

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2009-CP-34-304

Rept # 69049
RECEIVED
JUL 11 2013
SC Court of Appeals

MRR Sandhills, LLC and Z.V. Pate, Inc., Appellants,

v.

Marlboro County, South Carolina, Respondent.

PETITION FOR REHEARING OF APPELLANTS

Appellants, MRR Sandhills, LLC (“MRR”) and Z.V. Pate, Inc., (“Pate”) (“Appellants”), pursuant to Rule 221 of the South Carolina Appellate Court Rules, respectfully request that this Honorable Court grant rehearing on MRR Sandhills, LLC and Z.V. Pate, Inc. v. Marlboro County, 2013-UP-279 (filed June 26, 2013) (the “Opinion”) as set forth herein. The issues set out below were not addressed by the Court.

BACKGROUND

The Opinion affirmed the trial court’s conclusion that S.C. Code Ann. § 6-29-760(D) (the Statute) barred Appellants’ claim alleging that Respondent had not enacted a zoning ordinance. The Statute reads:

No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether *enacted* before or after the effective date of this section, may be made sixty days after the *decision of the governing body* if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission. (Emphasis added).

The trial court concluded that the Statute barred Appellants' claim because it was not filed within 60 days of April 11, 2002, the date on which the trial court concluded that the County's zoning ordinance was enacted. [Order p. 3] (R. p. 3).

The Opinion and the Order ignored Appellants' claim that the County never enacted a zoning ordinance (Brief pp. 7-12), incorrectly assumed that the County had *enacted* a zoning ordinance resulting from a *decision of a governing body* (despite evidence presented by Appellants to the contrary), and then applied the Statute.

In other words, neither the Opinion, the Order, nor the authorities cited therein—the Statute and Quail Hill v. County of Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008) (“Quail Hill”), address the core argument Appellants presented to the trial court and to this Court:

The Statute's 60-day limitation period does not bar Appellants' claim that the County has not enacted a zoning ordinance.

The challenges to the zoning ordinance in Quail Hill took place some thirty years after the ordinance was enacted. The Court of Appeals' opinion in Quail Hill does not explain the nature of the challenges raised by the appellants other than to say the property owner “assert[ed] certain irregularities in connection with the approval of the zoning ordinances[.]” Here, the crux of Appellants' argument is that there was never a valid zoning ordinance enacted. If no ordinance was enacted, the sixty-day period to challenge the enactment never started to run, and cannot be time-barred. Appellants do not raise some generic irregularity in the approval of the statute but raise and present overwhelming evidence that no ordinance was ever validly passed and therefore there is no ordinance for the County to now attempt to enforce. Appellants respectfully submit

that Quail Hill does not decide the issue presented in this appeal, and is largely if not totally irrelevant to the inquiry before the Court. Moreover, the Opinion overlooked numerous other arguments made by Appellants.

I. THE OPINION OVERLOOKED APPELLANTS' ARGUMENTS (REPLY BRIEF AT P. 4) THAT THE STATUTE'S TIME-BAR IS NOT TRIGGERED IN THIS CASE.

The plain language of the Statute establishes two predicate conditions that must exist before a claim can be barred under the Statute: the time-bar can apply *only when* an ordinance has been “enacted;” and then it applies *only if* the County has “substantially complied” with notice requirements or established procedures:

No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether *enacted* before or after the effective date of this section, may be made sixty days after the *decision of the governing body* if there has been *substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.*” (Emphasis added).

The Opinion and the Order presume—without addressing Appellants’ arguments to the contrary—both that an ordinance was enacted, and that the County “substantially complied” with its established procedures.

A. The Opinion Overlooked Appellants’ Arguments (Brief pp. 11-12) (Reply Brief p. 4) that the Statute Does Not Bar a Claim that a County Has Not Enacted a Zoning Ordinance, and Is Not an Absolute Time-Bar.

Without an “enacted” ordinance, the Statute’s time limitation does not apply pursuant to its plain language. Absent a “decision of the governing body” resulting in “enactment” the time limitation for challenge set out in the Statute cannot begin to run, because there is no enactment to trigger it.

