

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-2695

The Town of Hollywood.....Appellant/Respondent,

vs.

William Floyd a/k/a Jeff Floyd,
Troy Readen, and Edward McCracken
a/k/a Eddie McCrackenRespondents/Appellants.

APPELLANTS' BRIEF OF RESPONDENTS/APPELLANTS

July 16, 2012

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STATEMENT OF ISSUES ON APPEAL

Did the lower court err in failing to find that there was a genuine issue of material fact as to whether the zoning administrator did or did not have authority to grant the plaintiffs' application in phases?

Did the lower court err in granting summary judgment when the Town's Ordinances—if they existed—require that the plaintiffs' application be automatically approved after 60 days if the Planning Commission does not act?

STATEMENT OF THE CASE

On June 14, 2007, the defendants (who, as explained later, became the plaintiffs) appeared before the Town of Hollywood Planning Commission for approval to subdivide a 13.2-acre parcel of real estate located on Bryan Road next to Stono Plantation. (This is the “first Planning Commission meeting.”) The Planning Commission directed the landowners to the Town’s Planning Director, who approved the subdivision in two phases on June 22, 2007 and June 27, 2007. (Vol. III, R.O.A. pps. 972-975 [plats]) After issuing two work permits to the landowners to clear the property, the Town of Hollywood filed this action on October 12, 2007, at case number 2007-CP-10-4559, alleging that the Town’s Zoning Administrator improperly approved the defendants’ subdivision plat because the Town’s Ordinances required that the subdivision be approved by the Town’s Planning Commission. Reserving all their rights, the parties struck that case with leave to restore to afford the defendants—the landowners—an opportunity to appear before the Planning Commission a second time to gain approval. The landowners did that on August 14, 2008, and the Town’s Planning Commission took no action on the subdivision request. (This is the “second Planning Commission meeting.”) Therefore, the parties restored the case on March 29, 2010, at Case No. 2010-CP-10-2695.

The Town renewed its motion for summary judgment, which came before Judge Markley Dennis on September 7, 2010. Judge Dennis granted summary judgment for the Town, which then left the landowners’ counterclaims as the only remaining issues. Therefore, the trial court realigned the landowners as plaintiffs for trial. To avoid confusion, we will refer to the landowners as plaintiffs even though they are listed in the caption as defendants. The landowners, who became the

plaintiffs, filed their answer and counterclaims on August 29, 2008, alleging a violation of equal protection, due process, tortuous interference, *etc.*

The Town's Planning Commission included Matt Wolfe, who lives next door to the plaintiffs' project in the gated community known as Stono Plantation, and who is personally opposed to it because of what he claims will be an adverse impact on his neighborhood. At the first Planning Commission meeting on June 14, 2007, the first Planning Commission took no action on the application and directed the plaintiffs to see the Town's Planning Director, Kenneth Edwards. Town Council Member, Annette Sausser, attended this first Planning Commission meeting and introduced herself to the plaintiffs and their witnesses by making a throat slashing gesture, telling them that their application will "never happen!" (See Supp. Record on Appeal, pages 1 - 19 for the transcript of this first Planning Commission hearing.)

The plaintiffs' counterclaims against the Town of Hollywood allege that the Town denied their subdivision request for improper purposes and violated the defendants' constitutional rights. On May 5, 2010, the Town filed a motion for summary judgment. On July 23, 2010, the landowners filed an affidavit in opposition to the motion for summary judgment. On September 7, 2010, the Honorable R. Markley Dennis, Jr. granted the Town of Hollywood summary judgment on the issue of the subdivision. Immediately after Judge Dennis granted summary judgment, the Clerk called the case for trial. Since Judge Dennis granted summary judgment for the Town on the relief it sought, the lower court realigned the parties, and the landowners became the plaintiffs. The parties tried the case from September 8-13, 2010. On September 13, 2010, the jury returned a verdict against the Town for \$450,000.00.

