THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Mar 08 2023
S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

M. Dawes Cooke, Special Referee

Case No. 2017-CP-08-01088
Appellate Tracking Number: 2020-001118
Court of Appeals Opinion Number: 2022-UP-402

Todd Olds, Petitioner,

vs.

Berkeley County, Berkeley County Planning Commission, Respondents.

PETITION FOR A WRIT OF CERTIORORAI

Thomas R. Goldstein, S. C. Bar No. 2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554 4291
(843) 554 5566 (fax)
tgoldstein@cobblaw.net
Attorneys for Petitioner

Other counsel of record:
John S. West
John S. West, L.L.C.
207 Carolina Boulevard
Moncks Corner, S. C. 29461
(843) 761 5626
jwestlaw@homesc.com

INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that he filed a Petition for Rehearing on November 16, 2016, (App. page 352) and the Court of Appeals finally ruled on the Petition for Rehearing by Order dated February 10, 2023. (App. page 351)

QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals erred in falling to adhere to its own holding in *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (2009).

The Court of Appeals disregarded the controlling precedent of the Supreme Court in *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999), and its own precedent in *Wyndham Enterp. v. City of N. Aug.*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012), and *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

The Court of appeals misapplied the "fairly debatable" standard as the County Council openly stated that the question was to be determined solely by the Council member in whose district the subject property is situatied without debate or consideration.

The Court of Appeals overlooked the Petitioner's reliance on the County's Comprehensive Plan, which Petitioner raised early and often and not for the first time in Petitioner's Reply Brief.

TABLE OF AUTHORITIES

CASES:

STATUTES

OTHER AUTHORITIES

STATEMENT OF CASE

In 2011, Berkeley County passed its Comprehensive Plan in accordance with § 6-29-510, S. C. Code, ann. As required by statute, the County evaluated its inventory of property and adopted a Future Land Use Map to govern zoning and development. (Appendix, pages 173, 200, and 215 [joint exhibits 3, 8 and 9]) Six years later, on July 20, 2017, Petitioner purchased two contiguous parcels of real estate commonly referred to as 749 and 751 Royle Road (S. C. State highway, S-8-535), a major traffic artery connecting U. S. Highway 78 to U.S. Highway 17-A, crossing over Interstate 26. (App. pgs. 178-179 [packet pages 21-23, Joint Exhibit 3]) Petitioner's property is approximately a thousand feet from Royle Road and Interstate 26.

In 2017, Petitioner knew the County classified 749 Royle Road as R-2 (mobile home residential) and 751 Royle Road, as R-3 (mobile home commercial). The zoning classification matrix of the surrounding properties is found in the App. at page 174 [packet page 14, joint exhibit 3]. The matrix shows the subject parcel is surrounded by R-2, R-3, and OI (Office and Institutional). Because he had done his due diligence, Petitioner knew the County's 2010 Comprehensive Plan designated Royle Road as appropriate for reclassification to R-3 because the County determined the area was appropriate for higher density residential growth to meet the County's critical need for affordable housing.

On January 24, 2017, Appellant filed an application with the Planning Department to consolidate the two parcels into one parcel classified R-3 to be consistent with the County's Future Land Use Map and Comprehensive Plan. (App. page 170 [application]) The Berkeley County Planning Department conducted a site investigation and reported its findings and recommendation to the County Planning Commission as follows:

The applicant, B. Todd Olds, is requesting to rezone a 1.29-acre parcel, located along Royle Road and indicated by the following TMS number: 233-09-02-046, from Manufactured (R-2) to Mobile Home (R-3). According to the Application, the applicant wishes to conform with the adjacent property (TMS 233-09-02-007) which is already zoned R-3. The Applicant's intent is to combine the subject property with the adjacent 1.2 acre R-3 zoned parcel (TMS 233-09-02-007) Upon combination, the 2-acre minimum lot size requirement for R-3 zoning would be met.

. . .

Conformance with Comprehensive Plan: Yes. -- The subject property contains the 2010 Future Land Use Plan recommendation of *Low Density Suburban*, which seeks to include diverse housing choices and will act as a transition from Constrained Growth Areas to higher density residential and commercial areas.

Staff Recommendation: **APPROVAL – Staff recommends approval of this request as it provides an opportunity for the development of a diversity of housing options, which align with Future Land Use Plan and are compatible in the context of the area concerned.** The proposed use of the property is compatible with surrounding land uses. There is also an understanding between the applicant and the Planning Department that parcels 233-09-02-046 [left hand parcel] and 233-09-02-007 [right hand parcel] will be combined and recorded prior to third reading at County Council.

App. page 174 [joint exhibit 3] (boldface and underline in original)

After the Staff filed its recommendation, the County scheduled the application for three meetings: On February 28, 2017, Petitioner appeared before the Berkeley County Planning Commission, which voted unanimously to deny recommending approval. Petitioner then appeared two times before the County Council, first on March 13, 2017, before the County Council's *Land Use and Economic Development Committee*, and then on March 27, 2017 before the County Council. (The *Land Use Committee* and County Council are the same.) The Record demonstrates that the "meeting" before the *Land Use Committee* on March 13th was not much of a meeting since before any spoke about the application, Councilmember Newell informed the Council that it was his decision to make because the property was in his district, and he had already decided against Petitioner without hearing from him. App. page 255 [tr. page 36, lines 16-18]: "I think myself being the councilman for that district, I should have the right to say approval or disapproval." He made a motion for denial, which was seconded, before Council considered the application. App.

page 256 [tr. p. 37]) Despite the findings of the Planning Staff and the Comprehensive Plan, the *County Council Land Use Committee* voted 6-2 and County Council voted 5-2 vote to deny the request to rezone to R-3. All three denials were based on the same unsupported canards from nearly the same complaining neighbors, 5 at Planning Commission and 3 at County Council. Councilmember Schulknight summed up their complaints this way: ". . . with that in mind, again, I've been down Royle Road many a times; I've been down Royle Road for the last 40 years. And I've seen a lot of stuff going on over there, all the development in that area. And I feel for you, I really do. And I know—I'll be remiss to sit here and try to tell you that it doesn't devalue your property, because it does." (App. pages 278 – 279 [tr. page 59, line 20—page 60, line 3]]) The Minutes, transcripts, and the votes of these three meetings are found in the Appendix at pages 185, 189, and 194 and verbatim transcripts at pages 221-281.

