

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 09 2018

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Mikell Scarborough, Master in Equity

Case No. 2010-CP-10-5449
App. No. 2018-001888
Ct. App. Op. No. 5581 (Filed August 1, 2018)

Nathan Bluestein, Ettaleah
Bluestein, MD, Theodore
Albenesius and Karen
Albenesius

Respondents,

v.

Town of Sullivan's Island and
Sullivan's Island Town
Council,

Petitioners.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Derk Van Raalte and Brady Hair
2500 City Hall Lane
North Charleston, South Carolina 29406
(843) 572-8700. derk@bradyhair.com
Attorneys for Petitioners

Other Counsel of Record:
Robert Hood, Sr., James Hood,
Deborah Sheffield (of counsel)
172 Meeting St., Post Office Box 1508
Charleston, South Carolina 29402
Counsel for Respondents

INDEX

Questions Presented 1

Statement of the Case..... 1

Arguments 4

 1. The Court of Appeals correctly interpreted the deed when ruling that the Town of Sullivan’s Island honored to all contractual obligations.....5

 A. The Court of Appeals correctly determined the parties’ intent regarding preservation of the natural condition of the property.....5

 B. Paragraph 6 of the Deed Restrictions clearly authorized the Town’s ordinance.....6

 C. The Court of Appeals gave proper consideration to evidence of the deed grantor’s interpretation.....7

 2. The Court of Appeals correctly disposed of Petitioner’s nuisance claims.....8

 3. Petitioners’ Other Listed Issues are Not Preserved9

 4. Even if Petitioner has identified some minor defect in reasoning, S.C.A.R. 220(c) supports affirmation of the decision based on the record below such that no useful purpose would be served by granting the requested Writ of Certiorari.....10

Conclusion.....10

QUESTIONS PRESENTED

1. The Court of Appeals correctly interpreted the deed when ruling that the Town of Sullivan's Island honored to all contractual obligations.
 - A. The Court of Appeals correctly determined the parties' intent regarding preservation of the natural condition of the property.
 - B. Paragraph 6 of the Deed Restrictions clearly authorized the Town's ordinance.
 - C. The Court of Appeals gave proper consideration to evidence of the deed grantor's interpretation.

1. The Court of Appeals correctly disposed of Petitioner's nuisance claims.
2. Petitioners' Other Listed Issues are Not Preserved
3. Even if Petitioner has identified some minor defect in reasoning, S.C.A.R. 220(c) supports affirmation of the decision based on the record below such that no useful purpose would be served by granting the requested Writ of Certiorari

STATEMENT OF THE CASE FACTS

This case revolves around Appellants' desire to look across property they do not own and cut vegetation on property they do not own. Sullivan's Island is a barrier island. Petition for Certiorari, p. 4. When house lots were initially sold decades ago the Town retained ownership of an additional, undeveloped parcel of land lying between Appellants' lots and the ocean (hereinafter "Accreted Land.") See Appendix, p. 2. The Accreted Land can be seen in black on the graphic below.

¹ Hereinafter, "Pet."

Rather than accepting acts of nature for what they are, Appellants fault the Town for their diminished view. In 1995 and 2005 the Town passed zoning amendments that were more restrictive about what plants could be cut on town-owned land. Appendix, p. 4. With less cutting nature took its course. Some vegetation has reached a height where Appellants' views across the Town-owned Accreted Land are no longer as good as they were just after Hurricane Hugo. See Appendix, p. 5

Appellants did not challenge either of these ordinance amendments within the sixty (60) day window specified by S.C. Code Ann. 6-29-760(D). Instead, Appellants in 2010 sued the Town seeking to invalidate the 1995 and 2005 zoning ordinances and obtain other relief. Ultimately the Town won Summary Judgment, leading to the Court of Appeals opinion below. Here, the Petitioners continue to argue that the Town's zoning ordinance amendments violate the Deed Restrictions. Consideration of these arguments requires identification of both the relevant Deed Restriction provisions and the relevant town ordinances.

Specific Deed Provisions

The Court of Appeals selection of relevant Deed Provisions cannot be improved upon and is relied upon here:

“Whereas the Lowcountry Open Land Trust (the "Grantor") is a nonprofit corporation whose purpose is to preserve and conserve natural areas; and

WHEREAS, the Grantor is the owner in fee simple of certain real property (hereinafter referred to as the "Property") which has aesthetic, scientific, educational, and ecological value in its present state as a natural area which has not been subject to development or exploitation, which property is described more on the attached Exhibit A;

WHEREAS, the parties desire to place restrictions upon the Property for the purposes of, inter alia, retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife; and

WHEREAS, "natural, scientific, educational, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property at the time of this grant, evidenced by:

- A) The appropriate survey maps from the United States Geological survey, showing the property line and other contiguous or nearby protected areas;

- B) An aerial photograph of the Property at an appropriate scale taken as close as possible to the date hereof; and
- C) On-site photographs taken at appropriate locations on the property”

Appendix, pp. 2-3

The Court of Appeals then noted that “[t]o further those purposes, the deed provided certain restrictions. Specifically,

- 1. ‘Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
- 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens. . . .
- 6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of the law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.”

