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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Unpublished Opinion No. 2013-UP-279 (S.C. Ct. App. filed June 26, 2013)

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

v.

Marlboro County, South Carolina, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 22, 2013.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in upholding the trial court's conclusion that S.C. Code Ann. § 6-29-760(D) and laches barred Petitioners' claim that Marlboro County has not enacted a zoning ordinance?

II. Did the Court of Appeals err in upholding the trial court's dismissal of Petitioners' preemption claim?

III. Did the Court of Appeals err in upholding the trial court's dismissal of Petitioners' causes of action for equal protection and substantive due process violations?

IV. Did the Court of Appeals err in concluding that the denial of Petitioners' partial Motion for Summary Judgment was not immediately appealable?

INTRODUCTION

This matter primarily involves the interpretation and interplay of two statutes, S.C. Code Ann. § 4-9-120 ("Section 4-9-120") and S.C. Code Ann. § 6-29-760(D) ("Section 6-29-760(D)"). Section 4-9-120, "Procedures for adoption of ordinances; proceedings and all ordinances shall be recorded," enacted in 1962 and amended in 1975, prescribes the mechanism and procedure through which local governments enact local ordinances, including zoning ordinances. Section 6-29-760(D), a part of the S.C. Local Government Comprehensive Planning Enabling Act of 1994, establishes a time bar for challenges to the validity of a zoning ordinance based on a failure to satisfy the requirements set out in S.C. Code Ann. 6-29-760(A)-(C).

There are special and important reasons for this Court to hear this case. Recall that on February 16, 2012 this Court initially certified this case for review pursuant to Rule 204(b), SCACR, because of at least one "issue of significant public interest or a legal issue of major importance" involved herein. In addition, this Court has never addressed Section 6-29-760(D), and the interplay of Section 6-29-760(D) and Section 4-9-120 presents this Court with a novel issue. Similarly, the opinion of the Court of Appeals (the "Opinion") creates an irreconcilable conflict between Section 6-29-760(D) and Section 4-9-120, and is in conflict with at least two prior decisions of this Court.

Petitioners MRR Sandhills, LLC ("MRR") and Z.V. Pate, Inc. ("Pate") ("Petitioners") demonstrated in this case -- based on Marlboro County's (the "County's") own documents and affidavits -- that the County's purported zoning ordinance never became law because it did not receive the three readings required by Section 4-9-120:

> 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. . .

Petitioners have consistently and continually alleged and argued that the County has not enacted a zoning ordinance due to its failure to satisfy Section 4-9-120, and that the time bar contained in Section 6-29-760(D) never began to run against them. The County neither acknowledged nor addressed Petitioners' allegations, evidence and arguments on this point. Likewise, the trial court never addressed the County's failure to enact an ordinance, even after Petitioners made a Rule 59(e), SCRCP, motion (R. pp. 632-639) asking for a ruling on this issue. The Court of Appeals then compounded the trial court's error when it dismissed Petitioners' appeal in a Rule 220(b), SCACR, opinion devoid of any meaningful legal analysis.

Instead, the trial court dismissed Petitioners' claim, pursuant to Rule 12(b)(6) SCRCP, by incorrectly applying the time bar contained in Section 6-29-760(D). Section 6-29-760(D), which has never been considered by this Court, provides:

> 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's Order applied Section 6-29-760(D)'s time bar by reasoning that Petitioners filed their lawsuit against the County more than sixty days after "Marlboro

County's Zoning Ordinance *was enacted* in 2002." (Emphasis added). [Order, p. 3] (R. p. 3).

In order to conclude that the sixty-day limitation barred Petitioners' claim, the trial court and the Court of Appeals assumed that the County had enacted a zoning ordinance.[1] But Petitioners alleged in their Complaint and presented unrefuted evidence that the alleged ordinance *never received the requisite three readings*. For purposes of a Rule 12(b)(6) motion, the allegations in Petitioners' complaint are presumed to be true. See e.g., Woodell by Allen v. Marion Sch. Dist. One, 307 S.C. 297, 298, 414 S.E.2d 794 (Ct. App. 1992) ("A court ruling on a Rule 12(b)(6) motion must construe the complaint in the light most favorable to the nonmoving party and it must consider the facts alleged in the complaint as true.")

