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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

THE HONORABLE KRISTI F. CURTIS, CIRCUIT COURT JUDGE

Case No. 2021CP2607973

Vishu Bhambhani, Appellant,

Vs.

Chris Thompson, CBO of the City of Myrtle Beach, Respondent

Appellant's Initial Brief

/s/Tucker S. Player
SCBar # 16217
Player Law Firm, LLC
512 Village Church Drive
Chapin, SC 29036
803-315-6300
tucker@playerlawfirm.com
Attorney for Appellant

Other Counsel: Michael Battle
mbattle@battlelawsc.com
Battle Law Firm
1200 Main Street
Conway, South Carolina 29528

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STATEMENT OF THE CASE

The appeal arises from an order of the Myrtle Beach City Council directing Appellant Vishu Bhambaini, owner of Coral Sands Motel, to demolish unsafe dwellings located on his land in the City of Myrtle Beach. City Council's order was authorized by S.C. Code Ann. § 31-15-20. (Repairing, closing, or demolishing unfit dwellings) and by Article II Division 3. - Unfit Dwellings of the Code of Ordinance of the City of Myrtle Beach South Carolina. A hearing was held before the City Council of Myrtle Beach on November 9, 2021. At the conclusion of the hearing, the City Council voted to demolish the building. Appellant filed an appeal with the Circuit Court. A hearing on the appeal was heard by Kristi F. Curtis was held on May 30, 2022. Judge Curtis issued her order denying Appellant's appeal on July 8, 2022. This appeal was timely filed and served.

STATEMENT OF THE FACTS

Appellant's motel is located at 302 North Ocean Boulevard, Myrtle Beach, South Carolina. On July 16, 2021, City building officials conducted an inspection of Appellant's structures at that location. Respondent found the structures were unsafe, the structures were unfit for human habitation, and the conditions of the structures violated City Ordinances and the International Property Maintenance Code (IMPC). Respondent issued a complaint to Appellant and the complaint was served on Appellant on July 30, 2021. On August 18, 2021, Respondent ordered Appellant to come into compliance with the City's ordinances and the IPMC. The order was served on Appellant on August 20, 2021. On October 16, 2021, the City Building Official served a Notice of Failure to Comply with the Order, together with a Rule to Show Cause to City Council at a hearing scheduled for November 9, 2021.

The Rule to Show Cause hearing was conducted as scheduled on November 9, 2021. Appellant and his attorney were present and participated in the proceedings. Evidence was presented by Respondent in the form of testimony and in the form of a power point presentation including photographs and documents documenting safety problems and code violations found in the structures.

Upon cross examination, Respondent admitted he is not an engineer. He further testified that all of the "code violations" were in the "packet." Appellant is in possession of only a single document with any references to violations, located at CBO Notice, that includes entries with generic titles of regulations with no specifics as to how the structure violated this provision, where this violation exists on the premises, and how such alleged violations posed harm to the public safety. For instance, the accusatory pleading issued by Respondent indicates that the structure was harboring rodents, but does not say what rodents, where the rodents are, or how Appellant was

"harboring" said rodents. The accusatory pleading alleges problems with "exterior walls", "general exterior", "doors" but does not say what the problem is, where this problem exists on the premises, or how the City expects them to correct the defect that the City will not identify. Respondent admitted that he will not tell any citizen how to fix the problems he identified, that the landowner must hire a licensed contractor or engineer to correct the issues. T.26. When asked to testify about the specific defects in the specific buildings, Respondent merely declared all of the buildings were unsafe but the only notice he provided of allegedly defects was through photographs. T.27.

Respondent also testified that the only engineer who inspected the property told him it was not structurally unsound. Respondent testified that his response to that assertion was "good. Send me the report." T.27. He further testified that that the email containing this assertion from the engineer stated that the information necessary to perform an analysis of the buildings was obtained through FOIA, not from the notice provided by Respondent. T.28, Respondent testified that is was the responsibility of the landowner to provide an "in depth investigation on the structural issues." T.29. This was later reiterated by the mayor, the city attorney and two other members of City Council. T.54-55.

Councilman Lowder, who has no legal training of any kind, stopped Appellant from testifying because he declared it was hearsay. T.33. Respondent proffered hearsay testimony in favor of the City and Mr. Lowder did not make any objection to that testimony. One council member actually told Appellant that he made a mistake by hiring a lawyer to defend himself, seeming to implicate that his decision to hire an attorney would be held against him by the Council. T.59.

All parties engaged in open discussions of compromise on the record. A compromise plan was discussed and agreed to by Respondent. T.69. However, Councilman Lowder refused to agree to the compromise because it would allow Respondent to repair his property in violation of a nuisance order previously obtained by the local solicitor. T.85. At no point was any cost estimate of repairs ever presented by Respondent. Yet, City Council found that the yet-to-be determined costs of repairs exceeded the value of the property of $81,000.00 and it was to be demolished.

Appellant appealed the order of City Council and a hearing was held before Judge Kristi Curtis. Despite this being an equitable matter on appellate review from a non-judicial tribunal, Judge Curtis rule she could not go against the factual findings of City Council and was required to affirm the Order. This appeal followed.

ARGUMENTS

Standard of Review

"As to questions of law, this court's standard of review is de novo." *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm'n*, 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019).

I. RESPONDENT DID NOT PROVIDE SUFFICIENT NOTICE TO COMPLY WITH DUE PROCESS

In order for the government to substantially affect a citizen's Constitutional rights, it must provide sufficient notice and an opportunity to be heard. The notice must "contain the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117-18, 94 S. Ct. 2887, 2907-08 (1974). "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Id*. *See also Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 S.C. 230, 489 S.E.2d 630 (1997).

