

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2024-000814

Folly East Indian Co., LLC,.....Appellant,

v.

City of Folly Beach.....Respondent,

and

Save Folly’s Future.....Intervenor.

INTERVENOR’S RESPONSE BRIEF

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I. STATEMENT OF THE ISSUES

- 1. Did the Trial Court err in finding that the Folly Beach Short Term Rental Ordinance was validly enacted pursuant to the initiative and referendum process despite the Supreme Court’s holding in *I’On, L.L.C. v. Town of Mt. Pleasant*, which held that a land use regulation cannot be enacted by initiative and referendum process of § 5-17-30?**
- 2. Did the Trial Court err in finding there was no genuine issue as to a material fact when Respondent stripped Plaintiff’s vested property right, a right that runs with the land, to rent its property on a short-term basis?**

II. STATEMENT OF THE CASE

1. INTRODUCTION

This Matter comes before this Court on an Appeal of Judge Paul M. Burch’s March 7, 2024, Order granting a summary judgment to the Respondent, City of Folly Beach (“Folly Beach”) and Intervenor, Save Folly’s Future (“SFF”). In doing so, Judge Burch held that the Petition and Referendum procedure, as set out in South Carolina Code § 5-17-10, et. seq., could be used to create a cap on Investment Short-Term Rental (“ISTR”) Business Licenses issued by the City and is not in violation of Title 6 of South Carolina’s Code of Laws setting forth the procedures to be followed when restricting or zoning property for specific uses. Judge Burch’s Order is well supported by both the facts and the law and should be upheld.

2. APPELLANT’S FLAWED QUESTIONS ON APPEAL

To overturn the Trial Court’s granting of Summary Judgment, Appellant presents two issues to this Court. As discussed below, these issues include both erroneous conclusions of law and misrepresentations of facts. As the Trial Court recognized, Appellant’s arguments are unsupported by either the law or facts. As a result, the answers to these questions that reflect both the facts and settled law mandate that the Trial Court’s order be upheld in *toto*.

a. SHORT ANSWER TO APPELLANT’S ISSUE # 1:

No, the Trial Court did not err in finding the Ordinance was validly enacted. As was extensively briefed below, the initiative and referendum did not violate the Supreme Court’s Holding in *I’On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), in that:

- i. The Initiative/Referendum did not seek to amend the zoning regulations but rather it sought to change the City’s policy regarding the issuance of Business Licenses.
- ii. The Resulting Ordinance had no impact on the Zoning regulations, rather it was a modification or amendment of the Business Licensing Regulations. Folly Beach is entitled to regulate the use of property through either its business regulations or its zoning ordinances. *Greenville Cnty. v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428, 432 (2003), *overruled by Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005) (local governments “may enact ordinances regulating land use in two fashions: one, pursuant to a comprehensive zoning plan, . . . and two, pursuant to their police powers . . .”).
- iii. Since 2010, when the City first adopted an ordinance governing short-term rentals, Folly Beach has chosen to regulate short-term rentals as part of its business regulations, contained in Title XI of its Code of Ordinances. In support of this fact, Folly Beach submitted the affidavit of Folly Beach’s City Administrator, Aaron Pope, who affirmed:

Since 2010, and through several amendments, the City has continued to regulate short-term rentals through its business license ordinance. It was renumbered as Chapter 117: Short Term Rentals

in 2017. The short-term rental ordinances have never been adopted in compliance with the South Carolina Comprehensive Planning Act, and, to my knowledge, no one has ever complained to the City that we should have been adopting these business regulations as part of our zoning code.

Exhibit 4 to Folly Beach’s Motion and Memorandum in Support of Motion for Summary Judgment, ¶ 6. *See also, Id.* at Exhibit 6, July 22, 2010, “An Ordinance Creating Section 116 of the Folly Beach Code of Ordinances Establishing Requirements for Obtaining a Business License to Rent Property on a Short Term Basis.”¹

b. SHORT ANSWER TO APPELLANT’S ISSUE # 2:

The facts and the law are clear. The Appellant has no vested right that runs with the land to rent its property on a short-term basis.

- i. In its initial Complaint, Appellants claimed that it had been denied business licenses for its short-term rentals. As the City and SFF pointed out, Appellant had in its possession the very licenses that it complained it had been denied. Failing to establish its interest in that fashion, it then Amended its Complaint and claimed that it had been stripped of a vested right to have its business licenses transferrable upon sale of its property in the future.²

¹ Appellant submitted two Affidavits - one from Richard D. Brendel and one from Michael J. Riffert, both members of Appellant’s LLC. *See* Exhibit A to Appellant’s Motion and Memorandum in Support of Summary Judgment. Both gentlemen swore that Folly Beach regulated short-term rentals by zoning, but they offered no evidence or citations to support their claim. These unsupported statements are patently false, and the Trial Court rightfully disregarded them.