This case presents this Court with a novel issue: whether Section 6-29-760(D) bars a claim that a governing body has not enacted an ordinance in the manner required by Section 4-9-120. Section 6-29-760(D) cannot apply to bar Petitioners' claim because the County enacted no zoning ordinance in 2002. As argued repeatedly by the Petitioners, the application of Section 6-29-760(D) to bar a claim requires an "enacted" ordinance and a "decision of the governing body." Absent a "decision of the governing body" resulting in "enactment" the time limitation set out in Section 6-29-760(D) cannot begin to run, because there is no enactment to trigger it.

[1] More specifically, the Order concluded that the County enacted a zoning ordinance on April 11, 2002, and started the sixty-day "clock" in Section 6-29-760(D) the next day. In other words, the Order (and Opinion) accepted as true (despite Petitioners' allegations and demonstration to the contrary) the County's claim that it enacted a zoning ordinance. The trial court thus applied an incorrect standard in dismissing the cause of action pursuant to Rule 12(b)(6), SCRCP

Because the trial court and the Court of Appeals failed to address the Petitioners' demonstration that the County enacted no zoning ordinance, the Order and the Opinion both conflict with at least two previous decisions of this Court. Failure to give an ordinance the mandatory number of readings renders it void. Berkeley Electric Cooperative, Inc. v. Town of Mount Pleasant, 308 S.C. 205, 417 S.E.2d 579 (1992). The Opinion gives a void ordinance the force of law and directly conflicts with this Court's decision in Berkeley Electric Cooperative.

Moreover, construing the Statute to give a void ordinance the force of law effectively repeals S.C. Code Ann. § 4-9-120 by implication. Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 141, 628 S.E.2d 38, 41 (2006). Repeal by implication is disfavored, and exists only when two statutes, here Section 6-29-760(D) and Section 4-9-120, are incapable of any reasonable reconcilement. If the two provisions "can be construed so that both can stand, a court shall so construe them." Id. at 141-142. In direct conflict with Capco, neither the Order nor the Opinion attempted to reconcile the two statutes.

Similarly, the Opinion's reliance upon Quail Hill v. County of Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008) ("Quail Hill") to support its construction of Section 6-29-760(D)'s time bar also conflicts with this Court's decisions in Berkeley Electric Cooperative and Capco. Quail Hill is inapposite precisely because that case clearly did not involve a claim that a zoning ordinance was not enacted because of a failure to give it three readings. Moreover, the trial court in Quail Hill never mentioned, considered or applied Section 6-29-760(D)'s time bar. Rather, that trial court actually conducted a hearing on the merits to consider the claim that Richland County did not have a valid

zoning ordinance. Quail Hill, LLC v. County of Richland, 2006 WL 6651727, *1 (Ct. Comm. Pl. June 22, 2006).

In sum, this Court has never considered the operation of Section 6-29-760(D), this case presents a novel issue, the Opinion is in conflict with two decisions issued by this Court, and the Opinion misapplies Quail Hill. For all of these reasons, the Court should grant this Petition for Certiorari.

STATEMENT OF THE CASE

Procedural History

Petitioner MRR began work in 2007 to locate a Municipal Solid Waste or sanitary landfill (the "Proposed Facility") in Marlboro County. Based on preliminary discussions with County officials, MRR gained control of approximately 1150 acres in a sparsely populated area of northern Marlboro County, owned by Pate, and suitable for use as a sanitary landfill (the "Property"). MRR and Pate entered into a contract for the Proposed Facility to be sited on the Property.

According to an unsigned and undated zoning map (R. p. 444), Marlboro County consists of only one zoning district, General Development ("GD"). [Plaintiffs' Memo in Support of Summary Judgment, Ex. 2] (R. pp. 89-90). According to Section 3.1.2 of "Ordinance 545" represented by the County to be the Marlboro County Zoning Ordinance, a sanitary landfill is a prohibited use in a GD district (R. pp. 101, 383) and by extension throughout Marlboro County.

In coordination with MRR, Pate made a rezoning request for the Property that was denied by the Marlboro County Council ("Council").

