

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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S.C. Supreme Court

Opinion No. 27252

(S. C. S.Ct. filed May 15, 2013)

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.

REPLY TO APPELLANT/RESPONDENT'S RETURN TO PETITION FOR REHEARING

June 28, 2013

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TABLE OF AUTHORITIES

CASES:

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REPLY TO RESPONDENT'S RETURN TO PETITION FOR REHEARING

As authorized by Rule 240(f), *South Carolina Appellate Court Rules*, petitioner files the following reply to the Town of Hollywood's Return.

Page 2 of the Town's Return allows the parties to find some common ground. Petitioners agree that the Opinion under review states the correct standard of review. Likewise the petitioners agree the Court "reversed on the equal protection claim because there was no evidence to support the jury's verdict." (Return at page 2) There is no doubt that this statement summarizes the Court's reasoning. However, the petitioner respectfully submits that the trial record contains abundant evidence of Hollywood's disparate treatment—including written and oral admissions by the Town—imposing unique challenges on the petitioners that

the Town did not impose on anyone else. In short, the Town admitted unequal application of its laws:

Q. So your recommendation was to be considerate of your neighbors, more or less, is that correct?

A. Yes. And for their benefit, **it would have above and beyond what normal people would do.** I didn't make this suggestion too often at all, but in light of this, I felt like this would make the project go smoothly.

Record on appeal pages 234-235 [transcript 116-117])

The unequal protection is an established fact as the Town's Planning Director admits that the Town—not the Planning Commission—was imposing these specifically tailored “demands” on the petitioners to assuage the “significant people around saying they weren't so thrilled with the subdivision”:

This was just, like I say, a recommendation, not a requirement, and there was previous dialogue between myself and Troy, in fact, Troy Readen, and not a requirement, just thought because there by that time was a lot of uproar with different people—well, **there was significant people around saying they weren't so thrilled with the subdivision.**” (Vol. II, R.O.A. p. 234-235 [tr. 116-117]) (emphasis added) See also Vol. II, R.O.A. p. 875 [tr. Page 21]): By providing extra buffering not required by the ordinance, the landowners could placate the neighbors because “that people didn't want to see the homes going in or whatever they may be. There was an agreement that we could have

some buffering between the common land, even though it's residential common— everything's R.A." (Vol. II, R.O.A. p.875 [tr. Page 21])

The Town cites § 6-29-340, S. C. Code, ann. to support its assertion that the Hollywood Planning Commission possesses the authority to approve the subdivision of property. The Town claims the Court's opinion was proper in focusing solely on the acts of the Town's Planning Commission. The complaint alleges that the Town violated the rights of the developers, not the limiting the allegations to the Planning Commission. However, assuming for purposes of argument the complaint were limited to the Planning Commission, the Town's assertion that the Planning Commission is invested with authority to approve property subdivision is inaccurate according to § 6-29-340:

SECTION 6-29-340. Functions Powers and Duties of Local Planning Commissions

(B) In the discharge of its responsibilities, the local planning commission has the power and duty to:

(2) prepare and recommend for adoption to the appropriate governing authority or authorities as a means for implementing the plans and programs in its area:

(b) regulations for the subdivision or development of land and appropriate revision thereof, and to oversee the administration of the regulations that may be adopted as provide d in this chapter;

The Town's Planning Commission must comply with the statute and is empowered only to make recommendations to the town council, which is the appropriate governing authority.

The Town cannot re-write the record below or re-characterize the complaint. The record below is full of evidence that the Town subjected the petitioners to individualized rules that are not in the ordinances, and which the Town imposed to satisfy the Town's two prominent residents of the adjoining gated community—Annette Sausser and Matt Wolfe.

Moreover this Court overlooks two additional critical points about the Town's "recommendations."

The first is, as set forth on page 3 of their Return, the Town concedes that it is the sole province of the jury to determine if the "recommendations" were "suggestions," "requirements," or "demands." The Town argues that Holton's demands were mere "suggestions" because it is to the Town's obvious benefit to do so. This is a distinction without a difference in the area of unequal protection as discussed by the U.S. Supreme Court in *Town of Willowbrook*. The issue of whether the Town was making helpful suggestions or dictating individualized demands was a disputed fact, and the appellate court cannot usurp the jury's truth finding function in deciding which assertion is true. The jury saw and heard the manner in which Ed Holton gave his testimony, and the appellate court cannot substitute its view of who was credible based on reading the record. More importantly, the Town's assertion that a "recommendation" cannot give rise to an equal protection claim is an obvious incorrect statement of law. As the unanimous U. S. Supreme Court held in *Village of Willowbrook vs. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000), the Town of Willowbrook's demand that Mrs. Olech give the town a 33-foot easement in exchange for sewer service turned out to be not required by the ordinance, and that was enough to make out a violation of her equal protection rights because there was no rational basis for asking Mrs. Olech for a greater easement than was required. The proof of the lack of rational basis in *Olech* is the fact that the Village backed down from its demand and agreed to the standard easement, thus proving the greater easement was always unnecessary. If we agree with the Town's position that Holton's list presented to the developers only involved suggestions, rather than requirements, then the

Town of Hollywood subjected the developers to the same violation as the Village of Willowbrook imposed on Mrs. Olech—arbitrary demands without a rational basis. Also, the record contains evidence of the Town’s specific animus for the developers, which is similar to the animus Willowbrook visited upon Mrs. Olech.

