

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

Jennifer B. McCoy, Circuit Court Judge

Case Number: 2020-CP-10-03549

Appellate Case Number: 2021-000105

Fred Holland Realty, Inc., and
LaJuan Kennedy..... Appellants

v.

The City of Folly Beach..... Respondent

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN AFFIRMING THE HEARING OFFICERS CONCLUSION THAT THE CITY OF FOLLY BEACH HAD THE POWER TO PASS AN EMERGENCY ORDINANCE RESTRICTING SHORT TERM RENTALS IN CONTRADICTION TO THE GOVERNOR'S EXECUTIVE ORDERS?
2. DID THE CIRCUIT COURT ERR IN AFFIRMING THE HEARING OFFICERS CONCLUSION THAT THE EMERGENCY ORDINANCE RESTRICTING SHORT TERM RENTALS WAS NOT PREEMPTED BY THE GOVERNOR'S EMERGENCY EXECUTIVE ORDER 2020-19?
3. DID THE CIRCUIT COURT ERR IN FAILING TO FIND THAT BECAUSE THE FOLLY BEACH EMERGENCY ORDINANCE WAS MORE RESTRICTIVE THAN THE GOVERNORS EXECUTIVE ORDER WITH REGARD TO SHORT TERM RENTALS, THE FOLLY BEACH EMERGENCY ORDINANCE WAS ARBITRARY AND CAPRICIOUS?
4. DID THE CIRCUIT COURT ERR IN AFFIRMING THE HEARING OFFICERS CONCLUSION THAT THE FACTS PRESENTED SUPPORTED A FINDING OF A VIOLATION OF THE EMERGENCY ORDINANCE AND WARRANTED A FINDING THAT THERE WAS A "NEW CHECK IN" THAT VIOLATED THE EMERGENCY ORDINANCE?

STATEMENT OF THE CASE

This case involves an appeal from the circuit court affirming the decision of the Business License Hearing Officer below who affirmed the finding of the Municipal Official that the Appellant had violated Emergency Ordinance 06-20 enacted by the City of Folly Beach on March 28, 2020 and amended on April 6, 2020, pursuant to a Declaration of Emergency declared by the Mayor of the City of Folly Beach on March 16, 2020. The ordinance and the numerous explanatory/amending COVID Updates that were issued as a result of and by authority of said ordinance seeks to severely restrict property owners from leasing their homes to short term renters in contradiction to the

Executive Order issued by the Governor. Conversely the Ordinance and COVID updates limit the ability of a non-resident from being able to lease a short-term rental within the City. After the onset of the COVID Pandemic, the Governor declared a State of Emergency and issued several Executive Orders. Included among those Executive Orders was Order #2020-19. That Executive Order only prohibited short term rentals in the State of South Carolina including “new reservations of new bookings” to individuals from areas considered to be COVID “hot spots” or areas designated by the CDC as an area with extensive community transmission. The City of Folly Beach Emergency Ordinance outlawed any short-term rentals to any individuals without exception. The ordinance specifically prohibited “new check-ins” for any short-term rental. Although the Folly Beach ordinance “evolved” over time it was always more restrictive than and conflicted with the rules imposed by the Governor’s Executive Orders.

STANDARD OF REVIEW

“Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits.” South Carolina Code §18-7-170 (2019). On appeal to the Circuit Court the Review of the Municipal Hearing Officer is a De Novo review. Section 18-7-170 allows the circuit court to weigh the evidence or substitute its findings of fact for those of the designated municipal hearing officer. Vacation Time of Hilton Head Island, Inc. v. Kiwi, Corp., 280 S.C. 232, 312 S.E.2d 20 (Ct. App. 1984); Burns v. Wannamaker, 281 S.C. 352, 315 S.E.2d 179 (Ct. App. 1984).

The Court of Appeals will presume that an affirmance by a Circuit Court of a [municipal courts] judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the [municipal court] and there are no facts that show the affirmance was influenced by an error of law Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88 (S.C. App. 2000).