On October 30, 2009, Petitioners filed a Complaint against the County (R. pp. 15-42) alleging, among other things, that 1) the County had no zoning ordinance; 2) the County's actions violated Petitioners' rights to equal protection; 3) the County's actions violated Petitioners' substantive due process rights; and 4) the County's actions were preempted by the South Carolina Solid Waste Act, S.C. Code Ann. § 44-96-10, *et seq.*.

On December 30, 2009, the County filed a Rule 12(b)(6) Motion to Dismiss, Answer, and Counterclaim (R. pp. 43-67). On June 18, 2010, Petitioners filed a partial Motion for Summary Judgment (R. pp. 68-69) seeking a determination that because the County has no zoning ordinance Petitioners have the right to use the Property as a sanitary landfill.

In an Order (R. pp. 1-13) dated January 25, 2011, the trial court concluded that Petitioners' Complaint failed to state facts sufficient to state a cause of action with respect to the following claims: 1) the County did not enact a zoning ordinance (Petitioners' first cause of action; 2) equal protection (fourth cause of action); 3) substantive due process (fifth cause of action); and 4) preemption (seventh cause of action). In particular, the trial court concluded that Section 6-29-760(D) and laches barred Petitioners' claim that the County had not enacted a zoning ordinance. The trial court denied the County's Motion to Dismiss the following claims by Petitioners' against the County: 1) the denial of the rezoning request was improper (third cause of action); and 2) estoppel and interference with prospective contractual relations (ninth and eleventh causes of action).

Following a Motion for Reconsideration (R. pp. 632-639) made pursuant to Rule 59(e), SCRCP, Petitioners received written notice of the entry of an Order denying their

Motion for Reconsideration on May 24, 2011 (R. p. 14). Petitioners served and filed their Notice of Appeal to the Court of Appeals on June 6, 2011.

The Court of Appeals affirmed the trial court's Order in an Unpublished Opinion No. 2013-UP-279 filed June 26, 2013 (the "Opinion").

Facts Material to the Consideration of the Questions Presented

The County argued, and the trial court concluded, that "Marlboro County's Zoning Ordinance was enacted in 2002." [Order, p. 3] (R. p. 3). More particularly, the County and its Council claim that "Ordinance 545" (R. pp. 374-442) is the official County zoning ordinance enacted on April 11, 2002. [Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, Ex. C-1] (R. p. 373).

In 2002, the County's established procedure for adopting an ordinance included "having three readings" on the ordinance. [Affidavit of Anna Moore, Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, Ex. A] (R. pp. 358-362). Accordingly, "Ordinance 545" claims that on April 11, 2002 the Council held a public hearing on, gave third reading to, and made effective "Ordinance 545." (R. pp. 375-376). The Public Notice for the April 11, 2002, Public Hearing and County Council Meeting, published on March 18, 2002, stated that "Marlboro County Council will conduct a Public Hearing on April 11, 2002 at 6:00 pm for Ordinance #545 – Marlboro County Zoning Ordinance." [Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, Ex. C-12] (R. pp. 498-499).

The Council created minutes of its April 11, 2002 public hearing and meeting (the "Minutes") (R. pp. 458-465). The Minutes were signed by the Chairman of the Council

and the Clerk of Council, and the Minutes were approved by the Council on May 9, 2002. (R. pp. 458-465). The Minutes are authentic and valid. (R. p. 459).

As memorialized by the Minutes, after the close of the public hearing on "Ordinance 545," Council members proposed substantive amendments[2] to the proposed zoning ordinance, including, but not limited to, adding the following language (R. p. 461):

> Page 4, Section 3-1.2 Permitted Uses. There will be no prohibited uses under that section; whereas in the other readings there were four prohibited uses listed which have been dropped. The Commission/Council is deleting the language except for following expressly prohibited uses will be deleted [sic] and the listing of prohibited uses is deleted . . . .

The Council gave a single reading to this ordinance containing all the amendments listed in the Minutes (the "April Ordinance"). [Id.]

