THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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.

APPENDIX

February 28, 2023

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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 Tracking Number 2020-001118

Todd Olds, Appellant,

vs.

Berkeley County and Berkeley County Planning Commission, Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds,	)	
Plaintiff,	)	
	)	**ORDER ON MOTION FOR RECONSIDERATION**
vs.	)	
	)	
	)	
Berkeley County and Berkeley County Planning Commission,	)	
	)	
	)	
	)	
Defendants.	)	
	)	

This matter is before the Undersigned on Plaintiff's motion pursuant to South Carolina Rules of Civil Procedure 59 and 60 for reconsideration of its Order entered on May 12, 2020. In that Order the Undersigned, sitting as Special Referee, denied Plaintiff's appeal from the Defendant's refusal to rezone a 1.1-acre parcel of property at 751 Royle Road from R-2 (residential mobile home) to R-3 (commercial mobile home). I have carefully reviewed Plaintiff's motion, Defendant's memorandum in opposition to the motion, Plaintiff's reply to Defendant's opposition, and my original Order. I heard argument on July 10, 2020. For the reasons that follow I must deny Plaintiff's motion.

First, I agree with Plaintiff's logical arguments.[1] As I read the caselaw, in the zoning context arbitrary and capricious (or arbitrary and unreasonable as some decisions put it) means the same thing as not fairly debatable. In fact, the *modus tollens* syllogism works both ways because fairly debatable and not arbitrary and capricious mean the same thing when referring to judicial review of zoning legislation. Arbitrary and capricious, arbitrary and unreasonable, and not fairly debatable all mean the same thing in this context.

[1] I am heartened, though not surprised, that counsel knows the proper use of the oft-misused term, "begging the question."

"In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable." *Knowles v. City of Aiken*, 305 S.C. at 224, 407 S.E.2d at 642. "The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent on respondent to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." *Town of Scranton v. Willoughby*, 412 S.E.2d 424, 306 S.C. 421 (S.C. 1991) (per curiam). "The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision." *Rushing v. City of Greenville*, 265 S.C. 285, 217 S.E.2d 797 (S.C. 1975). Judicial review of a legislative decision – e.g., a request to alter a zoning classification – differs from review of a quasi-judicial decision – e.g., granting a variance – in that a legislative body is not required to take evidence or deliberate in a particular way, whereas an administrative body is expected to make evidence-based decisions in accordance with applicable statutory or regulatory standards. "An ordinance rezoning a particular piece of property, like an ordinance adopting a comprehensive zoning plan, is legislation, pure and simple. As such, it is entitled to the presumption of legislative validity. . . . Furthermore, to view the act of rezoning a single tract as a quasi-judicial act . . . would only invite countless challenges, many of which must proceed to the courts for a dispositive adjudication." *Hampton v. Richland County*, 292 S.C. 500, 357 S.E.2d 463 (S.C. App. 1986).

Plaintiff makes a valid point that everything is debatable, and the dispositive question is whether the County Council's decision is *fairly* debatable. Plaintiff's well-articulated frustration in this case, wherein his rezoning request was consistent with the County's Comprehensive Plan and endorsed by the County's planning staff, is reminiscent of Justice Hearn's exasperation in *Historic Charleston Found. v. City of Charleston*, 400 S.C. 181, 734 S.E.2d 306 (S.C. 2012):

"Thus, while it may be fairly debatable whether a large building is necessary for the continued development of Upper King, it is clear that a 105–foot building on this site would not be in accord with the Plan's requirement of deference to historical structures and respect for the skyline. I certainly am mindful of our role as a court and the admonition that we not become city planners, as well as the high burden a challenger must meet. In purporting to find the ordinance lawful even if it is spot zoning, the majority hides behind this standard and simply writes that we must 'keep [ ] in mind the particular circumstances of the case.' Yet this is exactly what the majority avoids doing, opting instead to allow the City to blatantly ignore its own duly adopted plan." But Justice Hearn wrote in dissent and the majority of the Court found that the City had acted within its rights albeit contrary to its comprehensive plan.

