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Aug 29 2023

NOTICE OF MOTION FOR REHEARING OF APPEAL
IN A CIVIL CASE

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2020-000528

Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the
Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins, Plaintiffs,

v.

Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC;
Atlantic Coast Funding, LLC; and John Doe, a Nominal Defendant
Representing all Persons or Entities Unknown Who May Claim an Interest in
the Property that is the subject of this action,Defendants,

And

Atlantic Development Company, LLC and Atlantic Coast Funding,
LLC;Third-Party Plaintiffs,

v.

Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development,
LLC; Charles F. Webber; Mark L. Skowron, as Trustee of Mark L. Skowron
Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of
the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor,
Trustee of the Norman W. Taylor Revocable Living Trust dated April 28,
2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut;
Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and
Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G. Bauknight;
Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated
Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015;
GGK Properties, LLC; Leon Levine and Sandra Levine; Joseph Moglia and
Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable

Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable Trust under Trust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust Dated August 1, 2017; Phillip Kleinman and Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP; Astorg Imports, Inc.; ABLP Properties, LLC; Sutton Children, LLC; Daniel C. Schuster and Mardell J. Schuster; Roy C. Putrino and Eileen M. Putrino; Spencer Squier and Sherri Squier; VDM 1004, LLC; Roger B. Matherly and Bonnie V. Matherly; ITAC 203, LLC; Rebecca R. Shroff and Kersi S. Shroff; Sandra P. Levine and Lori Ann Sklut, Co-Trustees of the Irrevocable Trust F/B/O Amy Beth Levine dated September 18, 1986; David E. Lukowski; Richard B. Kline and Leslie Kline; James P. Aplington and Carol D. Aplington; Michael L. Van Glish and Judith K. Van Glish; Anna A. Olsen; Anne Marie Murray; William J. Pridemore and Irina V. Pridemore; William B. Davidson and Julia Davidson; Bruce Alexander Henderson and Valerie Sokolov; Mark W. Lee; Sue David Kline; Thomas Mckiernan and Anne Mckiernan; Philip H. Strobl and Amy Mott Strobl; James M. Faircloth and Sylvia Faircloth; Cheryl Jackson and Phillip H. Jackson; Weldon Riggs and Tiffany Riggs; Janet P. Merritt, Trustee of the Janet P. Merritt Living Trust U/A dated March 24, 2000; Melia Mooney Pavoris; William L. Mansfield and Patricia S. Mansfield; Stuart W. Gibbs and Helen R. Gibbs; Michael R. Blackburn and Pamela M. Blackburn; Jeffrey G. Edwards and Teresa T. Edwards; and Michael J. Wilk,Third-Party Defendants,

Of which Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins; Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development, LLC; Charles F. Weber; Mark L. Skowron, as Trustee of Mark L. Skowron Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor, Trustee of the Norman W. Taylor Revocable Living Trust dated April 28, 2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut; Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G. Bauknight; Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015; GGK Properties, LLC; Leon Levine and Sandra Levine; Joseph Moglia and Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable Trust under Trust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust dated August 1, 2017; Phillip Kleinman and Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP;

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And

Of which Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and John Doe, a Nominal Defendant Representing all Persons or Entities Unknown Who May Claim an Interest in the Property that is the subject of this action are the.....Respondents.

NOTICE OF MOTION AND MOTION FOR REHEARING EN BANC

Pursuant to Rules 219(a), SCACR, 221(a) and 240, SCACR, Vista Del Mar Condominium Association (the Association) and the individual unit owners (Unit Owners) of the Vista Del Mar Horizontal Property Regime (the Regime) (collectively, “Appellants”) respectfully requests and moves the Court to rehear its Appeal in this matter en banc as to Issue #4 (Rule 12(b)(6), SCRCP) only.

GROUND FOR MOTION

Appellant respectfully moves the Court to rehear argument on the application of Issue 4 previously presented to the Court (Rule 12(b)(6), SCRCP) concerning (1) Section 4-9-660 of the South Carolina Code, and (2) Section 30-4-70 of the South Carolina Code, and the relief sought by way of Writ of Mandamus and Injunction.

(1) **Section 4-9-660 of the South Carolina Code**

1. In its Order dated August 25, 2010 (“Order”), the Court held that Section 4-9-660 does not create a private right of action, and, further, that Appellant did not allege or claim that it would be irreparably harmed if an injunction is not granted, and that no adequate remedy at law was available to Appellant.
2. The Supreme Court, in **Bradshaw v. Anderson County**, 388 S.C. 257, 695 S.E.2d 842 (2010), upheld the dismissal of the taxpayers’ action under § 4-9-660 for declaratory and injunctive relief on the grounds that the acts of the council members complained of were directly authorized by the specific words of the statute. The decision was one on the merits of the case.
3. The Supreme Court in **Bradshaw** did not hold that the taxpayers had no private right of action *ab initio*, and the Supreme Court did not dismiss on the grounds of lack of standing of the taxpayers to bring their action.
4. The annotated South Carolina Code and legal research on Westlaw provide no reported cases that are directly on point on this issue, or any other reported case directly addressing § 4-9-660.
5. **Bradshaw** illustrates that a taxpayer such as the Appellant has standing to bring an action seeking declaratory and injunctive relief. The Appellant respectfully prays this Court to reverse itself and hold that the Appellant may pursue its action to a trial on the merits of its claims that the Respondents interfered unlawfully by giving instructions to county employees.