Appendix, pp. 3-4

Specific Town Ordinance Changes

The Court of Appeals was similarly succinct in identifying the relevant history of Town ordinance changes, stating:

“When the deeds were executed in 1991, the Town had an ordinance, passed in 1981, restricting the use of the ocean adjacent property. The ordinance indicated

“There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees as provided in this section) and no man- made changes of topography in [the] area. The Town Council may establish a program pursuant to which citizens may apply to the Town for permission to prune, trim and cut bushes and trees in the . . . area as follows . . . (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or

pruning shall not be detrimental to the safety, welfare, and health of the people of the Town.'

§ 21-39A. In 1995, that ordinance was amended. The 1995 Ordinance was, in most material ways, identical to the 1981 Ordinance. However, the 1995 Ordinance noted, 'vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') above the ground.' § 21-39.1G. Finally, the Town amended the ordinance again in 2005. The 2005 Ordinance indicated which plants could be trimmed and pruned and noted '[t]his vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground.' § 21-71(C)(3)."

Appendix, p. 4

ARGUMENT

1. **The Court of Appeals correctly interpreted the deed when ruling that the Town of Sullivan's Island honored to all contractual obligations.**
 - A. **The Court of Appeals correctly determined the parties' intent regarding preservation of the natural condition of the property.**

The Town has faithfully adhered to the letter and spirit of the Deed Restrictions. Petitioners argue that the deed restrictions require the Town to manage the Accreted Land as a virtual bonsai forest, where every grain of sand, blade of grass and tree leaf is perpetually maintained exactly as it existed on the 1991 deed date. See Pet. p. 12 ("the Petitioners maintain the overriding intent of the Town and the Land Trust was to literally and figuratively take a snapshot in time and preserve the land in the same condition as it existed in February, 1991...." (emphasis added.)) Petitioners support this argument by focusing in isolation on a deed recital that states that the "natural" condition of the property means the condition of the land at the time of the 1991 grant and that contemporaneous photographs are one yardstick. Pet. p. 12.

The Court of Appeals declined the Petitioner's invitation to read a single recital in isolation, and instead reviewed the deed as a whole. The Court of Appeals correctly determined that Petitioners' narrow focus could not be the whole story, because under Paragraph 2 of the Deed Restrictions, the deed's recital language "was 'made subject to' the Town's 'unrestricted authority to trim and control the growth of vegetation....'" Appendix, p. 8. Further, the Court of Appeals recognized Paragraph 6 of deed expressly left the Town with the authority "to 'enact ordinances and regulations affecting the property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.'" Id. Reading everything together, the Court of Appeals arrived at an accurate overview, observing that the Deed Restrictions were intended to "protect the Town's ocean adjacent property from development" rather than require the Town to maintain a never-changing bonsai exhibit. See Appendix, p. 8 and 2.

B. Paragraph 6 of the Deed Restrictions clearly authorized the Town's ordinance.

Contrary to Petitioners' argument, the Court of Appeals ascribed to Deed Restrictions Paragraph 6 the only reasonable meaning possible. Paragraph 6 allows the Town to "enact ordinances and regulations affecting the property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions." Appendix pp. 3-4. In other words, the Town may amend its rules over time provided that the amendment is the same or more protective of the environment than the rule in place in 1991.

The Petitioner's turn Paragraph 6 on its head, arguing that the goal of the deed restrictions is to protect their ocean view and, accordingly, that a "more restrictive" ordinance would be one that places greater restrictions on plant growth (i.e. allows more cutting.) See Pet. p. 14-15. That is simply wrong.

The Court of Appeals found the Petitioner's viewpoint "illogical", particularly given that the Deed Restrictions were put in place by LOLT, an organization "whose purpose is to preserve land and conserve natural areas." Appendix p. 8. As will be discussed in the following section, Petitioner's reading is also contradicted by direct evidence of the grantor LOLT's own opinion. See Appendix pp. 8-9. Petitioners' argument even flies in the face of deposition testimony, where Petitioner T. Albenesius admitted that he doesn't like the challenged ordinance because it is more restrictive than the rule he desires.² The evidence is overwhelming that the Petitioners are arguing Paragraph 6 backwards here.

C. The Court of Appeals gave proper consideration to evidence of the deed grantor's interpretation.

The Court of Appeals not only used evidence of the deed grantor's intent properly, it did so in the manner Petitioners themselves suggest is appropriate. In addition to finding the deed language unambiguously favored the Town, the Court went on to note that the LOLT's executive director had provided an affidavit affirming that the LOLT had inspected the Town's stewardship of the property

² See ROA pp. 467-68. Deposition of T. Albenesius p 17, lines 4—7 ("Q: When you say it's [the current ordinance] not a good one, do you think that the Town needs a less restrictive cutting ordinance to better protect your view? A: Yes.")

annually over the years and found no deed restriction violations. Appendix pp. 8-9.

