

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

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MAY 02 2016

SC Court of Appeals

Case No. 2005-CP-32-2712

Case No. 2008-CP-32-419

McGuinn Construction Management, Inc., Appellant,

v.

Saul Espino and Mara Espino, Respondents.

and

Saul Espino and Mara Espino, Respondents,

v.

Gates Commons, LLC, S. Wade McGuinn, Individually,
and Town of Lexington, Defendants,

Of whom, Town of Lexington, is Appellant.

**RETURN TO RESPONDENTS'
PETITION FOR REHEARING**

The Respondents Saul Espino and Mara Espino have petitioned this Court for a rehearing of its recent unpublished opinion in *McGuinn Construction Management v. Espino*, Op. No. 2016-UP-138 (S.C. Ct. App. filed March 23, 2016). In response, the Appellant Town of Lexington submits that this Court properly ruled on the issues challenged by the Espinos in their petition for rehearing.

I.

The Espinos take issue with this Court's determination that summary judgment was erroneously granted because the lower court failed to take into consideration the "as-built plans" in its construction of the easement. This Court's analysis of that issue is correct and does not warrant a rehearing.

The evidence in the record reflects that in April 1988, an express easement was granted to the Town of Lexington by Coventry Associates, Inc. (a predecessor in interest to the Espinos). The easement was described as follows:

All easements and rights of way necessary for the maintenance of the aforesaid water and sewer lines, said easements being 15' and 30' in width, **reference being made to the "as-built" plans referenced above for a more complete and accurate description of said easements.**

(R. 233). (Emphasis added). As the highlighted language states, the easement specifically makes reference to the "as-built plans" for "a more complete and accurate description of said easements." (R. 233). The "as-built plans," however, were never

submitted to nor considered by Judge Johnson when he ruled on the scope of the easement.

Citing existing precedent, this Court correctly explained that when an instrument such as a deed or easement incorporates plans by reference, then those plans must be considered and read in conjunction with the deed or easement. *See, Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001); *Fuller-Ahrens Partnership v. South Carolina Dept. of Highways & Public Transportation*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993). However, in the case at bar, the easement was construed without reference to the "as-built plans." This Court thus found that a "potential latent ambiguity" exists. The Espinos contend that the parties did not make that latent ambiguity argument in the court below. That is not correct. Both Appellants clearly argued that the lower court erred in failing to recognize that the scope of the easement cannot be determined from its face because quite clearly the instrument expressly refers to the "as-built plans" for a "complete and accurate description" of the easement. The Appellants argued that reference to the "as-built plans" and other evidence show that the sewer pipe at issue is an inactive spur line whose purpose was to provide for future development of the property located behind the Espinos' property. The Court agreed with the Appellants' position and concluded that the absence of the "as-built plans" created a "potential latent ambiguity," suggesting that it is unclear without reference to the "as-built plans" what the intent of the parties was with respect to the

spur line at issue. In short, the Court has agreed that reference to the "as-built plans," as expressly referenced in the easement instrument itself, must be considered in determining the scope of the easement and the language used in the instrument itself. The Espinos are clearly incorrect in suggesting that this Court decided this case on an issue that was not raised by the Appellants in the lower court. A rehearing is therefore not warranted.

II.

The Espinos also repeat their argument that the terms of the easement instrument on its face are not ambiguous and provide only for "maintenance." The Court was correct in rejecting that argument. As the Town has previously argued, the obvious purpose and intent of the easement was to grant the Town the right to operate the sewer system and to have its sewer pipes in the ground traversing the Espinos' and other residents' properties. A construction that restricts the rights to "maintenance" as construed by the Espinos would not even allow the Town to *operate* the sewer system. The term "maintenance," from a practical standpoint, cannot be limited to the "regular upkeep or repair" of the lines as the Espinos assert. That limited use would prevent the use of the easement for its obvious intended purpose of transporting sewage. Thus, the Espinos' position does not and cannot reflect the intention of the parties creating the easement.

III.