On April 28, 2017, the appellant filed an appeal with the Berkeley County Court of Common Pleas. (App. page 28) The circuit court denied Petitioner's motion for summary judgment on October 2, 2, 2018. (App. page 26) On March 29, 2019, the parties referred the case to M. Dawes Cooke as Special Referee to make findings of fact and conclusions of law and to enter a final order directly appealable to the Court of Appeals on whether the County's denial of the appellant's application was or was not arbitrary and capricious.

On May 12, 2020, the Special Referee issued an Order upholding the County Council's decision to deny the rezoning. (App. page 5) Petitioner filed a motion for reconsideration on May 21, 2020, and on July 23, 2020, the Special Referee denied reconsideration. (App. page 1) Petitioner filed an appeal on August 7, 2020 (App. page 131), which the Court of Appeals decided without oral argument on November 9, 2022. (Appendix page 348) Petitioner timely petitioned

for rehearing, and the Court of Appeals denied that application on February 10, 2023 (Appendix at page 351)

1. The Court of Appeals failed to adhere to established precedent, including *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (2009)

The Court of Appeals cited *Bear Enters. v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995) (and not much else) for the proposition that zoning is a legislative matter, concluding the Court has no power to zone property. Petitioner never suggested otherwise. However, appellate courts are not decoration, and the Court of Appeals cannot ignore challenges to government action because the subject is zoning:

> In municipal government, few issues generate as much public interest as the control of land-use development. Zoning ordinances touch people where they live. Sensitive to the intense public interest in local land-use development, the Legislature has developed an orderly structure for public participation in the process. That process also contemplates the rational development of land use, free from undue political influence. *I'On, L.L.C. v. Town of Mt. Pleasant* 338 S.C. 406, 526 S.E.2d 716(2000)

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Marbury v. Madison*, 5 U.S. 137 (1803)

Therefore, simply because local governments possess power to zone, that power does not exempt them from judicial review when they act arbitrarily. As this Court said in *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (2004):

> [a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Restaurant Row Assoc. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). However, a decision of a municipal zoning board will be overturned it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. *Id*.

Here, the Court of Appeals turned away from **any** analysis, erroneously inflating the holding of *Bear Enterprises* to conclude that courts lack any power to review zoning decisions. Local governments have wide latitude in zoning, but wide latitude is not the same as unbridled, and the

Court of Appeal's refusal to review the merits is in conflict with its 2009 decision in a similar zoning case, *Harbit v. City of Charleston,* 382 S.C. 383, 675 S.E.2d 776 (2009), which is the present case in a mirror. In *Harbit*, the Court of Appeals upheld the City's decision to deny the property owner's request to be included in the Ashely River Overlay District "because the City proffered several **reasonable** grounds for the denial of Harbit's rezoning application." (emphasis added) There, the City argued that Harbit's property was a necessary buffer between the development taking place along Wesley Drive and the residential neighborhood behind him and his application was inconsistent with the City's Plan. *Harbit* is the exact opposite of the present case, and if *Harbit* is correctly decided, then the present case is not for lack of finding any reasonable grounds for voting inapposite to the findings and goals of Berkeley County's Comprehensive Plan. This legislatively enacted Plan determined Petitioner's two lots should be uniformly classified as R-3. Here, Berkley County ignored its legislative decision and failed to offer supportive findings to do so, relying entirely on unsupported complaints of neighbors. The County's "legislative decision" and "reasonable grounds" are expressed in the Planning Department's evaluation quoted above on page 2. (App. page 174) It is impossible to reconcile the Opinion under review with the Court of Appeals' rationale in *Harbit*. (The Court of Appeals also erroneously held Petitioner did not raise the issue of the County's "legislative decision" being expressed through its adoption of the Comprehensive Plan, a demonstrably incorrect conclusion addressed separately in Argument 4 below on pages 23-25.)

2. The Court of Appeals disregarded the controlling precedent of the Supreme Court in *Bannum v. City of Columbia,* 335 S.C. 202, 516 S.E.2d 439 (1999), and its own precedent in *Wyndham Enterp. v. City of N. Aug.*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012), and *Helicopter Solutions v. Hinde,* 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

As set forth above, if *Harbit* is correctly decided, then the Opinion under review is not because they are mutually exclusive. South Carolina jurisprudence has a well-developed body of law that a

property owner's right to use his or her property to its highest and best use cannot be regulated solely by "undue political influence." *I'On, op. cit.* page 4 The Court of Appeals is required to adhere to precedent, and while there are dozens of cases, such as *Purdy v. Moise*, 223 S.C. 298, 75 S.E.2d 605 (1953), standing for this proposition, Petitioner cited the following three to the Court of Appeals as being directly on point and controlling:

(A) *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999)[1]

Bannum demonstrates the Court of Appeals erred as it is directly on point applying the same analysis raised here. In *Bannum*, a property owner asked for a special exception permit to build a "halfway house" in a residential neighborhood. In a fact pattern identical to this case, residents turned out in a greater force than the 6 complainants here and argued against the issuance of the permit because they did not want "those kinds of people in our neighborhood." The Board refused to grant the special exception "holding the halfway house would have a negative impact on traffic and vehicular and pedestrian safety. The circuit court affirmed the ZBA's denial of the permit." *Bannum, op. cit*. pg. 6.

