

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Roger M. Young, Circuit Court Judge
R. Markley Dennis, Jr. Circuit Court Judge

Case No. 2010-CP-10-2695

The Town of Hollywood

Appellant-Respondent

v.

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

Respondents-Appellants

RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT RECEIVED

JUL 09 2012

SC Court of Appeals

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STATEMENT OF THE CASE

This case arises out of a land use dispute. The Respondents-Appellants William Floyd a/k/a Jeff Floyd, Troy Readen and Edward McCracken a/k/a Eddie McCracken (hereafter referred to as "Developers") entered into a contract in February 2007, to purchase a 13-acre tract located on Bryan Road within the Town of Hollywood, South Carolina. (R. 794-800). The Developers submitted an application for rezoning the property to the Planning Commission for the Appellant-Respondent Town of Hollywood ("Town"). (R. 804). The Planning Commission considered the rezoning request at its regularly scheduled meeting on June 14, 2007. At that meeting, the Developers presented a rough sketch of the property and indicated their intent to subdivide and develop the tract into seventeen lots. (R. 100). At the conclusion of the Developers' presentation, the Planning Commission informed the Developers that their plans did not require a rezoning. They were further advised that the approval of the subdivision of the tract did, however, require formal approval by the Planning Commission before they could proceed with the project. (R. 100). The matter was accordingly tabled.

Thereafter, the Developers met with the acting zoning administrator Kenneth Edwards who indicated that he would approve the subdivision himself if the project were divided into two phases. On June 27, 2007, which was two days

before Edwards was leaving his employment with the Town, Edwards "approved" two plats for the subdivision of the Bryan Road property. The Developers then closed on the property on the same day. (R. 807-809).

The Town Code of Ordinances do not give the zoning administrator authority to approve a final subdivision plat without approval from the Planning Commission. When the Developers began work on the site, the Town issued a Stop Work Order. Because the Developers indicated that they would not comply with the Stop Work Order, the Town filed this action in the Court of Common Pleas for Charleston County seeking declaratory and injunctive relief. Specifically, the Town sought a declaration that (1) the Developers had no authorization or approval under the Town Code of Ordinances or state law to subdivide the property without approval of the Planning Commission and (2) that the plats signed by Kenneth Edwards were null and void. The Town further sought a permanent injunction to cease further development of the property until the appropriate approval was sought and received from the Planning Commission. That action was filed on October 12, 2007. (R. 20-25).

In response to the Town's Complaint, the Developers filed counterclaims under 42 U.S.C. § 1983 for alleged violations of equal protection and due process, as well as state law claims. (R. 32-37).

The Town's claims for declaratory and injunctive relief were adjudicated by way of a motion for summary judgment. By order filed September 7, 2010, Circuit Court Judge R. Markley Dennis, Jr. concluded as a matter of law that Kenneth Edwards "lacked authority to either approve Defendants' subdivision or waive the subdivision approval process as set forth in the Town's Municipal Code. Edwards' actions in signing the plats as approved by the Town were without authority and cannot be used to estop the Town from enforcing its ordinances." (R. 7). Judge Dennis further issued a declaratory judgment that "(1) the Defendants have no authorization or approval under the Municipal Code of Hollywood or the laws of the State of South Carolina to subdivide the property or begin development activities on the Bryan Road Property, and (2) the plats signs by Edwards upon which the Defendants have wrongly proceeded to develop the Property are null, void and of no effect." (R. 7-8).

Judge Dennis denied summary judgment on the Developers' counterclaims, which proceed to trial before Circuit Court Judge Roger M. Young and a jury from September 8, 2010 through September 13, 2010. (R. 8). Only the federal constitutional claims were submitted to the jury. The jury returned a verdict for the Town on the procedural and substantive due process counts. (R. 17-18). On the equal protection count, the jury found for the Developers and awarded \$450,000.00 in actual damages. (R. 18).

After the trial was completed, the Developers filed a Motion for Reconsideration on September 22, 2010, from Judge Dennis' summary judgment order. (R. 113-115). That motion was denied by Judge Dennis by order filed October 19, 2010. (R. 11).

The Developers later filed a cross-appeal from the orders issued by Judge Dennis. The Developers have not appealed from the jury verdict nor any trial or post-trial rulings by Judge Young.

ARGUMENTS

I. The Circuit Court was correct in granting summary judgment on the Town's claim for declaratory relief.

The Developers contend that Judge Dennis erred in granting summary judgment on the Town's claim for declaratory relief because he failed to give any weight to the affidavit of Jeff Floyd. In granting a declaratory judgment, Judge Dennis concluded that acting zoning administrator Kenneth Edwards acted without authority when he "approved" two plats for the subdivision of the Bryan Road property.

