

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM MARLBORO COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Case No. 2009-CP-34-304

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

v.

Marlboro County, South Carolina, ..... Respondent.

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**REPLY TO RESPONDENT'S RETURN TO  
PETITION FOR REHEARING OF APPELLANTS**

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Appellants, MRR Sandhills, LLC ("MRR") and Z.V. Pate, Inc., ("Pate") ("Appellants"), pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, provide their Reply to the Return filed by Respondent.

**ARGUMENT**

The County has not once addressed Appellants' actual claims and arguments in support of same. Its Return is no exception:

- The County continues to refuse to acknowledge or respond to Appellants' citation to the requirement in S.C. Code Ann. Section 4-9-120 that that an ordinance must receive three readings in order to become law, or the case law making clear that failure to give an ordinance those required readings renders it void *ab initio*;

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**SC Court of Appeals**

- The County continues to refuse to acknowledge or respond to Appellants' demonstration (based on the County's own documents and affidavits) that the County Council did not enact a zoning ordinance.

- And so the County is left with presenting a collection of red herrings- facts and law that are immaterial, beside the point, and/or or created out of thin air- to attempt to convince this Court that the Statute and Quail Hill decide this case.

Appellants have already exposed the County's confabulations to this Court (and to the trial court) numerous times. In particular Appellants have already demonstrated (and the County has not refuted) that Quail Hill did not involve a claim that a zoning ordinance was not enacted because of a failure to give it three readings. However, the Return contains one particularly egregious example in the County's "tangled web" that demonstrates clearly the County's practice of simply making things up. On Page 2, the County argues:

The Circuit Court dismissed the developer's challenge to the validity of the ordinance because the developer brought its challenge long after the 60-day statute of limitations in Section 6-29-760(D) had run, Quail Hill, LLC v. County of Richland, 2006 WL 6651727, \*1 (Ct. Corn. Pl. June 22, 2006).

The Quail Hill trial court order (attached hereto) did no such thing, and contains no mention of any statute of limitations whatsoever, and in particular no reference to or application of the Statute.

Instead, the order states the following:

There is no evidence to substantiate the Plaintiffs assertion that the Richland County Zoning Ordinances were not validly enacted.

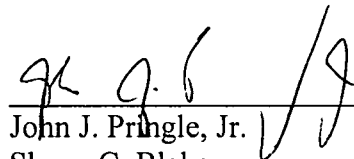
And so the County's house of cards regarding the "similarities" between Quail Hill and this case collapses. The Circuit Court in the Quail Hill case did not rule that a zoning challenge was time-barred by the Statute, but instead considered the merits of that claim.

In this case, of course, Appellants offered uncontroverted evidence that the County never enacted any zoning ordinance whatsoever, and that the Statute does not bar a claim that a zoning ordinance never became law. However, the erroneous application of the Statute and Quail Hill has prevented that evidence (or the appropriate law) from being considered.

### CONCLUSION

Appellants renew their request that the Court consider their arguments and grant their Petition for Rehearing.

Respectfully Submitted,



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July 25, 2013

2006 WL 6651727 (S.C.Com.Pl.) (Trial Order)  
Court of Common Pleas of South Carolina.  
Richland County

QUAIL HILL, LLC, Plaintiff,  
v.  
COUNTY OF RICHLAND, South Carolina, Defendant.

No. 05-CP-40-0750.  
June 22, 2006.

**Order**

Roger M. Young, Presiding Judge, Fifth Judicial Circuit, Charleston, South Carolina.

Roger M. Young, Presiding Judge.

This matter comes before this Court pursuant to a motion for summary judgment filed by the Defendant, Richland County. A hearing was held in Columbia on April 17, 2006, and arguments were made by Clifford O. Koon, Jr., Esquire, appearing on behalf of the Plaintiff, and William H. Davidson, II, Esquire, appearing on behalf of the Defendant. After a review of the pleadings, the Defendant's motion, the written and evidentiary submissions by the parties, and the oral arguments of counsel, and in viewing all evidence in the light most favorable to the non-moving party, this Court grants the Defendant's motion and dismisses this action with prejudice.

