called for. The plaintiffs, having purchased the property, expended money thereon, and operated a trailer camp prior to the existence of either of the zoning ordinances, have a vested right to operate such trailer camp'[.]

Id. At 586, 88 S.E.2d at 671-72 (emphasis added).

As also was stated in *James*, the police power of a municipality to enact a zoning ordinance restricting use of privately owned property is not unlimited, and it does not extend to suppression or removal from a residential district a lawful business, already established there, in the absence of a factual showing that continuance of such business would be detrimental to public health, safety, morals, or general welfare. *Id.* At 584-85, 88 S.E.2d at 671.

A case in which use of property for mobile homes had nonconforming-sue status and protection is *Cuseo v. Horry County Planning Commission*, 315 S.C. 498, 445 S.E.2d 644 (Ct. App. 1994). In that case, the evidence supported a County Board of Adjustment and Appeals' finding that a subdivision developer's utilization of lots in a subdivision for nonconforming mobile home purposes has been grandfathered and had not been abandoned. The evidence also supported the fact that the developer continuously and diligently pursued development of the subdivision. The subdivision was a development in progress at the time the ordinance prohibiting mobile homes became effective. Restrictive covenants and lot sizes revealed that the development included mobile home uses. The developer diligently pursued the development even though sales were slow due to economic conditions, and a county planning development employee had authority to grant grandfather status and did so upon the developer's request.

Cuseo, as well as the circumstances of the Appellants' case, are to be distinguished from a situation in which a landowner merely contemplates, or intends, a particular land use before enactment of a zoning ordinance regulating or prohibiting that use. *See Stratos v. Town of Ravenel*, 297 S.C. 309, 310, 376 S.E.2d 783, 784 (Ct. App. 1989). In *Stratos*, the property owner apparently had obtained adequate soil tests for septic tanks and a property survey for the contemplated mobile home park during the moratorium period, but it was not clear if he formally applied to the Town

for the permit during the moratorium period. Evidence showing only that the landowner had contemplated use of his property as a mobile home park did not establish a nonconforming use prior to enactment of the zoning ordinances.

The Appellants in the instant case has progressed far beyond merely contemplating use of the property for renting space for recreational vehicles, so as to make that a protected nonconforming use. Appellants have a history of renting out their land to temporary workers. The temporary workers would use the land to park their recreational vehicles. The Appellants rented their land before the zoning ordinance came into effect and did so legally. The Court's Order granting Respondent summary judgment was clearly erroneous. Thus, the Court should find that there is a protected pre-existing use and the Appellants can rent out their land to temporary workers so they can utilize their recreational vehicles.

V. APPELLANTS HAVE ALLEGED FACTS SUFFICIENT TO FORM A CAUSE OF ACTION; THEREFORE, THE COURT SHOULD DENY RESPONDENT'S MOTION TO DISMISS

The trial court erred in dismissing the Appellants' Second Amended Complaint. A motion to dismiss should only be granted when the complaint viewed in the light most favorable to the Plaintiff fails to state any valid claim for relief. *See Gentry v. Yonce,* 337 S.C. 1, 522 S.E.2d 137 (1999). And a court must deny a motion to dismiss when the "facts alleged and inferences reasonably deducible therefrom" entitle plaintiff to relief under any theory. *Id.* at 5, 522 S.E.2d at 139 (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). Although South Carolina has retained code pleading the "technical, restrictive or outmoded requirements of Code Pleading are not necessarily required." *Lightsey, Jr. & Flanagan* at 93-94. Furthermore, Rule 8(f), SCRCP, states that all pleadings are to be construed to do substantial justice to all parties.

In the instant case, the Respondent has repeatedly stated that Appellants' complaint is deficient for a myriad of reasons; however, none of those alleged deficiencies causes Appellants'

complaint to fail to state of cause of action which entitles the Appellants to relief under any theory. Instead, the court should merely ask itself if everything the Appellants have said is true, do the Appellants have a cause of action. The answer to that questions is yes. Appellants have alleged that they own property which has been deprived of its use via a county ordinance which discriminates between different classes of people without any rational basis. That constitutes a cause of action under South Carolina law. Appellants have alleged the following facts: 1) they own property in Newberry County; 2) they use and plan to use that property to house temporary workers in recreational vehicles; 3) the County passed an ordinance restricting the number of temporary workers who may lease these vehicles when the County does not restrict how many non-temporary workers may lease these vehicles; 4) the County has selectively enforced this ordinance; and 5) the County had made representations through its zoning of property that the Appellants relied upon.

