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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge
Case No. 2020-CP-26-00785

APPELLATE CASE NO. 2021-001074

ANI CREATION, INC. d/b/a Rasta; ANI CREATION, INC. d/b/a Wacky T's; BLUE SMOKE, LLC d/b/a Doctor Vape; BLUE SMOKE, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; KORETZKY, LLC d/b/a Grasshopper; RED HOT SHOPPE, INC.; E.T. SPORTSWEAR, INC. d/b/a Pacific Beachwear; MYRTLE BEACH GENERAL STORE, LLC; I AM IT, INC. d/b/a T-Shirt King; and BLUE BAY RETAIL, INC. d/b/a Surf's Up, Petitioners,

Appellants

vs.

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS and KEN MAY, ZONING ADMININISTRATOR FOR CITY OF MYRTLE BEACH, Respondents,

Respondents

APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING

On April 19, 2023 this Court issued its Opinion No. 28151 affirming the Order of the Circuit Court. The Appellants, in response to this Court's Opinion, respectfully offers the following points this Court overlooked or misapprehended in issuing its Opinion.

I. THE OPINION OF THIS COURT ERRED IN NOT ADDRESSING THE GOOD FAITH RELIANCE DOCTRINE ADOPTED IN *PURE OIL V. CITY OF COLUMBIA*.

Appellants in their brief argue the good faith reliance defense to the City of Myrtle Beach changing the zoning ordinances make it illegal to sell certain legal products in the Ocean Boulevard Entertainment Overlay District (hereinafter "OBEOD"). Appellants have been in business continuously for over 30 years and have sold cigarettes, novelty items, pipes, tacky t-shirts and more recently CBD oil without restriction. Appellants do not sell sexually explicit products. Once the OBEOD ordinance was enacted and affirmed by this Court Appellants can no longer to sell those items without risk of loss of their businesses and possible fine or imprisonment.

This Court in its Opinion makes no reference to the landmark case of this Court of *Pure Oil Division v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970) cited in Appellants' original Brief. In that case, this Court held that good faith reliance is a defense to a change in zoning ordinances. The rulings of this Court have been that a business owner should be able to rely on a zoning ordinance when he opens a business. South Carolina is one of about half a dozen states that limits the retrospective application of zoning ordinances.[1] This opinion overturns over almost 100 years of precedent on this subject.

This Court makes no mention of *Pure Oil* or the Court's longstanding policy which has consistently held that a citizen should be able to rely upon the laws of its municipality. A citizen with an existing business who is selling products should not lose his vested constitutional right to sell those products just because the zoning ordinance is changed by the City. The language of this Court in *Pure Oil Division v. City of Columbia* is telling:

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[1] Other states include Pennsylvania, California, Illinois, and by implication Idaho. *See, e.g. City of Los Angeles v. Superior Court*, 34 Cal. Rptr. 161 (Dist. Ct. App. 1963); *Lomond, Inc. v. City of Idaho Falls*, 92 Idaho, 595, 448 P.2d 209 (1968); *Westerheide v. Obernueferman*, 3 Ill. App. 3d 996, 279 N.E. 2d 402 (1972); *Boron Oil Co. v. Kimple*, 445 Pa. 327, 284 A.2d 744 (1971). *See generally* Annot, 50 A.L.R. 3d 596, 620-32 (1973). Several states do not allow zoning statutes to have any retroactive effects. See 3 A. Rathkopp, The Law of Zoning and Planning, note 10, at 57-4 to -6.

> We see no sound reason to protect vested rights acquired after a permit is issued, and to deny such protection to similar rights acquired under an ordinance as it existed at the time a proper application for permit is made. In both instances, the right protected is the same, that is, the good faith reliance by the owner on the right to use his property as permitted under the zoning ordinance in force at the time of the application for a permit. There are no intervening considerations of public necessity involved under the facts of this case. 254 S.C. at 34, 135, 173 S.E.2d at 143.

