

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
COURT OF COMMON PLEAS

BENJAMIN H. CULBERTSON, CIRCUIT COURT JUDGE S.C. SUPREME COURT

Case No. 2016-1300

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S.C. SUPREME COURT

David M. Repko,..... Respondent,

v.

County of Georgetown, Petitioner

**AMICUS CURIAE BRIEF OF THE
SOUTH CAROLINA ASSOCIATION OF COUNTIES**

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INTERESTS OF AMICUS CURIAE

The South Carolina Association of Counties (Association) represents the interests of each of South Carolina's forty-six counties. The South Carolina General Assembly granted the counties the general police power to enact laws to preserve the health, peace and order. S.C. Code Ann. §4-9-25. Counties are specifically authorized to enact ordinances and regulations for the subdivision and development of land pursuant to the S.C. Local Government Comprehensive Planning Enabling Act. S.C. Code Ann. §6-29-10 *et seq.* Planning and land use regulations are local ordinances used to guide the overall development of the jurisdiction, and to protect the health, safety and general welfare of the public at large. These ordinances are not designed or intended to protect a certain individual.

The Association supports Georgetown County's position that the county's subdivision ordinance provided a countywide regulatory scheme that, like the state enabling legislation, did not create a public duty to protect an individual land purchaser.

Pursuant to Rule 213, SCACR, the Association respectfully submits this brief in support of Petitioner Georgetown County, and asks that this Court to affirm the Circuit Court's directed verdict in favor of the County.

STATEMENT OF ISSUES ON APPEAL

The Association respectfully adopts the Statement of Issues on Appeal as presented by the Petitioner, Georgetown County in its Brief of October 2017.

The fact that this Association did not comment on all issues before this Court should not be inferred to mean anything less than complete, across the board support for Georgetown County in this case. It reflects a conscious decision to concentrate on the most serious issues important to the membership of the Association, and those issues where the Association may provide this court with the unique insight of its members.

STATEMENT OF THE CASE

The Association respectfully adopts the Statement of The Case as presented by the Petitioner, Georgetown County in its Brief of October 2017.

ARGUMENT

GEORGETOWN COUNTY'S DEVELOPEMENT ORDINANCE IS A GENERAL PUBLIC HEALTH AND SAFETY REGULATION AND DOES NOT CREATE A PRIVATE DUTY TO PROTECT THE PLAINTIFF

Fundamentally, this case involves the question of whether the county's land development ordinance created more than a general duty to the public. The Plaintiff alleged at the circuit court, as well as the Court of Appeals, that the ordinance created a public duty on Georgetown County to protect him from harm caused by a private developer's failure to complete infrastructure installation in a planned unit subdivision. Circuit Court Judge Culbertson correctly held that that the county's ordinance created only a general duty to the public, and did not create private duty to the Plaintiff (R.4).

The Court of Appeals however, determined that a section of the county ordinance concerning financial guarantees posted by developers was ambiguous and resorted to the use of statutory construction, including the application of the “special duty” test. The Court then interpreted the language of that section of the ordinance to create a duty on the county to protect individual land purchasers from actions by private developers.

The ordinance at issue in this case was enacted by Georgetown County Council on June 25, 2002, and is codified as Appendix B of the county’s official Code of Ordinances. The ordinance is a unified set of standards regulating the subdivision and development of land countywide. The regulations encompass a total of seven articles, and set standards for a variety of land development activities including, platting requirements, design standards, improvements and infrastructure. The ordinance was enacted pursuant to Article 7 of the South Carolina Local Government Planning Enabling Act (Planning Act)¹.

The legislative purpose of the ordinance is contained in Article 1, Section 4, and provides as follows:

Art. 1, Sec. 4. - Purpose.

For the purpose of providing for the orderly development of Georgetown County and its environs through control and regulation of the subdivision of land.

The standards contained herein are intended to encourage the following:

1. Promote sound planning practices;
2. Promote the wise distribution of development in order to avoid congestion and overcrowding;

¹ Article 1, Section 2: This Ordinance is adopted pursuant to the authority granted under General Statutes of South Carolina, Code of Laws, Title 6, Chapter 29, Article 7, Sections 6-29-1110 through 6-29-1200.

3. Protect the public health, safety, and general welfare;
4. Allow for cost saving efficiencies;
5. To assure the timely provision of required streets, utilities, and other facilities and services to new and existing land developments;
6. Coordinate street improvements with existing or planned streets;
7. To assure the timely provision of safe and convenient traffic access and circulation, both vehicular and pedestrian, in and through new land developments;
8. To assure that population and traffic are distributed in order to avoid congestion and overcrowding;
9. To assure the provision of needed public open spaces and building sites in new land developments through the dedication or reservation of land for recreational, educational, transportation, and other public purposes;
10. To assure that development is compatible with adopted comprehensive plan, zoning ordinance, official map, and capital budget;
11. To assure compatible development in areas subject to flooding or other detrimental influences natural or manmade;
12. To assure adequate rights-of-way for automobile or alternative modes of transportation, utility, and environmental purposes;
13. To encourage new and innovative design alternatives to promote creativity and flexibility in development; and,
14. To assist in the coordination between governmental and public service authorities to provide orderly development and ensure continuity of regulatory standards.

