

According to testimony in the case, the rezoning plan, which was given final approval by City Council at a public meeting in February 2019, rezoned much of Pendleton Street, including the Plaintiffs' property, from Regional Commercial (C-3) to Redevelopment District (RDV). The RDV designation is a blend of residential and commercial uses, and would be appropriate for office, retail, residential uses, including restaurants, and is intended to encourage a neighborhood friendly environment.

RDV permits the current use of the Plaintiffs' property as a restaurant but is somewhat more restrictive than C-3. In particular, a restaurant with a drive-through window, which is permitted on a C-3 property, is a nonconforming use which is conditionally allowed on RDV property. The Plaintiffs' property is "grandfathered", which means that so long as the property is in continuous use as a restaurant, the RDV designation does not impact the use of the property, and the drive through window will be unconditionally permitted. Under the zoning plan, this and other nonconforming uses are allowed to continue unless the business ceases to operate for six months or more, or if the existing use is significantly expanded. In such an event, the owner of the property would be able to apply for the continued use of the drive through window. There was testimony at trial that although the City could not absolutely guarantee an application to continue the use would be approved, as a practical matter City planner Virginia Stroud testified that an application to continue the use would likely be approved. Potential factors that could affect the continued use of the drive through window would be the degree of light and sound caused by the use of the window.

The Plaintiffs opposed the rezoning effort and wanted their property to remain C-3. The testimony showed that at public neighborhood meetings that were conducted by the City's planning staff as part of the rezoning application process, Plaintiffs voiced their concerns about the drive through window and their desire that their property remain C-3.

Plaintiffs were also upset about property owned by a third party, referred to during the testimony in the case as the Enigma Property, or Spinx Property, which is situated within the rezoned area at the northeast corner of the intersection of Pendleton and Academy Streets. The original rezoning map prepared by City staff showed the zoning of the Enigma property was to be changed from C-3, to RDV.

The evidence shows that on August 16, 2018, the City's Planning Commission held a public hearing to consider the plan proposed by the planning staff, and tabled the proposed plan. The Commission requested that a workshop be conducted by staff to consider concerns that had been voiced during public meetings about the plan, and to consult with Urban Design Associates, which was providing planning advice to the City. According to the evidence, this workshop was conducted on September 27, 2018, and a meeting with the consultants took place on November 8. During this timeframe, representatives for Enigma argued that the Enigma property should remain C-3, primarily for two reasons. First, the other three corner properties at the intersection of Academy Street and Pendleton Street were C-3. Second, Academy Street is an arterial street, and research showed that as many as 27,300 cars per day traveled through intersection. Virginia Stroud, a city planner called as a witness by the Plaintiffs, testified that the staff realized they had made an error in recommending the Enigma property be zoned RDV, and that they modified the plan to leave the Enigma Property as C-3. This justification for leaving the Enigma Property as commercial is documented in the Ordinance approving the rezoning plan.

Further regarding the recommendation to leave the Enigma Property as C-3, the final zoning map shows that not only was the Plaintiffs' property changed to RDV, other properties on Pendleton Street within the boundaries of the zoning area were also changed to RDV. The weight of the evidence shows that while the Enigma Property may have been zoned differently from other properties on Pendleton Street in the final plan which was approved by City Council, the City's

rationale for the different treatment had a rational basis in fact and was not in the Court's view a constitutional deprivation of the Plaintiffs' rights.

At trial, Plaintiffs complained that planning staff made other changes to the proposed plan which benefitted certain property owners, while staff unfairly refused Plaintiffs' request to leave their property as C-3. The Court finds that the weight of the evidence about this alleged disparate treatment fails to demonstrate a Due Process or Equal Protection violation. Instead, the changes about which the Plaintiffs complain appear to be mere "tweaks" to the plan that were consistent with the overall purpose of the rezoning, while the Plaintiffs' request was not. For example, there was testimony from Ms. Stroud that the RDV designation definition was changed to allow funeral homes without crematoriums; that property owned by the Stone Family Trust, which bordered Academy Street, which was originally designated RM-2, was changed at the request of the owners to RDV; that the designation of a parking lot being used by a law firm was modified from RM-1 to OD (Office and Institutional District). Ms. Stroud testified that all these minor changes were consistent with the overall purposes of the rezoning proposal, which purposes are stated in the Ordinance that approved the rezoning. While the Plaintiffs asserted that these changes reflected a pattern of disparate treatment that violated their constitutional rights, the Court finds that based on the applicable law which will be discussed below, the weight of the evidence does not establish a constitutional violation.