"Ordinance 545" is substantively different from the "April Ordinance" given reading by Council on April 11, 2002, because "Ordinance 545" contains none of the amendments read at the April 11, 2002 Meeting. For example, Subsection 3-1.2 of "Ordinance 545" enumerates four (4) categories of prohibited uses in the GD, General Development District. "Sanitary Landfills" are an expressly prohibited use in this subsection. (R. p. 383). As stated in the Minutes, however, the "April Ordinance" removed any such "prohibited uses" found in Subsection 3-1.2 of "Ordinance 545." (R. pp. 458-465).

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[2] The amendments read at the Council's April 11, 2002 meeting were recommended at an April 8, 2002 meeting of the Marlboro County Planning Commission ("Planning Commission"), as shown by the authentic minutes of that April 8, 2002 meeting of the Planning Commission. [Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, Ex. C-9] (R. pp. 488-493).

The Minutes thus establish beyond dispute that neither the "April Ordinance" nor "Ordinance 545" received three readings as required by Section 4-9-120. Because Council did not comply with the clear requirements of law, it never enacted a zoning ordinance. Where no zoning ordinance was enacted, the 60-day time limit prescribed in Section 6-29-760(D) was never triggered, and Petitioners' claims are not time-barred.

ARGUMENTS

I. THE OPINION AND THE ORDER ERRED BY CONCLUDING THAT SECTION 6-29-760(D) AND LACHES BAR PETITIONERS' CLAIM THAT THE COUNTY HAS NOT ENACTED A ZONING ORDINANCE.

The Opinion affirmed the trial court's conclusion that Section 6-29-760(D) barred Petitioners' claim because the claim was not filed within 60 days of April 11, 2002. The Order ignored Section 6-29-760(D)'s plain language and the necessary precondition for its application-- an enacted zoning ordinance. Therefore, the Order relied solely on a conclusion that is incorrect as a matter of law: "Marlboro County's Zoning Ordinance was enacted in 2002." [Order, p. 3] (R. p. 3). The Opinion and the Order overlooked Petitioners' allegations, arguments and the undisputed facts demonstrating that the County never enacted a zoning ordinance. The trial court and Court of Appeals incorrectly assumed that the County had *enacted* a zoning ordinance resulting from a *decision of the governing body* (despite unrefuted evidence to the contrary), and then misapplied Section 6-29-760(D).

The Opinion and the Order do not address the requirement of Section 4-9-120 that a county ordinance receive three readings in order to become law, and the case law holding that an ordinance lacking the requisite readings is void *ab initio*. Nor did the trial court or the Court of Appeals consider that no zoning ordinance in this case

received the three readings required by Section 4-9-120. Section 6-29-760(D) does not apply to Petitioners' claim by its plain language, and the trial court's improper application of the time bar creates improper and unnecessary statutory conflicts. Finally, the trial court erred in determining the County demonstrated "substantial compliance" with Section 6-29-760(D) and the Opinion did not address Petitioners' arguments involving the County's lack of "substantial compliance."

A. SECTION 4-9-120 REQUIRES EVERY COUNTY ORDINANCE RECEIVE THREE READINGS IN ORDER TO BECOME LAW.

Specifically, Section 4-9-120 provides that:

> "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." (emphasis added).

Per the plain and unambiguous language of Section 4-9-120, any ordinance other than an emergency ordinance[3] must receive three readings in order to become law. The County was aware of this requirement, as its established procedure for adopting an ordinance included "having three readings" on the ordinance. [Affidavit of Anna Moore, Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, Ex. A] (R. pp. 358-362).

Furthermore, compliance with Section 4-9-120 is a mandatory predicate to the enactment of a zoning ordinance, as evidenced by the use of the term "shall" by the

[3] No party has alleged, and the circuit court did not conclude, that the ordinance in question was an "emergency ordinance."

General Assembly. Horry County v. City of Myrtle Beach, 288 S.C. 412, 343 S.E.2d 36 (1986); see also Hatfield v. Meers, 402 S.W.2d 35, 44-45 (Kansas City Court of Appeals, Missouri 1966) ("Hatfield") (ruling that readings requirement for enactment of city ordinance were mandatory and "supported by the solid weight of authority in this country."). 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) ([f]ranchise agreement was illegal because it had not received the readings required to create an ordinance), quoting S.C. Code Ann. § 5-7-270: ("[n]o [municipal] ordinance shall have the force of law until it shall have been read two times on two separate days with at least six days between each reading.").