The decisions of this Court regarding vested rights concerning municipal ordinances are rooted in the case of *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955). In *James*, this Court held invalid as to the plaintiff an attempt by the City of Greenville to require the discontinuance within one year of an otherwise legal nonconforming use. Plaintiff had purchased his land in 1945 and commenced using it as a trailer court and apartment complex in 1947. The City annexed the property in 1948 and rezoned it in 1950 to a single-family district. The City then notified the plaintiff that he had one year to discontinue the nonconforming use. This Court held that notwithstanding a zoning ordinance, one's property may be continued to be used for the same purpose it was being used at the time of the passage of the zoning ordinance and that such ordinance amounted to a taking of property without just compensation in violation of Article 1 Sections 5 and 17 of the Constitution of South Carolina.

This Court in *James* cited the United States Constitution as the basis for its actions:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of ... property without due process of law, nor shall any person be denied the equal protection of the laws." 88 S.E.2d at 666.

Chief Justice Baker in the opinion went on to say: "If the writer hereof is considered rather caustic, it is not without basis." 88 S.E.2d at 667. He then went on to quote the Biblical story related in 1 Kings, Chapter 21, where Ahab, King of Samaria, coveted a small vineyard owned by Naboth, because it was near unto his house and offered Naboth therefor its worth in money, or even a better

vineyard, all of which Naboth refused. This caused Ahab to become "heavy and displeased" and he "would eat no bread." However, Jezebel, the wife of Ahab, learning of the cause of his apparent trouble, arranged to have Naboth, in the presence of a large gathering, accused by two witnesses of having cursed God and the King, thereupon Naboth was carried without the City where the gathering was had and stoned to death; and Jezebel thereof thereby delivered the possession of the vineyard to Ahab. 88 S.E.2d at 669.

Finally the *James* Court found "It was unnecessary to cite further authority, especially in light of the fact that all decided cases to which we have had access, and coming from the various states of the Union, hold that notwithstanding of zoning ordinance, one's property may be continued to be used for the same purpose it was being used, at the time of the passage of a zoning ordinance." 88 S.E.2d at 667.

In sum, the *James* case, the *Pure Oil* case and the *Kerr* case all have stood for the principle that a nonconforming property could continue to operate based on the theory of vested rights as found in the United States and South Carolina Constitutions. The *James* case has been cited at least 28 times and it has been a principle of this Court to allow nonconforming uses to continue until this case was decided. Appellants believe that this Court, which did not cite any of the above cases in its opinion, should address this issue head on. If the Court intends to reverse those prior decisions it should say so in its opinion.

Here, Appellants acquired constitutional vested rights to sell legal products and this Court has not addressed that constitutional right of Appellants which has been reaffirmed by this Court in numerous cases since *Pure Oil*. Appellants ask this Court to follow the doctrine of stare decisis and reverse its prior opinion in this case.

II. THIS COURT ERRED IN NOT ADDRESSING THE CLAIM OF APPELLANTS THAT THEIR BUSINESSES WERE GRANDFATHERED AS A MATTER OF LAW.

This Court in *Kerr v. City of Columbia*, 232 S.C. 405, 102 S.E.2d 364 (1958) held that an ongoing business was grandfathered even though a majority of city council had zoned it out of business. In *Kerr*, the Supreme Court held that that the owner of land was entitled to the permit in accordance with the vested rights acquired by her under the ordinance of the Town of Eau Claire, and that the City of Columbia stood "in Eau Claire's shoes." Since Eau Claire could not deny the permit, because rights had become vested, neither could the City of Columbia, even if the latter's zoning ordinance applied so as to change the classification of this owner's property from business to residential.

The same applies here in that Appellants had vested rights which cannot be taken away by a new or amended City zoning ordinance. The Constitutions of South Carolina and of the United States prohibits such and this Court has followed the concept of vested rights for over sixty years. See *Kerr v. City of Columbia*, 232 S.C. 405, 102 S.E.2d 364 (1958) and *Pure Oil Division v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970). The Court's Opinion in this case for the first time overrules all these prior decisions and thus establishes a new rule of law in South Carolina without addressing the case law.

The concept of vested rights is even stronger in this case when the Court considers *Wyndham Enterprises v. North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (2012). In *Wyndham*, this Court reversed the trial court in a zoning dispute when other fireworks stores were located directly across the street from appellants proposed fireworks store and another fireworks store was located nearby).