In his affidavit, Jeff Floyd, who is one of the Developers, attests that he attempted unsuccessfully on three occasions to obtain a copy of the applicable subdivision ordinances. That led him to conclude in his affidavit that "[t]he Town of Hollywood had no written Ordinances that they could provide to us until after this lawsuit" and that "the Town now cites Ordinances which did not exist when this controversy began." (R. 1174). Based on that affidavit, the Developers take the position that there exists a genuine issue of material fact as to whether the Town had subdivision ordinances enacted in 2007.

In his summary judgment order, Judge Dennis acknowledged the existence of the Land Development Ordinance which was adopted in 1998 to implement the

Town's Comprehensive Plan. (R. 4). Judge Dennis also noted that the ordinances had been recodified in March 2007, but the language in the 1998 ordinances remained the same. (R. 4).

Based on those ordinances, Judge Dennis correctly determined that a two-step process must be followed to legally subdivide any parcel into more than three lots, and that that process requires action exclusively by the Planning Commission. *See*, Town of Hollywood Ordinance § 30-34. (R. 82). Judge Dennis also correctly ruled that Kenneth Edwards did not have the legal authority to approve the subdivision of a parcel into more than three lots. *See*, Town of Hollywood Ordinance § 30-12. (R. 80). Importantly, the Developers do not contend that Judge Dennis misinterpreted or misapplied these ordinances. Instead, they contend that Judge Dennis should not have concluded as a matter of law that these ordinances existed in 2007.

The Developers' position is seriously flawed in at least two respects. First, the existence of an ordinance is not an issue of fact. In two recent cases, the South Carolina Supreme Court has held that the zoning designation of a parcel, which is established by ordinance and may only be changed by ordinance, is a matter of law, not fact. *See*, *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010); *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011). Just as the zoning designation is not an issue of fact, neither is

the existence of an ordinance an issue of fact. The existence of an ordinance – just like the existence of any law -- is clearly a matter of law that is within the province of the court to determine. In the present case, the Town submitted a copy of the Land Development Ordinance including the provisions governing subdivision approval into the record. (R. 77-98). As a result, the record supports Judge Dennis' reliance on the applicable ordinances in spite of what is contained in the Jeff Floyd affidavit.

Second, even if the Developers were correct that the existence of an ordinance is somehow an issue of fact, that issue does not preclude summary judgment in the present case. In the case of *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984), the Supreme Court explained as follows:

A motion for a summary judgment speaks in terms of "no genuine issue as to material facts." It is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine.

316 S.E.2d at 407. The Court further recognized that "[t]he judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Id.* Likewise, this Court has held that "[i]t is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine." *Evans v. Stewart*, 370 S.C. 522, 636 S.E.2d 632, 635 (Ct.

App. 2006). The issue of fact is not genuine where the "evidence create[s] a far fetched inference." *Saluda Motor Lines, Inc. v. Crouch*, 300 S.C. 43, 386 S.E.2d 290, 292 (Ct. App. 1989).

In the present case, the Developers have indeed created a far fetched inference with the affidavit of Jeff Floyd. The Developers do not dispute Judge Dennis' application of the ordinances that on their face were enacted in 1998 and were in effect in 2007. However, in a vain attempt to create an issue of fact in dispute, the Developers question whether the ordinances were in existence. Clearly, they have not presented a genuine issue of fact that would indeed preclude summary judgment.

In short, Judge Dennis committed no error of law in concluding that the ordinances that he cites were indeed in existence in 2007. Contrary to the Developers' claim, Judge Dennis did not weigh evidence; instead, he found as a matter of law that the ordinances existed. That ruling should not be reversed. Likewise, the application of the ordinances by Judge Dennis in granting summary judgment – which the Developers do not even challenge – should be affirmed.

The Developers also make the curious argument that Judge Dennis' ruling on the declaratory portion of the case resulted in a lesser verdict for the Developers on the equal protection claim. This assertion is entirely speculative. The jury found liability and awarded actual damages. The Developers have not appealed the jury's

verdict nor any rulings at trial or post-trial. They have not claimed that the jury's verdict (should it stand) was inadequate in any respect. Indeed, it is not valid to argue that the jury would have awarded greater actual damages if additional allegations of "wrongdoing" could have been shown. The jury presumably awarded the damages to which the Developers were entitled.¹ Moreover, the Developers did not appeal the jury's defense verdict on the due process claims, and hence, they are precluded from arguing any effect of the summary judgment on the litigation of those claims at trial.