The evidence shows that on December 4, 2018, another neighborhood meeting was held by staff to discuss the changes to the original rezoning plan. Constantinon Hassiotis testified that the Plaintiffs did not receive notice of this meeting. However, the City introduced Exhibit 16 without objection, which was a letter to property owners in the area advising of the December 4 meeting that included a copy of the revised proposed zoning map.

City Exhibit 20 includes the Planning Staff Report to the Planning Commission which was provided to the Commission in anticipation of its December 20 meeting. The report includes the explanation for why the Enigma Property was being left as C-3. This explanation also appears in City Exhibit 4, the Ordinance which gave final approval to the plan.

City Exhibit 22, which contains the minutes of the Planning Commission's December 20, 2018 meeting, shows that the Commission voted to recommend to City Council the revised version of the plan, which included returning the Enigma Property to C-3. The minutes reflect that public comments had been received both in favor of and against the rezoning. The negative comments included concerns made "about current uses becoming nonconforming or requiring Conditional Use permits and Special Exceptions in the future". Planning Commission Chairman Jason Tankersley, who was called as a witness by the Plaintiffs, testified that those comments were attributed to the Plaintiffs. The Planning Commission voted to recommend the plan as revised to City Council during the meeting. The vote was 5 to 2, with Chairman Tankersley being one of the two who voted against the plan. Mr. Tankersley testified that his opposition was based on his professional perspective as a commercial developer, and that in his view, the project was larger than he would have liked. However, Mr. Tankersley also testified that the plan was approved by City Council, and that although he voted against it, the process was fair, and that the plan was reasonable. Finally, Mr. Tankersley testified that no one to his knowledge attempted to improperly influence City Council or the Planning Commission during the rezoning process.

First reading of the proposed ordinance was conducted at City Council's meeting held on January 28, 2019. Minutes of the meeting were introduced as City Exhibit 1. They contain comments by numerous members of the public who commented about the proposed plan. One was a representative of the Plaintiffs, who advised City Council of Plaintiffs' opposition to the rezoning. Plaintiffs argued that the rezoning plan, although the current use of their property was

admittedly grandfathered in, would be rezoned to RDV if the property were ever vacated for more than six months or if there were a capital investment of 25% or more. Plaintiffs argued that this would require the owners of the property to obtain a conditional use permit for the drive through window. The minutes reflect that Mayor White commented that in some circumstances a restaurant might be in close proximity to a residential neighborhood and cause issues with noise and lights, but in the case of the Plaintiffs' property, that would not affect their situation.

The minutes also show that a representative for the Stone Family Trust spoke to Council and requested that his client's property be zoned RDV. The evidence, including the zoning map submitted with the proposed rezoning plan, showed the Stone property fronts Academy Street. The existing zoning for the property was C-2, a commercial designation. Under the proposed plan, the property was downgraded to RM-3 a significant change. The Stone Family Trust representative requested that City Council allow the property to be zoned RDV, which the representative suggested was a reasonable, compromise change. The minutes do not reflect any objection made to the requested change by any Council member or by the public present at the meeting.

According to the City Council Minutes introduced as City Exhibit 3, the rezoning plan came up for second and final reading at City Council's February 11, 2019 meeting. The meeting minutes document that proper notice to the public was given in advance of the meeting. The rezoning plan was unchanged from the plan presented at first reading, with the exception that the request of the Stone Family Trust was included. The minutes indicate that City Council was aware that the change had been made. Again, the minutes show no objections from the public or from City Council about the Stone Family Trust change, and City Council voted unanimously to approve the rezoning plan. The Ordinance was introduced as City Exhibit 4.