Here, a similar analysis applies in that there are literally hundreds of stores outside the OBEOD selling the same products that Appellants cannot now sell in the OBEOD but have been able

to sell for years. This Court's Opinion must address the vested rights of Appellants under the United States and South Carolina Constitutions specifically in relation to the takings clause. Appellants request the Court address this issue square on and decide as a matter of law whether the good faith reliance doctrine and the grandfathering claims of Appellants apply to these eleven businesses. It is important to note that only these eleven businesses would have a grandfathering right or be subject to the good faith reliance defense since these were the only businesses who appealed the Board of Zoning Appeals decision. This Court has noted that there are over 25 businesses in the OBEOD, however, those businesses have not litigated their claims and would not be protected by this Court Order which applies only to Appellants. In sum, these Appellants should be entitled to the good faith reliance defense and should also be entitled to grandfathering under well-established precedent of this Court.

III. THE COURT ERRED IN FAILING TO FIND A REGULATORY TAKING WHEN IT RULED THAT THE OBEOD ORDINANCE WAS VALID.

This Court in its Opinion cites as primary authority a case from Montana, *Helena Sand and Gravel, Inc. v. Lewis & Clark Cnty. Plan. & Zoning Comm'n*, 290 P. 3d 691, 699-700 (Mont. 2012). While the Montana Supreme Court did uphold a comprehensive zoning ordinance which was adopted after a citizen-initiated proposal to reconfigure a zoning district, the Montana Supreme Court remanded the taking issue to the trial court. The *Helena* case was in the same posture as this case. In *Helena*, an appeal was undertaken when a new zoning ordinance was enacted which effectively prohibited mining in an area in which mining had previously been allowed. The Montana Supreme Court remanded the takings issue for consideration of that issue under the *Penn Central* analysis established by the United States Supreme Court. Since this was an appeal from a Board of Zoning Appeals ruling and Appellants could not legally bring a constitutional takings claim before the Board, this Court should follow the Montana's Supreme Court lead and remand this case to the trial court to consider the following question: Whether the City's adoption of the zoning pattern and regulations

constituted a taking of Appellants' real property without just compensation? In fact, the United States District Court dismissed the federal takings claim until this Court could issue its ruling. (R. p. 64). Due process requires Appellants be allowed to have a hearing and to present evidence on the takings claim. Appellants' counsel made this exact argument during oral argument that any issue regarding the takings claim must be remanded for further consideration. Simply put, a zoning ordinance appeal is not the place to try a takings case. Appellants refer the Court to the Record on Appeal, p. 44: "The Board of Zoning Appeals determines it does not have the authority or jurisdiction to decide matters that are collateral attacks...." To hold otherwise clearly would go against the spirit and intent of the *Helena* case which this Court so heavily relies upon in making this decision and more importantly violates Appellants' Constitutional rights.

IV. APPELLANTS HAD NO OPPORTUNITY TO BE HEARD ON THE TAKINGS CLAIM.

Appellants also point out this Court just decided a takings case which was filed not as an appeal of a zoning ordinance, but a constitutional cause of action brought by the landowner in circuit court. In *Braden's Folly v. City of Folly Beach*, Opinion 28148, filed April 5, 2023, Appellant sued Folly Beach over an ordinance which did not impact the existing use of Braden's Folly lots. Each party filed summary judgment motions based on appraisers' estimates and extensive discovery of the Plaintiff's claims.

This Court in *Braden's Folly*[2] cited a decision of this Court that in evaluating a regulatory takings claim, the property owners investment backed expectations are defined only at the time he purchases the property. *Columbia Venture, LLC v. Richland County*, 413 S.C. 423, 449, 776 S.E.2d 900 (2015). This is precisely Appellants' claim in this case; however, the Court fails to address it in

[2] The significant difference between *Braden's Folly* and this case is that *Braden's Folly* can continue to use their property as they always have done in the past. Here Appellants cannot do this.

its Opinion. The Court in *Braden's Folly* further lists three factors from *Penn Central* which are not mentioned or examined but clearly militate in favor of Appellants. Those factors are: (1) whether the challenged regulation interferes with the existing use of the property (clearly applicable here); (2) the degree to which the property's general locale is subject to regulation (clearly applicable here); and (3) whether the property owner acquired the land after the regulation went into effect (clearly not applicable here as they owned the property previous to the Ordinance enactment.). Since the Court cannot apply these factors because it was a zoning appeal, it should remand the takings claim for a fact-finding trial by the circuit court. In sum, this Court erred as a matter of constitutional law in failing to allow Appellants a full opportunity to be heard on its takings claim, something which could not be done before the Board of Zoning Appeals as a matter of South Carolina law.