STATEMENT OF FACTS

Pursuant to the threats posed by the Novel Corona Virus (COVID-19) the Governor of the State of South Carolina declared a State of Emergency on March 13, 2020, for the entire State and has been issuing Executive Orders since that date on a regular basis to provide for the health, safety, and welfare of the citizens of South Carolina. That on March 16, 2020 Mayor Tim Goodwin of the City of Folly Beach declared a “Proclamation of Emergency” and on March 28, 2020 the City of Folly Beach acting by and through its chief executive and its council, passed Ordinance 06-20 which among other acts declared a “State of Emergency” in the City of Folly Beach separate and distinct from the State of Emergency declared by the Governor. The Ordinance further authorized the Mayor to rule the city by decree. Goodwin has issued several proclamations/executive orders which are styled as “COVID Updates,” these “laws” or “declarations of law” set forth laws, rules and regulations which the citizens and residents of The City of Folly Beach are required to obey upon pain of penalties provided by state law as provided for in Ordinance 06-20.

The Original version of the Folly Beach Declaration of Emergency, 06-20 passed on March 28, 2020, suspended all new short-term rentals but allowed long term rentals.

Presumably, the mayor and city council were providing an accommodation to individuals who rented homes or apartments on Folly Beach but were not property owners. Many of those individuals rent on a month-to-month basis. The ordinance prohibited “new check-ins” of short-term renters. The ordinance itself does not define or reference a definition of “short term” and “long term.” The amended version of the ordinance passed on April 6, 2020 prohibited “new check-ins” for short-term or long-term renters. The mayor’s proclamation “COVID Update 5” issued on March 24th defined long-term rental as one of 30 days or more. On March 29, 2020, the South Carolina Attorney General issued an opinion which clearly set out that counties and municipalities were prohibited from enacting emergency ordinances and that the power to enact such ordinances rests solely with the Governor. On April 3, 2020, the Governor issued Executive order 2020-19 governing short-term rentals in the State of South Carolina. In direct contradiction to the Governors Order the City of Folly Beach continued to prohibit both short-term and long-term rentals allowable under the Governors Order. The Governors Order which defines short-term rental as any rental less than 90 days and prohibits all short-term rental only to person from “hot spots” as define by the CDC.

On March 16, 2020, Fred Holland Realty, Inc., took a reservation for a long-term rental from the Richardson family. Ms. Richardson suffers from COPD. They were originally placed at a unit located at 208 East Ashley. On or about April 1, 2020, Ms. Richardson contacted Fred Holland and discussed their desire to extend their stay until the end of April because their daughter who lived in their home worked at a local hospital and was treating COVID patients. This posed a dangerous situation for Ms. Richardson because she suffers from COPD. The stay was extended on April 1, 2020, but the

extension potentially required the family to be moved to a new unit at some point in the future if the owner of 208 East Ashley wished to use his home. On April 13, 2020, the family was moved to 403 West Ashley for the remainder of their stay. A citizen of Folly Beach complained to the elected officials of the City of Folly Beach and the city police investigated the family for moving to 403 West Ashley. The City of Folly Beach determined that the move constituted a “New Check-in” even though the Richardson family had been on Folly Island prior to the Mayor or the Council limiting rentals.

The Zoning Official issued a violation letter to Appellants on April 14, 2020. The letter levies a fine of \$500.00 per day and continues to accrue so long as the Richardson family stays on Folly Beach. (Limited to a maximum of \$2,500.00 by consent of the City Attorney). On the same day Goodwin clarified his previous proclamations stating that “Visitors currently checked in may remain until the end of their reservation, and may extend only for the same guests, on the same rental terms, and at the same location.” (See COVID-19 Update 11). Initially Appellant attempted to persuade the Richardson family to vacate the Island but they refused to do so because of the serious health risks moving back to their home in North Charleston would pose. The City of Folly Beach has chosen not to take any enforcement action against the Richardson family and instead wishes to only punish Appellants. Further, Appellants would show that in another circumstance on or about April 1, 2020, with the exact same facts that involved a long-term renter being moved to another location the City of Folly Beach investigated the matter but because of the involvement of a City Council member on behalf of the renter no action was taken by the City of Folly Beach.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN AFFIRMING THE HEARING OFFICERS CONCLUSION THAT THE CITY OF FOLLY BEACH HAD THE POWER TO PASS AN EMERGENCY ORDINANCE RESTRICTING SHORT TERM RENTALS IN CONTRADICTION TO THE GOVERNOR’S EXECUTIVE ORDERS.