B. "ORDINANCE 545" NEVER RECEIVED A THIRD READING BY THE COUNCIL AS REQUIRED BY SECTION 4-9-120, AND THUS WAS NEVER ENACTED.

The Council did not give third reading to "Ordinance 545" at its April 11, 2002 Council Meeting, but yet the County claims "Ordinance 545" is its zoning ordinance. The reading requirements of Section 4-9-120 are "intended to satisfy procedural due process protections . . . ." N.C. Electric Membership Corp. v. White, 722 F.Supp. 1314, 1324 (D.S.C. 1989) (explaining requirement that several public meetings must take place before legislative action can be taken by County Council). The purpose of a statutory requirement that ordinances receive the required number of readings is to "safeguard against error, injustice, and hasty or ill-advised action by the Council." Hatfield, 402

S.W.2d 35, 44-45. The Minutes are unambiguous[4] with respect to the actions of the Council at that meeting, and demonstrate that after conducting a public hearing on April 11, 2002 on "Ordinance 545," (during which no comments were received), the Council gave reading to an ordinance materially different from "Ordinance 545." As a result, "Ordinance 545" never received a third reading by the Council, and as a matter of law, was never enacted.

C. THE APRIL ORDINANCE NEVER RECEIVED THREE READINGS AND WAS NEVER ENACTED.

Neither party has alleged otherwise nor presented any evidence to support a finding that the April Ordinance received three readings. To the contrary, the undisputed evidence demonstrates that, at most, the April Ordinance received one reading -- at the April 11, 2002 Council meeting.

The April Ordinance never received a public hearing. The Minutes make clear that the matters encompassed by the April Ordinance were presented after the public hearing on "Ordinance 545" was closed. Additionally, the language of the April Ordinance was recommended to the Council by the Planning Commission at a meeting held on April 8, 2002, several weeks after the public notice for the April 11, 2002 public hearing was published. Therefore, the April Ordinance is not an enacted zoning ordinance as a matter of law, pursuant to S.C. Code Ann. § 4-9-120.

D. SECTION 6-29-760(D) DOES NOT APPLY WHEN (AS HERE) NO ORDINANCE HAS BEEN ENACTED.

Without an "enacted" ordinance, Section 6-29-760(D)'s time limitation does not

[4] As such, the Minutes are the only competent evidence of the actions and proceedings of the Council on April 11, 2002, and cannot be explained, enlarged, or contradicted by parol evidence. Berkeley Electric Cooperative, 303 S.C. 205, 208.

apply pursuant to its plain language. Absent a "decision of the governing body" resulting in "enactment" the time limitation for challenge set out in Section 6-29-760(D) cannot begin to run, because there is no enactment to trigger it.

As described above, "Ordinance 545" never became law because it did not receive three readings. Because no ordinance ever was enacted into law, Petitioners' claim cannot be time-barred. When no ordinance has been "enacted," Section 6-29-760(D) does not apply. In interpreting a statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). The Court must apply the clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

To trigger its application, Section 6-29-760(D) plainly and explicitly requires that a zoning regulation first has been duly "enacted" and that there be a "decision of the governing body" enacting the ordinance. It is undisputed that "Ordinance 545" failed to constitute a "legislative decision" (pursuant to Section 4-9-120 and the County's own procedures) because it did not receive three readings, and "Ordinance 545" cannot be a "decision of the governing body." Without a duly "enacted" "decision," the time limitation for challenge set out in Section 6-29-760(D) cannot begin to run, because there is no predicate legitimate action to trigger it.

Similarly, the requirement that an ordinance be enacted in order for Section 6-29-760(D)'s time bar to apply demonstrates that the facts in Quail Hill, LLC v. County of

Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008) "Quail Hill") are not "very similar" to this case at all [contrary to the Order's analysis (p. 4)(R. p. 4)]. None of the "irregularities" alleged in Quail Hill claimed, as the Petitioners demonstrated here, that the ordinance in question did not become law. Quail Hill at most demonstrates the possible universe of claims that may fall within the limitations period of Section 6-29-760(D), and very clearly does not bar a claim that an ordinance did not receive three readings.