***Factual Background***

This action arises from the Plaintiffs purchase of approximately seventy-two (72) acres of real property located on Heyward Brockington Road in Richland County on March 13, 2003. The Plaintiff asserts that it engaged the services of Aylan Brown to assist in purchasing and managing the aforementioned property, and that the Plaintiff relied upon a statement or statements to Mr. Brown by Carl Gosline, the subdivision administrator for Richland County, that the subject property was zoned RU, or rural. The Plaintiff further asserts that the records of the Office of the Richland County Tax Assessor noted that the subject property was zoned RU. The Plaintiff subsequently sought and obtained subdivision plat approval for the subject property by the Richland County Planning Commission; however, in November 2004, a discrepancy was noted as to the zoning designation of the subject property by Geo Price, the Zoning Administrator of Richland County. The record reflects that Mr. Price determined that the subject property had been zoned RS-1, or residential, since the adoption of the Richland County Zoning Ordinances, including the time at which the Plaintiff purchased the property in 2003.

On November 17, 2004, Mr. Price advised the Plaintiff that the official zoning map of Richland County reflected that the zoning designation of the subject property was RS-1 and that the property therefore was not permitted to have manufactured housing. The Plaintiff did not appeal the interpretation of the Zoning Administrator, and subsequently sought to amend the zoning of the subject property. On January 25, 2005, Richland County Council denied the Plaintiffs petition to amend the zoning designation of the subject property, and the property presently maintains the zoning designation of RS-1. The Plaintiff brought this civil action asserting causes of action for equitable estoppel, negligent misrepresentation, negligence, and inverse condemnation.

***Legal Analysis***

### **I. Inverse Condemnation**

With respect to its inverse condemnation claim, the Plaintiff contends that it must only show a diminution in value to establish that an inverse condemnation has occurred. The Plaintiff further maintains that Richland County has failed to enact a valid zoning ordinance. The Defendant asserts that there exists no taking because the zoning designation of the subject property was never changed after the Plaintiffs purchase of the subject property. Further, the Defendant asserts that the zoning of the subject property was a proper police power function pursuant to the ordinances of Richland County.

This Court finds that there is no evidence that the zoning designation of the subject property was changed, and at most, any representation of the zoning designation of the property by Mr. Gosline or contained in the Tax Assessor's records was a mistake. The zoning ordinance was a proper police power function of Richland County and there was clearly no taking in this case. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 596 S.E.2d 917 (2004). As there is no evidence of a taking in this case, the Plaintiffs claim for inverse condemnation must necessarily fail as a matter of law. *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005).

As to any assertion of lost profits asserted by the Plaintiff, the Court also finds that any such claim is not recoverable in a takings claim. *Mibbs, Inc. v. South Carolina Dept. of Revenue*, 337 S.C. 601, 524 S.E.2d 626, 628 (1999). There is likewise no evidence to substantiate the Plaintiffs assertion that the Richland County Zoning Ordinances were not validly enacted.

The Court, therefore, finds that there was no taking in this instance by any action of Richland County, and as such, the Defendant is entitled to summary judgment as to the Plaintiffs claim for inverse condemnation.

### **II. Equitable Estoppel**

The Plaintiff has also asserted that Richland County should be estopped from maintaining that the zoning designation of the subject property is RS-1, based upon the alleged representations of Mr. Gosline and the records of the Tax Assessor's Office. The Richland County Zoning Ordinances provide that the official zoning map of Richland County constitutes the only official description of the location of zoning district boundaries, and that the zoning administrator is the only representative on behalf of Richland County that can interpret the official zoning map. Further, the zoning ordinances and state law provide that County Council is the only entity that can adopt or amend zoning designations in Richland County.