On September 22, 2010, the landowners filed a motion for reconsideration of Judge Dennis'

Order Granting Summary Judgment. On September 23, 2010, the Town moved for an Order granting a new trial, which the circuit court denied by Order dated October 4, 2010. On October 19, 2010, Judge Dennis denied the landowners' motion for reconsideration. The Town appealed the jury verdict on May 13, 2010, and the landowners appealed Judge Dennis' summary judgment order on May 19, 2011. As a result, the Town became the primary appellant on its appeal from a jury verdict, and the defendants became the secondary appellant on their appeal from Judge Dennis' summary judgment Order.

FACTS

The underlying facts are almost entirely uncontested. As may be seen by reference to Jeff Floyd's affidavit (Vol. III, R.O.A. p. 1172), he and two partners purchased a 13.2-acre tract located on Bryan Road. Prior to purchasing the property, they inquired of the Town as to whether the tract could be subdivided. They appeared before the Town Planning Commission on June 14, 2007, and the Planning Commission directed the landowners to make an application to the Planning Director, Kenneth Edwards. When they appeared before the Planning Commission on June 14, 2007, while waiting for their case to be called, Town Council member Annette Sausser approached them and inquired if they were there on the Bryan Road matter. When they replied in the affirmative, Councilwoman Sausser drew her thumb across her neck to simulate cutting her throat and told the landowners and their witnesses: "Never happen!" For an unbiased account of this event see the testimony of Mary W. Wolf at Vol. II, R.O.A. p. 439-441 [tr. page 344-346].

The first Planning Commission informed the applicants that they were in the wrong place and directed them to see the Zoning Director, Kenneth Edwards. After consulting with Mr. Edwards, the applicants and their engineer, Curtis Lybrand, submitted their subdivision to Mr. Edwards in the

manner instructed by him. He approved the subdivision in two phases, and stamped phase 1 on June 22, 2007 and phase 2 on June 27, 2007. (Vol. III, R.O.A. pages 972 and 974) The plaintiffs then recorded the plats and proceeded to market the lots. After the Town approved the subdivision, the Town issued two permits to the plaintiffs, a logging permit on July 20, 2007, and a second one on September 4, 2007, (Vol. II, R.O.A. pages 813 and 814 [plaintiffs' exhibits 8 and 9] Once the plaintiffs were actively engaged in development, then the Town asserted that Edwards' acts were void based on the Town's ordinances. The plaintiffs responded the Town had no ordinances, and if it did, the Town could not produce them. As set forth above, Judge Dennis granted the Town summary judgment because he found the Town's ordinances controlled, and after moving for reconsideration, the plaintiffs appealed on November 10, 2010. (Supp. R.O.A. p.21 [Notice of Appeal]).

ARGUMENT 1.

The learned trial judge erred by not giving any weight to the plaintiffs' affidavit filed in response to the Town's motion for summary judgment.

It will be difficult to evaluate this case if this Court operates under the normal expectation of how the Town of Hollywood operates. The Town of Hollywood is unique in the history of local government. The Town of Hollywood has never been burdened by deference for the rule of law, and the Town openly flaunts the most fundamental underpinnings of law. Without so much as a pretend nod to the First Amendment, it declares itself a "Christian" town, adopting the Christian cross as its municipal symbol. (See any Town of Hollywood official document, such as correspondence to the plaintiffs at Vol. II, R.O.A. p. 832 [Holton correspondence to Floyd dated October 23, 2007, Plaintiffs' Exhibit 12] The present case is but one chapter in the long, well-documented history of

bizarre governmental acts in Hollywood. At the trial of this case, one witness testified that dealing with the Town of Hollywood on a 1-10 scale, with 1 being “excellent” and 10 “horrible” is a “13”:

Q. How would you rate your experience with the town of Hollywood on a one to ten?

A. At the time I did it, I would rate them at about a 13.

Q. And what do you attribute that to?

A. It was just a pain. I don't like having to deal with people who inflict their personal opinions into it. I like to follow a set of rules. There should be a set of rules that you follow. I'm not interested in a specific person's personal feeling about it or the fact that he may live next door to it and have some interest in it. That doesn't mean a thing to me. All I'm interested in doing is following the rules.