Appellants note that this Court in issuing its Opinion finds no taking of property pursuant to the United States or South Carolina Constitutions is erroneous. As stated before, Appellants have not had an opportunity to present evidence and be heard on this issue nor would the Board of Zoning Appeals have been able to decide that at their hearing and the law provides the circuit court cannot take additional evidence. See S.C. Code § 6-29-840 (2022) (the court may not take additional evidence). In fact, the opinion of the Board of the Board of Zoning Appeals clearly indicates it cannot decide any issue regarding grandfathering, vested rights or constitutionality and that was for the courts to decide. See S.C. Code § 6-29-800 (A)(1)(2)(3)(4) the powers of the Board of Zoning Appeals does not extend to a constitutional taking claim. Obviously, Appellants had no right to present evidence before the trial court regarding a takings claim on an appeal from the Board of Zoning Appeals. See S.C. Code § 6-29-840(B) "Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter of the Board of Zoning Appeal such as, but not limited to, a determination of the amount of

damages due to an unconstitutional taking." Appellants' argument is bolstered by *Helena Sand* in which the Montana Supreme Court cited *Lingle v. Chevon U.S.A.., Inc.* 544 U.S. 528, 539, 125 S.Ct. 2074, 2082 (2005). In *Lingle* the Court concluded that, although plaintiff's waterfront parcel retained substantial economic value despite coastal wetlands regulations restricting use, "the claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded." See also, *Palazzolo v. Rhode Island*, 533, U.S. 606, 617, 121 S.Ct. 2448, 2457 (2001) (holding "where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including a regulations economic effect on the landowner, the extent to which the regulation interferes with reasonable investment expectations and the character of the government action.")

Palazzolo, according to the Montana Supreme Court makes clear that *Penn Central* requires an "ad hoc," fact-specific inquiry where the property retains economic value but, "when its diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner." Here an ad hoc, fact specific inquiry cannot be held before the Myrtle Beach Board of Zoning Appeals as a matter of law. See S.C. Code § 6-29-800(A)(1)(2) (the Board of Zoning Appeals will hear variances and appeals when there is an error made by an administrative official enforcing a zoning ordinance). Finally, on appeal to the circuit court Appellants are precluded by law from presenting testimony on other issues which results in a denial of due process on their federal takings claim.

In this case, the federal district court dismissed the takings claims without prejudice, finding that the claims were not yet ripe. (R. pp. 46-64). Clearly those takings claims are now ripe based on this Court's ruling and this Court must remand the matter to the trial court to make a decision

regarding the takings claims after presentation of evidence consistent with the United States Supreme Court opinions on this subject.

As has been indicated earlier in this petition for rehearing, Appellants could not legally develop the facts of a takings claim since this was an appeal from a zoning ordinance decision by the Board of Zoning Appeals. Appellants should not be left without a remedy and an opportunity to be heard. Clearly the law prevents Appellants from raising a takings claim before the Board of Zoning Appeals or on appeal to the circuit court and, thus, it was error for this Court to rule on that issue.

V. THIS COURT ERRED IN FINDING NO CRIMINAL PENALTIES WOULD BE ASSESSED TO APPELLANTS UNDER THE OBEOD ORDINANCE.

Appellants assert that it was error as a matter of law for this Court to hold that they would not be subject to criminal penalties for the sale of consumer products. In fact, the ordinance imposes criminal penalties after a business license is revoked. Appellants in their Reply Brief cited Section 110 of the Myrtle Beach Zoning Ordinance which makes it a misdemeanor to change the use of or occupy land...without first obtaining the appropriate permit.... (Appellants' Reply Brief, pp. 8-9). In sum, if one operates a business without a license, he or she is subject to arrest and resulting criminal penalties.