(2) **Section 30-4-70 of the South Carolina Code**

6. This Court noted that the Appellant’s Complaint cited to the provisions of the Code that allow a South Carolina citizen to seek injunctive relief against a violation of the South Carolina Freedom of Information Act, Chapter 4 of Title 30 (“FOIA”).
7. This Court, however, appeared to hold that an action against the individual Respondents was inappropriate because the Respondents are public officials and the acts complained of occurred in the course of their public duties. The Court may be implying that any action under the FOIA must always be brought against the public body and not the individuals on such public body who cause a violation of the FOIA.
8. FOIA issues normally arise in actions against a public body as a governmental entity; *see, e.g., Burton v. York County Sheriff’s Dept.*, 358 S.C. 339, 594 S.E.2d 888 (App. 2004); *see also Business License Opposition Comm. v. Sumter County*, 311 S.C. 24, 426 S.E.2d 745 (1992) (upholding trial court’s grant of injunction prohibiting a public body from holding future

secret meetings in violation of FOIA).

9. The FOIA also provides for penalties to be assessed against “*any person or group of persons who willfully violates...*” provisions of the FOIA. § 30-4-110. However, those prescribed sanctions are criminal in nature and the Appellant has no standing to bring an action under that Section.

10. This Court noted that there is additional litigation current, involving the Appellant and Horry County and Council as local government units that started in October 2005. This Court also noted that the Appellant had sought at one time to consolidate the actions, but that such consolidation had not occurred.

11. This Court also noted that some of the significant allegations against the individual Respondents in the case now before this Court are related to incidents occurring after the commencement of the October 2005 litigation, and are allegations concerning personal acts, not collective acts of the County Council: the Complaint included, as this Court noted, individual acts by the Respondents in violation of the FOIA by using informal means to conduct public business. § 30-4-70(c).

12. The essential purpose of the FOIA is to protect the public from secret government activity. Wiedemann v. Town of Hilton Head, 330 S.C. 532, 500 S.E.2d 783 (1998); South Carolina Tax Comm’n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994); *see also* Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001) (the FOIA was enacted to prevent the government from acting in secret).

13. Where the acts complained of are acts of individuals, not involving the public body as a whole seeking an injunction against the public body would be inappropriate – a majority of the members of the public body may not be aware of the individuals’ acts. Limiting the relief to a prohibitory injunction against the malfeasors would be proportionate, since it would be inequitable to issue an injunction against those persons who had committed no wrongdoing.

(3) Mandamus

14. This Court held that a Writ of Mandamus may only issue against a person in that person’s official capacity.

15. While this may be the usual circumstances under which a Writ would issue, the tangled litigation surrounding the events of 2005 and early 2006 in this case, left the Appellant without any ability to seek that relief in the parallel case.

16. The present case was started while a Motion for Reconsideration was pending in the parallel

case, and an Amended Complaint was not possible under the Rules of Civil Procedure to incorporate all the allegations in the case before this Court into the litigation that had started in October 2005.

17. The Appellant sought consolidation, but that has not been ordered by the Circuit Court, nor agreed between the parties (as this Court noted, different counsel represents the defendants in the two cases).

18. Dismissing the Appellant's suit for a Writ of Mandamus, at a time when that relief cannot be demanded in the parallel case, is unjust as it allows a wrong to go without any remedy.

19. Notwithstanding the foregoing, Appellant concedes that the individual against who the Writ of Mandamus is sought will leave the office of County Council Chairman at the next General Election, and is not seeking re-election. Since this case has been on-going for over four years, the Appellant concedes that the issue of Mandamus may become moot before a trial on the merits occurs in Circuit Court

Respectfully submitted,

**WRIGHT, WORLEY, POPE,
EKSTER & MOSS, PLLC
Attorneys for the Appellant**

August 29, 2023


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**PROOF OF SERVICE OF A NOTICE OF MOTION FOR REHEARING
OF APPEAL**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2017-CP-26-00424

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vs.

Appellants,

Vista Del Mar Condominiums, LLC,
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John Doe, a Nominal Defendant
Representing all Persons or Entities
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Respondents.

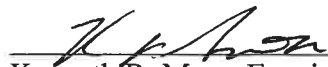
PROOF OF SERVICE

I certify that I have served the Notice of Motion for Rehearing of Appeal on James Christopher Clark, attorney for Respondent Vista Del Mar Condominiums, LLC, and Demetri K. Koutrakos, attorney for Respondents Atlantic Development Company, LLC and Atlantic Coast Funding, LLC, by emailing and depositing copies of it in the United States Mail, postage prepaid, addressed to James Christopher Clark, Esquire 2411 N. Oak Street, Suite 401, P.O. Box 1349, Myrtle Beach, SC 29578 and to Demetri K. Koutrakos, Esquire 1812 Lincoln Street, Suite 200, P.O. Box 1390, Columbia, SC 29202-1390 on August 29, 2023.

August 29, 2023

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GEORGE N. SPIRAKIS*
JOEL C. HYNES*
MARTHA HENLEY SLEDGE (Retired)

D.F. McGUGAN, JR.
(1921 - 1994)

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**licensed in NC & SC
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*DRC-Certified Family Financial Mediator
*Of Counsel

August 29, 2023

South Carolina Court of Appeals
Clerk, Jenny Abbott Kitchings
1220 Senate Street
Columbia, SC 29201

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RE: Enclosed Notice of Motion for Rehearing on Appeal
Vista Del Mar Condominium Association, et al, Appellants, v. Atlantic Development
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Appellate Case No. 2020-000528
Our file No. SC-6791-003

Dear Ms. Kitchings:

Please find enclosed for filing an original plus six (6) copies of Appellants' Notice of Motion for Rehearing of Appeal in the above referenced case, along with our check in the sum of \$50.00 for the filing fee. I have also enclosed a Certificate of Service evidencing that the same has been served upon all counsel of record.

Sincerely,


Kenneth R. Moss

KRM/ptw
Enclosure

cc: Robert E. Lee, Esquire
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rel@rellawfirm.com
Co-Counsel for Plaintiffs / Appellants

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