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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
M. Dawes Cooke, Special Referee

Case No. 2017-CP-08-01088
Appellate Case No.: 2020-01118
Opinion No.: 22-UP-402

Todd Olds……Petitioner,

vs.

Berkeley County and
Berkeley County Planning Commission……..Respondents

APPELLANT'S PETITION FOR REHEARING

November 17, 2022

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CASES:

As allowed by Rules 221 and 219 (petition for *en banc* hearing filed separately and simultaneously), appellant petitions for rehearing on the following points misapprehended and overlooked by the Court in Opinion 402. (Appellant also simultaneously files a motion for hearing *en banc* as allowed by Rule 219 because the Opinion under review is in conflict with this Court's 2009 opinion in *Harbit v. City of Charleston,* 382 S.C. 383, 675 S.E.2d 776 (2009))

1.

THE COURT OF APPEALS OVERLOOKS THE FUNDAMENTAL ISSUE RAISED WHICH IS THAT WHILE LOCAL GOVERNMENTS HAVE DISCRETION IN ZONING MATTERS, THEY DO NOT HAVE THE RIGHT TO MAKE SUCH DECISIONS ARBITRARILY AND CAPRICIOUSLY.

The Court of Appeals affirms the Special Referee's decision on two grounds: (1) that zoning decisions are discretionary and the Court has no power to interfere in them, and (2) that petitioner never raised Berkeley County's Comprehensive Plan as the County's "legislative statement" until the Reply Brief. The second is demonstrably incorrect (discussed in the next section), and the first is a misstatement of South Carolina law. As this Court correctly noted in Opinion No. 402, local governments have discretion in matters of zoning, and the judicial branch does not interfere **unless the legislative decision is arbitrary or capricious**. There are obvious limits on legislative discretion including legislative discretion in matters of zoning. South Carolina has a well-developed body of law demonstrating how and when the Courts of this state never hesitate to override local land use decisions when the decision is based on nothing more than prejudice. That is holding of cases such as *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999) (City's refusal to grant special exception for halfway house reversed); *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015) (legislative decision by Horry County Board of Zoning Appeals to deny use of

premises as helicopter tour facility reversed); *Purdy v. Moise*, 223 S.C. 298, 75 S.E.2d 605 (1953) (decision to deny zoning to a "tourist court" reversed); *Wyndham Enterp. v. City of N. Aug.*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012) (City's decision to deny special exception reversed) and any number of other cases. Against this well-developed body of law, the Court of Appeals elevates a single out-of-context statement to the Special Referee about an indisputable point that legislative bodies have discretion in zoning matters, but such discretion is always circumscribed by the traditional avoidance of arbitrary and capricious acts, and, as set forth below, the Courts of this state always prevent arbitrary and capricious government acts. The legal issue raised here, and left unexamined, is whether the County can ignore and vacate its "legislative act" solely to appease the unsupported, prejudicial comments of complaining neighbors. If the Court of Appeals is going to give weight to a single statement of counsel made to the Special Referee during the December 10, 2019, hearing, Petitioner respectfully submits the Court is required to evaluate the statement in context. The Record on Appeal contains the following colloquy between counsel and the Court, which is not only more accurate, but also more representative:

> MR. GOLDSTEIN: . . . But very briefly, this case tuns on really an analysis of what is or what is not an arbitrary and capricious action by a governmental body.
>
> I'm not going to bore you with the details of the Local Government Comprehensive Planning Enabling Act of 1994, but I spend a lot of time there and a – and it sets for the way in which local governments go about creating zoning classifications. And can the comprehensive plan, in this case, identify this particular tract of land, that's the subject of this dispute, as being appropriately rezoned to R-3. And if you read the staff comments—the Berkeley County Planning Department Staff comments, they explain in – in sufficient detail how they arrived at this position. [Staff comments at page 173 R.O.A.]
>
> One, it's consistent with the comprehensive plan which was a – years of undertaking, involving other members of the public and experts to arrive at a comprehensive plan. And I'm going to answer your question at the end; whether or not it does or does not have the force of law. It does, but I'll save that for the end. But anyway—

MR. COOKE: I'm going to change that question, by the way –

MR. GOLDSTEIN. Okay

MR. COOKE: --rather than does it have the force of law, I'd like to hear more about whether its elements are mandatory because –

MR. GOLDSTEIN. Yes.

MR. COOKE: I get that it has the force of law --

MR. GOLDSTEIN: Right.

MR. COOKE: in that it's required.

MR. GOLDSTEIN: Right.

MR. COOKE: --to be implemented and so forth, but the real question is, are its requirements mandatory?

MR. GOLDSTEIN: Okay. Well, I'm going to jump ahead to that then. That was the last thing I was going to address.

MR. COOKE: No, you can wait.

MR. GOLDSTEIN: No, let me jump ahead.