VI. WILKES TESTIMONY WAS OFFERED BUT NOT CONSIDERED.

Appellants presented the testimony of Timothy Wilkes at the hearing before the Board of Zoning Appeals on October 10, 2019. Wilkes indicated that he had been in business in the OBEOD zoning area for over thirty years prior to the enactment of the OBEOD. (See R. p. 284, line 12). Appellant also indicated that all nine plaintiffs owned businesses in the OBEOD prior to the enactment of that ordinance. (R. p. 284, lines 17-20).

Significantly, in regard to the federal takings claim, Wilkes testified that being unable to sell the same products would affect the property value of the properties he owns in the area. (R. p. 286,

lines 18-24). And that he would like the Board of Zoning Appeals to grant a variance for the nine businesses. (R. p. 295, lines 23-25). Thus, despite the fact it was a hearing before the Board of Zoning Appeals, Appellant Wilkes staked out his claim for a regulatory taking. While the Board of Zoning Appeals could not decide such a matter, it clearly was raised appropriately by Appellants and should be remanded for further proceedings before the circuit court.

VII. IF THIS COURT ADHERES TO ITS OPINION, IT SHOULD SET A TIME PERIOD FROM WHICH APPELLANTS' BUSINESSES MUST COMPLY.

As this Court is aware, its Opinion was issued April 19, 2023. Appellants are gearing up for the busy tourist season. Appellants have already purchased significant inventory for the summer of 2023. If this Court reaffirms its decision, each Appellant has inventory which will now be illegal and they will be unable to sell. Further, at least one business, Blue Smoke, LLC d/b/a Blue Smoke Vape Shop will be out of business since it is a tobacco shop. This Court should allow Appellants an additional amortization period through at least December 31, 2023 to sell these products which were perfectly legal prior to this Court's Order. The result will be that much of the inventory will be sold and Appellants' losses will be much less. See attached Affidavits of Appellants' managing members who state that the result of this Court's Opinion will leave them with hundreds of thousands of dollars of inventory which they cannot legally sell in their shops. (Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9).

Appellants also believe that providing a reasonable amortization period from this Court would allow Appellants the opportunity to possibly seek review of this case from the United States Supreme Court. Appellants must appeal to that Court by writ of certiorari within 90 days of the denial of a rehearing. Appellants request that the Court stay this decision if it determines not to rehear it for 90 days from the date of its final rehearing decision.

VIII. THIS COURT SHOULD LIMIT ITS DECISION TO PROSPECTIVE APPLICATION ONLY.

Appellants are aware of the general rule regarding retroactive application of judicial decisions in this state. Normally, decisions creating new substantive rights have prospective effect only while decisions creating new remedies to vindicate existing rights are applied retrospectively. See *McCaskey v. Shaw*, 295 S.C. 372, 368 S.E. 2d 672, 673 (Ct. App. 1988) (Prospective application is required when liability is created when formerly none existed); *Hupman v. Erskine College*, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984).

In this case, this Court has noted in its Opinion that it is deciding a novel issue, specifically, whether an ordinance constitutes an impermissible reverse spot zoning. While the Court disagreed with Appellants it would be unjust and inappropriate to make the application of the OBEOD retroactive since Appellants clearly had vested rights under existing South Carolina law. See *Pure Oil Division v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970). Appellants were litigating a novel issue, i.e. reverse spot zoning and vested rights and it would be unjust since Appellants would not be able to sell their current inventory which is legal throughout South Carolina. Further, this Court's decision overturns *Pure Oil Division v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970) and *Kerr v. City of Columbia*, 232 S.C. 405, 102 S.E.2d 364 (1958) and its progeny. *Ani Creations* is a novel case on zoning in the United States as it is the first case regarding a comprehensive zoning plan in which a Court has held that stores who had sold legal products for years could not sell those same products now. Under those circumstances, this case is ripe for prospective application of this Court's Opinion.