There is overwhelming evidence in this case from which the jury could find Hollywood’s witnesses less than credible and find that the Town’s shifting criteria were nothing more than a pretext to kill the project to satisfy the demonstrated animus of Annette Sausser and Matt Wolfe. As this Court previously held, decisions affecting land use should be rational and free from the influence of undue political pressure. *ION v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) The jury saw and heard the witnesses, and it is for the jury to say whether they believed the Town’s explanations or whether the Town’s decision was based on “undue political influence.” It is undisputed that the Town imposed arbitrary criteria on the petitioners that are not grounded in any ordinance, rule, policy, or the Town’s Comprehensive Plan. The Town’s intent to hide the petitioners’ project from the “significant” neighbors in the neighboring gated community cannot serve as a legal rational basis to deny a property owner the right to use his or her property. Any government official can rationalize any act, but in our system of jurisprudence, it is for the jury alone to decide if the explanations are real or pretext. Thus, when the Town writes in its Return: “[Holton] made those recommendations or suggestions only to assist the Developers in addressing the public opposition to their project,” (Return at page 4), the Town invades the province of the jury and substitutes a legal argument for facts. Mr. Holton was startlingly candid about his desire to hide the petitioners’ neighborhood from the significant people in Stono Plantation by imposing a 50-foot buffer on

them. There is no rational basis for such a recommendation other than to discriminate against the petitioners' target market; in fact, Holton admitted in his testimony that the buffer was demanded only because "... people didn't want to see the homes going in." Additionally it is undisputed that the Town of Hollywood denied developers the opportunity to inspect the Town's ordinances so that they could understand the Town's requirements and procedures. The developers have a right to inspect the Town's ordinance, and there can be no rational basis for the Town's repeated refusal or "inability" to produce its code of ordinances.

In their response, the Town claims that the alleged unavailability of the ordinances is not evidence of equal protection violation but concedes it could be a due process violation. However, in 2013, this Court held in § 3, "Equal Protection" of the *Dunes West Golf Club v. Mt. Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013), Opinion,

Under the rational basis test, the Court must determine: 1) whether the law treats similarly situated entities differently; 2) if so, whether the legislative body has a rational basis for the disparate treatment; and 3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. *Ed Robinson Laundry & Dry Cleaning, Inc. v. S. C. Dept. of Revenue*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003).

Harbit v. City of Charleston, 382 S.C. 383, 396, 675 S.E.2d 776, 783 (Ct. App. 2009) ("[The Equal Protection Clause] does not prohibit different treatment of people in different circumstances under the law.").

As this case demonstrates, a rational basis test is just as relevant in an equal protection analysis as it is in a due process analysis. The Town seems to think that rationality plays no part in evaluating an equal protection claim. This is not correct as this Court held in *Dunes West*. Moreover, *Harbit* clarifies that similarly situated parties may be treated differently, which could be interpreted to include the Hollywood developers, who the Court claimed produced no other

similar situated party. *Harbit* suggests that mere disparate treatment between similar parties is not evidence of any equal protection violation. As the *Ed Robinson* case above notes, one important determination in an equal protection violation is whether any disparate treatment bears a rational relationship to a legitimate government purpose. The second important determination is the presence of a factor demonstrating ill will and an intent to discriminate. The evidence in this case—including Holton’s admission—is abundant with demonstrations of vindictive action, animus, and ill will. The discriminatory actions of Ed Holton, Councilmember Sausser, and Commissioner Wolfe, are clear expressions of the Town’s enforcement of its putative ordinances with discriminatory intent. As the U. S. Supreme Court held in *Olech*:

(noting that the distinguishing factor between “run-of-the mill” zoning cases [and] cases of constitution right is the presence of a factor demonstrating “vindictive action, illegitimate animus, or ill will.”)

In short, the jury heard and saw the witnesses and the jury decided who to believe and who not to believe. Any appellate court can review any trial record and conclude there was insufficient evidence for the jury to reach a verdict if it substitutes its view of the evidence for that of the jury, especially in a real estate case where every parcel of real estate is, by definition, unique from every other parcel of real estate. The record in this case is clear that the petitioners have been stymied from using their property for no reason other than Town officials misused their municipal authority to single out the petitioners for disparate treatment. Therefore, even though Opinion No. 27252 articulates the correct standard of review, in reversing the jury’s verdict, the Court substitutes its view of the evidence for that of the jury.

CONCLUSION

Based on the foregoing, petitioners respectfully request that the Court grant the petitioners a rehearing on the important constitutional issues raised in this case.

Respectfully submitted,

June 28, 2013



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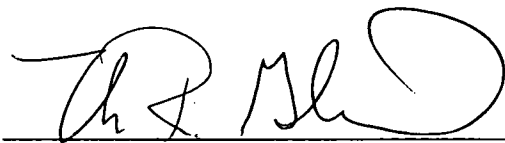
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CERTIFICATE OF SERVICE

I certify that I served the Reply to Return to Petition for Rehearing on the Town of Hollywood by depositing a copy of it in the United States Mail, postage prepaid, on June 28, 2013, to its attorney of record, Mr. Andrew Lindemann, Esq. at Davidson & Lindemann, P.A., P. O. Box 8568, Columbia, S. C. 29202-8568, and Mr. Hugh Buyck, Buyck Law Firm, L.L.C., P. O. Box 2424, Mt. Pleasant, SC 29465.



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