THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-6613

County of Charleston, South Carolina, ... Appellant,

vs.

South Carolina Department of Transportation, ... Respondent.

FINAL REPLY BRIEF OF APPELLANT

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I. THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION (SCDOT) MISAPPREHENDS THE FACTS OF THE CASE AND THE APPLICABLE STANDARDS OF THE CHARLESTON COUNTY ZONING AND LAND DEVELOPMENT REGULATIONS ORDINANCE (ZLDR).

A. The ZLDR Regulatory Process Can be Harmonized With the SCDOT's Road Maintenance Responsibility.

The SCDOT acknowledges it may obtain "[p]ermits for tree removal . . . where one or more of the following conditions are deemed to exist by the Planning Director: . . . 3. Trees pose an **imminent safety hazard to** nearby buildings, or pedestrian or **vehicular traffic** (as determined by the Planning Director or a qualified arborist); . . . ." ZLDR, Art. 9.5, § 9.4.5(A)(3)(Emphasis added). In addition, the SCDOT concedes the application of S.C. Code Ann. § 6-29-770 for all non-highway uses of real property such as section sheds and equipment depots, but not for the highway right of way. (R. p. 3). Instead, the SCDOT citing Brashier, challenges whether it should make a determination on a case-by-case basis if the removal is based on safety and coordinate the removal through the Planning Director. Brashier v. S.C. DOT, 327 S.C. 179, 490 S.E.2d 8 (1997). This is a distinction without a difference. In Brashier, the South Carolina Supreme Court rejected the Legislature's attempt to require certain toll projects to be initiated by counties instead of the SCDOT. The Brashier Court held that "Article VIII, section 14 'precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subjects encompassed by that section.'" Id. Unlike Brashier, the SCDOT does not have the exclusive control over trees within the road right of way, no more than it has exclusive control over the wetlands, drainage, utilities, or historic properties. This fact is evidenced by its recognition that it must comply with the NEPA process, the Coastal Zone

Management Act, and the municipal consent statute.[1] See S.C. Code Ann. § 57-5-820. "Where an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict." McKeown v. Charleston Cnty. Bd. of Zoning Appeals, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct.App.2001).

Notably, the SCDOT cites the NEPA process (the National Environmental Policy Act) in its brief as the basis for its consideration of roadside vegetation management to support its exclusivity argument. (Resp't Br. p. 2). The NEPA process requires the SCDOT to conduct environmental reviews to consider the potential impacts on the environment by its proposed actions when federal action is involved, to include federal funding or permits. NEPA also requires a determination of potential environmental impacts and mitigation for unavoidable impacts, and further requires the SCDOT to consult with the interested agencies. The issue here is the SCDOT's unwillingness to seek review and approval from counties prior to the removal of a certain class of trees, to include the mitigation of replanting or paying a mitigation fee. Nothing in State law gives the SCDOT exclusive authority over tree protection and removal. Instead, the Planning Act specifically mandates that the SCDOT comply with local zoning. See S.C. Code Ann. § 6-29-770. Since the ZLDR Ordinance, Article 9.4 is not inconsistent with State law, this Court should reject the SCDOT's unconstitutionality defense and find that it must comply with the ZLDR provisions.

[1] The SCDOT must coordinate with and receive approval from a variety of entities prior to constructing a road. These entitles can include: the Department of Health and Environmental Control, Ocean and Coastal Resource Management, local governments, landowners, the Army Corps of Engineers, the State Highway Commission, the State Historic Preservation Office, railroad companies, and utility companies. While the SCDOT is charged with building and maintaining highways, it does not have carte blanche to do so.