E. THE CIRCUIT COURT'S CONSTRUCTION CREATES IMPERMISSIBLE AND UNNECESSARY STATUTORY CONFLICTS.

The Order's conclusion that Section 6-29-760(D) bars a claim that an ordinance failed to receive three readings conflicts directly with Section 4-9-120. If such a conflict between those two statutes existed, then Section 6-29-760(D) repealed by implication Section 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). Repeal by implication is disfavored, and exists only when the two statutes are incapable of any reasonable reconcilement. 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).

In this case, no conflict exists between the two statutes, and the Court must read 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, Section 6-9-760(D) may apply in the event an ordinance is enacted pursuant to Section 4-9-120. On the other hand, where a governing body fails to comply with Section 4-9-120 by failing to give a proposed ordinance the required three readings, the time bar prescribed in Section 6-29-760(D) does not apply. Only Petitioners' construction of the two statutes harmonizes them.

F. EVEN IF SECTION 6-20-760(D) APPLIED TO THIS CASE (AND IT DOES NOT), THE COUNTY HAS NOT DEMONSTRATED THE "SUBSTANTIAL COMPLIANCE" NECESSARY TO TRIGGER THE TIME-BAR.

The County has not demonstrated "substantial compliance" with the County procedures or notice requirements that would trigger Section 6-29-760(D)'s sixty-day limitation period. Two reasons compel this conclusion. First, as required by the County's own procedures, Council must give three readings to enact an ordinance. (Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, Ex. A (R. pp. 358-362); See also Section 4-9-120). "Ordinance 545" did not receive three readings. This fact is not seriously in dispute. Therefore, Marlboro County did not demonstrate "substantial compliance" with its own established procedures or with Section 4-9-120, both of which require three readings in order for an ordinance to become law.

Secondly, S.C. Code Ann. § 6-29-760(A) requires that "[b]efore enacting or amending any zoning regulations or maps, the governing authority or the planning commission, if authorized by the governing authority, *shall hold a public hearing on it*, which must be advertised and conducted according to lawfully prescribed procedures."

(Emphasis added). The County held no public hearing on the "April Ordinance" and provided no public notice of it, violating S.C. Code § 6-29-760(A). The public notice the County provided for the public hearing on April 11, 2002 in connection with "Ordinance 545" did not include any notice of the matters included in the "April Ordinance."

More importantly, the public notice for the April 11, 2002 public hearing *could not* have included the language contained in the April Ordinance. The public notice was issued on March 18, 2002, almost three weeks *before* the Planning Commission met on April 8, 2002. The Minutes of the April 8, 2002 Planning Commission show that the Planning Commission recommended the language of the April Ordinance – and the material changes from "Ordinance 545"—on April 8, 2002. Therefore, even if the "April Ordinance" had received two readings prior to April 11, 2002 (and it did not), the County's failure to notice and hold a public hearing in connection with the April Ordinance demonstrates that the County did not substantially comply with the requirements of § 6-29-760(A). Accordingly, the circuit court erred, and the Court of Appeals likewise erred in affirming the trial court's decision.

G. PETITIONERS' CLAIM THAT THE COUNTY HAS ENACTED NO ZONING ORDINANCE IS NOT BARRED BY THE EQUITABLE DOCTRINE OF LACHES.

Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Chambers of South Carolina, Inc. v. County Council for Lee County, 315 S.C. 418, 421; 434 S.E. 2d 279, 280 (1993). Laches is an equitable doctrine consisting of the elements of (1) a delay (2) that is unreasonable and (3) that

causes prejudice. Terry v. Lee, 314 S.C. 420,445 S.E.2d 435 (1994).

The trial court erred by summarily concluding as a matter of law that Petitioners unreasonably failed to challenge the "zoning ordinance" in 2002. The County cannot be heard to claim that its own failure to enact a zoning ordinance (and almost a decade of claiming otherwise) was knowledge that could be imputed to Petitioners. Whatever "notice" provided by "Ordinance 545" was meaningless, as it was not an enacted ordinance. In other words, Petitioners did not "know their rights" in 2002.