R.O.A. Vol. II, pps. 572 -573 [tr. Pps. 492- 493]

In order to appreciate the background of this controversy, consider the Town's opening salvo to the applicants expressed through the statement of its Town Council member Annette Sausser, who without hearing any of the particulars, told the plaintiffs: “Never happen!” The General Assembly requires local governments to have Planning Commissions in an effort to insulate land use issues from politics. As Justice Waller said in *I'ON v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), land use decisions are supposed to be “rational” and free from “undue political influence.” Here, Councilwoman Sausser believes it is appropriate not only to participate in a Planning Commission hearing in violation of the statute, but also to broadcast the end result to the applicants by simulating a throat cutting before they have an opportunity to state their case. Even though she is not a member of the Planning Commission, she had a significant interest in the Bryan Road project since she owned property in the adjoining gated community, Stono Plantation. See Plaintiffs'

Exhibit 18 at page 900 of the R.O.A., Vol. II. Because she was so personally interested in killing the project, she sat on the dais with the Planning Commission, which is an additional exclamation point on the Town's disrespect for the rule of law. Her participation as a Town Council member violates the statutory composition of the Planning Commission. See § 6-29-350: "no member of a planning commission may hold an elected public office. . .". All Planning Commission members know this because the statute requires them to undergo training as a member, and this training includes ethics. The purpose of the statutory scheme is to prevent the thing that happened to the plaintiffs in this case. The Town of Hollywood does not care, and it freely thwarts the General Assembly's mechanism to insulate land use decisions from "undue political influence" despite the clear direction of the courts:

In municipal government, few issues generate as much public interest as the control of land-use development. Zoning ordinances touch people where they live. Sensitive to the intense public interest in local land-use development, **the Legislature has developed an orderly structure for public participation in the process. That process also contemplates the rational development of land use, free from undue political influence.**

I'ON v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (emphasis added)

As this record demonstrates, the Town of Hollywood openly rejects this idea, and because the wealthy homeowners of the gated Stono Plantation neighborhood next door had the ear of Town Councilwoman Sausser, a former resident of the gated community, the plaintiffs never had a chance.

Thus, the lower court did not evaluate the Town's motion for summary judgment properly because it made the understandable mistake in assuming that the Town of Hollywood at least plays lip service to the rule of law. The error below is that the lower court did not give the plaintiffs' affidavit filed in opposition to summary judgment **any** weight. In short, the lower court rejected the Floyd affidavit and could not accept that the Town operates without published ordinances even

though the affidavit filed in opposition to summary judgment creates a genuine issue of material fact on this point. Specifically, with regard to the ordinances that allegedly prohibit the Planning Director from approving a subdivision of less than ten lots, Mr. Floyd states:

First of all, I made demands in person upon the Town time and time again to show me what Ordinance was preventing us from moving forward. Not only could the Town not identify any Ordinance, but also it could not even provide a copy of its Ordinances to me. I made 3 trips to the City Hall, each time asking for a copy of the Ordinances. At one meeting set up specifically to get the Ordinances, Troy and I met with the mayor's assistant, Beth Carpenter and with Ed Holton, the current Zoning Administrator, and they told Troy and me that the Town could not produce any Ordinances for us because the Town was in the process of "recodifying" them and the Ordinances were not in any one place where they could be retrieved.

The Town of Hollywood had no written Ordinances that they could provide to us until after this lawsuit. Even now the versions that the Town now produces do not match up.

It is shocking that the Town now cites Ordinances which did not exist when this controversy began, and if the Ordinances did exist, which I doubt, the Town was unable to produce them. Affidavit of Jeff Floyd, July 13, 2010 (Vol. III, R.O.A. page 1172)

The lower court gave this affidavit no weight and ignored this testimony. See plaintiffs' September 22, 2010, Motion for Reconsideration in the Record on Appeal at page 113: "As may be seen by reference to the affidavit filed in opposition to the Town's motion for summary judgment, the Town of Hollywood had no ordinances in 2007, and if it did, it could not produce them or even identify them. The plaintiffs argue that the existence of the ordinances in June 2007 is in doubt, and at a motion for summary judgment, the Court is not allowed to disregard this testimony because to do so it must weigh competing allegations and decide who to believe. If the existence of the ordinances

is in doubt, then this Court cannot possibly conclude that Kenneth Edwards' acts were *ultra vires*."