Appellants request prospective application of Ani Creations so as to protect Appellants' vested constitutional rights, especially in light of the fact that this Court has essentially reversed *James*, *Pure Oil* and *Kerr* by its decision in this matter. To hold otherwise upsets settled expectations

of individuals all across this state who run businesses in municipalities. If this Court is now going to change the rule on nonconforming use of property, it should only do so prospectively and it should not apply to the Appellants in this case. This has been a principle of law in South Carolina for over 70 years. It has been cited countless times. See *Boehm v. Town of Sullivan's Island Board of Zoning Appeals*, 423 S.C. 133, 814 S.E.2d 523 169 (S.C. Ct. App. 2018) ("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 continuance of the use would constitute a detriment to the public health, safety or welfare.") (quoting *F.B.R. Investors v. City of Charleston*, 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991); see also *Friarsgate Inc. v. Town of Irmo*, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (Ct. App. 1986) ("Generally, in American jurisdictions a landowner that uses his property for a lawful purpose before the enactment of zoning which subsequently prohibits that use may continue the nonconforming use after the enactment of zoning unless the use clearly constitutes a public nuisance.")

In sum, if the Court now intends to change the above rule, prospectivity would be the only constitutional way it could be done. Appellants request this Court address this issue on rehearing. See also the South Carolina Constitution, Art. I, Section 4 which prohibits passage of law that impairs a contract or divests vested rights in property. *Schumacher v. Chapin*, 228 S.C. 77, 88 S.E.2d 874 (1955).

IX. THE OBEOD VIOLATES EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

During the argument and in Appellants' brief, Appellants cited the only cases with facts very similar to the facts in this case. *Walgreen Co. v. City and County of San Francisco*, 185 Cal. App. 4th 424, 419-436, 498 (Cal. Ct. App. 2010) considered whether the trial court properly dismissed an equal protection challenge to a San Francisco law prohibiting certain pharmacies from obtaining licenses to

sell tobacco products. The ordinance prohibited stand alone pharmacies from obtaining licenses to sell tobacco but not grocery stores or big box stores containing licensed pharmacies. The Court found the law treated the two categories of pharmacies differently. The California Court of Appeals found based on language essentially the same language as in the South Carolina Constitution that this differential basis for selling tobacco products was unconstitutional.

San Francisco then amended the ordinance to prohibit the sale of tobacco by any store within San Francisco that contains a pharmacy. Safeway Stores filed an equal protection challenge and argued that the amended law treated general grocery stores, big box stores and other retailers without pharmacies different from retailers who did have pharmacies that could sell tobacco. In *Safeway v. City and County of San Francisco*, 797 F.Supp. 2d 964, 971-973 (N.D. Cal.), the Court stated: "In prohibiting the sale of tobacco products in pharmacies the amended ordinance accomplishes its purpose by ending an inference that tobacco products may not be harmful because they are sold by a major participant in the healthcare delivery system."

In this case, Appellants are in the position of the plaintiffs in *Walgreen*. Appellants are unable to sell CBD oil, cigarettes, novelty items and other legal products in their stores while directly across the street and throughout the City of Myrtle Beach, those same products are sold everywhere. Appellants are treated unconstitutionally different from stores across the street which are literally within feet of Appellants' businesses and can sell the same products. In fact, the entire Ocean Boulevard area in the City of Myrtle Beach is treated disparately in that on some areas of Ocean Boulevard the products are absolutely available for sale while in the OBEOD area of Ocean Boulevard those same products are not available for sale. This is a classic equal protection argument and this Court in its opinion fails to address this issue arguing Appellants have not met their burden of proof. There is no rational basis to have the same products sold throughout the City and literally across the

street from the OBEOD while prohibiting those same products in the OBEOD zoning district. The Court's opinion in Section C of its Opinion makes no distinction, nor does it provide any case law for its ruling.

X. SUBSTANTIVE DUE PROCESS IS VIOLATED IF A ZONING ORDINANCE IS MADE RETROACTIVE ON EXISTING BUSINESSES.

As the United States Supreme Court has noted: "Retroactive legislation prevents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectation and upset settled transactions. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 1998, five members of the Supreme Court specifically viewed retroactive legislation as a problem of due process. In that case, the plaintiff challenged a federal law that established a mechanism for funding healthcare benefits for coal industry retirees and their dependents. Under the law, the government assigned Eastern the obligation to pay premiums for workers who had worked for the company prior to 1966. Eastern sued, claiming that the law was a taking and that it violates substantive due process. 524 U.S. at 498-499. The Supreme Court held that the law was a taking. A plurality of the Court held that legislation was unconstitutional as a taking because "it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience. 524 U.S. at 537-538.

