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SC Court of Appeals

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.

REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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REINTRODUCTION

This matter involves the right to rent one's property on a short term basis, a long-established right in existence long before the City of Folly Beach's business license, and even precedes the existence of the City itself. If the right to use one's property means anything, it must include the right to lease. In an effort to sidestep the clear holding of *I'On*, certain citizens petitioned the City via the Referendum and Initiative Process to modify the zoning rules (which currently permit short-term rentals throughout the City of Folly Beach) under the guise of a "business license" ordinance and cap. The City now surreptitiously argues that this is a mere business license issue and attempts to justify its actions by saying 'well others are doing it too.'¹ There is no support in the record for this proposition and the City does not explain why this is relevant to whether the Ordinance at issue was properly enacted and/or constitutional. Appellant files this short reply on two key issues: (1) the Initiative and Referendum Process cannot be used as an end-run around zoning (i.e., this process cannot be used in a way that nullifies an existing zoning rule or process); and (2) the Business License Act cannot be weaponized by the City to alter Appellant's Property's zoning or take away Appellant's vested right to rent.

ARGUMENT

I. Respondent incorrectly asserts that whether "the Initiative and Referendum Process can amend a municipality's business license" is dispositive of Appellant's claims.

In its Brief, the City states that this "appeal involves a simple issue ... Can the Initiative and Referendum process set forth in South Carolina Code §§ 5-17-10, et seq. amend a municipality's business license regulations?" Brief at 5. The City's deception here should be

¹ The City is wrong here, anyways. See Exhibit B to Appellant's Memo in Support of Preliminary Injunction (collecting zoning ordinances cited by Respondent).

obvious on its face but consider this hypothetical in context of the *I'On* case. Assume that, instead of using the petition and referendum process to amend the zoning ordinance to prevent the development of the I'On, the citizens petitioned to amend the business license ordinance to require a business license for any non-residential properties and set a maximum limit for the number of licenses (and set it below the existing number of non-residential properties). Would the Supreme Court's decision in *I'On* be different? Surely not.

The City also argues that it did not “seek to change the City’s Zoning Code.” Brief at 5. This is precisely the issue. The City’s Zoning Code currently, and at all times, permits short term rentals throughout the City. The referendum and initiative process does not allow citizens an end-run around the zoning rules and process merely by classifying an ordinance as a “business license.” If the City wants to limit short term rentals, it needs to amend its zoning because short term rentals are fully permitted throughout the City. *See Keen v. City of Manhattan Beach*, 77 Cal.App.5th 142 (2d Dist. 2022) (determining that the City must amend its zoning ordinance in order to ban short term rentals); *see also Kracke v. City of Santa Barbara*, 63 Cal. App. 5th 1089, 278 Cal. Rptr. 3d 370 (2d Dist. 2021) (striking down ban on short-term rentals where the city had previously allowed such rentals and did not properly amend).

The City’s interpretation of the *I'On* case is unworkably narrow and will render the decision essentially meaningless.² The point of *I'On* is that citizens cannot use the petition and referendum process “to nullify zoning and land use rules.” *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000). The City has not, and cannot, explain how a

² If we follow the City’s logic, there is no telling what the City can do to property owners. The City can require a license for any use permitted under zoning and ‘cap’ the available licenses at whatever number it wants to. This cannot be the law in South Carolina.

licensing requirement—which limits the number of properties that can rent on a short-term basis—does not nullify the current zoning rule that allows for such use in all areas.

II. Appellant’s right to rent does not stem from a “license” and the City cannot weaponize a business license ordinance to alter zoning or take away a vested right.

Under the South Carolina Business License Tax Standardization Act (SCBLTA), as codified in S.C. Code Ann. § 6-1-400, a license is defined as a privilege for doing business within the jurisdiction. S.C. Code Ann. § 6-1-400. When a county or municipality issues a business license, such as a short-term rental business license, the business is assessed a tax based upon the revenue generated from rental activities. *Id.* The SCBLTA ensures the proper licensure and taxing of businesses, which ultimately promotes fair competition by standardizing the process required for licensure by businesses—including Short Term Rentals.

Appellant does not contest that the authority to require a business license is a clearly well-established governmental function under South Carolina law. Appellant does not contend that its vested right comes from any “license” necessarily. Rather, the right to rent property, whether on a short or long term basis, exists irrespective of any license and here, precedes the City’s enactment of the licensing requirement entirely (and even the City of Folly Beach itself).³

Moreover, the SCBLTA does not allow a municipality to weaponize a business license in this manner.⁴ Business licenses serve administrative functions and, in context of land use regulation, work in conjunction with the zoning overlay. *See, e.g., Ani Creation, Inc. v City of*

³ Compare *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022). In *Hignell-Stark*, the court found that the short term rental license was a privilege, not a right, because the renting of homes on a short term basis was impermissible prior to the enactment of the license. In Folly Beach, homeowners were permitted to do so prior to the enactment of any such license. *Id.* (citing *Phillips v. Washington Legal Foundation*, 524 U.S. at 167, 118 S.Ct. 1925 (1998)).

⁴ If we follow the City’s logic, a group of citizens could petition the city to require licenses for all long term rentals and set a cap low enough to prevent any property owners (not currently renting) from renting property in the future. This should run afoul of the holding in *I’On*.

Myrtle Beach Bd. of Zoning Appeals, 440 S.C. 266, 275, 890 S.E. 748, 752 (2023). The right to operate a business is not the same as the right to use your property in a certain way, except in the City of Folly Beach. A regulation that changes the permitted use of certain parcels of land must be done by amending the zoning ordinance. *Id.* In fact, the proper means of regulating Short Term Rental businesses under local ordinances includes an amendment to zoning or enacting a special zoning overlay. *See Charleston Development Company, LLC v. Alami*, 433 S.C. 533, 538 (S.C. Ct. App. 2021) (City of Charleston enacted a special zoning overlay to permit Short Term Rentals, defined as leases between 1 and 29 days, in a certain district of the City). Moreover, in *Landing Dev. Corp. v. City of Myrtle Beach*, the court reiterated that the issuance of a Short Term Rental business license was pursuant to a zoning ordinance, which determined where such rentals could occur. 285 S.C. 216 (1985). No conditional permit of any kind is required to rent property on a short-term basis under the City's current zoning. The business license ordinance should not be used to prevent the operation of a business when the business is compliant with all applicable laws, including zoning.

Finally, Appellant has established a vested use. The only record evidence regarding this issue is the testimony of Appellant's owners. Appellant has already made substantial expenditures in reliance on the zoning status and its long-standing short-term rental use of the property. Additionally, Appellant will be damaged if a new buyer of its property(ies) cannot continue this use as the market value of Appellant's property is significantly less without such use.

CONCLUSION

For the reasons set forth herein and as stated in Appellant's Initial Brief, Appellant respectfully requests that this Court reverse the circuit court's erroneous grant of the City's Motion for Summary Judgment and GRANT Appellant's Motion for Summary Judgment.

Respectfully Submitted,

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PROOF OF SERVICE

I do hereby certify that on October 10, 2024, I have served all counsel in this action with a copy of **Reply Brief of Appellant** via e-filing to the following email addresses:

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