B. The SCDOT Has Not Been Issued a Citation For its Failure to Work Within the Regulatory Provisions of the ZLDR.

The SCDOT claims that "[t]he Department determined that the trees in question presented a hazard to the travelling public and removed them. The County disagreed, issued a citation, and attempted to collect a fine." (Resp't Br. p. 3). That is inaccurate. On or about July 18, 2012, the County sent a Notice of Tree Violation to the SCDOT regarding work it was performing on Maybank Highway in the County. (R. pp. 104-05). The SCDOT removed three Grand Trees within its right of way on Maybank Highway without obtaining a zoning permit. The removal of the Grand Trees was part of the SCDOT's ongoing maintenance of Maybank Highway.

The ZLDR prohibits the removal of trees prior to the issuance of a zoning permit by the planning director. (R. pp. 97-98, 100-01). The ZLDR provides that the provisions of this Article in their entirety shall apply to all real property in unincorporated Charleston County, except as otherwise expressly exempted. See, ZLDR Art. 9.4, § 9.4.1(B)(1). Notwithstanding this bar to tree removal, the ZLDR provides a partial exemption for the SCDOT allowing it to remove trees without prior permission or a zoning permit, except for the following:

a. All trees species measuring 6 inches or greater DBH located in right-of-ways along Scenic Highways as designated in this Ordinance shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.

b. Grand Tree Live Oak species in all present and proposed right-of-ways and easements shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.

c. All Grand Trees other than Live Oak species in all present and proposed right-of-ways and easements not located on a Scenic Highway are protected but may be permitted to be removed administratively when mitigated per Article 9.4.6.

ZLDR, Art. 9.4, § 9.4.1(B)(3).[2]

The County notified the SCDOT that it must either replace trees pursuant to the schedule in the ZLDR or pay a fee to the Tree Fund as mitigation if "planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design." ZLDR, Art. 9.4, § 9.4.6(E). The Planning Department did not issue citations to the SCDOT. Furthermore, at no time did the SCDOT notify the Planning Department based on a qualified professional that its tree removal was based on vehicular safety which would have triggered the exemption in the ZLDR. The County contends that SCDOT must work within the regulatory provision of the ZLDR which expressly recognizes that if "Trees pose an **imminent safety hazard to** nearby buildings, or pedestrian or **vehicular traffic"** they can be removed. See, ZLDR, Art. 9.4, § 9.4.5(A)(3)(Emphasis added)

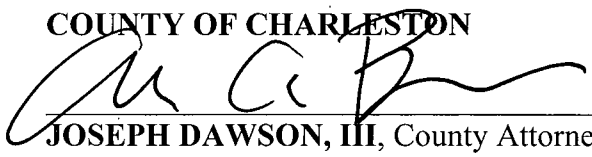
CONCLUSION

For the reasons set forth above, this Honorable Court should reverse the trial court's Order and find that the SCDOT is not exempt from the regulatory provisions of the Planning Act and ZLDR regarding the protection and preservation of trees.

[2] A Grand Tree is defined as any tree measuring 24 inches or greater diameter breast height (DBH) except pine tree and Sweet Gum tree (Liquidamber styraciflua) species. (R. p. 96).

Respectfully submitted,

COUNTY OF CHARLESTON



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North Charleston, South Carolina
November 12, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2015-001309

Charleston County Assessor, ... Appellant,

v.

University Ventures, LLC, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant Charleston County Assessor complies with Rule 211(b), S.C.A.C.R.

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APPEAL FROM CHARLESTON COUNTY
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Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001309

County of Charleston, South Carolina, ... Appellant,

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South Carolina Department of Transportation, ... Respondent.

PROOF OF SERVICE

I certify that I have served the **Final Reply Brief of Appellant** on the all counsel of record by depositing a copy of the same in the United States Mail, postage prepaid, on November 12, 2015, addressed as follows:

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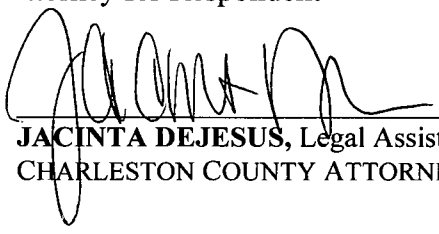

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