In sum, the Circuit Court did not err in granting summary judgment on the Town's claim for declaratory relief.²

¹ Of course, punitive damages were never an issue because a municipality is not liable under 42 U.S.C. § 1983 for punitive damages. *See, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

² Much of the Developers' "argument" in Argument I of its brief is unrelated to the summary judgment on the Town's claim for declaratory relief. Moreover, the Town objects to the Developers' reliance on testimony and evidence from the trial itself. Obviously, that evidence was not in existence at the summary judgment stage and was not considered by Judge Dennis. Moreover, the Town objects to the entirely unsubstantiated recitation of the jury's deliberations as set forth on page 12 of the Developers' brief. There is absolutely no basis for the Developers' claims with respect to how the jury was deadlocked and the size of the award that was being considered by the jury. The inclusion of such raw speculation by the Developer's counsel is reprehensible and certainly contrary to the Appellate Court Rules. *See*, Rule 210(h), SCACR ("the appellate court will not consider any fact which does not appear in the Record on Appeal").

II. The Circuit Court did not err in failing to rule that the Developers' subdivision should have been approved as a result of the Planning Commission's failure to taken action at its August 2008 meeting.

As a second issue for appeal, the Developers contend that, even if the Court concludes that the Town of Hollywood had its Land Development Ordinance in effect in 2007, their subdivision should have been approved as a result of the Planning Commission's failure to taken action at its August 2008 meeting. Despite the absence of any formal application for a preliminary plat approval at that time, the Developers contend that the motion to "table" the project should have been deemed an approval of the project because the Planning Commission took no action within sixty days. (R. 889-890). This issue is quite simply not preserved for appellate review, and at any rate, does not impact the rulings by Judge Dennis.

It is elementary that an appellant cannot raise an issue on appeal that was not first raised to and decided by the lower court. In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an

appellate court cannot address an issue unless it was raised to, *and ruled upon by*, the trial court." *Id.* (Emphasis in original).

In his summary judgment order filed September 7, 2010, Judge Dennis did not address this issue. Instead, in granting declaratory relief to the Town, Judge Dennis addressed only the legality of the actions of Kenneth Edwards when he "approved" two plats for the subdivision of the Bryan Road property. Judge Dennis specifically wrote:

Edwards lacked the authority to either approve Defendants' subdivision or waive the subdivision process as set forth in the Town's Municipal Code. Edwards' actions in signing the plats as approved by the Town were without authority and cannot be used to estop the Town from enforcing its ordinances.

(R. 7).

During the hearing on the motion for summary judgment, the Developers' counsel made cursory reference to the argument that they are now making on appeal. In a mere two sentences, counsel argued: "Under their ordinance, failure to act on a subdivision within sixty days is deemed to be an approval. That's their ordinance, that they're relying on." (R. 149). That argument was not mentioned again. When Judge Dennis ruled – both orally and by written order – there was no mention of nor adjudication of this argument, and the Developer's counsel did not raise it again. After the summary judgment order was issued, the Developers did file a Rule 59(e) motion raising three grounds; however, this argument was not

raised or even mentioned.

In short, the issue now raised by the Developers – to the effect that their plat should be deemed approved by the alleged inaction by the Planning Commission for in excess of sixty days – was not decided by Judge Dennis and was not raised by way of a Rule 59(e) motion. As a result, it is abundantly clear that the issue is not preserved for appellate review.

In addition, the issue now raised by the Developers does not impact the summary judgment issued by Judge Dennis. In his oral ruling, Judge Dennis made clear that his order "doesn't stop [the Developers] from having this plat submitted for approval." (R. 156). The Town does not disagree. The Town has always taken the position that no formal application for preliminary plat approval has yet been made by the Developers. (R. 146). Hence, the Developers have not shown how Judge Dennis' ruling on the legality of Edwards' actions in signing the plats is erroneous based upon the unpreserved issue they now raise. Clearly, the summary judgment should be affirmed.


CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Town of Hollywood respectfully requests that this Court affirm the orders of Judge

R. Markley Dennis, Jr. granting summary judgment to the Town on its claims for declaratory relief.

Respectfully submitted,

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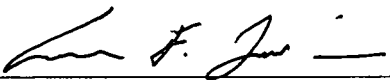
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July 9, 2012

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Town of Hollywood certifies that the Final Respondent's Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Town of Hollywood certifies that the Final Respondent's Brief of Appellant-Respondent complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent Town of Hollywood, does hereby certify that service of the **Respondent's Brief of Appellant-Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 9th day of July 2012:

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