As previously referenced, Mr. Gosline was a subdivision administrator for Richland County, and property tax information records are maintained by the Tax Assessor's Office of Richland County. Neither Mr. Gosline nor the Tax Assessor's Office have the authority to interpret, alter or amend the zoning of the subject property, and any such act would clearly be outside their respective scope of authority. As such, equitable estoppel cannot be applied to frustrate Richland County's attempts to enforce its zoning ordinances. *McCrowery v. Zoning Bd. Of Adjustment of the City of Rock Hill*, 360 S.C. 301, 599 S.E.2d 617 (Ct. App. 2004). Further, the evidence indicates that the Plaintiff had the means by which with reasonable diligence it could acquire knowledge of the zoning designation of the subject property as the official zoning maps and Richland County ordinances are public record, and as such, the Plaintiff cannot claim to have been misled. As a result, equitable estoppel cannot be imposed in such a situation. *Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001).

After a review of the evidence in the light most favorable to the non-moving party, this Court finds that the Plaintiff has failed to establish a claim for equitable estoppel in this case, and the Defendant is, therefore, also entitled to summary judgment on this claim.

### **III. Negligent Misrepresentation and Negligence**

As for the Plaintiffs causes of action for negligent misrepresentation and negligence, it is well settled that “[t]he Tort Claims Act governs *all tort claims* against governmental entities and is the *exclusive* civil remedy available in an action against a governmental entity or its employees.” *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413, 416 (Ct. App. 2003). (Emphasis added). Section 15-78-70(a) provides that the Tort Claims Act “constitutes the exclusive remedy for any tort committed by an employee of a governmental entity.” S.C. Code Ann. § 15-78-70(a). *See also*, S.C. Code Ann. § 15-78-200.

Section 15-78-40 of the Tort Claims Act provides: “The State, an agency, a political subdivision, and a governmental entity *are liable for their torts in the same manner and to the same extent as a private individual under like circumstances*, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.” S.C. Code Ann. § 15-78-40. (Emphasis added). Moreover, Section 15-78-50(b) provides that “[i]n no case is a governmental entity liable for a tort of an employee where that employee, if a private person, would not be liable under the laws of this State.” S.C. Code Ann. § 15-78-50(b). *See also*, *Sloan Construction Company, Inc. v. Southco Grassing, Inc.*, S.C. , 629 S.E.2d 372 (Ct. App. 2006).

Citing Section 15-78-50(b), the South Carolina Supreme Court has held that “[t]he Tort Claims Act allows recovery to ‘any person who may suffer a loss proximately caused by a tort’ committed by a government employee if a private person would be liable for that tort under South Carolina law.” *Gosnell v. Dorchester School District No. 2*, 301 S.C. 21, 389 S.E.2d 865, 865 (1990). In *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990), the Supreme Court reiterated: “Section 15-78-50 permits recovery to ‘any person who may suffer a loss proximately caused by a tort’ committed by the State *except that the State would not be liable for a tort of an employee if a private person would not be liable for that tort under South Carolina law.*” 391 S.E.2d at 568-569. (Emphasis added).

Thus, as the foregoing authority dictates, Richland County may be held liable for alleged negligence and negligent misrepresentation in enforcing and administering zoning *only if a private person can also be held liable for breach of that same duty under South Carolina law*. As asserted by the Defendant, and pursuant to the United States Supreme Court's decision in *United States v. Olson*, 126 S.Ct. 510 (2005), if there are governmental duties of care that do not have a private counterpart under state law, there can be no liability under the South Carolina Tort Claims Act. Although there are numerous governmental duties of care that are identical or similar to duties of care owed by private individuals, in this instance the duty of care regarding zoning is a uniquely governmental function. The Court is not aware of, and counsel did not identify, any analogous private counterpart under state law for zoning.