Under the facts alleged, Petitioners have not delayed unreasonably in asserting their rights. Petitioners sought a rezoning determination from the Council that would have allowed use of the Property as a sanitary landfill. Seeking such a determination from the Council was required prior to any action in this Court challenging the enactment of "Ordinance 545." Moore v. Sumter County Council, 387 S.E.2d 455 (1990) (party required to exhaust administrative remedies before County Council prior to pursuing judicial relief in connection with a zoning ordinance). Following that determination by the Council, Petitioners filed a lawsuit. Under these circumstances, no basis exists for the trial court to conclude under Rule 12(b)(6) that Petitioners can be charged with unreasonable delay and have their claim be time-barred by laches.

Second, laches is an equitable remedy that cannot operate to bar a legal claim when the applicable statute of limitations has not run. Twelfth RMA Partners, P.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44, 47 (1999); citing Crotwell v. Whitney, 229 S.C. 213, 92 S.E.2d 473 (1956) (citations omitted). Since the sixty-day limitation in Section 6-29-760(D) cannot begin to run absent an enacted zoning ordinance, the doctrine of laches cannot bar Petitioners' claim.

II. THE COURT OF APPEALS ERRED BY UPHOLDING THE TRIAL COURT'S DISMISSAL OF PETITIONERS' PREEMPTION CLAIM.

Petitioners alleged in their Complaint (R. p. 36) that assuming *arguendo* "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, Petitioners alleged that the "zoning ordinance" is preempted *as applied* in this case. Recall that the trial court *denied* the County's motion to dismiss Petitioners' claim that the County's denial of Petitioners' rezoning request was improper. Accordingly, a claim that the decision of the County "improperly encroached upon the jurisdiction of DHEC" must also survive.

The Solid Waste Act, S.C. Code Ann. § 44-96-10, *et seq.*, regulates the disposal of solid wastes within the state and provides for oversight and promulgation of regulations by DHEC to carry out same. Petitioners' Complaint alleges that the "arbitrary denial" of Pate's rezoning request "exceeded the jurisdiction of the County and the lawful purposes of zoning, and unlawfully encroached upon the jurisdiction of DHEC." [Complaint p. 19, ¶ 116] (R. p. 36). The Complaint thus alleges that "Ordinance 545", if it was enacted, nevertheless is preempted *as applied* in this case because the Council encroached into a field of authority occupied exclusively by DHEC. The Complaint's allegations, if true, are sufficient to state a claim of field preemption. See, e.g., Days Cove Reclamation Co. v. Queen Anne's County, 146 Md.App. 469, 807 A.2d 156 (Court of Special Appeals of Maryland 2002) (zoning board forbidden from acting in an area preempted through state law landfill permitting process).

Moreover, the fact that the trial court *denied* the County's motion to dismiss the Petitioners' third cause of action alleging that the County's denial of the Petitioners' rezoning request was improper demonstrates that cause of action by its very nature involves the appropriate *application* of law. Therefore, the trial court erred by prematurely dismissing Petitioners' seventh cause of action without allowing the case to proceed to determine whether "Ordinance 545", even if it was enacted, nevertheless is preempted *as applied* in this case because the County considered matters that are encompassed in a field occupied exclusively by DHEC.

III. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DISMISSAL OF CERTAIN OTHER CAUSES OF ACTION IN THE COMPLAINT.

The trial court dismissed Petitioners' first and second causes of action, finding both claims time-barred by S.C. Code Ann. §6-29-760(D) and the doctrine of laches. As discussed above, the trial court erred in dismissing these claims as time-barred. Similarly, the trial court dismissed a portion of Petitioners' eighth and tenth causes of action, seeking injunctive and declaratory relief, to the extent matters therein are time-barred. For the same reasons discussed above, the trial court erred by limiting Petitioners' eighth and tenth causes of action.