MR. COOKE: Okay.

MR. GOLDSTEIN: Because that is the – that peels back the layers of this onion because the comprehensive plan is the future land use maps [and] are the results of careful, deliberative legislative action. And it represents, by ordinance, the statement of Berkeley County as to what this property is appropriately used for. And in arriving at its recommendations, it takes into account everything of critical need for affordable housing, the surrounding area, the proximity to major arteries, and so forth.

. . .

So what we're asking you to do – what we the appellants are asking you to do is to balance. Balance on one side the deference that courts traditionally afford to legislative decisions, which is significant. On the other side is that when legislative decisions act in direct contravention to establish[ed] public policy and when they act arbitrarily and when they act capriciously the courts have a quote, duty, end quote, to overturn that legislative decision. That's a quote straight out of *Austin v. Board of Zoning Appeals*.

R.O.A. pages 289, line 19—page 291, line 25 and 294, line 8—19

Austin v. Board of Zoning Appeals, 362 S.C. 29, 606 S.E.2d 209 (2004) held: "However, a

decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Here, the Record on Appeal demonstrates that the **only** reason the County Council identified for refusing to bring Appellant's property into conformity with the Comprehensive Plan was its reliance on the unsupported prejudice of complaining neighbors. As a result, there is no basis for the Court of Appeals' to rely upon a single, isolated statement, plucked out of context, as a basis to deny meaningful review to Petitioner. The Record on Appeal presents a serious injustice because County Council denied Olds the right to the highest and best use of his property on nothing more than unsubstantiated prejudice, and in so doing, County Council ignored the well-reasoned findings and future land uses adopted in its "legislative act," the Comprehensive Plan, which it adopted following a public, statutory process.

The Special Referee recognized how odious the pretexts of the complaining neighbors were, agreeing with Appellant that they are canards: "To be sure, some of the public comments made in opposition to Plaintiff's application can be labeled unsupported, pejorative speculation." R.O.A. page 16 However, and this is the error identified by Appellant in his briefs, both the Court of Appeals and the Supreme Court have rejected neighbors' complaints unless supported by evidence: "Thus, because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony, we reverse the circuit court's decision to affirm the BZA." *Wyndham Enterprises, LLC v. City of North Augusta,* 401 S.C. 144, 735 659151 (Ct. App. 2012) The Court overlooks this precedent and the analysis contained therein and in the entire body of law of the subject. The Record on Appeal demonstrates that the Respondent's **entire** justification for urging this Court to keep hands off its decision is premised

upon complaining neighbors' unsubstantiated complaints, speculation and characterization of mobile home residents as undesirable neighbors. As one small example, consider Ms. And Mr. Headden's testimony of phantom meth labs. At page 248 of the Record on Appeal, she is explaining to County Council why people in mobile homes create, in her view, negative effects:

MRS HEADDEN: And if you all had to live beside the one I live beside and across from the one that this gentlemen is talking about, you wouldn't want to see another trailer pulled in anywhere. Because we see Berkeley County – it's a daily thing. We smell meth being cooked. My husband was a fireman for 30-something years.

MR. RAYMOND HEADDEN: I am trained in clandestine drug labs, so I know what it smells like. The smell of –

MRS. HEADDEN: So I'm asking you to really consider not to let this happen. I appreciate it.

BOARD MEMBER: Have you called the Sheriff's Office?

MR. RAYMOND HEADDEN: Many times, many times, yes, sir.

BOARD MEMBER: The drug boys come out there?

MR. RAYMOND HEADDEN: They come out there. But to smell it is one thing, but to be able to locate it is something else. And these guys are pros at what they're doing. They know when they're coming, and they know what to do to avoid their appearance.

R.O.A. page 248, line 14—249, line 14

Every Court addressing this type of unsubstantiated, undifferentiated, unsupported calumny has declared it to be unworthy of of consideration, rejected in *Bannum*, rejected in *Wyndham*, rejected in *Helicopter*, and rejected in every case it has appeared. In denying the rezoning, the County Council put raw prejudice in one side of the scale and their own legislative findings, their own staff recommendations, their own future land use map, and their own ordinance in the other and found the raw prejudice outweighed the rest. Opinion Number 402 never takes up this issue.

While local governments have discretion in matters of rezoning, their discretion is not absolute, and here the Court overlooked the indisputable fact that the decision to deny petitioner's rezoning is based on raw prejudice and nothing else.

2.

THE COURT OF APPEALS ERRONEOUSLY CONCLUDES THAT THE PETITIONER DOES NOT RAISE THE FACT THAT THE COMPREHENSIVE PLAN IS THE LEGISLATIVE EXPRESSION OF BEREKELY COUNTY UNTIL HIS REPLY BRIEF, A PALPABLE ERROR.