Plaintiffs have alleged three causes of action in their Amended Complaint. In the First Cause of Action Plaintiffs seek a declaratory judgment by this Court that the Ordinance is invalid because it violates their due process rights, and that the Plaintiffs are entitled to own, sell, operate, expand, and maintain a drive through restaurant on their property. In the Second Cause of Action, Plaintiffs allege the Ordinance violates their constitutional rights of substantive due process, procedural due process, and equal protection. In the Third Cause of Action, Plaintiffs seek an award of costs, fees, expenses, including attorney's fees and costs.

For the reasons set forth below, based upon the evidence submitted to the Court and the law applicable to this evidence, this Court finds that Plaintiffs have failed to meet their burden of proof as to all causes of action, and that this case should be dismissed with prejudice.

APPLICABLE LAW

The authority of the City to enact zoning ordinances that restrict the use of privately owned property is founded in the municipality's police power. Harbit v. City of Charleston, 382 S.C. 383, 674 S.E.2d 776 (2009); McMaster v. Columbia Board of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660 (2011). Rezoning is a legislative matter, and this Court has no power to zone property. Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (1995).

A municipal ordinance is a legislative enactment and is presumed to be constitutional. In reviewing substantive due process challenges to municipal ordinances, a court must consider whether the ordinance bears a reasonable relationship to *any* legitimate interest of government. McMaster v. Columbia Board of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660 (2011); Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013). Every presumption will be made in favor of the constitutionality of a legislative enactment, and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room

for reasonable doubt that it violates some provision of the Constitution. Id. An issue regarding the interpretation of a legislative enactment is a question of law. In order to prove a denial of substantive due process, a party must show that they were arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. It is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations. McMaster.

The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent upon the challenger to show the arbitrary and capricious character of the ordinance through clear and convincing evidence. A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property. McMaster; Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d (Ct. App.2009).

Only where a municipality's zoning action is so unreasonable as to impair or destroy constitutional rights will courts declare a municipality's action unconstitutional, and if the propriety of a municipality's decision is even "fairly debatable," a court cannot inject its judgment into its review of a municipality's decision, but must leave the decision undisturbed. Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (1995).

Under the rational basis test for equal protection claims, the court must determine (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013). In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable; and in the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial

relation to the public health, the public morals, the public safety or the public welfare in its proper sense. Id.

Regarding the claim that the Plaintiffs' equal protection rights have been violated by the Ordinance, the rational basis standard, rather than strict scrutiny, applies to an equal protection challenge to a rezoning denial because the classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage. Harbit v. City of Charleston, 382 S.C. 383, 674 S.E.2d 776 (2009). Even assuming a governmental entity is not enforcing an ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of an equal protection violation. Id. Under the rational basis test for equal protection claims, the court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013).

The City has introduced without objection 34 exhibits, which include the Ordinance, the application for rezoning including supporting documentation, and minutes of the meetings of the Planning Commission and City Council. These are public records which taken together represent the City's position in this case. The Court notes that municipal records properly authenticated or verified are competent evidence of the proceedings of the transactions of the governing body. Parol evidence cannot be admitted to explain, enlarge, or contradict minutes of the proceedings of the City Council unless the minutes are incomplete or ambiguous. Otherwise, parol evidence could render official minutes uncertain and unreliable so that the minutes would fail to afford dependable evidence of the proceedings of the municipal body. See Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 417 S.E.2d 579 (1992).