The Circuit Court erred in affirming the Hearing officer’s conclusion that the City had the power to pass Emergency Ordinance 06-20 restricting short term rentals. The Governor is granted the authority under state statute to issue Executive Orders in an emergency situation. As set forth in and relied upon by Appellant The South Carolina Attorney General has opined (Opinion Dated March 29, 2020), that the Governor’s extraordinary powers in a state of emergency preempt similar orders of Counties and Municipalities during the same state of emergency. S.C. Code § 25-1-430 defines “emergency” as “(b) "Emergency" shall mean actual or threatened enemy attack, sabotage, conflagration, flood, storm, epidemic, earthquake, riot, or other public calamity.” Emphasis added. S.C. Code § 25-1-430 (2018).

Code § 25-1-440 states, in part, as follows:

SECTION 25-1-440. Additional powers and duties of Governor during declared emergency.

(a) The Governor, when an emergency has been declared, as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility:

(1) issue emergency proclamations and regulations and amend or rescind them. These proclamations and regulations have the force and effect of law as long as the emergency exists;

(2) declare a state of emergency for all or part of the State if he finds a disaster or a public health emergency, as defined in Section 44-4-130, has occurred, or that the threat thereof is imminent and extraordinary measures are considered necessary to cope with the existing or anticipated situation. A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly;. . . . S.C. Code Ann. § 25-1-440 (2018).

In determining whether a local ordinance is valid, it must pass a two-part test. The first prong of the test is to determine if the municipality was authorized to adopt the ordinance. The second prong is if the municipality had the power to adopt the ordinance whether it is consistent with the South Carolina Constitution and laws. Denene v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002), (citing Buesy's v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000)).

Clearly the Governor has acted in the face of the COVID 19 pandemic. As a result the Governor by taking action to insure the safety of the citizens of the State of South Carolina has preempted any action on the part of the political subdivisions of the state. Later in time the Governor would delegate authority to individual Counties and Municipalities to take action as they saw fit to protect their citizens but at the time of this infraction, April 14, 2020, we were still in the infancy of the pandemic and the Governor had not, at that time, delegated any authority to the various municipalities and counties.¹ If the Folly Beach Emergency Ordinance (06-20) is in fact preempted by S.C. Code § 25-1-440, then the alleged infraction is unlawful because The City of Folly Beach lacked the power to pass the ordinance initially. This specific question of whether a municipality possesses the authority or power to declare a state of emergency was addressed in an informal opinion of the South Carolina Attorney General. That opinion states as follows:

Attorney General Condon has forwarded your recent opinion request to me for reply. You inform this Office that the Isle of Palms City Council (hereinafter "City Council") is considering passage of an emergency powers ordinance that would delegate certain specified powers and functions to the City Administrator, or other

¹ The question of whether or not the Governor may delegate that authority to a municipality or other local government is not addressed in this brief.

designee of the City Council. You ask whether the City Council has the authority to confer these powers on a city employee or other unspecified person.

. . . In short, the Ordinance gives the City Council the power to declare a state of emergency in the city based on the occurrence of certain specified events. Further, the City Administrator may temporarily declare a state of emergency until such time as City Council may convene to act upon such emergency.

The threshold question regarding the validity of the Ordinance is whether the City Council and the City Administrator have the authority under the laws of this state to declare a state of emergency. Therefore, this opinion will first answer this threshold question followed by an answer to the specific question raised in your request.

The health, welfare, and safety of the lives and property of the people of this state are beyond question matters of public concern, and reasonable regulations and laws designed to preserve and protect the same are contained in the police power inherent in the sovereign. See Article XII, Section 1 of the Constitution of the State of South Carolina. There is no similar inherent "police power" in political subdivisions such as municipalities, as municipalities derive their authority from the sovereign. Consequently, the General Assembly provides by general law for the structure, organization, powers, duties, functions, and responsibilities of municipalities. Article VIII, Section 9.