On review, this Court reversed because it found the refusal to grant the permit to be "arbitrary." The Court reached this decision because it found that the neighbors' concerns about "traffic" and "safety" and "recidivism" to be wholly unsupported and nothing more than their raw speculation, which is **exactly** what happened here:

After reading the entire record in this case, it is inescapable to us that the ZBA's decision was based, not on the requirements of the "special exception" ordinance, but upon the fears of neighboring residents who did not want "those type of people" in their neighborhood. Although

[1] The Respondents attempt to distinguish this line of cases because they involved "special exceptions," but this is a distinction without a difference. "Legislative enactments" apply to special exceptions just like zoning. Berkeley County adopted its Comprehensive Plan ordinance as required by statute. §§ 6-29-510 and 6-29-800 This putative distinction is discussed more fully below.

we are sympathetic to the concerns of neighboring individuals, the ordinance simply does not provide such a basis for denial of the permit. Accordingly, the circuit court's order affirming the denial of Bannum's special exception permit is REVERSED. *Bannum v. City of Columbia, op. cit.*

That analysis determines the outcome here. Here the Council admitted that they were jettisoning their own ordinance—their legislative enactment—in favor of appeasing a handful of complaining neighbors because, as Councilmember Schurlknight expressed it: of the "stuff" going on down there on Royle Road. App. page 185, quoted above on page 3. Councilmember Schurlknight concluded that the application to rezone the two parcels to be consistent with the County's Comprehensive Plan would "devalue" nearby property, but, as in *Bannum*, there is not a *scintilla* of evidence in the Record to support his assertion, and it was for that reason this Court reversed the City's decision in *Bannum*, and the Court of Appeals does not have the authority to disregard this precedent. Even more troubling is Councilmember Newell's declaration at the opening of the March 13, 2017, meeting that Council should not even consider the application because the property is in **his** district, and it is **his** decision alone: "I think myself being the councilman for that district, I should have the right to say approval or denial." (App. Page 255) Immediately after making this statement, Council moved and seconded a motion to deny the application before anyone said a word! (App. Page 256) This procedure is a lampoon of this Court's "fairly debatable" standard or the application of a "rational development of land use, free from undue political influence" standard. *I'On, L.L.C. v. Town of Mt. Pleasant* 338 S.C. 406, 526 S.E.2d 716 (2000).

(B.) *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012)

The precise legal issue of the requirement for minimal objective facts to reach the threshold for a "fairly debatable" decision came before the Court of Appeals in 2012 when a Board of Zoning Appeals refused to grant a special exception for an application to open a fireworks store. As here,

nearby residents turned out and objected to the permit for the same reasons expressed here: traffic and safety and loss of quality of life. Like the present case, the complaining neighbors said that the area already had a fireworks store, which tracks with the complaints here that Royle Road has too many mobile homes: "There are 13 trailer parks presently on Royle Road that I personally counted from I-26 overpass northeast to Highway 17-A." (App. page 266 [tr. Page 47, lines 12-14]). The Courts Of Appeals rejected this reasoning in *Wyndham*, which is demonstrated by substituting "mobile homes" for "fireworks" in the Court of Appeal's 2012 opinion:

> We find the BZA's decision was arbitrary and capricious. Regarding the third criterion, the BZA determined the special exception would not discourage or negate the use of the commercially zoned property immediately surrounding the property but would have a detrimental impact on existing and proposed residential development. At the hearing, residents testified as to their concerns regarding the proposed [mobile homes]. These concerns included an increase in traffic, a decline in property values, and a detrimental impact on the [401 S.C. 150] character of the surrounding area. The testimony proffered was based on speculation and opinion. Although property owners can generally testify as to the value of and damage to their own property, here only one of numerous witnesses addressed the special exception's effect on property value. Moreover, the property owner did not testify about his specific parcel but rather testified broadly about the undesired [mobile homes'] possible effect on the neighborhood's home values as a whole. This testimony was not competent to support the denial of the special exception. *Compare Olson v. South Carolina Dept. of Health & Entl. Control*, 379 S.C. 57, 67, 663 S.E.2d 497, 502–03 (Ct.App.2008) (affirming an administrative law court's finding that the effect on the value of adjacent landowners' property warranted the denial of a dock permit because *those adjacent landowners* testified the desired permit would diminish the value of their respective properties); [735 S.E.2d 663] *Myrtle Beach Farms Co. v. Hirsch*, 304 S.C. 94, 96–97, 401 S.E.2d 196, 198 (Ct.App.1991) . . .
>
> Additionally, none of the residents properly explained why Appellant's [mobile homes] would cause a decrease in property values when . . . [mobile homes are] located across the street from the property and [others] located nearby. The residents' testimony also failed to relate how their concerns about [mobile homes] would be different from their concerns regarding [other mobile homes] which would be allowed as a matter of right without the need to seek a special exception. No competent testimony was presented differentiating the effect of [mobile homes] on property values from the effect of a [condominium or duplex] on property values. Both of these types of business would be entitled to open in the same commercial location as a matter of right.
>
> Regarding the residents' traffic concerns, we note that although there was testimony that residents felt the [mobile homes] would increase traffic, they failed to offer any competent [401 S.C. 151] evidence to support their opinions. See *Bannum v. City of Columbia*, 335 S.C. 202, 206,

516 S.E.2d 439, 441 (1999) (reversing a zoning board's denial of a special exception permit and holding that although neighboring residents testified they felt a proposed halfway house would increase traffic, there was no factual evidence presented to support that allegation). Multiple neighborhood residents provided accounts of problems exiting and entering the neighborhood at the location of the proposed [mobile home park]. However, this testimony failed to establish how adding the [mobile homes] would increase traffic problems in any way but a conjectural manner. Additionally, the [County's Planning Staff's] own traffic consultant determined the proposed [mobile homes] would not generate a significant amount of traffic.