In the third paragraph of Opinion 402, this Court asserts erroneously that Petitioner did not raise the issue of the Berkeley County Comprehensive Plan being the "legislative act" of Berkeley County until his Reply Brief. The Record refutes this. First, the Petitioner made this precise issue the central issue of the appeal as set forth in the Statement of Issue on Appeal. The statement of issue on appeal states:

> IS THE SPECIAL REFEREE'S DECISION CONTROLLED BY ERRORS OF LAW AND FACT BECAUSE THE COUNTY'S **LEGISLATIVE DECISION**, ITS COMPREHENSIVE PLAN, FOUND THE PLAINTIFF'S PROPERTY TO BE APPROPRIATE FOR THE REZONING HE REQUESTED, AND THE SOLE BASIS FOR DENYING THE REQUEST WAS TO APPEASE OBJECTING NEIGHBORS WHOSE CONCERNS WERE NOT SUPPORTED BY ANY CREDIBLE EVIDENCE? Appellant's **Initial Brief** at page 3. (emphasis added)

Moreover, Appellant's Initial Brief's Argument 1 B states the argument this way:

> **B. The County's decision was at variance with its legislative findings as expressed in the adoption of its Comprehensive Plan and Future Land Use Plan. (**Appellant's Brief at page 10, boldface in original)

Appellant argues **throughout his initial brief—not in the Reply Brief for the first time**—that the County's legislative expression is expressed through its plan, adopted as Ordinance 18-04-11, which Petitioner included in the Record on Appeal at pages 133-219. The term "Comprehensive Plan" appears in Petitioner's initial brief 33 times and leaves no doubt that the County's legislative decision is expressed through its plan. As quoted above, the Special Referee addressed this precise issue with counsel on the record. In Petitioner's first argument, discussing whether the County Council's decision to deny rezoning was "fairly debatable, the Petitioner wrote in his **initial** brief:

First, the circuit court erred by giving the same weight to unsupported speculation of complaining residents to the weight of the County's carefully reached "legislative decision" as adopted and codified by the County in its 2010 Comprehensive Plan and Future Land Use Plan. (See R.O.A. pages 134 - 169 for Ordinance 18-04-11 2017 review of the 2010 Comprehensive Plan. [Joint Exhibit 1] The County's legislative decision is contained in the extensive investigation and deliberation that led to its adoption of its Comprehensive Plan, not in the complaints of complaining neighbors who do not want "those people" in "our" neighborhood. The County adopted, by Ordinance 18-04-11 on April 23, 2018, renewing its 2010 10-year Comprehensive Plan after extensive investigation and public comment. (R.O.A. page 133 [ordinance, Joint Exhibit 1]. The *Comprehensive Planning Enabling Act of 1994*, § 6-29-510, *et. seq*. requires each county to adopt a Comprehensive Plan, and the statutorily required process mandates extensive public participation as well as the evaluation and incorporation of objective data in arriving at a Plan. On its Home Page, Berkeley County summarizes the process as follows:

The 2010 Comprehensive Plan was a 2-year process that involved several rounds of public input meetings providing citizens and business owners the opportunity to help shape the plan. In addition, monthly meetings were held involving the public, county planning staff, BDC Council of Government's staff, and the Planning Commission. Several guest speakers were invited to give presentations providing valuable information to the Planning Commission. The plan was officially adopted by County Council on June 27, 2011.

Berkeley County's Comprehensive Plan (R.O.A. pages 215 – 219 [G1.2 Comprehensive Plan, Joint Exhibit 9, page 1-2]) identifies a critical shortage of affordable housing in Berkeley County, and as part of the evaluation of land use after conducting numerous workshops and public meetings, the County adopted a "Future Land Use Plan," which identified Royle Road as the appropriate location for the creation of affordable housing. The circuit court's legal error is that it found the complaining neighbors' subjective, speculative and unsupported assertions about the behavior of future residents were equal to the specific conclusions reached by County Council in adopting the Comprehensive Plan. The Comprehensive Plan is an ordinance and has the force of law. See Berkeley County Ordinance § 1-2, "Purpose." This requirement, which the Special Referee incorrectly applied as a "suggestion," makes clear the force of the ordinances: "It is the purpose of this ordinance to: **Implement the goals and policies outlined in the Berkeley County comprehensive plan.**" (R.O.A. page 345, emphasis added) The elevation of complaining residents over the rational conclusions adopted in The Comprehensive Plan is palpable legal error as many cases have held, three of which are more fully addressed in Section C below. Grounding a legislative decision on prejudice does not provide a legally sufficient basis to reach a "fairly debatable" standard for legislative design, especially when those subjective concerns are at variance with the legislative findings and conclusions Berkeley County adopted in its Comprehensive Plan. A legal decision based on speculation of future harm can never be "fairly debatable," any more than a judge can find a defendant guilty because the Court suspects he might cause trouble if set free. The two bases for conclusion are incompatible with one another, and the trial court erred in equating the unsupported speculation of complaining residents with the rational deliberation of Berkeley County government in enacting its Comprehensive Plan and Future Land Use Plan. Petitioner's **initial** brief, pages 10-11

Therefore, this Court's conclusion that the Petitioner did not raise this issue until his Reply Brief

is not supported by the record and is overlooked by this Court in Opinion No. 402. Should the Court have any doubt about how Petitioner raised this issue or when, then the Court should set the case for oral argument to give the parties an opportunity to address the Court's error in failing to recognize when and how the Petitioner raised this issue in person.