In furtherance of its Constitutional mandate, the General Assembly has provided general legislation for the governance of municipalities. Home Rule was accomplished through the passage of Act No. 283, 1975 Acts and Joint Resolutions. Section 5-7-30 of the Code (Supp. 1996) sets forth the powers conferred upon municipalities. This provision makes it clear that the grant of power is subject to the general laws of the State. There is nothing contained in this list of powers that can be reasonably construed to confer upon a municipality the extraordinary authority to declare a state of emergency. In another portion of the Home Rule legislation, municipalities have been granted the limited power to adopt emergency ordinances to meet public emergencies affecting life, health, safety or property of the people. The emergency ordinance, which may be adopted upon affirmative vote of at least two-thirds of the council members present, expires automatically as of the sixty-first day following the date of enactment. S.C. Code Ann. § 5-7-250 (1977).

The General Assembly, apparently recognizing that actual or threatened disaster or public calamity will often extend beyond political boundaries and exceed local capabilities, has enacted general legislation dealing with civil defense and disaster preparedness at the State level. In 1979, the General Assembly established the South Carolina Emergency Preparedness Division within the Office of the Adjutant General and seemingly shifted to the State level the overall and final responsibility for emergency preparedness and response. See S.C. Code Ann. § 25-1-420 (1989).

The Governor has been granted a wide range of emergency powers to further enable the State to respond effectively to emergencies. S.C. Code Ann. § 25-1-440 (1989 & Supp. 1996). Among the powers granted to the Governor are as follows:

(a) The Governor, when an emergency has been declared, as the elected Chief Executive of the State, shall be responsible for the safety, security and welfare of the State and shall be empowered with the following additional authority to adequately discharge this responsibility:

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(1) Issue emergency proclamations and regulations and amend or rescind them. Such proclamations and regulations shall have the force and effect of law as long as the emergency exists.

(2) Declare a state of emergency for all or part of the State if he finds a disaster has occurred, or that the treat thereof is imminent, and extraordinary measures are deemed necessary to cope with the existing or anticipated situation. A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly.

....

Given the existence of the statute expressly empowering the Governor to declare a state of emergency for any part of the State, I believe that local governments have been pre-empted in the matter. It appears that only the Governor has the clear legislative authority and available resources at his command to declare a state of emergency and order actions in accordance with such declaration. See, Op. Arty. Gen. dated September 5, 1980. Section 5-7-250 gives municipalities the power the adequately respond to public emergencies, but not the power to declare such.

The next question is whether the City Council can delegate the power to declare a state of emergency to the City Administrator. Since the City Council does not have the authority to declare a state of emergency, it follows that the City Council can not delegate a power it does not possess to the City Administrator.

... Informal Opinion of S.C. Attorney General dated April 21, 1997

The City of Folly beach relied upon a similar Ordinance authorizing the Mayor to declare a "State of Emergency" within the municipal boundaries of the City of Folly Beach. The Ordinance in question states that it is an emergency ordinance to "Declare a State of Emergency" and further states "Whereas, in light of the foregoing, City council

of the City of Folly beach deems it proper and necessary to adopt this emergency ordinance in order to address how the City and Council will proceed in light of the above emergency.” (Ordinance 06-20). The Ordinance also refers to City Ordinance Section 35.05 which is a similar ordinance to the one addressed in the Informal Opinion of the Attorney General dated April 21, 1997. That opinion lays out the legal reasoning why any ordinance that authorizes a municipality to “Declare a State of Emergency” violates the Statues and Constitution of the State of South Carolina. Section 1 of the Emergency Ordinance 06-20 authorizes the Mayor to rule as an unchecked autocrat during the “emergency.”