The Espinos also re-assert their position that the Town is not an aggrieved party for purposes of this appeal. For the reasons discussed in the Town's reply brief, the Town qualifies as an aggrieved party.

Importantly, the Espinos take the position that the Town should be bound by the ruling by Judge Johnson, and in fact, Judge Johnson's order is attached as an exhibit to the Espinos' complaint in the 2008 action and the rulings are incorporated by reference. (R. 73). However, the Espinos cannot have it both ways. As previously discussed, they cannot argue that the Town is not an aggrieved party that cannot participate in this appeal and then also argue that the Town is bound by Judge Johnson's declaratory judgment as to the scope of the easement on which the Town is the grantee. If the Town is not permitted to join McGuinn Construction in arguing that summary judgment was incorrectly granted, then the Town is entitled to a remand with direction that the declaratory judgment entered by Judge Johnson in the 2005 action shall have no preclusive effect on the Town in the 2008 action, leaving the scope of easement issue to be litigated *de novo* in that action.

This Court did not find it necessary to address the Town's alternative argument that it has been denied the opportunity to be heard on the scope of the sewer easement issue. However, if this Court now determines that a rehearing is for some reason warranted, the Court is respectfully asked to address this additional issue. The Town should not be bound by Judge Johnson's decision. The

Town, which is the grantee of that easement and thus a necessary party to any judicial determination of its scope, should be permitted to present the evidence required to correctly interpret the scope of the easement and the intentions of the parties, which would necessarily include a proper consideration of the "as-built plans" that the easement instrument itself references for "a more complete and accurate description of said easements." (R. 233).

CONCLUSION

Based on the foregoing discussion, the Appellant Town of Lexington respectfully requests that this Court deny the Respondents' petition for rehearing.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:  _____

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April 27, 2016

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant Town of Lexington, does hereby certify that service of the **Return to Respondents' Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 27th day of April 2016:

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April 27, 2016

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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RE: McGuinn Construction Management, Inc. v. Saul Espino and Mara Espino
Civil Action Number: 2005-CP-32-2712

RE: Saul Espino and Mara Espino v. Gates Commons, LLC, S. Wade McGuinn, Individually,
and Town of Lexington
Appellate Case Number: 2014-001519
Civil Action Number: 2008-CP-32-4192
Claim Number: 690001C03151
Our File Number: 321.7443

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Return to Respondents' Petition for Rehearing** in the above referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

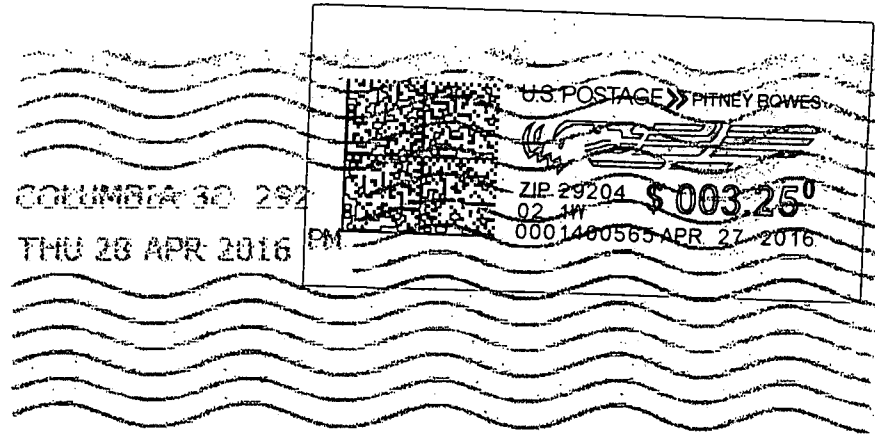
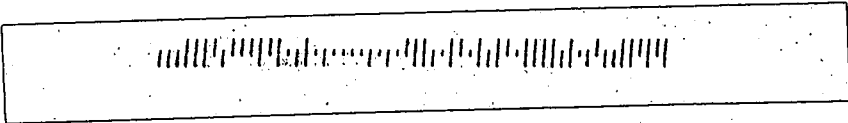
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Page Two

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