3.

OPINION NO. 2022 UP 402 IS IN CONFLICT WITH THIS COURT'S HOLDING IN *HARBIT V. CITY OF CHARLESTON*, 382 S.C. 383, 675 S.E.2d 776 (2009)

As set forth in the companion motion filed simultaneously with this Petition pursuant to Rule 219, the Petitioner is asking for a hearing *en banc* because Opinion 402 is in conflict with the published decision in *Harbit v. City of Charleston, ibid*. In *Harbit v. City of Charleston*, the City refused to rezone the plaintiff's property because it was not part of the "Savannah Highway SH Overlay Zone" (also known as the "Ashley Bridge District"), adopted by ordinance, and therefore not contemplated for rezoning by the Comprehensive Plan:

> In 2005, Harbit applied for rezoning of the Wesley Drive property based on its location within the Savannah Highway Overlay Zone (the Zone). The Zone was created as a result of a comprehensive study of land surrounding the Ashley River Bridge in Charleston.[1] Based on this study, the City developed the "Ashley Bridge District" plan, which identified the need to maintain residential communities in the Zone, despite increased commercialization. While highlighting the need to maintain residential uses in the Zone, the plan allows certain properties along Savannah Highway and Wesley Drive to be used for limited commercial purposes, including professional office use. Under the Ashley Bridge District plan, the other properties on Harbit's side of Wesley Drive within the Zone have been rezoned for limited commercial use.
>
> *Harbit v. City of Charleston,* 382 S.C. 383, 675 S.E.2d 776 (2009)

In *Harbit,* the Court of Appeals found that the City's refusal to rezone Harbit's tract was "fairly debatable" because the Harbit tract was not included in the Savannah Highway Overlay Zone, and therefore it was not arbitrary and capricious to exclude him from the zone. This case presents

the exact opposite facts. Here the landowner purchased property specifically because it **is** in the Berkeley County's designation for R-3 zoning. If *Harbit* stands for the proposition that a requested rezoning is properly denied because it is out of conformity with the City's ordinance, then this case cannot also be correctly decided because it is "fairly debatable" to deny a rezoning because the parcel **does** conform to the County's determination the property should be amended to R-3. One of the two cases must be incorrectly decided, and since *Harbit* is settled law, then Opinion No. 402 must be incorrectly decided because here, petitioner seeks nothing more than to bring his property in conformity to the County's legislative decision. For that reason, the petitioner is filing a separate motion under Rule 219, *South Carolina Appellate Court Rules* for an *en banc* hearing.

CONCLUSION

For the reasons set forth above, the petitioner respectfully submits that the Opinion 402 is controlled by errors of law and fact as well as a misreading of the petitioner's appellate filings, and conflicts with this Court's Opinion in *Harbit ibid*. For these reasons, the petitioner requests that the Court review its Opinion and grant the petitioner a rehearing *en banc* to address the important issues raised in this case.

Respectfully submitted,

/s/ Thomas R. Goldstein____

November 17, 2022

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Todd Olds……. Appellant,

vs.

Berkeley County and
Berkeley County Planning Commission…… Respondent,

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing and the motion for hearing *en banc* on the Respondent, Berkeley County, by depositing a copy of it in the United States Mail, postage prepaid, on November 17, 2022, addressed to its attorney of record, John West, West Law Firm, L.L.C., P. O. Box 1869, Moncks Corner, South Carolina 29461 and by electronic mail to jwestlaw@homesc.com.

November 17, 2022

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Re: Todd Olds vs. Berkeley County, Case No.: 2017-CP-08-01088
Appellate Tracking Number: 2020-001118
Opinion No.: 22-UP-402

Dear Ms. Kitchings,

I am filing a Petition for Rehearing and a separate Motion for Rehearing En Banc. I enclose our firm's check in the amount of $50.00 for each motion. Please let me know if I need to do anything further to perfect these filings. By copy of this letter, I am providing a copy of each to opposing counsel. I thank you in advance for your attention to this request, and with kind regards, I am

Very truly yours,

BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Thomas R. Goldstein

TRG/

enclosure: Checks Nos.: 20147 and 20148

cc:
John S. West, Esq.