Under Folly Beach Code § 35.05 the Mayor has the unchecked authority as set forth in the ordinance:

“(B) Once a state of emergency has been declared, the Mayor, or the Mayor Pro Tem in the Mayor's absence, will have the power to take necessary actions including but not limited to:

- (1) Require some or all of the roads within city jurisdiction be closed;
- (2) Require the city be evacuated;
- (3) Establish a curfew within city limits;
- (4) Authorize the Director of Public Safety to hire people to assist city staff and fill certain roles and to compensate them in accordance with the duties they undertake and the number of hours they work;
- (5) Disperse assemblies or congregations of people;
- (6) Suspend issuance of permits;
- (7) Prohibit or restrict business operations within city limits;
- (8) Designate off-limit areas;
- (9) Commandeer boats and vehicles; and
- (10) Authorize the Director of Finance to make emergency purchases outside of the regular procurement process.”

City of Folly Beach Ordinance 35.05

Clearly our constitutional structure and our General Assembly never intended for a municipality to be vested with the authority to seize the property of its citizens without due process of law, yet that is exactly the power that the City of Folly Beach has

embraced by enacting this Declaration of Emergency and adopting this resulting Emergency Ordinance. Further, the Governor has stated in his Executive Orders including Executive Order 2020-19, “[I]f or to the extent that any political subdivision of this State seeks to adopt or enforce a local ordinance, rule, regulation, or other restriction that conflicts with this Order, this Order shall supersede and preempt any such local ordinance, rule, regulation, or other restriction.” (Executive Order 2020-19). In addition, the Governor has stated in his Executive Orders, “[i]n accordance with § 1-3-440(4) of the South Carolina Code of Laws, I further authorize, order, and direct any State, county, or city official to enforce the provisions of this Order and any prior or future Orders issued in connection with the present State of Emergency, as necessary and appropriate, in the courts of the State by injunction, mandamus, or other appropriate legal action.” (Executive Orders, S.C. Code Ann. § 1-3-440(4)).

It is very clear in the language of the Executive Orders issued by the Governor including Executive Order 2020-19 that the Governor intends to preempt any action by local government. The Governor’s Executive Orders anticipate that local government should obey the Executive Orders of the Governor not enact “Declarations of Emergency” or Emergency Ordinances that compete with the structure that the Governor has put in place to protect the citizens of the State of South Carolina. While Folly Beach is in fact an Island it cannot seek to isolate itself from the State of South Carolina which is exactly what was attempted here. Even if Folly Beach’s actions are not in conflict with the Orders, Folly Beach’s Emergency Ordinance placing restrictions on short-term rentals and access to short-term rentals by non-city residents exceeds the authority granted to the City under State law. See, S.C. Code Ann. § 5-7-250. Richland County v. S.C.

Department of Revenue, 422 S.C. 292, 311, 811 S.E.2d 758, 768 (2018) (“ . . . observing that local government enactments and regulations ‘must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power’”).

State law does not authorize the City to treat disparately non-City residents by placing restrictions on short-term rentals affecting non-City residents. The emergency ordinance provisions provided to municipal corporations under State law do not expand the power of local government or create new substantive powers to regulate matter reserved to the Chief Executive of the State. The emergency ordinance statute is procedural in nature and it merely suspends the normal procedural process necessary to adopt laws when public emergencies affecting life, health, safety or the property of the people exists within the municipal boundaries. Therefore, the City’s actions exceed the power given to it under State law. See, S.C. Code Ann. § 5-7-250 (“To meet public emergencies affecting life, health, safety . . . council may adopt emergency ordinances; . . . An emergency ordinance is effective immediately upon its enactment without regard to any reading, public hearing, publication requirements, or public notice requirements.”). This Statute that has been relied upon by The City to uphold their Declaration of Emergency and their Emergency Ordinances 06-20 is in fact merely a procedural statute that allows the city to deal with an emergent situation that may occur within the boundaries of the municipality when the city needs to act quickly and does not have the time to have three readings and a public hearing. This is very evident by the fact that the statute relied upon by the City is entitled “**Council meetings; rules and procedures for meetings; freedom of information; emergency ordinance.**” S.C. Code § 2-7-250

(2019). There is a statute that confers “Powers” to municipalities entitled “**Powers conferred upon municipalities; surtax for parking spaces.**” S. C. Code § 5-7-30, It contains no reference to the power to declare a state of emergency nor does it confer the power to pass emergency ordinances when the State’s Chief Executive has already acted.