As to the second criterion, the BZA determined the special exception was not in substantial harmony with the surrounding area. The record reflects the property is located within a [residential] district near another [mobile home park], and [a Church]. Although the BZA determined the [mobile home park] was in substantial harmony with these [residential] uses, the BZA found the [mobile homes] was not in substantial harmony with nearby residential developments. We find the BZA's decision to give deference to residential neighborhoods outside the [residential] zoning district in which the [mobile homes] would be located was arbitrary and capricious. Furthermore, as stated above, the record is void of any factual evidence to support the testimony that this particular [mobile home park] would have a detrimental impact on the character of the surrounding area. *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012)

The County seeks to distinguish this line of cases on the ground that they involve appeals from Boards of Zoning Appeals, quasi-judicial bodies, while this case involves a County Council's "legislative decision." As set forth above, this is a distinction without a difference because Boards of Zoning Appeals must apply the 6 statutory factors set out by the General Assembly in § 6-29-800, S. C. Code., and local governments must adhere to their own rules.

There are no policies, regulations, statutes, or caselaw authorizing a local government to act arbitrarily or capriciously, and the Court's oversight of "legislative decisions" in zoning matters is well established. The Federal Courts apply the same judicial review of local zoning decisions as the State Courts. As the Fourth Circuit noted in *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995), unsupported complaints of neighbors is insufficient to sustain a legislative decision:

Sylvia Development and Dohnal timely appealed the Board's resolution to the Circuit Court for Calvert County. In May 1990, the Circuit Court reversed the Board's decision as unsupported by probative evidence. The court's opinion explained that under Maryland law the Board, sitting as an adjudicative body in a TZD application hearing, was required to render a final decision with findings of fact based upon substantial evidence in the record. In the case of Blue Dolphin Estates,

the court found that the only support in the record for the Board's finding of inadequate road access consisted of the "unsubstantiated, generalized concerns" of local residents. Such lay testimony, without more, could not be considered probative in the face of contrary expert evidence produced by engineers from the County Planning Commission[2] and several state agencies. The court also summarily rejected the Board's second and third findings, as the consultant's report on water supply was never admitted into the record and the "contrary to public interest" determination was asserted without any factual basis. The court held that an adjudicative agency decision made without the support of any record evidence was by definition "arbitrary" and ordered the Board to grant Sylvia Development's TZD application. The Board did so in a resolution issued July 3, 1990.

See also *Purdy v. Moise*, S.C. 223 S.C 298, 75 S.E.2d 605 (1953) where the Supreme Court required the City of Sumter to grant building permit for "tourist court" in area zoned for "hotel."

(C) *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

This Court decided *Bannum* in 1999, and the Court of Appeals decided *Wyndham* in 2012. Three years later, the Court of Appeals took up the same legal issue in another zoning case in Myrtle Beach, like *Wyndham*, addressing a decision that is "not supported by competent, substantial, and material evidence, [but] . . . based on opinion and speculation testimony." *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012) As discussed above, the Court of Appeals in *Wyndham* summarized the "evidence" adduced against the applicant, which is identical to the "evidence" relied upon by Council here:

Also, at the hearing, fourteen residents of nearby residential neighborhoods testified against the special exception. Residents' concerns included increased traffic, decreased property values, and a negative image of the community due to multiple [401 S.C. 147] fireworks retailers in the same area.

Like the 6 neighbors in this case, and like the neighbors in *Bannum* and *Wyndham*, Hinde contended, **without evidence**, that the operation of the helicopter business injured him **by diminishing his property values**—the same unsupported ground relied on here. He had nothing to

[2] Which is equivalent to the Comprehensive Plan here.

support his opinion, which is the common link running through all these cases, and the Court of Appeals erred here in concluding a "legislative decision" gets a holiday from reason because elected officials make it. In *Hinde*, after the Board of Zoning Appeals sided with the neighbors and ordered the business closed, the circuit court reversed the Board of Zoning Appeals, and the Court of Appeals affirmed the circuit court, holding:

> This court is prohibited from writing into an ordinance language restricting property rights to a greater degree than intended by the legislative body. It is a well-founded principle of law that statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner. *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) (citations omitted); see also *Keane/Sherratt P'ship by Keane v. Hodge*, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct.App.1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.") (footnote omitted). Thus, we find the circuit court properly held the Zoning Board made an error of law in construing the County Ordinance to exclude a helicopter sightseeing tour facility as a permissible use within the AC district. *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

Second, reason universally governs, whether the subject is law, medicine, or logic. Thus, while it is a tautology to state that the issue—any issue—can be "debated," the question put before the Court of Appeals, a question it refused to answer, was whether this record contains enough evidence to support the denial as a product of rational conclusion, *i.e.* "**fairly** debatable." To be rational requires more than relying on unsupported speculation, and a decision cannot be rational, or "fairly debated," unless it is supported by some rational underpinning. Without such minimal logical support a decision is "arbitrary": "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgement, is made at pleasure, without adequate determining principles, or is governed by no **fixed rules or standards**."