The Opinion overlooked Appellants’ demonstration (Brief p. 10) (Reply Brief p. 1, pp. 5-6) that the County did not give three readings to the document it claims to be its

zoning ordinance, in clear violation of S.C. Code Ann. § 4-9-120.¹ Nor did the Opinion address established South Carolina case law cited by Appellants (Brief p. 9) concluding that failure to give an ordinance the mandatory number of readings renders it void. See Berkeley Electric Cooperative, Inc. v. Town of Mount Pleasant, 308 S.C. 205, 417 S.E.2d 579 (1992).

Similarly, the Opinion overlooked Appellants' argument (Brief p. 12) that Quail Hill is inapposite. The construction of the Statute in Quail Hill cannot apply in this case because there was no allegation in Quail Hill that a governing body had failed to *enact* an ordinance. None of the "irregularities" alleged in Quail Hill claimed, as the Appellants demonstrated here, that Richland County did not enact a zoning ordinance. Quail Hill at most demonstrates the possible universe of claims that may fall within the limitations period of the Statute, and very clearly does not include an allegation that a putative ordinance did not receive three readings, as Section 4-9-120 unambiguously requires. Additionally, the Opinion did not address Appellants' arguments (Brief pp. 14-15) that the County did not demonstrate "substantial compliance" with the notice requirements necessary to trigger any time-bar set out in the Statute. Again, Quail Hill did not address, and is not dispositive of, this issue.

¹ South Carolina Code Section 4-9-120 provides:

The council shall take legislative action by ordinance which may be introduced by any member. With the exception of emergency ordinances, *all ordinances shall be read at three public meetings of council on three separate days with an interval of not less than seven days between the second and third readings.* All proceedings of council shall be recorded and all ordinances adopted by council shall be compiled, indexed, codified, published by title and made available to public inspection at the office of the clerk of council. The clerk of council shall maintain a permanent record of all ordinances adopted and shall furnish a copy of such record to the clerk of court for filing in that office.

(Emphasis added.)

B. The Opinion Overlooked Appellants' Arguments (Brief pp. 12-13) that Its Construction of the Statute Applying a Time-Bar Impermissibly and Unnecessarily Conflicts with Existing S.C. Law.

The Opinion construes the Statute to give a void ordinance the force of law, a construction that directly conflicts with S.C. Code Ann. § 4-9-120. If the Court's opinion is correct and a conflict between those two statutes exists, then the Statute repealed by implication S.C. Code Ann. § 4-9-120. Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 141, 628 S.E.2d 38, 41 (2006). However, repeal by implication is disfavored, and arises only when the two statutes are incapable of any reasonable reconciliation. If the two provisions "can be construed so that both can stand, a court shall so construe them." Id. at 141-142; See also N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007) (courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention).

Here, no conflict exists between the two statutes, and the Court should construe them so that both can stand. Capco; Powell v. Red Carpet Lounge, 280 S.C. 142, 145, 311 S.E.2d 719, 721, (1984) (statutes addressing similar subject matter must be read together and reconciled if possible to give meaning to each and avoid an absurd result). Reading both together, the Statute *may* apply in the event an ordinance is enacted pursuant to S.C. Code Ann. § 4-9-120. Only Appellants' construction of the two statutes harmonizes them.

II. **THE OPINION OVERLOOKED APPELLANTS' EVIDENCE AND ARGUMENTS (BRIEF PP. 7-11) THAT THE COUNTY DID NOT ENACT A ZONING ORDINANCE.**

The County claims that "Ordinance 545" is its zoning ordinance, but its own Minutes (R. pp. 458-465) demonstrate conclusively that "Ordinance 545" never received third reading by the County Council, in violation of S.C. Code Ann. § 4-9-120 and the County's established procedure for adopting an ordinance (R. pp. 358-362). However, the County, the trial court, and this Court have all overlooked that established fact as well as Appellants' arguments to that effect.

III. **THE OPINION MISAPPREHENDED APPELLANTS' ARGUMENTS REGARDING THE CAUSES OF ACTION DISMISSED BY THE TRIAL COURT.**

A. **The Opinion Misapprehended the Nature of Appellants' Preemption Claim.**

As argued in their Brief (pp. 16-17), Appellants' alleged in their Complaint (R. p. 36) that assuming *arguendo* that "Ordinance 545" was lawfully enacted (and it was not), then the "arbitrary denial" of the rezoning request "exceeded the jurisdiction of the County and the lawful purposes of zoning, and unlawfully encroached upon the jurisdiction of DHEC." In other words, Appellants alleged that the "zoning ordinance" is preempted *as applied* in this case. Recall that the trial court denied the County's motion to dismiss Appellants' claim that the County's denial of Appellants' rezoning request was improper. Accordingly, a claim that the decision of the County "improperly encroached upon the jurisdiction of DHEC" must also survive.