The Attorney General also opined regarding the current situation. In that opinion dated March 29, 2020, the opinion states:

“In conclusion, consistent with our 1980 opinion, we reaffirm that local government cannot exercise the emergency powers delegated to the Governor by the General Assembly. As our General Assembly codified into the law of our State, “the Governor . . . as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State.” S.C. Code Ann. §25-1-440(a) (2018). Therefore, counties and municipalities should be aware that any unauthorized exercise of such emergency powers could subject these political subdivisions to liability at the behest of a private citizen with requisite legal standing.” Opinion of the Attorney General Dated 3-29-2020.

The Folly Beach emergency ordinance is a legislative enactment and is presumed to be constitutional. Southern Bell Telephone and Telegraph Co. v. City of Spartanburg, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). The Appellants bear the burden of proving the invalidity of a municipal ordinance. Id. The South Carolina constitution provides that the powers of local governments should be liberally construed. See S.C. Const. art. VIII, § 17.

To determine the validity of the Folly Beach emergency ordinance, the Appellate court makes a twofold inquiry: (1) did the local government have the power to enact the local ordinance, and if so (2) is the ordinance consistent with the constitution and general law of this State. See Beachfront Entertainment, Inc., v. Town of Sullivan's Island, 379 S.C. 602, 605, 666 S.E.2d 912, 913 (2008).

An ordinance is preempted under implied field preemption when the state statutory scheme so thoroughly and pervasively covers the subject as to occupy the field or when the subject mandates statewide uniformity. South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006), Aakjer v. City of Myrtle Beach, 388 S.C. 129, 694 S.E.2d 213 (S.C. 2010). With regard to an emergency situation only the Governor is authorized specifically by statute to act for the benefit of the citizens of the State of South Carolina. Appellant's position is that S. C. Code § 25-1-440, preempts the entire field. It leaves no room for error or argument that the only government entity authorized to act in the face of a State-Wide emergency is the Governor. To adopt the reading and the reasoning of the Hearing Officer and the Circuit Court the Governor is entirely unnecessary because each municipality will act to protect the interests of its citizens within its borders. South Carolina would have Two Hundred Seventy (270) individual municipalities that could adopt 270 different statutory schemes to protect their citizens. Further, Forty-Six (46) Counties in the state could act to protect their citizens. Such a scheme would lead to a patchwork of different rules and regulations and would result in chaos.

In the instant case the City of Folly Beach took drastic action that deprived its citizens of their constitutional rights. They closed the City to anyone who was not a property owner or long-term resident renter. You had to show an identification card and proof that you were either a property owner or leased property to go past the barricade which was protected by armed police officers with riot equipment. If you were a non-resident property owner only the owner and their spouse could enter the city, you were not even allowed to bring your children onto the island. If an individual owned a four-

bedroom home on Folly Island they were not allowed to have their own children come and stay with them at the outset of the pandemic. Clearly, the Mayor and the City Council members were frightened of COVID, and substantially overreacted to the virus. In so doing they stripped people including full time residents and non-resident property owners of their rights. The question this Court must ask is, “what if the city of Greenville closed its borders?” Would anyone allow the City of Greenville to close Interstate 85 at the city limit. That is essentially what the City of Folly Beach did.

"Under implied preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." S.C. State Ports Authority v. Jasper County, 629 S.E.2d 624, 368 S.C. 388 (S.C. 2006). Clearly the management of the COVID 19 pandemic mandated statewide uniformity in its management.

To the extent that any disagreement existed as to whether the Governor intended to preempt the entire field of “emergency ordinances” or “emergency powers,” that has been clarified by Executive Order 2021-23 issued on May 11, 2021. That Order clearly states that the only entity with the authority to act regarding the COVID-19 emergency is the Governor. Further, under South Carolina Code § 25-1-440 (2018), the Governors emergency Orders carry the authority of a statute passed by our legislature, “These proclamations and regulations have the force and effect of law as long as the emergency exists.” S.C. Code § 25-1-440(a)(1).