At the summary judgment stage, the Court is not permitted to weigh evidence let alone ignore it. In fact, the Court is required to construe all the facts and the inferences reasonably deducible there from in the light most favorable to the party resisting summary judgment:

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Sumner v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); Rule 56(c), SCRPC. *See also Standard Fire Ins. Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990) (motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence

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and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). *See also Bates v. City of Columbia*, 301 S.C. 320, 391 S.E.2d 733 (Ct.App. 1990) (in determining whether to grant summary judgment, pleadings and documents on file must be liberally construed in favor of nonmoving party who must be given benefit of all favorable inferences that might reasonably be drawn from record). If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997); *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Tupper, supra*; *Koester, supra*. However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. *Tupper, supra*; *Baugus, supra*.

Staubes v. Folly Beach, 331 S.C. 192, 500 S.E.2d 160 (Ct. App. 1998)

South Carolina law requires that a municipal government have its ordinances on file and available for inspection and copying by any interested citizen. See § 5-7-290:

Municipal ordinances to be codified; public inspection. Each municipal council shall provide by ordinance for the codification and indexing of all ordinances, either typewritten or printed, and the maintenance of ordinances in a current form reflecting all amendments and

repeals. All ordinances as codified shall be available for public inspection at reasonable times.

Here the plaintiffs' evidence—which the lower court erroneously ignored—is that these ordinances did not exist, and if they did exist, the Town was either unable or unwilling to produce them. The plaintiffs contend that the ordinances came into existence after the fact to bolster the Town's position. Either way, the lower court did not give this evidence any weight and thus improperly granted summary judgment. Summary judgment is a drastic remedy that should be cautiously invoked so as to not deprive a party of his or her fundamental right to trial by jury. An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment. *Id.* Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004). The Order under review (and the Order denying reconsideration) construes all the evidence in the light most favorable to the Town, and for this reason, the Order granting summary judgment must be reversed.

While not dispositive of the issue now before the Court, it is interesting to note that when this case did go to trial, the jury in the case deadlocked 10-2 to award the plaintiffs' 1.5 million dollars in damages. Only after an *Allen* charge by the trial court, did the jury return a compromise verdict of \$450,000.00. “An *Allen* charge, also known as a "Dynamite" or "Hammer" charge, is to be used when the jury has expressed a deadlock and cannot come to a unanimous conclusion. *See Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154.” *State v. Kelly*, 372 S.C. 167, 641 S.E.2d 468 (Ct. App. 2007) Had the jury been given an opportunity to hear about the dysfunctional manner in which the Town treated the subdivision of the lots between the Town’s Planning Commission and the Town’s

Planning Director, it is entirely possible that the *Allen* charge would have been unnecessary. The point is that Judge Dennis' Order prevented the jury from hearing the full orchestration of the Town's irregular procedures.

It is thus reasonable to infer that the jury verdict would not have deadlocked and would have been much higher had the lower court not deprived the plaintiffs of the opportunity to present this issue before the jury. Because the lower court gave no weight to the plaintiffs' evidence, and because there is a clear genuine issue of material fact, the lower court's order should be reversed and remanded for entry of judgment against the Town of Hollywood.

ARGUMENT 2.

Even if the Ordinances did exist, they require that the plaintiffs' subdivision request was approved by the Planning Commission's failure to act.