In addition to the legislative purpose, the section most applicable in this case is a section dealing with the financial guarantees that the developer may post. Article V, Section 3-1 contains provisions to allow a developer to post a financial guarantee to ensure certain infrastructure is provided, while allowing the developer to begin selling individual lots. That section however, further states that the acceptance of a guarantee is at the discretion of the county, and that acceptance of a guarantee "shall not be construed as an obligation to any other agency, utility or property owner within affected developments."

The Association contends that the Court of Appeals erred in three principle ways. First, by focusing exclusively on one section of a unified development ordinance the Court failed to give the ordinance as a whole a fair and reasonable interpretation. Second, the failure to give the ordinance a fair and reasonable interpretation resulted in the unnecessary application of the “special duty” test. If the entire ordinance had been reviewed the Court would have found the ordinance contained express language throughout the ordinance creating only a public duty to regulate land development countywide. This express language foreclosed the need for statutory construction by the court, including the application of the “special duty” test. Finally, the legislative intent of the Georgetown ordinance and the facts of this case are not distinguishable from *Brady Dev. Co. v. Town of Hilton Head Island*.

A. The Court of Appeals Erred in Applying Statutory Construction to a Clear and Unambiguous Statute.

South Carolina’s courts have long been clear that where a statute’s language conveys a clear and definite meaning, the rules of statutory interpretation are not needed. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d.578, 581 (2000). Where a statute’s plain meaning is clear, the courts are not allowed to change its meaning or speculate on its legislative intention. To do so would allow the court to assume legislative power. *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785 (2014).

The text of a statute is considered the best evidence of legislative intent. Norman J. Singer, *Sutherland Statutory Construction* § 46.03, at 94 (5th ed.1992)). However, when considering the text of an ordinance, a court must give the entire ordinance a practical, reasonable, and fair interpretation consistent with the purpose, design, and policy lawmakers intended. The language of the statute must be read in a sense that

harmonizes with its subject matter and accords with its general purpose.” *Lambries*, at 10. If the legislative body’s intent is clearly apparent from the text of a statute, the courts are prohibited from attempting to search for meaning outside the statute. *Rainey*, at 87.

In this case, the Court of Appeals resorted to statutory construction based upon their review of a single section of a comprehensive countywide development ordinance. The Court failed to examine the vast majority of the ordinance, including its legislative purpose to determine if the ordinance was ambiguous. Allowing the courts of South Carolina to interpret one section of a larger ordinance, without “harmonizing” that section to the rest of the ordinance will routinely lead to unfair and unreasonable interpretations that may be inconsistent with the express legislative purpose of the ordinance.

The language contained in the ordinance on its face is clear and unambiguous. The legislative purpose of the ordinance expressly provides that its purpose is for the orderly development of the county, the encouragement of sound planning practices, and the protection of public health and safety. Further, there is additional language in the financial guarantee section relied on by the Court of Appeals that expressly denies that the county intended to for the particular standards in that section to create an obligation to any purchaser of a subject development, including the Plaintiff. Excluding consideration of the full unified ordinance and focusing exclusively on one section, the Court of Appeals failed to give the ordinance the practical, reasonable and fair interpretation this Court required in *Lambries*. Considering the full unified ordinance as a whole the legislative intent is clear. The ordinance did not intent to create anything other than a

public duty, and thus the Court of Appeals erred in applying rules of statutory construction to find another meaning.

B. No Part of the County Ordinance has an Essential Purpose of Protecting the Plaintiff Against a Particular Harm, and Therefore Fails the “Special Duty” Test.

As outlined earlier, the language of the ordinance clearly evidences the legislative intent by the county to create only a public duty regarding subdivision and land development by private developers. Assuming *arguendo* that any part of the ordinance could be found to be ambiguous, requiring the court to resort to statutory construction, there was sufficient language in the ordinance for the circuit court to determine that the ordinance fails the “special duty” test.

Since 1940 South Carolina has recognized the “public duty rule.” This rule states that public officials are generally not liable in discharging their public duties since the official’s duty is to the public at large, rather than a specific individual. See *Jensen v. Anderson Cnty Dep’t of Social Servs.*, 304 S. C. at 201, 403 S. E. 2d at 617 (1991) and *Edwards v. Lexington Cnty Sheriff’s Dept.*, 386 S.C. 125, 129, 688 S.E2d 125, (2010).

There is a limited exception to the public duty rule. This exception applies only where a statute intends to protect identifiable individuals from a particular harm. The specific test used to impose a special duty on a public officer requires that six elements must be satisfied:

- (1) an essential purpose of the statute is to protect against a particular kind of harm;
- (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not to cause that harm;
- (3) the class of persons the statute intends to protect is identifiable before the fact;

- (4) the plaintiff is a person within the protected class;
- (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
- (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Jensen v. Anderson County Dep't of Social Servs., 304 S. C. at 201, 403 S. E. 2d at 617 (1991) (quoting *Rayfield v. South Carolina Dep't of Corrections*, 297 S. C. 95, 374 S. E. 2d 910 (Ct. App. 1988), cert. denied, 298 S. C. 204, 379 S. E. 2d 133 (1989)); *Brady Dev. Co. v. Town of Hilton Head Island*.