² Appellant also amended its complaint in order to establish standing and argued that it has standing under the public interest exception. The Court below granted the Appellant’s Public Interest standing, and Intervenor is not contesting the Trial Court’s decision.

- ii. The law is clear. The Appellant was stripped of nothing. No one has a vested right to a business license. *Dantzler v. Callison*, 230 S.C. 75, 94–95, 94 S.E.2d 177, 188 (1956) (“No person can acquire a vested right to continue, when once licensed, in a business, trade or profession which is subject to legislative control and regulation under the police power, as regulations prescribed for such may be changed or modified by the legislature, in the public interest, without subjecting the action to the charge of interfering with contract or vested rights.”).
- iii. In addition, all business licenses before and after passage of the ISTR Ordinance are not transferable.³ As a result, the Ordinance as proposed in the initiative Petition, approved by the voters, and adopted by City Council has had no impact on the transferability of business licenses.

III. STANDARD OF REVIEW

“[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact [, then] the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. “In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted). “Summary judgment is

³ There can be no dispute that business licenses are not transferrable. The Folly Beach Business License Ordinance that existed prior to the adoption of the ISTR Ordinance stated very clearly at §110.08(B) that, “[a] business license shall not be transferable, and that a transfer of controlling interest shall be considered a termination of the old business and the establishment of a new business requiring a new business license, based on the old business income.” This Ordinance was enacted in 2021. Appellant took no steps to challenge that clear statement of the existing law.

not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995))

IV. ARGUMENT

1. The ISTR Business License Ordinance is Not a Zoning Ordinance

The Initiative/Referendum and resulting Ordinance did not seek to amend the zoning regulations but rather it sought to change the City’s policy regarding the issuance of Business Licenses for ISTRs. Contrary to Appellant’s sworn affidavits, Folly Beach does not and never has regulated Short-Term Rentals through its zoning laws. Instead, Folly Beach has since 2010 regulated Short-Term Rentals through its business regulations contained in Title XI of its Code of Ordinances. Folly Beach’s land use regulations, including zoning are set forth in Title XV of its Code of Ordinances. Two separate Titles that contain two separate means of exercising the city’s police powers. The City has the right to make that choice. The reason for amending the Folly Beach Code of Ordinances to include ISTR’s was the unrestricted growth in the number of ISTRs and the negative effects it was having on the Folly Beach community. See Exhibit 1 to Respondent’s Motion for Summary Judgment, “Petition To Limit Investment Short Term Rental Business Licenses to a maximum of 800,” at 1.⁴ Notably, while Appellant claims that it was not proper to

⁴ See also ¶ 4 to Affidavit of John T. McFarland, Attachment A to Intervenor’s Memorandum in Support of Motion to Intervene, stating:

ISTRs pose a long term existential and short-term nuisance threat to the heart and soul of Folly Beach as a residential beachfront community for many reasons, including:

- a. ISTRs are changing the nature of Folly Beach from a residential beachfront community to a commercial short-term rental community;
- b. ISTRs have lowered the quality of life in the city for a large number of residents;
- c. Noise from ISTRs is a constant complaint from scores of residents; and

utilize the initiative and referendum provision under S.C. Code, §5-17-10⁵, it is undisputed that the initiative/referendum procedures were properly followed.

Appellant argues that the Ordinance dealing with the issuance of business licenses must be a zoning ordinance regardless of the clear language of both the Referendum and Ordinance because both the issuance of a business license and the power to zone spring from the police powers of the municipality. The Trial Court rightly rejected this twisted use of linguistics.⁶

Not finding any support for its claims in South Carolina, the Appellant has reached out to other municipalities (Austin, Texas, Manhattan Beach, California, South Webber City, Utah, and New Orleans, Louisiana) that have chosen to regulate short-term rentals via zoning ordinances and argues that because these municipalities regulate short-term rentals by zoning ordinances, that Folly Beach should be required to do so as well. The cases from those jurisdictions do not support Appellant's argument and present facts that bear little if any resemblance to the facts in this case. For example, in the Texas case, the municipality was attempting to extinguish short term rental licenses that were already ongoing and sought to have its legislative changes applied retroactively. "The ordinance immediately suspended the licensing of any new type-2 short-term rentals and established April 1, 2022, as the termination date for all type-2 rentals. *See id.* § 25-2-950." *Zaatari*

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- d. Based on U.S. Census data, from 2010 to 2020 the residential population of Folly Beach has decreased from 2,617 to 2,078, a 20.6% decrease. As residences are being sold off, a large number are being purchased and converted to ISTRs which has resulted in significant population loss, especially for such a small community. If this trend continues and the residential population of Folly Beach continues to decrease by 500 residents per decade, by 2060 the residential population would be down to 78.