Additionally, the legal analysis as set forth by Richland County was recently recognized by the South Carolina Court of Appeals in the case of *Sloan Construction Company, Inc. v. Southco Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006). In its opinion, the Court of Appeals ruled that S.C. Code Ann. § 29-6-250, which is part of the Subcontractors' and Suppliers' Payment Protection Act requiring the procurement of payment bonds on government construction projects, does not provide for a private right of action against a governmental entity and does not constitute a waiver of sovereign immunity. The Court of Appeals adopted the reasoning of the federal courts in cases where the U.S. government was sued in negligence under the Federal Tort Claims Act (FTCA) for failing to insure that a payment bond was provided by the general contractor. In those cases, the federal courts found no liability under the FTCA because a violation of the Miller Act, which required the payment bond, did not have a private counterpart. *See e.g.*, *Devlin Lumber & Supply Corp. v. United States*, 488 F.2d 88 (4th Cir. 1973); *Hardaway Co. v. United States Army Corps of Engineers*, 980 F.2d 1415 (11th Cir. 1993). The South Carolina Court of Appeals in *Sloan* applied the same reasoning: “Because a private individual could never be liable under the bonding statutes, the South Carolina Tort Claims Act's limited waiver of sovereign immunity does not apply to suits brought against the government under the statutes in question.” Thus, it is clear that the South Carolina Court of Appeals has recognized the necessity of a private counterpart or private analogue in order for liability to exist against a governmental entity under the South Carolina Tort Claims Act.

Sections 15-78-40 and 15-78-50(b) of the Tort Claims Act, by their express language and as construed in *Gosnell*, *Wright*, and *Sloan*, do not allow for tort liability in this action. To allow the Plaintiff to recover under these causes of action would hold Richland County liable for negligence of its employees under circumstances where a private person cannot be held liable

under state law. Thus, Richland County's sovereign immunity has not been waived, and as a result, the Defendant is entitled to summary judgment on the Plaintiffs negligence and negligent misrepresentation claims.

As an additional basis for granting summary judgment on the Plaintiffs claims for negligence and negligent misrepresentation, this Court finds that Richland County would be immune from liability under the South Carolina Tort Claims Act for any compliance, enforcement or failure to enforce the aforementioned county zoning ordinances. Section 15-78-60(4) states that a governmental entity is not liable for a loss resulting from:

[a]doption, enforcement or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies ...

S.C. Code Ann. § 15-78-60(4). The Defendant is therefore entitled to absolute sovereign immunity for its compliance or enforcement of its Zoning Ordinances including the designations set forth on the official zoning map. Likewise, the Defendant cannot be held liable for failing to adopt or enforce an RU zoning designation for the subject property. *See, Adkins v Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993).

Additionally, this Court finds that the Plaintiffs cause of action for negligent misrepresentation would fail because the Plaintiff with the exercise of reasonable diligence could have acquired knowledge as to the zoning of the subject property from the public record and cannot claim to have been misled. *See, LoPresti v. Burry*, 364 S.C. 271, 612 S.E.2d 730 (Ct. App. 2005).

For each of these reasons, this Court concludes that the Defendant is entitled to summary judgment on the negligence and negligent misrepresentation causes of action brought pursuant to the Tort Claims Act.

IT IS, THEREFORE, ORDERED that that the Defendant's motion for summary judgment is hereby GRANTED, and the Plaintiffs Complaint is dismissed with prejudice.

AND IT IS SO ORDERED.

<<signature>>

ROGER M. YOUNG

Presiding Judge,

Fifth Judicial Circuit

Charleston, South Carolina

June 20, 2006

July 25, 2013

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**VIA HAND-DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1205 Pendleton Street  
Edgar Brown Building  
Columbia, SC 29201

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 Reply to Respondent's Return to 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.

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Enclosures (as stated)

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

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM MARLBORO COUNTY  
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Michael G. Nettles, Circuit Court Judge

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Case No. 2009-CP-34-304

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

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**PROOF OF SERVICE**

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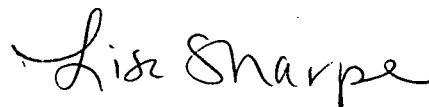
I, the undersigned paralegal of the law offices of Adams and Reese LLP, attorneys for Appellants, do hereby certify that I have served the Reply to Respondent's Return to Petition for Rehearing on all counsel in this action by depositing a copy of same in the United States Mail, postage prepaid, on July 25, 2013, addressed as follows:

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Lisa Sharpe, Paralegal

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