To be sure, substantial evidence supported Plaintiff's application to re-zone 751 Royle Road and some of the reasons that citizens advanced in opposition to the request were canards. However, as I stated in my original Order it would be unfair to judge a legislative decision by the least persuasive arguments advanced in support of it. Some of those who spoke against the measure expressed genuine and rational concerns about the negative effects that rezoning the property would have. Councilman Jack Schurlknight said, "My concern is about traffic, safety and children".... "That's a big concern right there." He also said, "It comes to a tipping point to where you know you got carrying capacity on the road. You got to look at the safety. And that's the direction I'm coming from. Totally." Council Chairman William Peagler said, "I don't hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residents and children." Considering the record as a whole, I am compelled to conclude that it is at least fairly debatable whether increasing the density of mobile

homes on Plaintiff's parcel would increase traffic congestion, endanger children, or lower property values -- particularly if this became a precedent for future similar requests in that area.

With sincere respect for Mr. Olds and the arguments of his able counsel, for the reasons stated above I must deny the motion for reconsideration.

M. DAWES COOKE, JR.
Special Referee

July 22, 2020

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds, Plaintiff,	)	
vs.	)	**ORDER**
Berkeley County and Berkeley County Planning Commission,	)	
Defendants.	)	

This matter came before me for hearing as Special Referee by consent of the parties on December 10, 2019.

Present at the hearing were Thomas Goldstein, Esq. of the Charleston County Bar, attorney for the Plaintiff, and his client Todd Olds; John S. West, Esq. and John O. Williams, II, Esq., each of the Berkeley County Bar, attorneys for the Defendants.

The parties have each submitted substantial briefs as supplemented and a stipulated set of exhibits. I have carefully examined and considered these filings as well as the arguments of counsel.

THE ISSUE FOR DETERMINATION

The matter began on January 24, 2017, when the Plaintiff applied to the Berkeley County Council to rezone a 1.1-acre parcel at 751 Royle Road from R-2 (residential mobile home) to R-3 (commercial mobile home) to match the zoning on his adjoining parcel at 749 Royle Road. (T.M.S. Numbers 233-09-02-046 and 233-09-02-007). At the time of Plaintiff's application, he had fifteen

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mobile homes on 749 Royle Road, the R-3 lot, and three[1] on 751 Royle Road. Plaintiff seeks to have both lots zoned R-3, which, if approved, would allow him to combine the two lots and have a total of twenty-seven mobile homes on them.

The County Planning Department staff recommended approval of the rezoning request "as it provides an opportunity for the development of a diversity of housing options, which align with the Future Land Use Plan and are compatible in the context of the area concerned." The Planning Committee, after holding a public hearing, voted to recommend denial of the request. County Council subsequently voted to deny the request. Plaintiff then filed this suit challenging the legality of the County's refusal to rezone 751 Royle Road.

Plaintiff advances four arguments: First, that the County's refusal to rezone 751 Royle Road to R-3 was arbitrary and unreasonable or capricious and contrary to law; second, that it violated his constitutional right to substantive due process; third, that it violated his constitutional right to equal protection; and fourth, that it violated his constitutional right to procedural due process. The parties have agreed that the only issue that is presently ripe for determination is the Plaintiff's first argument, whether the County's refusal to rezone his property was arbitrary and capricious and contrary to law.[2]

[1] The Record at some places says that he currently has three homes on the subject parcel. Elsewhere it says that he has two. The difference is immaterial for purposes of the analysis undertaken here.

[2] It appears that this issue implicates at least substantive due process. "The governing bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon these matters than are the courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens." *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (S.C. Ct. App. 2009). Thus, a finding as to the validity of the County's refusal to rezone Plaintiff's property requires a determination of whether it violates Plaintiff's constitutional rights. Nevertheless, this Order should not be construed as deciding any constitutional issues beyond what is specifically necessary to determine whether the County's action was arbitrary and capricious and contrary to law.

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THE RECORD

The parties agree upon the procedural record before me. They have stipulated to the accuracy, propriety, and completeness of the record for my consideration, which they will file with the Clerk of Court and is incorporated herein by reference. The record embodies and constitutes the salient facts upon which I intend to and do rely in issuing my order and judgment below.