The trial court also dismissed Petitioners' constitutional challenges embodied in the Complaint's fourth, fifth, and sixth causes of action. The allegations contained in the Complaint, *if true*, are sufficient to state causes of action for violations of equal protection, due process, and Petitioners' entitlement to relief under 42 U.S.C. § 1983. [Complaint pp.15-17, ¶¶ 92-110] (R. pp. 32-35). Dismissing same pursuant to Rule 12(b)(6), SCRCP was improper.

With respect to Petitioners' equal protection claim, the Complaint alleges that the County allows other similarly situated persons to use property for "prohibited uses" despite the land being zoned GD. [Complaint p. 15, ¶¶ 93-96] (R. p. 32). Petitioners alleged the County has applied the zoning ordinance in a discriminatory manner without any rational basis to treat Petitioners differently than other similarly situated persons. [Complaint pp. 15-16, ¶¶ 97-98] (R. pp. 32-33). 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 Petitioners 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 Petitioners 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, Petitioners *pled* facts that if true would entitle them to relief. The trial court misconstrued Petitioners' 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), SCRCP.

With respect to Petitioners' substantive due process claim, 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 Petitioners abandoned their arguments on this issue. The Record and the Briefs reveal otherwise. The Complaint alleges that the Petitioners 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 Petitioners from using the Property as a sanitary landfill constitute a violation of Petitioners' substantive due process rights. Likewise, as argued by Petitioners numerous times, 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. Therefore, the trial court erred by failing to apply the proper standard of review of the County's Motion to Dismiss under Rule 12(b)(6), SCRCP, and by prematurely dismissing Petitioners' substantive due process claim.

IV. THE ISSUE OF THE DENIAL OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT WAS IMMEDIATELY APPEALABLE.

The Opinion determined that the denial of Petitioners' Motion for Summary Judgment by the trial court was not immediately appealable because "the denial of the motion for summary judgment was not a final determination of the merits of the case . . ." Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon, 394 S.C. 197, 202 n.2, 715 S.E.2d 331, 333 n.2 (2011). In this case, the trial court's denial of Petitioners' partial motion for summary judgment on the their first cause of action was not interlocutory, because the trial court "granted Marlboro County's motion to dismiss the plaintiffs' first two causes of action and therefore, the plaintiffs' motion for partial summary judgment is now moot and is hereby DENIED." (Order at p. 12) (R. p. 12). As a result of the trial court's grant of the County's motion to dismiss, therefore, operated as a "final determination on the merits" of that cause of action. This cause of action is not

proceeding to trial.

Moreover, the Opinion ignored the recognized exception to the rule prohibiting review of interlocutory orders. "Specifically, the courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 338, 574 S.E.2d 502, 511 (Ct.App.2002) (citing Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct.App.2001). The appeal of the denial of summary judgment was part and parcel of the trial court's grant of the County's motion to dismiss. Because the grant of the County's motion to dismiss formed the basis for the denial of the motion for summary judgment, it was properly reviewable upon appeal.

The record contains adequate evidence and argument for this Court to consider and rule upon Appellants' Motion for Partial Summary Judgment. [Plaintiffs' Memorandum in Support of their Motions for Partial Summary Judgment] (R. pp. 70-167). Petitioners' First Cause of Action seeks a ruling that the County has no enacted ordinance that prohibits MRR from using the Property as a landfill. [Complaint pp. 11-12, ¶¶ 62-66] (R. pp. 28-29). Because there is no dispute that "Ordinance 545" did not received the three readings required under Section 4-9-120, then summary judgment is required on this issue pursuant to Rule 56, SCRCP.

CONCLUSION

For the reasons set forth herein, Petitioners request that this Court grant Certiorari and hear this case.

Respectfully Submitted,

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September 23, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Unpublished Opinion No. 2013-UP-279 (S.C. Ct. App. filed June 26, 2013)

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

v.

Marlboro County, South Carolina, ... Respondent.

PROOF OF SERVICE

I, the undersigned paralegal of the law offices of Adams and Reese LLP, attorneys for Petitioners, do hereby certify that I have served the South Carolina Court of Appeals as well as all counsel in this action with a copy of the Petition for Writ of Certiorari by depositing a copy of same in the United States Mail, postage prepaid, on September 23, 2013, addressed as follows:

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