Those are all facts that have been alleged. Respondent would prefer to bypass discovery and simply include all information it could ever want in the Appellants' Second Amended Complaint. However, Appellants have complied with the pleading rules under South Carolina law and have alleged facts when viewed in the light most favorable to them to constitute a cause of action.

In addition, as stated before, the complaint should be liberally construed to do justice to the parties. Respondent would like the complaint to be strictly construed. Instead, the complaint is required to be liberally construed to do justice to the parties. Here, the Appellants have been the victim of an unconstitutional ordinance which has attempted to take away their livelihood. In order to do justice, the Court should deny Respondent's motion to dismiss.

For the reasons stated above, Appellants' Second Amended Complaint alleges facts sufficient to constitute a cause of action. The Court's Order dismissing the Appellants' complaint is clearly erroneous and should be reversed by this Court.

CONCLUSION

The Newberry County zoning ordinance at issue in this case is, on its face, overly broad, arbitrary and unreasonable. Further, it is discriminatory. Judge Frank R. Addy, Jr.'s Order granting Respondent summary judgment as to Appellants' case should be reversed by this court and the ordinance at issue declared unconstitutional by this court. Further, the Court's Order dismissing the Appellants' Second Amended Complaint was clearly erroneous and should be reversed by this court. When viewed in the light most favorable to the Appellants, the Appellants' complaint alleges facts sufficient to assert a cause of action.

Respectfully submitted,

s/S. Jahue Moore
S. Jahue Moore, SC Bar #4063
Moore Bradley Myers Law Firm, P.A.
1700 Sunset Boulevard (29169)
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Jake@mbmlawsc.com
Attorney for Appellants

June 17, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Circuit Court for the Eighth Judicial Circuit

Frank R Addy, Jr., Circuit Court Judge

App. Case No. 2022-000276

Allen L. Murray, Christy Worthy Brown, Michael Adam Brown, ... Appellants,

vs.

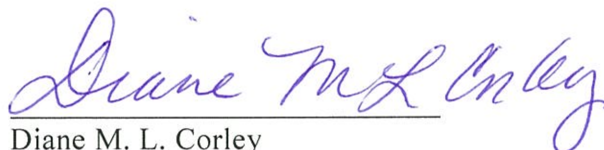
Newberry County, South Carolina, ...Respondent.

PROOF OF SERVICE

I, Diane M. L. Corley, an employee of the Moore Bradley Myers Law Firm, P.A., certify that I have served the Appellants' Initial Brief and Designation of Matter to be Included in the Record on the Respondent by mailing a copy on June 17, 2022, addressed to its attorney of record as follows:

Austin J. Tothacer, Jr, Esquire
Post Office Box 156
Newberry, SC 29108
jtothacer@newberrycounty.net

Steve A. Matthews, Esquire
P.O. Box 11889
Columbia, SC 29211
smatthews@hsblawfirm.com



Diane M. L. Corley
Legal Assistant to S. Jahue Moore

S. Jahue Moore†
James Edward Bradley†
Sheila McNair Robinson
Christian G. Spradley
William H. Edwards
Stanley L. Myers
Jane H. Downey◆
S. Jahue Moore, Jr.
William B. Fortino
Ralph Nichols Riley, Jr.
John C. Bradley, Jr.

Melissa K. Moore
Lester McGill Bell, Jr.
Bryan C. Letteer
Sierra D. Carini
Lawrence D. Turner
Emily E. Collins

Retired
J. Mark Taylor*‡
Robert D. Hazel‡
C. David Sawyer, Jr.‡
Billy C. Coleman (1916-2019)

June 17, 2022

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Jun 17 2022
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
VIA Email: ctappfilings@sccourts.org

RE: Allen L. Murray, et al., vs. Newberry County, SC
App. Case No. 2022-000276

Dear Ms. Kitchings:

Please find enclosed with this letter for filing with the Court, Appellants' Initial Brief and Designation of Matter.

Thank you in advance for your assistance in this matter.

Sincerely,

Diane M. L. Corley
Legal Assistant to S. Jahue Moore

Enclosures
cc: Austin J. Tothacer, Jr., Esq.
Steve A. Matthews, Esq.