⁵ §5-17-10 states, "The electors of a municipality may propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes. Any initiated ordinance may be submitted to the council by a petition signed by qualified electors of the municipality equal in number to at least fifteen percent of the registered voters at the last regular municipal election and certified by the municipal election commission as being in accordance with the provisions of this section."

⁶ Following Appellant's logic, since both humans and gorillas are mammals, then humans must be gorillas. Not even Charles Darwin would agree with Appellant's logic.

v. City of Austin, 615 SW 3d 172, 181 (2019). That is not the case here. The Appellant has not lost its right to rent on a short-term basis nor have any other Folly Beach license holders with existing ISTR licenses. Neither the referendum nor the resulting ordinance adopted and later amended by the City Council extinguished any existing licenses. The Appellant's licenses remained exactly as they existed when they received them, that is, subject to renewal every year. The Texas Court objected to and disallowed retroactive application of §25-2-950. There is no such retroactive application here.

In the California case, *Keen v. City of Manhattan Beach*, the owner of a short-term rental challenged the City of Manhattan Beach's interpretation of long-standing zoning ordinances pertaining to "Single Family Residential" and "Multi-Family Residential" residences. *Keen v. City of Manhattan Beach*, 77 Cal. App. 5th 142, 149 (2022).

In *South Weber City v Cobblestone Resort, LLC*, 511 P.3d 1207 (UT, 2022) the Utah Court of Appeals held that short-term rentals did not fit the definition of a dwelling contained in the local zoning regulation and that the municipality was not estopped from enforcing its business license requirement for short-term rentals.

In *Chaumont v. City of New Orleans*, 302 So.3d 39 (La. App. 4 Cir. 06/03/20), appellant was fined for exceeding the occupancy limits and failing to properly list his short-term rental in violation of the city's zoning ordinances setting forth permitted occupancy limits and requiring license numbers to be posted on advertisements for the rentals. The appellate court affirmed the evidentiary rulings by the hearing officer and trial court and held that the ordinance did not violate the Due Process Clause of the Fourteenth Amendment.

No zoning ordinance is involved in this case. The Trial Court rejected the Appellant's argument that the Ordinance and Referendum must be a zoning ordinance because that is how

other municipalities have chosen to regulate short term rentals. Folly Beach has the right to regulate business via a business license. Short term rentals are permitted in all areas of Folly Beach. Like all businesses, if an owner wishes to engage in the business of renting their property, short or long term, they must obtain a business license. Neither the Ordinance nor the Referendum specified any zone of Folly Beach wherein short-term rentals were not permitted.

2. The Process by Which the Ordinance at Issue was Passed did Not Violate Due Process.

The Appellant argues that the passage and enactment of the Ordinance violated its right to due process. It did not. Due Process is often described as having two separate elements: procedural due process, the opportunity to be heard, and substantive due process.

a. Appellant Had an Opportunity to be Heard

Even though the Appellant cannot and did not establish a cognizable property interest in the Trial Court as required to trigger a due process analysis, the Appellant (and others similarly situated that it claims to represent), did enjoy a substantial amount of procedural due process, that is, an opportunity to be heard on this issue. During the run up to the vote on the referendum many groups lobbied on each side of the issue and urged their supporters to vote for and against. Once the Referendum passed, the Appellant, its representatives or those with allegedly similar interests had opportunities to speak at City Council Meetings to oppose its adoption and or offer suggestions for amendments. The City Council did, in fact, make a number of amendments to the language of the Business License Ordinance after the Referendum was approved by the voters of Folly Beach.

b. The Appellant has No Cognizable Property Interest.

In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). As discussed

previously, both the State statute and the Folly Beach ordinance regarding Business Licenses deal with engaging in business activity. As a result, there is no interference or damage done to a constitutionally protected property right.

The Appellants also claim that the Ordinance not only violates its “constitutionally protected right to a business license but also its “right” to transfer that business license. The U.S. Supreme Court has held that there is no constitutionally protected property right to engage in a business activity or the activity of making a profit. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675 (1999). As provided in both the state statute and the Folly Beach ordinance, Business Licenses deal with the **granting of the privilege by the City of Folly Beach to engage in business activity within its jurisdiction**. The Business License Tax Standardization Act, which was passed on September 23, 2020, and signed by the Governor on September 30, 2020, defines a business license as a license issued to a taxpayer by a county or municipality for the **privilege of doing business**. S.C. Code §6-1-400 (a).

c. **A Business License is Not a Vested Right.**

No one has a “vested right” to a business license. Business licenses by law must be renewed yearly and cannot be transferred. As Appellant itself argued, a vested right is a right that runs with the land. Business licenses do not attach to the property but rather are issued to the individual or corporation or other entity to which it is granted for the privilege of engaging in a business. As a result, contrary to Appellant’s claims, there was no interference or damage done to a constitutionally protected property right. Appellant’s unsupported and unsupportable argument failed in the Trial Court, and it should do so again.