In perhaps one of the greatest unintended ironies of trial practice, the inescapable fact is that if the Town's ordinances did, in fact, exist at the time of the plaintiffs' application for subdivision, then the plaintiffs' subdivision request became automatically approved on October 15, 2008, at the latest. As set forth above, the landowners appeared before the Planning Commission not once, but twice, first on June 14, 2007, without counsel and then again on August 14, 2008, with counsel. Both times the Planning Commission refused to act on the application. During discovery conducted in the lawsuit, the plaintiffs obtained a copy of what the Town contends its ordinances are. Section 5-6-26 "The Final Plat" sets forth the following procedure:

(e) Action on Final Plat. The Planning Commission shall approve or disapprove the final plat as soon as possible after it has been submitted for final approval. Approval and the date thereof shall be shown on the plat over the signature of the chairman of the Planning Commission and the Zoning Administrator. If no action is taken by the Commission at the end of sixty (60) days after

submission, the plat shall be deemed to have been approved.

The irony of the Town's late statutory disclosure is that Councilwoman Sausser¹ previously made clear at the outset the Town's position on the subdivision application. Rather than stick to their guns, the Town's Planning Commission took a less honorable path and did nothing. While it is impossible to miss the Town's intent, transmitted as a simulated cut throat, accompanied with an emphatic "never happen!", even the most skillful trial lawyer cannot extract evidence from a witness' secret heart, giving rise to the universal proverb that we judge by what we do and not by what we say. Here, of course, Councilwoman Sausser, breaking with the usual political practice of hiding untoward acts, threw in an oral *coupe de grace*, which no one present mistook for anything other than the outcome was decided in advance. In evaluating this evidence, no one can mistake her or the Town's intentions. Because the Planning Commission was more circumspect, we must evaluate their state of mind in the usual fashion. They chose to do nothing. Passiveness is rarely a good quality, especially where the minority view is under attack. Literature offers a different approach to the analysis of character, and thus gives rise to dramatic renderings of the involuntary agenbite of inwit—remorse of conscience—made most famous by Shakespeare and James Joyce. No amount of metaphorical washing—the literary equivalent of political rationalizing—can wipe clean what the Town of Hollywood was doing—and still is doing—and all of the efforts of the General Assembly to design a statutory procedure to provide a level playing field fail when members appointed to the Planning Commission lack enough conviction to sit out decisions in which they are personally

¹ James Fennimore Cooper archly commented on untrained people making important political decisions: "The tendency of democracies is, in all things, to mediocrity, since the tastes, knowledge, and principles of the majority form the tribunal of appeal." "On the Disadvantages of Democracy" (1838) Councilwoman Sausser lacked the courage of her convictions and declined to share them at the trial of this case.

affected or to permit applicants to be heard or to vote projects up or down “free from undue political influence” as the Town’s alleged ordinance requires. Matt Wolfe’s refusal to step aside from voting on a project that personally affects him, and the Commission’s refusal to vote not only speaks volumes about Hollywood’s ethical shortcomings, but also provides the unintended ironic background to the legal issue presented in this case. The legal effect of this unintended irony is that the Town of Hollywood told the lower court, and will now tell this Court, that it wants to have its cake and eat it too.

On the one hand, the Town says the subdivision request is denied because it fails to conform to ordinances it could not produce, and on the other hand, the same ordinances—ultimately produced in discovery—determine that the plaintiffs’ subdivision request is approved for lack of action. Either way, the lower court erred in concluding that there is no genuine issue of material fact.

CONCLUSION

For the foregoing reasons, the lower court erred in granting the Town summary judgment when there is evidence in the record that the Town's alleged ordinances either did not exist, or if they did exist could not be produced. Either way, the landowners made out a genuine issue of material fact, and the lower court erred in granting summary judgment for the Town.

Respectfully submitted,

July 16, 2012



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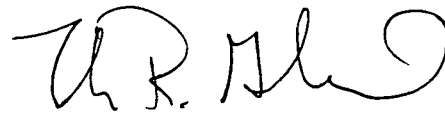
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a/k/a Eddie McCracken Respondents/Appellants.

CERTIFICATE OF COUNSEL

I certify that this brief complies with Rule 2119(b) *SCACR*.

July 16, 2012



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