B. **The Opinion Misapprehended the Equal Protection Claim Pled by Appellants, and Appellants' Arguments (Brief p. 18) Regarding Same.**

Appellants' Complaint alleges that the County applied the zoning ordinance in a discriminatory manner without any rational basis to treat Appellants differently from

other similarly situated persons. [Complaint pp.15-17, ¶¶ 92-110] (R. pp. 32-35). These allegations, if true, demonstrate a violation of S.C. Const. Article I, § 3 and the 14th Amendment of the United States Constitution and would entitle Plaintiff to relief under 42 U.S.C. § 1983. HHHunt Corp. v. Town of Lexington, 389 S.C. 623; 634-35, 699 S.E.2d 699, 704-705 (Ct. App. 2010) (allegations that a municipality's routine provision of water and sewer services in circumstances similar to Appellants constituted disparate treatment stated facts sufficient to support claim for violation of equal protection rights). Therefore, even under the Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 593 S.E.2d 462 (2004), standard cited by the Opinion, Appellants' *pled* facts that if true would entitle them to relief. The trial court misconstrued Appellants' burden in surviving a Rule 12(b)(6) Motion to Dismiss. In affirming the trial court's dismissal without any explanation or discussion, the Court of Appeals likewise applied an improper standard in reviewing a motion to dismiss under Rule 12(b)(6), SCRPC. Appellants submit that the Court should rehear the case, and when the Court construes all the facts alleged in the complaint as true, and deny the motion to dismiss as to the Equal protection claim.

C. The Opinion Misapprehended the Appellants' Substantive Due Process Claim and Arguments (pp. 18-19) Regarding Same.

The Opinion cites to Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) in concluding that Appellants abandoned their arguments on this issue. The Record and the Briefs reveal otherwise. The Complaint alleges that the Appellants have cognizable property interests in their right to use the Property as a sanitary landfill, because the County has no valid zoning ordinance. [Complaint pp. 16-17, ¶¶ 101-104] (R. pp. 33-34). If those allegations are true, and the County has no valid zoning ordinance, then its actions purporting to prevent Appellants

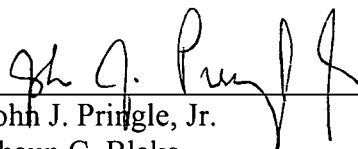
from using the Property as a sanitary landfill constitute a violation of Appellants' substantive due process rights. Likewise, as argued by Appellants, Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), the case cited by the trial court, involved an *enacted* zoning ordinance, and is not "precedent" at all in this case.

Appellants have not abandoned their arguments with respect to their substantive due process claim, and respectfully request that the Court address the issue.

CONCLUSION

Based upon the above, Appellants request that the Court consider the arguments made by Appellants and grant rehearing.

Respectfully Submitted,



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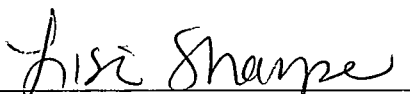
I, the undersigned paralegal of the law offices of Adams and Reese LLP, attorneys for Appellants, do hereby certify that I have served the Petition for Rehearing on all counsel in this action by depositing a copy of same in the United States Mail, postage prepaid, on July 11, 2013, addressed as follows:

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VIA HAND-DELIVERY

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SC Court of Appeals

RE: MRR Sandhills, LLC and Z.V. Pate, Inc. v. Marlboro County, South Carolina
Case No. 2009-CP-34-304
Appellate Case No. 2011-192941
Our File No. 051878-011777

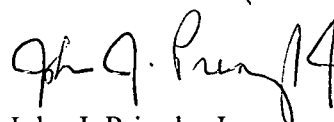
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Petition for Rehearing filed on behalf of the Appellants in the above-referenced case. Please return a clocked copy of same via the bearer of these documents.

By copy of this letter, we are serving a copy of these documents upon the Respondent and enclose our Proof of Service to that effect.

With kind regards, I am

Yours truly,



John J. Pringle, Jr.

JJP/lis

Enclosures (as stated)

cc: Steven D. Weber, Esquire
Harry R. Easterling, Jr., Esquire
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Mr. Chris Roof (via electronic mail only)