DECISION

Based upon the evidence presented by both Plaintiffs and Defendant City at trial, the Court finds that the Plaintiffs have not met the burden of proof established by the case law set forth above. As to the Due Process claims, the Plaintiffs have not overcome the legal presumption that the Ordinance approving the rezoning is constitutional, both generally, and as it applies to the Plaintiffs and their property at 907 Pendleton Street. Insufficient evidence has been produced by Plaintiffs to establish an invalidity that appears so clearly as to leave no room for reasonable doubt that the Ordinance or the plan violates the Constitution. Insufficient evidence was introduced to prove that the Ordinance was an arbitrary and capricious act on the part of City Council. Plaintiffs have not shown that the propriety of the Ordinance is not “fairly debatable”.

As to the Equal Protection claim, Plaintiffs acknowledged the appropriate standard to review the City’s action is the “rational basis” standard, not the “strict scrutiny” standard. The Court finds that the evidence presented establishes that to the extent it can be argued that the Ordinance treats the Plaintiffs’ property differently from the Enigma Property, a rational basis for the difference in treatment was established by the fact that the Enigma Property is located at the intersection of Academy Street and Pendleton Street whereas the Plaintiff’s property is not, and further by the fact that Academy Street is an “arterial” street with a high volume of automobile traffic. The “tweaks” to the plan made before the final reading of the Ordinance were consistent with the overall goals of the rezoning, while the Plaintiffs’ request that 907 Pendleton Street be left as a C-3 property was not. The Court finds that any difference in how the Plaintiffs and their property were treated under the Ordinance had a rational relationship to the purposes of the Ordinance.

The Court is mindful of the testimony of Mr. Hassiotis concerning his opinion that the City “targeted” the Plaintiffs and that the ulterior reason for the rezoning was to hurt them. The Court

has empathy for the Plaintiffs concerning this opinion but finds that there is insufficient evidence to establish that the reason for the rezoning was to hurt the Plaintiffs. Rather, the evidence in the Court's view establishes that the reasons for the rezoning are those set forth in the Ordinance, and, as succinctly summarized in the summary background language in the Request for Council Action, a part of City Exhibit 4, were "to better align zoning with current uses and encourage development that is compatible with the surrounding neighborhoods", and "to encourage more neighborhood-friendly development".

The Court also finds that the Plaintiffs have failed to establish that the designation of 907 Pendleton Street as RDV has resulted in a diminution of value of the property so profound as to be tantamount to a confiscation. Due Process is not denied merely because a rezoning plan does not permit a property owner to make the most beneficial use of their property. A zoning classification is not unconstitutional simply because a developer is deprived of a more profitable use of his property. A classification of property should be upheld as constitutional, absent evidence that the classification is either unnecessary or confiscatory. Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). See also McMaster v. Columbia Board of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660 (2011). While Mr. Hassiotis testified to his opinion of the zoning change on the value of 907 Pendleton Street, City's expert appraiser Corbin Haskell testified that he could not find any difference in value for a property situated as the Plaintiffs' property whether it was zoned C-3 or RDV. Mr. Haskell testified that a building that has been constructed on the Enigma Property since the rezoning could also have been constructed on that property if it had been rezoned to RDV. Photographs of that building were introduced by the City as Exhibits 28 and 29. It appears that the Enigma Property's zoning designation as C-3 did not ultimately work to its advantage when its property was developed.

CONCLUSIONS

Based upon the evidence submitted to the Court by Plaintiffs and Defendant City, and on the law applicable to zoning disputes, this Court makes the following findings:

1. That the burden of proof is on the Plaintiffs to prove that the rezoning by the Defendant City was unconstitutional.
2. That the Plaintiffs have failed to meet their burden of proof as to all the causes of action alleged in the Amended Complaint.
3. That the Defendant City of Greenville is entitled to judgment in this case.

It is therefore Ordered that the Plaintiffs' Amended Complaint be dismissed with prejudice, with costs of suit awarded to the Defendant City of Greenville.

AND IT IS SO ORDERED.

The Honorable Alex Kinlaw, Jr.
Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

_____, 2022



Greenville Common Pleas

Case Caption: George C Hassiotis , plaintiff, et al vs. Greenville South Carolina City
Of
Case Number: 2019CP2302041
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So Ordered

s/Alex Kinlaw, Jr., #2763