Deese v. S.C. State Board of Dentistry, 286, S.C. 182, 332 S.E.2d 39 (Ct. App. 1985) (emphasis added)

The Court of Appeals held: ". . . the special referee did not err by finding the County Council was not required to approve Olds's rezoning application simply because his request complied with the comprehensive plan." (Appendix, page 349) This is a gross mischaracterization of the legal issue and attacks a straw man. Olds never asserted County Council must bend to his will; rather he asserts the same settled principle of law articulated in *Bannum*, in *Wyndham*, in *Helicopter*, and any of a dozen other land use cases. Land use questions do not become "fairly debatable" when they are grounded on nothing more that expressions of pure prejudice. Land use decisions are supposed to be rational and "free from undue political influence." *I'On, L.L.C. v. Town of Mt. Pleasant* 338 S.C. 406, 526 S.E.2d 716(2000) Here, there is not a scintilla of evidence against Olds' application except the offensive and wildly speculative comments of neighbors who urged Council to deny the reclassification because they asserted mobile home residents are undesirable. It was on this sole basis that Council denied the request. When asked to evaluate the application between Council's own legislative findings adopted in its Comprehensive Plan vs. intolerant speculations of neighbors, the Council chose prejudice, and that is reversible error. *Bannum v. City of Columbia, supra*.

Throughout this case the Respondent has asserted the straw man argument that no citizen has the right to **demand** a particular zoning. While no citizen has the right to demand a particular zoning, every citizen has the right to demand to be treated rationally and fairly, including using his or her property to the highest and best use. Petitioner never asked anything more than his two parcels be treated uniformly and in conformity with the County's legislative decision expressed through its Comprehensive Plan, which it adopted after undertaking a thorough and rational examination of the

area—including public participation—which evaluated the issues of traffic and safety. In other words, Petitioner asks the County do nothing more than apply its own ordinance (just like Boards of Zoning Appeals do) and not leave his property rights controlled by the unbridled speculation of neighbors. The holdings running through all these cases are the same; to wit, that while the neighbors are entitled to be heard, their unsupported objections cannot form the sole basis of a decision. In short, prejudice and speculation alone are insufficient to raise the debate to the level of "fairly debatable." This is a logical principle of law that the Court is required to apply to do justice and prevent the impairment of rights motivated by nothing more than prejudice. Both the verbatim transcripts of Council's deliberation as well as the recorded video/transcript of that body demonstrates that Council failed to deliberate any of the facts, let alone "all of the facts" around a rezoning request to bring the subject parcel into conformity with adjacent parcel and in conformity with the County's legislative decision expressed through its Comprehensive Plan and Future Land Use Plan. It is the sole province of the Court to protect citizens' fundamental rights, and for this reason, the Appellant respectfully requests that this Court grant a writ of certiorari to review the Court of Appeals erroneous conclusion that the question below was "fairly debate[d]."

3. The Court of Appeals misapplied the "fairly debatable" standard.

A. The County's decision was arbitrary and capricious.
B. The County's decision was at variance with its legislative findings as expressed through its Comprehensive Plan and Future Land Use Plan.
C. The opposing neighbors presented nothing in opposition to the request for rezoning other than their unsupported prejudice.

A. The County's decision was arbitrary and capricious.

The parties—and the Court—stand on common ground that courts are required to uphold legislative decisions provided they are "fairly debatable," and it was on this conclusion that the Special Referee upheld the Berkeley County Council's decision: "That the Plaintiff's application to rezone

his property was consistent with the Comprehensive Plan is certainly a strong point in his favor. However, it is not enough to overcome his extremely high burden of proving that the merits of Council's legislative decision are not at least fairly debatable." (App. page 23 [Order at page 19]) There are several material errors in this conclusion that require reversal.

First, as discussed above, the Court of Appeals made no effort to evaluate whether the unsupported speculation of complaining residents outweighed the County's deliberative "legislative decision" as adopted and codified by the County in its 2010 Comprehensive Plan and Future Land Use Plan. (See App. 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 6 complaining neighbors who do not want "those people" in "our" neighborhood. The County adopted Ordinance 18-04-11 on April 23, 2018, renewing its 2010 10-year Comprehensive Plan after extensive investigation and public comment. (App. 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 (App. pages 215 – 219 [G1.2 Comprehensive Plan, Joint Exhibit 9, page 1-2]) (emphasis added)

The Comprehensive Plan 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 Court of Appeals ignored the Comprehensive Plan even though it is adopted by ordinance and has the force of law. See Berkeley County Ordinance § 1-2, "Purpose": "It is the purpose of this ordinance to: **Implement the goals and policies outlined in the Berkeley County comprehensive plan.**" (App. page 345, emphasis added) The Court of Appeals committed reversable error when it concluded that *Bear Enterp. v. County of Greenville, op. cit*. pg. 4 precludes the Court from reviewing local zoning decisions. The Court held further Petitioner did not raise the issue until his Reply Brief, another obvious error discussed in detail in Argument 4 below. Neither of these conclusions is correct. The Court of Appeals' concluding a zoning decision is unreviewable is an abdication of judicial responsibility. If the decision were not "fairly debate[d]," then Petitioner is denied fundamental due process because a denial of substantive due process = arbitrary and capricious. They are different expressions for the same legal wrong, and they can be used interchangeably. No court has ever held that an arbitrary or capricious decision is anything but a denial of substantive due process. See: *Sloan v. South Carolina Bd. Of Physical Therapy Exam'rs.*, 370 S.C. 452, 483, 636 S.E.2d 598, 615 (2006)

A fundamental issue raised by this case is what role the court plays in evaluating legislative actions. Here, the Court of Appeals determined that zoning decisions are unreviewable, an erroneous conclusion refuted by numerous courts from *Marbury v. Madison* right through to *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) to *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (2004). Courts never fail to protect fundamental legal rights against arbitrary governmental actions, and here the Court of Appeals essentially granted a demurrer holding erroneously that *Bear Enterps*. prohibits judicial review. As may be seen by reference to any of the

specific cases discussed above, South Carolina courts have never hesitated to correct "legislative decisions" when those decisions are arbitrary or capricious.