The Circuit Court was correct its analysis of the “special duty” test. The express language in the ordinance’s legislative purpose, and separate language contained within the financial guarantee section clearly deny that an essential purpose of the ordinance is to protect an individual land purchaser against a particular kind of harm. The language of the ordinance clearly indicates that Georgetown County did not intend for the standards to apply to anyone other than the public in general. The purpose section of the ordinance provides only general standards for the orderly development of the county, and the protection of the public health, safety and welfare. Section 3-1, further provides that the ability of a developer to file a financial guarantee does not create an obligation by the County to any property owner within affected developments. The language contained in the various sections of the ordinance fully supports the Circuit Court’s determination that the county intended the ordinance to create a duty to the general public. The language of the ordinance is clear and unambiguous. The purpose is to guide land development and protect public health and safety, and the standards contained in Section 3-1 do not create an obligation to individual property owners.

The facts of this case are substantially the same as those in *Brady*. Had the Court examined the whole ordinance, including both its legislative purpose as well as Section

3-1, the Court would have come to the same conclusion as the circuit court. The legislative intent of the ordinance did not have an essential purpose of protecting the Plaintiff from a particular harm. As the circuit court discussed in its directed verdict order, to find that the ordinance creates a “special duty” to the Plaintiff would necessarily make the county an insurer for every action by a developer to every land purchaser. There was sufficient evidence supporting the Circuit Courts directed verdict for the County.

C. The Court of Appeals Erred in Distinguishing this Case from *Brady Development Co. v. Town of Hilton Head*.

The circuit court recognized that the essential purpose of the Georgetown County ordinance was substantially the same as that found by this Court in *Brady Development Co. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993), reh’g denied, (Jan. 19, 1994). This Court pointed directly to the language of the Hilton Head ordinance that stated:

The town council finds that the health, safety and welfare of the public is in danger ... if development is allowed to continue without limitation ...

The purpose of this chapter is to promote the public health, safety and general welfare; to preserve the environmental, historical and social heritage and character of the town; to protect public, private and institutional investment; and to facilitate the timely and adequate provision of transportation, water, sewage disposal, schools, parks and other requirements.

This court held that the language in that ordinance did not create a special duty to Brady. *Id.* at 77. The purpose of the ordinance was to protect the general public from the dangers of overdevelopment on the Island of Hilton Head.

The Georgetown County ordinance and the facts of this case are essentially the same as the Hilton Head ordinance. The legislative purpose of the Georgetown County ordinance is to provide for the orderly development of Georgetown County and to protect the public health, safety, and general welfare. To change the legislative intent of the ordinance to raise the duty of the county from a public duty to a special duty to individual land purchasers would make the county an insurer against the actions of private developers. To create such a burden on counties would warrant consideration as to whether they would continue to enact even reasonable land development regulations and comprehensive planning. Land development for residential and commercial use would become an unregulated free-for-all that would not benefit the citizens of the state. A potential result this court warned of in *Brady*.

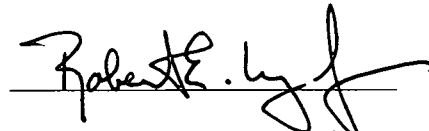
The legislative purpose of both ordinances is the development of land within the jurisdiction, and the protection of public health and safety. In both cases, the failure of a third-party developer led to the harm suffered by the Plaintiffs. Had the Court of Appeals examined the entire development ordinance, and not relied solely on Section 3-1, they would have had no choice but to reach the same conclusion as the Circuit Court. The Court of Appeals erred therefore in finding the two cases distinguishable.

CONCLUSION

The Georgetown County development ordinance is only of general scope and lacks specific language to give rise to a private duty to the Plaintiff. The ordinance contains express language that makes clear that the standards contained in the ordinance are for the general protection of public health and safety, and that the specific standards relied on by the Plaintiff did not create an obligation by the county to protect the Plaintiff,

or other individual. The Court of Appeal's use of statutory construction, including the application of the "special duty" test was unnecessary in light of the clear and unambiguous language. The Association respectfully asks this Court to affirm the circuit court's directed verdict in favor of the county.

Respectfully Submitted,

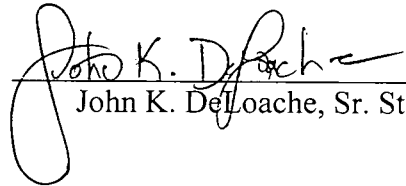
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February 9, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the South Carolina Association of Counties' *Amicus Curiae* Brief was mailed this 9th day of February, 2018 via United States Postal Service, First Class Postage Prepaid, to the following counsel of record:


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