Hopkins, Debbie

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S.C. SUPREME COURT

From: Barry Stanton <bstanton@stantonlaw.com>
Sent: Thursday, May 30, 2019 4:39 PM
To: Hopkins, Debbie
Cc: Pete Balthazor
Subject: Dortch v. City (Appellate Case 2019-000868) 2009-CP-40-1307/2013-CP-40-2159

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Dear Ms. Hopkins:

Thank you for allowing me, on a provisional basis, to respond by this e-mail to Mr. Shearouse's letter of May 24. I have been out of town since last Friday morning, and am still out of town dealing with a project which was supposed to be completed before last Tuesday. Yet, it is still underway, and my actual planned family vacation is all next week, when the response to the letter would fall due.

I believe this e-mail will be dispositive of any questions, but if a further response in hard copy is desired, I would ask if the response date could be extended to June 12 or afterwards.

This appeal was filed in this court instead of the Court of Appeals pursuant to S.C. Code Sec. 14-8-200, applying, among other things, to "a final judgment involving a challenge on state or federal grounds, to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance."

Mr. Shearouse has requested a copy of the ruling of the Circuit Court involving the issue, as it is not immediately apparent where the issue was ruled on.

Of course, it is the duly presented challenge involved in the case, and not always the ruling, which must raise the constitutionality issue. As I will explain, the challenge is set forth numerous times, although I will not exhaustively cover every time it was raised in every aspect.

Some of the problem lies in the fact that the Circuit Court did touch upon the issue, but nowhere nearly as extensively as it was raised and presented to the Circuit Court.

Appellant Dortch in fact filed a motion to reconsider the primary order, in part on grounds that a number of issues presented had not been ruled upon or had been misunderstood.

In the motion to reconsider, this issue was again extensively set forth with argument and authority. The motion to reconsider was denied with a form order not discussing or identifying the issue.

The two orders appealed are the primary order and the order denying the motion to reconsider. We filed both with this court at the time of filing the notice of appeal.

Years ago, when the first case was filed in the Circuit Court, Dortch duly raised the constitutional "grandfathering" issue, among others. The merits of the case began to be heard in the Circuit Court only late last year.

In the Circuit Court, in our 12-5-18 brief at 23-25, which preceded the Circuit Court's primary order, we stated:

"Dortch's building and lot also should have been grandfathered. Dortch has a constitutionally protected vested property right in the property and the use as it existed before the passage of §17-275 and any other portions of the zoning code that did not exist in the 1960s, or 1930s. James v. City of Greenville. Destruction and confiscation of these rights on the occurrence of minor, accidental, innocuous or arbitrary events not intended by Dortch are not only a violation of due process, but also an unconstitutional taking. The taking must either be prohibited or compensated. James."

At page 25, we further stated:

"The alleged loss of grandfathering was not based on the fire damage, which was minor. The City contended that the "use" was interrupted sheerly by a period of vacancy. The property was never intentionally "vacant." The city never proved through a sworn witness or any materials properly admitted into evidence that the property actually was vacant for a specified period. Importantly, nor did BOZA make any finding whatsoever thereabout. Despite inadmissible speculation on "vacancy," Dortch's brother and niece did live there during some of the period the property was asserted to be vacant, and Dortch so testified. Dortch committed no act indicating any intention on her part to abandon the existing use of the property or change it. She has now in fact been in and out of court nearly ten years trying to continue that use. The property was no more "vacant" than a beach house or a mountain house of a person with a second home is "vacant" when the person is not there for an extended period or visits to mow the grass, but does not stay. She still owned it with the intent to use it. A property is not abandoned when a person leaves it furnished intending to rent it or repair it, but is unable to do so.19 Further, any periods during which the property was unoccupied by breathing people were not the fault of Dortch or were beyond her control. If it is somehow held that the City proved through sworn testimony and other information adduced in accordance with the Rules of Evidence that the property was in fact unoccupied in a manner to trigger a loss of grandfathering under an ordinance provision, this Court should recognize grandfathering directly under the state and federal constitutions, James, rather than under the ordinance, or apply equitable tolling to 20 extend the property's grandfathered status under the ordinance and avoid an unconstitutional taking."

In our 2-12-19 Reply Brief, we further argued the issue at pp. 1-2 (arguments (1)(a)-(c)), p.3 (arg. (4)), p.19 (arg. (19)), and pp. 26-32 (arg. 35(a)-(n)).

For example, in the Reply Brief at p.1., argument (1)(a), we state:

"1. a. The City fails to address (i) the privileges and immunities clause, (ii) the due process clause, (iii) the equal protection clause, or (iv) the takings clause of the South Carolina Constitution. These four clauses of the South Carolina Constitution were applied in James v. City of Greenville, cited in Dortch's opening brief at 9, 24, 25, 26 and 30." The provisions of the South Carolina Constitution are mandatory and prohibitory, and not merely directory. S.C. Const. art I §23."

The Circuit Court ruled in the primary order on file with this court. In our motion to reconsider, we later explained that the Circuit Court's reasoning was erroneous. Page 10 of the Circuit Court's primary order, states:

"Appellant argues that James2 and Juel3
require an intent to abandon be shown before a
grandfathered use can be terminated. However, James is inapposite because the City of
Greenville's zoning ordinance, by its operation, discontinued nonconforming uses without any
action by the owner. James, 227 S.C. at 574, 88 S.E.2d at 665. Here, the City of Columbia's

ordinance allows nonconforming uses to remain unless the property is vacant, abandoned, or discontinued for any period of 12 consecutive months by the owner. City Code § 17-202(e).
The court in Juel addressed an ordinance stating that "any sign structure that no longer displays any sign copy shall be deemed to be an obsolete or abandoned sign." Juel, 344 S.C. at 46, 543 S.E.2d at 539. The court in Juel concluded the sign ordinance did not provide an objective time frame for abandonment. Id. at 46, 543 S.E.2d at 540. Therefore, the court applied the common law to find the owner did not intend to abandon a sign. Id. at 48, 543 S.E.2d at 540. Here, there is no reason to resort to the common law or the intent of the owner. The City of Columbia's ordinance includes an objective time frame for vacancy, abandonment, or discontinuance for any period of 12 consecutive months by the owner."

In our 3-29-19 motion to reconsider, we further argued the issue at p.2 (argument (b)), and p.6 (arg. (4)). In the latter, we stated:

"4. The Court assumes for its justifications of ordinances and standards challenged by Dortch as issues in the case, the very laws and interpretations which are challenged, without ruling on the challenged interpretation or validity. For example, the Court assumes that the challenged twelve month time limit which was asserted is applicable and valid. Dortch has challenged its applicability, and, if it is held applicable, its validity."

In the motion to reconsider, we further argued the issue at p.7 (arguments (5) and (6)), pp.8-10 (arg. (7)-(10)), and p.15 (arg. (21)(f) and (g)).

Thus, although the Circuit Court's ruling on the issue is sparse, the case on appeal definitely involves a challenge on state or federal grounds, to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance.

Respectfully,

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