One of the most frequently cited and clear expressions of what constitutes "arbitrary" in the arena of land use is the Fourth Circuit's decision in *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995). As quoted above on page 10, neighbors turned out in force, complaining, as here, that the proposed development would create traffic woes, devalue their property *etc.* For reasons identical to this case—except there were no allegations of phantom meth labs—the County Board turned down the property owner's request and forced him to bring an action to obtain a court order to compel the County to issue the permit. In compelling the County to issue the building permit, the Court held that "unsubstantiated generalized concerns" of neighbors are not sufficient to deny a property owner the right to use his or her property to its highest and best use. *Sylvia v. Calvert, supra.*, quoted above on page 10.

Here, the case is much stronger for it is the County's statutorily enacted Comprehensive Plan serves as its "expert evidence," which is stronger evidence than that provided by the "engineers from the County Planning Commission and several state agencies" in *Sylvia*. What was expert opinion in *Sylvia*, is a duly enacted ordinance here. When the Special Referee allowed complaining residents' unsupported concerns to veto the County's Comprehensive Plan, he committed legal error, and the Court of Appeals holds this decision is unreviewable! The South Carolina appellate courts have consistently decided that zoning decisions grounded solely on NIMBY complaints are the very definition of arbitrary. See *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (2004), where this Court took up the issue of the appropriate standard of review on cases being reviewed from the Board of Zoning Appeals. There, this Court held "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Restaurant Row*

Assoc. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "However, a decision of a municipal zoning board will be overturned it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id*."

Petitioner never asserted he can turn the Court of Appeals into a supervisory County Council, but he firmly believes that he can petition the Court to address an injustice. As the Court of Appeals said in *Deese v. S.C. State Board of Dentistry*, 286, S.C. 182, 332 S.E.2d 39 (Ct. App. 1985): "A decision is arbitrary if it is without a rational basis, is based along on one's will and not upon any course of reasoning and exercise of judgement, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Here, the Court of Appeals turned a blind eye to the entire case on the ground that *Bear Enterprises* prohibits judicial review of zoning decisions, a palpable error of law. The County's "fixed rules or standards" are those expressed through its ordinances, including its Comprehensive Plan. It is not asking too much to ask the Court of Appeals to evaluate whether the County adhered to its own legislative enactment, a question the Court of Appeals determined it cannot take up.

In *South Carolina v. Dykes*, this Court took up the question as to whether a legislative decision requiring lifetime monitoring did or did not violate the plaintiff's due process. While holding that a challenge to the constitutionality of a statute must be proven beyond a reasonable doubt, Justice Hearn, writing for the Court stated:

> However, one does not have a general liberty interest simply in being free from arbitrary and capricious government action. *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (*en banc*). Rather, "the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest." *Id.* If the interest infringed upon is a fundamental right, the statute must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); see also *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). If the right is not a fundamental one, the statute is only subject to rational basis review. *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347. Dykes does not argue South Carolina's satellite monitoring scheme fails the lesser rational basis review, choosing

instead to rely exclusively on strict scrutiny. Accordingly, we proceed only under this heightened review and must first determine whether the alleged right the statute infringes upon is fundamental.

South Carolina v. Dykes, 398 S.C. 351, 728 S.E.2d 455 (2012)

As both the State and Federal Constitutions make clear, the right to own and use property is "fundamental." In 2013, the Supreme Court withdrew Justice Hearn's 2012 Opinion quoted above, which contained a concurring opinion by Justice Kittredge, and reissued it with Justice Kittredge writing the Opinion, with a dissent by Justice Hearn. (The 2012 Opinion reversed the trial court; the 2013 Opinion affirmed the Court of Appeals as modified.) The only difference between the 2012 and the 2013 Opinions is that the Court narrowed the portion of the statute it declared unconstitutional, but Justice Kittredge articulated the same legal principal in 2013 as Justice Hearn in 2012 concerning the burden of proof when challenging government action although he stated it differently:

The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending. See *Luckabaugh*, 351 S.C. at 139-40, 568 S.E.2d at 346 (finding due process ensures that a statute which deprives a person of a liberty interest has "at a minimum, a rational basis, and may not be arbitrary"); *see also Lyng v. Int'l Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) (noting that although allegedly arbitrary legislation invokes the least intrusive rational basis test, that standard of review "is not a toothless one") (quoting *Matthews v. De Castro*, 429 U.S. 181, 185 (1976)))

Thus, while a landowner challenging government action must carry the burden of proof, the Court of Appeals cannot simply turn away from an analysis entirely by holding zoning decisions are exempt, a demonstrably erroneous (and dangerous) holding.

B. The County's decision was at variance with its legislative findings.

The Special Referee concluded that the concerns of the complaining residents was sufficient to justify the County's decision to deny rezoning. The parties agree that the decision of the Council

may be affirmed if it is at least "fairly debatable." However, the Court of Appeals refused to take up the question because it concluded it lacked the power to review a legislative decision on zoning. This is an error of law in two ways. First, as discussed above, the Court of Appeals is not precluded from reviewing a zoning decision because it is a legislative act.

Second, the term, "fairly debatable," cannot either be read or applied in a vacuum. The term, "fairly debatable," contains two words, an adjective, "debatable," modified by an adverb, "fairly." (Of course, the adjective, "debatable," is based on the noun "debate.") Neither the noun, debate, nor the adjective, debatable, requires discussion—the parties agree that anything and everything is subject to "debate" and is, therefore, "debatable." In logic and mathematics, everything and nothing, are interchangeable and equivalent—in any mathematical equation, $\infty = 0$ and $0 = \infty$. So saying something is debatable sheds no light on the inquiry because if everything is debatable, then nothing is debatable. The question put before the Court of Appeals, which it ignored, is whether the subject is "fairly" debatable.