Justice Kennedy concurred in the judgment and argued that Eastern's claims were better analyzed not as a taking but under the Due Process Clause. Specifically, Justice Kennedy argued "the Government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another" (a description that aptly summarizes the use of amortizations such as in this case.) 524 U.S. at 544. Justice Kennedy

further found that the constitutionality of the statute turned on the legitimacy of the government action, "the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." Under Kennedy's analysis, "the Court has given careful consideration of the due process challenges to legislation with a retroactive effects." 524 U.S. at 547. After listing numerous cases, Justice Kennedy concluded,

> If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. 524 U.S. 548-549.

In sum, the ordinance in this case as applied to Appellants is fundamentally unfair because of its retroactivity which makes part of their business illegal. This Court has not analyzed this case in this manner. This is especially true since the OBEOD ordinance amortizes the sale of these items over a very short period of time and makes the sale of those products essentially illegal after December 31. Thus, Appellants request that this Court reverse its decision since the OBEOD ordinance is essentially an unconstitutional retroactive law and violates the due process clause. .

XI. AMORTIZATION PROCEDURE IN THE OBEOD ORDINANCE IS UNREASONABLE AND VIOLATIVE OF DUE PROCESS.

The Court argues that the amortization period in the OBEOD ordinance is moot. However, this is not the test which has been approved by this Court. In *Centaur, Inc. v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (1990), this Court held that reasonableness is determined by "balancing the public gain against the private loss," quoting *Collins v. City of Spartanburg*, 281 S.C. 212, 214-15, 314 S.E.2d 332, 333 (1984). In this case, the ordinance gave Appellants a mere four months to sell all their inventory during the winter months. The fact that Appellants exercised their right to bring this matter before this Court is of no consequence. The Court should not and cannot consider the appeal time as an amortization period. In *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661

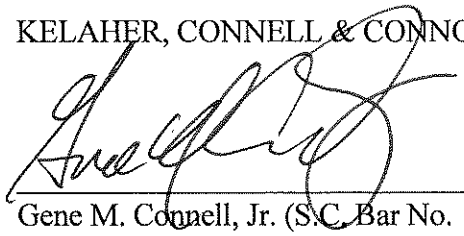
(1955), this Court looked only at the ordinance which provided for an amortization period of one year and did not consider the appeal time as part of the amortization process. The question for the Court was not whether the appeal time was reasonable, but whether or not the ordinance itself and the amortization period in the OBEOD ordinance was violative of due process. Clearly the ordinance and amortization period violated due process because it was completely unreasonable to expect Appellants to comply within that short period of time. In sum, the question for the Court was whether or not a four-month amortization period was reasonable and thus constitutional. In this case, the private loss to the Appellants was catastrophic while the public gain for a mere four-month unreasonable amortization schedule was minimal. In sum, the City of Myrtle Beach's amortization provisions in the OBEOD ordinance were *per se* unreasonable. The Court only need to go to the testimony of Wilkes at the Board of Zoning Appeals to find that the OBEOD amortization schedule was unreasonable as a matter of law. (See testimony of Wilkes, R. pp. 284-295).

CONCLUSION

In conclusion, this Court has issued a novel opinion which affects Appellants' vested Constitutional rights. Here, the Court has found legal products may not be sold based on a new ordinance. Where does it end? What if the City of Columbia amends its ordinances to prohibit the sale of soft drinks? What if the City of Charleston amends its ordinance so hamburgers can't be sold in a certain area of the city? What if the City of Greenville prohibits the sale of candy? The Court here upsets settled vested rights of Appellants and the real question is where does a City's power end? Already the City, according to the Mayor, is considering banning the sale of pocketknives in the OBEOD only. Where will all of this end if cities have the unlimited power to divest a business of vested rights with the stroke of a pen by the majority of City Council? It is for these reasons Appellants request a rehearing of this important case.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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