The Appellant also argues that the Ordinance at issue **made** ISTR business licenses non-transferable and thus, it must be nullified because it deprives it of a “vested right” to transfer its

business licenses. The Ordinance as proposed in the initiative Petition, approved by the voters and adopted by City Council has had no impact on the transferability of business licenses. That is because all business licenses before and after passage of the Ordinance are not transferable.⁷ The Ordinance did not alter the non-transferability of ISTR business licenses.

d. **Appellant Has Failed to Meet its Burden**

The Supreme Court has made it very clear that, “An ordinance is a legislative enactment and is presumed to be constitutional. The burden is upon the [the plaintiff] to prove unconstitutionality beyond a reasonable doubt. The burden requires the attacker to...’negate every conceivable basis that might support it.” *Lehnhausen v. Lake Shore Auto Parts Company*, 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed. 2d 351 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed.590 (1940)). The Appellant failed to meet this burden of proof in the court below. Neither the Ordinance contained in the petition, nor the Ordinance subsequently adopted by the City Council interfered with the Appellant’s due process rights because the Appellant had no protected property right to which due process attached.

3. **The Ordinance at Issue Did Not Eliminate the So-Called “Right to Rent” for all Properties on Folly Beach.**

To support its attack on the Trial Court’s well-reasoned order, the Appellant makes the broad and unsupported claim that by regulating the number of business licenses available for conducting the business of investment short term rentals (ISTR) the City of Folly Beach has

⁷ As discussed previously, the Folly Beach Business License Ordinance that existed prior to the adoption of the ISTR Ordinance approved by the voter initiative stated very clearly at §110.08(B) that, “[a] business license shall not be transferable, and that a transfer of controlling interest shall be considered a termination of the old business and the establishment of a new business requiring a new business license, based on the old business income.” This Ordinance was enacted in 2021. Appellant took no steps to challenge that clear statement of the existing law.

essentially barred the ability of a homeowner to rent properties on Folly Beach. (Appellant’s Brief, at 19). This is patently false.

The Referendum and Business License Ordinance simply limited the number of business licenses for investment short-term rentals to 800 in order to check an existential threat to the community. It did not require the suspension or elimination of any existing short term rental business licenses but rather would allow the number of ISTR licenses to decrease by attrition. Further, it did not identify any section of the City wherein a ISTR business could not be conducted. Long term rentals continue. Short term Rentals Continue. As before the enactment of the Ordinance instituting the ISTR license cap, property owners continue to be able to rent or sell their property as before. In fact, Appellant is doing just that. The ability to conduct a business on Folly Beach remains as it was before the adoption of the ISTR Business License Ordinance at issue, that is anyone purchasing a property who wishes to conduct a business is on notice not just via the Code of Folly Beach that requires a business license but also the Statues of the State of South Carolina that provide a business license may be required by the local municipality. This is true for existing licenses relating to short term rentals, long term rentals, restaurants, bars, or any other kind of business. S.C. Code Section § 6-1-400(2)(a) defines a business license as follows: “Business license” means a license issued to a taxpayer by a county or municipality for the privilege of doing business in that county or municipality.” This last gasp argument simply is wrong on the facts. See for example, <https://www.carolinaonevacationrentals.com/folly-beach-vacation-rentals> where one can find many short term rentals on Folly Beach that are available as short term rentals. For example, as of the date of this filing, one of Appellant’s properties, 112 B East Indian, is shown for rent on AIRBNB at: https://www.airbnb.com/rooms/958733632324482534?adults=1&children=0&enable_m3_privat

[e_room=true&infants=0&pets=0&search_mode=regular_search&check_in=2024-08-11&check_out=2024-08-16&source_impression_id=p3_1723300707_P3LVtjZYv7DBRmvK&previous_page_section_name=1000&federated_search_id=080e7cdf-63fd-43cd-965d-14e9e1b1821a.](#)

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GUESTS
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V. CONCLUSION

For the reasons set forth in both Respondent's and Intervenor's briefs, Intervenor respectfully requests that the Court uphold the well-reasoned decision of Judge Burch.

Respectfully Submitted,

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