The Special Referee's Order under review is wrong because if the issue is not **fairly** debatable, then the decision is arbitrary and must be reversed. "Fairly" means "Equitably, honestly, impartially, reasonably." *Black's Law Dictionary*, Fifth Ed. The case most frequently cited in South Carolina for the "fairly debatable" standard in land use cases is *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (2009), discussed above. As pointed out above, *Harbit* is the opposite of the present case. Petitioner points out on page 5, in *Harbit*, the Court of Appeals upheld the City's decision to deny the property owner's request to be included in the Ashely River Overlay District "because the City proffered several reasonable grounds for the denial of Harbit's rezoning application." The *Harbit* case is the exact opposite of the present case because here the "several reasonable grounds" of *Harbit* are the County's legislative determination expressed through its Comprehensive Plan—see Staff

recommendation quoted above on page 2. Here, Petitioner purchased the property because he did his due diligence and saw that the County made its legislative decision, based on a careful, deliberative process, including public participation, to designate the property as appropriate for R-3. The record here demonstrates that the only reason the County denied him was to satisfy the unsupported concerns of a small number of complaining neighbors at variance with its own ordinance. Thus, the circuit court erroneously concluded that the record contains evidence supporting Council's denial: "However, evidence in the record suggests that the residents of that area had for years consistently opposed more mobile homes[3] and the County consistently denied applications for them." (App. pg. 17) This is incorrect. The only objective evidence in the case is the evidence (1) contained in the County's Comprehensive Plan and its Future Land Use Plan, (2) the facts presented by the Planning Department Staff, and (3) the complaining neighbors admission that the area already contains numerous mobile homes. All the testimony about whether future residents monitor their children, abuse their pets, or cook meth was pure speculation typified by the Headden's testimony discussed in more detail in the next section. Instead of wild speculation, Berkeley County, through its legislative process, determined Royle Road is the appropriate place for allowing additional mobile homes for the reasons stated in the Staff Report (Exhibit 3) and in in the Comprehensive Plan. The Court's slippery slope conclusion runs in the opposite direction it intended because if Council can deny appellant's request without any **evidence** of impact on safety, traffic or children, then it can deny every multi-family residential project anywhere else for no reason at all, and since Berkeley County is

[3] As the video and transcript of record of the meetings depict, the complaining neighbors consistently emphasized the proposed homes as "trailers," arguing people who live in "trailers" are undesirable. Their emphasis on this pejorative term illuminates their prejudice (App. page 275 [tr. page 56])

experiencing a residential boom, it is clear that this decision is premised on nothing more than an unsupported prejudice that classifies residents of mobile homes as undesirable second-class citizens.

As discussed above, everything is subject to debate, but when faced with the issue of whether a governmental action is or is not arbitrary and capricious, Courts focus on whether the legislative debate is fair or unfair. (See definition of "fairly" above on page 19.) The Special Referee correctly noted on page 7 of the Order (App. page 11), citing *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Circ. 1995): "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.'" Thus a zoning decision is arbitrary if it is unsupported by **evidence** of a "substantial relation to public health." Courts address the distinction between a substantial relation and arbitrary relation by voiding legislative decisions determined to be "arbitrary" or "capricious."

C. The opposing neighbors presented nothing in opposition to the request for rezoning other than their unsupported prejudice.

As this circuit court said on page 12 of its Order (App. page 16), "The decision was for the Council to make, **after due deliberations and taking into account all of the facts**." This sentence highlights the error because the record shows no evidentiary support for the required "due deliberation." In making the motion to deny the application for rezoning, Council Member Schurlknight highlighted the lack of evidence because he admitted he was basing his decision on "stuff" going on out there. The only indication of "stuff" is the testimony of complaining neighbors asserting that people who live in mobile homes will not look after their pets, their children and they

will cook meth.[4] Councilmember Schulknight's word choice reinforces the absence of even a *scintilla* of evidence, and thus as a matter of law, there could not be "due deliberation." A judge does not submit a case to a jury if there are no facts upon which a reasonable jury could make a finding, and the absence of facts in opposition to the application is what distinguishes this case from *Harbit*—especially because here, unlike *Harbit*, the County's Future Land Use Plan provides the "proffered several reasonable grounds." In *Harbit*, the City made specific findings and reached definite conclusions, which is exactly the opposite of what happened here. In *Harbit*, the City's Overlay Zone is equivalent to the County's Comprehensive Plan and Future Land Use Plan. For the cases to be equivalent, the Staff Recommendation would have to be the opposite of what it is. By stating that the decision is based on unsupported "stuff," and the unsupported putative devaluation of property values, the County Council conceded it was making an arbitrary decision based on prejudice. As identified above, Councilmember Newell made a motion to deny the application **before he heard it** because the property is in his district! In short, this record demonstrates there was no "due deliberation" in Council's decision making—only unsupported prejudice. The record lacks support for Council considering any fact put forward by a complaining resident, let alone deliberating "all" the facts.

In affirming an administrative decision to grant a mining permit in *Bursey v. South Carolina Department of Health and Environmental Control*, 360 S.C. 135, 600 S.E.2d 80 (Ct. App., 2004), *cert.* granted, affirmed at 369 S.C. 176, 631 S.E.2d 899 (2006)[5] the Court of Appeals said:

A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable, probative

[4] Mr. and Mrs. Headden spent a considerable amount of time alleging that people in mobile homes cook meth—Mr. Headden claimed he is "trained in clandestine meth labs"—because they smell it, but whenever the police responded, there were no meth labs detectable because people who cook meth are smart. App. pages 246-248

[5] An unrelated portion of the case is overruled at *Allison v. W. L. Gore & Assoc*., 394 S.C. 185, 714 S.E.2d 547 (2011) (Timeliness of appeal is appellate question, not subject matter question.)

and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(A)(6)(e), (f) (Supp. 2003); *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 565 S.E.2d 286 (2002); *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996); see also *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (stating court may not substitute its judgment for that of agency as to weight of evidence on questions of fact unless agency's findings are clearly erroneous in view of reliable, probative, and substantial evidence on whole record).