According to Petitioners “[i]f the Land Trust annual reports might be some evidence of the Town’s compliance, they do not automatically preclude the Petitioners from pursuing a breach of contract claim, and they cannot sustain the grant of summary judgment on interpretation of the deed.” Pet. at p. 16. The problem for Petitioners is that the Court of Appeals made none of the mistakes Petitioners claim.

The Court expressly noted that the “affidavit alone does not determine whether the Town’s actions comply with the deed’s plain language.” See Appendix p. 9. The affidavit is described as “additional evidence.” See Id. In terms of its ultimate decision, the Court of Appeals made clear that it ruled for the Town “based upon the plain language of the deed in its entirety . . .” Id. Thus, the Court of Appeals used the affidavit exactly how Petitioner suggests, as “some evidence”, but not conclusive, preclusive, or even essential evidence.

2. The Court of Appeals correctly disposed of Petitioner’s nuisance claims.

In light of the Town’s compliance with the clear meaning of the Deed Restriction language, the Petitioners have no “nuisance” argument remaining. The Court of Appeals found that “Appellants’ arguments sound in contract, not in tort. Indeed, Appellants acknowledged as much during oral argument.” Appendix, pp. 9-10. (emphasis added.) Petitioners apparently still do not quarrel with the idea that the fate of their nuisance claim is linked to the Deed Restrictions. See Pet. p. 17. As a result, the fact there was no breach of Deed Restrictions by the Town means that

the Petitioners' nuisance claim is similarly resolved.

3. Petitioners' Other Listed Issues are Not Preserved

Petitioners, beginning on Page 17 of the Petition for Certiorari, devote several pages to issues not placed before the Supreme Court for consideration. Rule 242(d) requires that Petitions for Certiorari include a list of "Questions Presented for Review." In this case Petitioners listed two³:

- (1) "Did the Court of Appeals err in affirming the Trial Court's grant of summary judgment ... on the Petitioner's breach of contract claims because the courts have misinterpreted the language of the 1991 Deed and ignored the express intention of the parties to preserve the conditions and character of the oceanfront area as it existed in February 1991" Pet. p. 1
- (2) "Did the Court of Appeals err in affirming the Trial Court's grant of summary judgment to the Respondent Town on the Petitioners' nuisance claims because the Town's violation of the Deed Restrictions through its new trimming policies have allowed overgrowth that ... poses dangers to the Plaintiffs..." Id.

As these are the only two listed Questions presented, they are the only issues on review. See S.C.A.R. 242(d). Moreover, the additional discussion Petitioners set forth starting on Page 17 were presented only in conclusory fashion to the Court of Appeals in the Petition for Rehearing and are only briefly sketched here. See Appendix pp. 17-18 (Petition for Rehearing.) and Pet. p. 17. Conclusory, short arguments may be deemed abandoned for purposes of appeal. See Glasscock, Inc. v. US Fidelity and Guaranty Co, 348 S.C. 76, 81 (SC App. 2002).

- 4. Even if Petitioner has identified some minor defect in reasoning, S.C.A.R. 220(c) supports affirmation of the decision based on the record below such that no useful purpose would be served by granting the requested Writ of Certiorari**

The Town respectfully asserts that the impact of SCAR 220(c), which permits affirmation of a decision below based on any ground which may exist in the record, should similarly result in a denial of Certiorari here.

CONCLUSION

For the reasons stated, the Town of Sullivan's Island asks the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Nov. 7th, 2018


Derk Van Raalte
Brady Hair
2500 City Hall Lane
North Charleston, South
Carolina 29406
(843) 572-8700
derk@bradyhair.com
Attorney for Respondent

³For brevity the subparts are not reproduced here.

RECEIVED

NOV 09 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough, Master in Equity

Case No. 2010-CP-10-5449
App. No. 2018-001888
Ct. App. Op. No. 5581 (Filed August 1, 2018)

Nathan Bluestein, Ettaleah
Bluestein, MD, Theodore
Albenesius and Karen
Albenesius

Respondents,

v.

Town of Sullivan's Island and
Sullivan's Island Town
Council.

Petitioners.

CERTIFICATE OF SERVICE

I certify that I have served the Appellants and the Hon. Daniel E. Shearouse by depositing a copy of the following documents:

Return to Petition for Writ of Certiorari

In the care of the United States Postal Service, postage prepaid, addressed either directly or to their respective attorneys of record as follows:

Robert Hood, Sr.
James Hood
Deborah Sheffield, *Of Counsel*
172 Meeting Street
PO Box 1508
Charleston, SC 29402

(Copy)

Hon. Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

(Original plus six copies)

Nov 7, 2018



Derk Van Raalte
J. Brady Hair
Law Offices of Brady Hair
2500 City Hall Lane
North Charleston, SC 29406
843-572-8700
derk@bradyhair.com

Counsel for the Respondents