II. THE CIRCUIT COURT ERRED IN AFFIRMING THE HEARING OFFICERS CONCLUSION THAT THE EMERGENCY ORDINANCE RESTRICTING SHORT TERM RENTALS WAS NOT PREEMPTED BY THE GOVERNOR’S EMERGENCY EXECUTIVE ORDER 2020-19.

The Governor's Executive Order 2020-19 specifically addresses the restrictions on short term rentals that apply in the State of South Carolina. Executive Order 2020-19 specifically states:

"If or to the extent that any political subdivision of this State seeks to adopt or enforce a local ordinance, rule, regulation, or other restriction that conflicts with this Order, this Order shall supersede and preempt any such local ordinance, rule, regulation, or other restriction." Executive Order 2020-19, Issued and effective April 3, 2020.

Express preemption occurs, as a general rule when the General Assembly declares in express terms its intention to preclude local action in a given area. See e.g., Wrenn Bail Bond Service, Inc., 335 S.C. at 28, 515 S.E.2d at 522. See also Michigan Canners Freezers Ass'n., 467 U.S. at 469, 104 S.Ct. 2518; S.C. State Ports Authority v. Jasper County, 629 S.E.2d 624, 368 S.C. 388 (S.C. 2006). The same logical conclusion must be drawn when the Governor acting under his Emergency Powers issues an Executive Order.

"Implied field preemption occurs "when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." Ports Auth., 368 S.C. at 397, 629 S.E.2d at 628..." Sandlands C & D Llc v. County of Horry, 394 S.C. 451, 716 S.E.2d 280 (S.C. 2011).

"Implied conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." Ports Auth., 368 S.C. at 400, 629 S.E.2d at 630..." Sandlands C & D Llc v. County of Horry, 394 S.C. 451, 716 S.E.2d 280 (S.C. 2011).

The Governors Order only placed restrictions on short term rentals to individuals who were travelling from states with “extensive community transmission” rates of COVID-19. At the time the list included ONLY individuals from New York, New Jersey and Connecticut. The Folly Beach Ordinance unlawfully and in direct contradiction of the Governor’s Executive Order restricts rentals to any person including current residents of Charleston County and the State of South Carolina. Clearly these are not ordinances that “complement” one another or in any way work in conjunction with one another. The City Ordinance does not reference in any fashion the place from which the renter comes. That is the criteria put in place by the Governor’s Executive Order. Under the City of Folly Beach Ordinance, a long-term renter as defined by The City of Folly Beach could be from one of the “hot spot” areas prohibited by the Governors Order but would be allowable under the Folly Beach Ordinance if their rental contract exceeded 30 days. The Governors Order provides exceptions for individuals involved in commercial vehicle/ transportation operators, airline employees, military, healthcare, public safety, or emergency response. The City of Folly Beach Ordinance would deny these people the ability to obtain a short-term rental in the City of Folly Beach even though they are granted a specific exemption under the Governors Order. The ruling of the lower court incorrectly argues that the Governors order applied to any area under a travel advisory. They conclude that the entire planet was under a travel advisory and therefore their isolation from the rest of the world was justified. That argument ignores the fact that the Governors Executive Order only limited travel from the areas designated as “hot spots.”

Clearly the City of Folly Beach Council led by the Mayor panicked and overreacted to the situation and passed an ordinance that deprived property owners of a

valuable right. It also has been used to impose an unfair and improper penalty upon Appellant.

III. THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT BECAUSE THE FOLLY BEACH EMERGENCY ORDINANCE WAS MORE RESTRICTIVE THAN THE GOVERNORS EXECUTIVE ORDER WITH REGARD TO SHORT TERM RENTALS, THE FOLLY BEACH EMERGENCY ORDINANCE WAS ARBITRARY AND CAPRICIOUS.

The Circuit Court ignores the argument that the Folly Beach Ordinance is contrary to the Constitution and Law of the State of South Carolina because it is in fact arbitrary and capricious. Appellant asserts that the law is in fact contrary to the Constitution and Laws of the State of South Carolina as set forth in her briefs and by the evidence submitted at the hearing. It is worthy of note that the Governor amassed the entire emergency apparatus of the State of South Carolina and with all that knowledge, experience and scientific information he concluded that we only need to prohibit those individuals from areas of extensive community transmission or “hot spots” while the Mayor and the City Council had available to them one individual – Dr. Edward O’Bryan, Chief Medical Officer for MUSC Business- and they concluded that they needed to exclude everyone. They concluded based upon that limited information that they should shut down and isolate Folly Island from the rest of the world. Nothing could be more arbitrary.