As demonstrated before City Council and against before Judge Curtis, the only notice provided was a unspecific list of 30 "code violations" with no information as to (1) the location of the defective fixture/item; (2) the manner in which the specific item actually violates the code; or (3) what Appellant was required to do to come into compliance. Appellant was forced to hire and engineer and FOIA the City to obtain the necessary information to defend against the allegations of the City. This cannot constitute "sufficient notice."

The only legal method for the demolition of Appellant's property under the ordinance cited by Respondent is to prove it is unsafe for human habitation. The only witness for Respondent, the Respondent himself, admitted that he was unable to determine the structural stability of the building. Respondent and the majority of City Council all openly declared that it was Appellant's responsibility to provide a report on the structural integrity of the building.

This is insane.

Essentially, the City of Myrtle Beach, allows a non-engineer to conduct a visual inspection of a property, take some pictures, and cite random building codes (without any explanation, measurements, or application to the premises) in order to force the landowner to hire an engineer to prove the building is safe. This is no different than a solicitor obtaining an indictment and shifting the entire burden to the defendant to disprove the naked allegations of the indictment. That cannot be the law.

The hearing before City Council was little more than a sham. One council member stopped Appellant from testifying because he believed the testimony was hearsay. First, there is no rule, regulation or other requirement preventing hearsay from being uttered before City Council. Second, Mr. Lowder had no problem allowing his own witness (Respondent) from testifying to hearsay on several occasions, including "hearsay" from Steve Powell, the same witness Mr. Lowder prevented Appellant from testifying about. More egregious was the comment to Appellant that he made a mistake in hiring a lawyer instead of just fixing the issues. Finally, the ultimate decision was based on the same council member refusing to allow the compromise agreed to during the hearing because of the injunction the City possessed over Appellant. Not only was this an incorrect interpretation of the law, it was not a proper consideration for demolishing the building of Appellant. Therefore, Appellant was denied constitutionally sufficient notice and a fair hearing.

The lower court erred in affirming City Council and this Court should reverse and dismiss the charges against Appellant.

II. THE LOWER TRIBUNAL UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO APPELLANT IN VIOLATION OF DUE PROCESS

The law is clear across the United States: in a condemnation action, the burden of proof lies with the condemning authority. *Keene Valley Ventures, Inc. v. City of Richland*, 174 Wash. App. 219, 298 P.3d 121 (2013); *In re Va. Park*, 121 Mich. App. 153, 328 N.W.2d 602 (1982); *Pendarvis Constr. Corp. v. Cobb Cty.-Marietta Water Auth., 239 Ga. App. 14, 520 S.E.2d 530 (1999)*; *Am. Ass'n of Cab Cos. v. Parham*, 291 Ga. App. 33, 661 S.E.2d 161 (2008); *Mingo v. City of Detroit*, No. 277403, 2008 Mich. App. LEXIS 1275 (Ct. App. June 17, 2008). During the hearing before City Council, it was abundantly clear that the City unconstitutionally shifted the burden of proof to Appellant without any justification. The sole purpose of the hearing before City Council was to determine if Appellant's property would be destroyed by the City. This necessarily invokes serious constitutional protections with regard to due process and the Takings Clause. Whether this proceeding is treated as a criminal, quasi-criminal, or regulatory matter, the burden lies with the government to offer proof sufficient to justify the governmental action. That is not how Respondent and the City of Myrtle Beach operate.

The colloquy during the City Council hearing was quite surreal. The building inspector admitted that he could not opine on the structural integrity of the building, which is the only method of proving it is unfit for habitation, and then openly stated "any engineer can take those code violations and understand what needs to be fixed on that building and do his report. Now, his report would also be more extensive than just my code violations. He would have to do an in-depth investigation on the structural issues." T.29. The factfinder clearly agreed with this

improper shifting of the burden of proof when they reiterated the requirement that the landowner is required to hire an engineer to explain what is wrong with the building. When counsel for Appellant asked how the defendant is supposed to know what is wrong with the building in order to repair it, the Mayor clearly stated it was the responsibility of the landowner to hire an engineer to determine the defects. This is akin to the solicitor obtaining an indictment and requiring the defendant to hire an private investigator to determine if he committed a crime. This cannot be the law and the lower court must be reversed.

III. THERE WAS INSUFFICIENT EVIDENCE BEFORE CITY COUNCIL TO ORDER DEMOLITION OF THE BUILDING

Respondent unambiguously stated he was not qualified to give any opinion regarding what needed to be done to correct the cited code violations. Thus, he openly admitted he was unqualified to give any opinion or estimate of repairs that would be required to bring the building into compliance. No other witness testified regarding the building or the estimated costs of repairs, except Appellant who declared he was willing to pay the costs of repairs regardless of the tax valuation. There was not one document nor a single word of testimony that supports the notion that Appellant's property could not be repaired for less that $81,000.00, which was a requirement for demolition. Therefore, the lower court must be reversed.

CONCLUSION

The lower court made numerous errors of law and fact that are completely unsupported by the record. The government improperly and unconstitutionally shifted the burden of proof to the defendant landowner. This amounts to an abuse of discretion requiring reversal of the Order and remanding for further proceedings. Therefore, Appellant respectfully requests that this Court

reverse the Order dismissing this case and remand for trial to take place at the earliest possible convenience.

May 2, 2023

/s/Tucker S. Player
SC Bar # 16217
512 Village Church Drive
Chapin, South Carolina 29036
tucker@playerlawfirm.com
Attorney for Appellant
803-315-6300