As set forth above, this Court defines capricious for us:

A decision is arbitrary if it is without a rational basis, is based along on one's will and not upon any course of reasoning and exercise of judgement, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. *Hatcher v. South Carolina District Council of Assemblies of God, Inc.*, 267 S.C. 107, 226 S.E.2d 253 (1976); *Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821 (1943). *Deese v. S. C. State Board of Dentistry*, 286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985)

As discussed above and throughout this Petition, the circuit court erred when it concluded that: ". . . neighbors' fears about increased housing density and its attendant aggravation of traffic congestion and increased burden on infrastructure are fairly debatable." (R.O.A. page 17 [Order page 13]) They are "fairly debatable" if, and only if, they are supported by something more than mere conjecture. This error, as discussed above, is that while the neighbors' assertions may be "debatable," when they lack evidentiary support for them, they cannot be "fairly debatable." Thus, the decision becomes, by definition, arbitrary and capricious under the established definitions quoted above. The Council relied entirely upon the neighbors' speculations and canards, leading to a decision "without a rational basis, . . . based on [their] will, and not upon any course of reasoning and exercise of judgment, . . . made without adequate determining principles [and not] governed by . . . fixed rules or standards." The Planning Department, on the other hand, by utilizing the objective criteria of the Comprehensive Plan and Future Land Use Plan, concluded that the area has transformed over the years—this was the complaining residents' complaint—which is why the Comprehensive Plan

designated the lot as one to be rezoned to bring it in conformity with the adjoining lot and the surrounding neighborhood, including the bordering "office and institutional" designation. Thus, all the "fixed rules or standards" contained in The Comprehensive Plan support the request for rezoning, and the Court of Appeals erred in declining to examine the question.

4. The Court of Appeals erroneously concluded that the Petitioner raised the County's Comprehensive Plan as the legislative act of the County for the first time in his Reply Brief when it was a central pillar of the case at every level.

As the amended complaint filed June 26, 2017, (App. Pgs. 29-34) makes clear, the Petitioner made the County's failure to adhere to its Comprehensive Plan a central pillar of the case. See, for example paragraph 16 of the Complaint:

> Because the County **failed to comply with it Code of Ordinances, Article I, Section 1, 2**, when it failed to rezone the subject property in order to implement the goals of the Comprehensive Plan, the County's decision is, therefore, controlled by an error of law, and is arbitrary, irrational. And not supported by any rational or scientific reason. **Because of the refusal to rezone to conform to the legislative finding of the Comprehensive Plan**, the County's amendment and refusal to correct same must be overturned because it has no rational relationship to any legitimate interest of government **as expressed by the County in its governing ordinances**. **Instead of applying the controlling ordinances and he Comprehensive Plan, the Planning commission and the County Council accepted complaining citizens' unsupported allegations that residents of mobile homes are more likely than other residents to commit crimes, make noise, or present a danger to children.** (emphasis added)

In upholding the County's decision, the Special Referee spent a considerable amount of the Order under review analyzing the application of the Comprehensive Plan to the Petitioner's request. See Order under review at pages 11-23 of the Appendix. Even though the Special Referee ultimately came down on the County's side of the dispute, he summarized the conflict: ". . . the Plaintiff asserts that the County's decision to deny rezoning is based upon nothing but unsupported, pejorative speculation that reduces the decision to an arbitrary and capricious decision, and **that the decision conflicts with the County's express legislative decision in its Comprehensive Plan**." (R.O.A. pages 11-12, emphasis added)

Moreover, when Petitioner submitted the circuit court's Order for judicial review, his statement of issues on appeal, in all capitals, set forth:

> 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 SUPORTED BY ANY CREDIBLE EVIDENCE? (Brief at page 3, emphasis added) (App. page 370)

The Petitioner's Brief to the Court of Appeals devoted a separate argument to the County's failure to adhere to its own "legislative decision." Argument 1. B. is titled: "The County's decision was at variance with its legislative findings as expressed through its Comprehensive Plan and Future Land use Plan." (App. page 385) Therefore, Petitioner is at a loss to explain how the Court of Appeals concluded ". . . we hold Old's argument that the Comprehensive Plan is the relevant 'legislative act' that should 'not be interfered with by the courts' is not properly before this court because Olds raised it for the first time in his reply brief." (App. page 349) The Court of Appeals overlooked the central legal issue even though Appellant highlighted and addressed it. Had the Court afforded the parties an opportunity for oral argument, Petitioner could have drawn attention to the salient portions of the record, but either way, this record demonstrates that Opinion 2022-UP-402 is controlled by palpable errors of fact and law.

Conclusion

Based on the foregoing, Petitioner respectfully submits that the Court of Appeals departed from established precedent and failed to address the central issue on appeal. In the seminal zoning case, *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716(2000), this Court held zoning decisions are supposed to be rational, free from undue political influence. The Court of Appeals ignored the record, which demonstrates that Berkeley County, after careful deliberation, including

significant public participation, adopted its Comprehensive Plan and Future Land Use Map recognizing that the Petitioner's property is properly reclassified to R-3. Berkeley County Council abandoned its "rational development of land use, free from undue political influence" and made a decision based on nothing more than pejorative, unsupported speculations from a small, vocal group of citizens, violating the established precedent in this State, starting with *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999) and the cases following.

Respectfully submitted,

March 6, 2023

/s/ Thomas R. Goldstein_____
Thomas R. Goldstein, S. C. Bar # 2186
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
tgoldstein@cobblaw.net
Attorneys for the Plaintiff