IV. THE CIRCUIT COURT ERRED IN AFFIRMING THE HEARING OFFICERS CONCLUSION THAT THE FACTS PRESENTED SUPPORTED A FINDING OF A VIOLATION OF THE EMERGENCY ORDINANCE AND WARRANTED A FINDING THAT THERE WAS A “NEW CHECK IN” THAT VIOLATED THE EMERGENCY ORDINANCE

The facts as presented in this case lead to only one reasonable conclusion that the mere fact that Appellant moved the renters from one house to another does not constitute

a new check in. It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature or in this case council. First South Savings Bank, Inc. v. Gold Coast Assoc., 301 S.C. 158, 390 S.E.2d 486 (Ct.App.1990). When the terms of the statute or ordinance are clear and unambiguous, the court must apply them according to their literal meaning. Id. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980), State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (S.C. 1991), Glover v. County of Charleston, 361 S.C. 634, 606 S.E.2d 773 (S.C. 2004).

First the term “new check in” is not defined by the Emergency Ordinance nor any other ordinance so it must be afforded its ordinary meaning. Clearly the City of Folly Beach applied and the Hearing Officer adopted a very strained definition of what constituted a new check in.

The City of Folly Beach has adopted the position that anytime a person moves from one rental unit to another no matter the reason it constitutes a “New Check In”. (See Testimony of Upton, Transcript pp 19-20). Conversely, The Appellant, who has Forty-Seven (47) years of experience in the vacation rental business defines new check in as “the first time the person checks into Folly Beach,” and she further confirms that it is not uncommon to have to move renters from one rental unit to another but that does not create a “new Check in.” (Transcript pp. 54-55). Clearly based upon the facts presented

the finding by the hearing officer that moving the Richardson's from one rental unit to another constituted a "new check-in" is an abuse of discretion.

With regard to her finding that the Richardson's did not qualify as long-term renters, the City of Folly Beac has never contended that Appellants violated the Ordinance because the renter was a short-term as opposed to a long-term renter. In fact the renters would have been required to show their rental contract to the officer guarding the entrance to Folly Beach every day as they went off and then onto the island.

Taken as a whole the purpose of the ordinance was to prevent new people from coming on the Island. It was essentially to isolate Folly Island from the rest of Charleston County, even though every single person on the Island would leave and return to go shopping. The Attorney for The City of Folly Beach himself testified that the purpose of the Emergency Ordinance was to keep people off of the island. He testified that the acts of Appellant constituted a violation of the Ordinance because it "added people" to the island. When questioned, he stated that it added the property owners from the original house the renters were staying in. (Transcript page 102). That position makes absolutely no common sense. If the Island was COVID free allowing the renters to stay on the island would introduce no new people. If you made the renters leave instead of allowing them to move into another vacant house the owners of the first house were still going to come onto the island whether the renters were there or not.

One of the most important points raised at the hearing was that after this incident occurred the City issued COVID Update #11 which imposed a new restriction indicating that "Visitors Checked in may remain until the end of their existing reservation, and the stay may be extended **only for the same guests, on the same rental**

terms, and at the same address.” (Exhibit J). Since this is the first clarification or Emergency Ordinance regulation that even mentions a restriction on extending reservations one would reasonably conclude that extension had been allowed in the past but are now being restricted by the COVID Update. This Update was issued on April 14, 2020, the same day Appellant was charged with violating the ordinance. The only reason to issue the Update and specifically address the terms under which a client could be extended was that other real estate rental companies were doing the exact same thing.

CONCLUSION

In conclusion, for the reasons stated above the decision of the Circuit Court affirming the decision of the Hearing Officer affirming should be reversed and the Violation issued by the City should be dismissed based upon the grounds of preemption or for such other grounds as set forth in this brief.

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