In summary, the record reflects that by application presented to the Berkeley County Planning Department, the Plaintiff/applicant sought to rezone a parcel of land in Berkeley County, South Carolina bearing TMS #233-09-02-046, from an R-2 to an R-3 zoning designation. He did not seek a special exception or variance, but rather sought to rezone the parcel. A successful rezoning would enable the owner to increase the total number of mobile homes on both lots to twenty-seven.

At the time of his application there were two (or three) mobile homes on the subject parcel, each legally non-conforming. Berkeley County Planning Department staff reviewed Appellant's application and recommended that the rezoning request be approved. At a Planning Commission public hearing held on February 28, 2017, staff Planner Ty Adler introduced and explained the application for change in zoning classification. He explained that the applicant intended to rezone 751 Royle Road to R-3 and then combine it with the adjacent 749 Royle Road, which was already zoned R-3. Mr. Adler stated that the proposal aligned with the Comprehensive Plan and would enhance diversity in housing. For these reasons staff recommended approval of the request. Plaintiff/applicant spoke in favor of the request. Several neighboring property owners spoke against the requested rezoning. No member of the general public spoke in favor of the request. The comments are summarized below along with comments later presented to County Council. After hearing from the public and considering the merits of the application for rezoning, the

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Planning Commission voted unanimously to recommend to the County Council that it deny the rezoning request.

The matter then continued according to the ordinary procedure and was brought before the County's Land Use & Economic Development Committee on March 13, 2017. Planning staff reported on the status of the application. In her presentation before the Committee, Planning and Zoning Director Alison Simmons testified as follows:

> "... Planning Commission recommended denial in a unanimous vote after reviewing the requested change and hearing from many community stakeholders in opposition to the request. Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area and the diminution of property values and quality of life..."

Following receipt of input from the public and discussion by members of the committee, the Land Use & Economic Development Committee voted 6-2 to deny the rezoning request.

The matter was then presented to the full County Council for action on the proposed ordinance to rezone the subject property at its March 27, 2017 meeting. A Planning staff member again introduced the application and explained it. Plaintiff/applicant spoke in favor of his application. Members of the public appeared and expressed a variety of concerns in the "Public Discussion" period of the hearing, similar to the concerns previously voiced to the Planning Commission. When the question of consideration of first reading on the proposed ordinance to rezone the subject property came for a vote by County Council, Council voted 5-2 to deny the rezoning request.

As reflected in the summary minutes and the video recordings of the proceedings, throughout consideration of the rezoning proposal, opinions for and against the proposal were voiced and for a variety of reasons.

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Excerpts of testimony and comments from the video recording of the February 28 and March 27 meetings include *inter alia*:

- Plaintiff/applicant spoke in support of his application, He stated that he intended to put a quality mobile home park on the property. He did not intend to put "trash" there. He would place security lighting, require vinyl siding, and improve the access road. He said that he intended to own the mobile homes in the park except those that are already there. He stated that this would not be a "thug park." He would "vet" the people applying to live there and would have strict leases. He would allow the Sheriff to have full access. He stated that there is no crime in his North Charleston mobile home park. He intended this to be a quality park and provide affordable housing in accordance with the County's Comprehensive Plan.

Several nearby residents spoke in opposition to the application. Among the statements that they made included the following:

- There is an overabundance of mobile homes in the area. the property is too small for twenty-four mobile homes. He is concerned about children playing in the road.
- The area is saturated with mobile home parks. He is concerned about drug problems, traffic, and children having no place to play.
- He does not want lights and trailers. Kids have come onto his property from the existing mobile home park and gotten into his swimming pool.
- She has had problems with kids in the mobile home park partying and coming across the fence onto her property.
- His property will not appraise for what it is worth because of the mobile homes nearby. Animals are neglected at the park. His wife stated that they have smelled meth being cooked there.
- "In a couple of those (pictures) you will see it is high traffic on this road at certain times of day"... "And yes, I can say that I have put my house up for sale twice and was told by the real estate agent that because of the trailers next door and around in my area that the value of my real estate, I could not get what it would really be worth because it has depreciated" ... "There is a two and a half mile stretch from 17A to 78. It takes approximately twenty to twenty-two minutes to travel both ways or one way in heavy traffic time. We are posed with a major problem with the safety factor of those emergency vehicles going to and from. One person being trapped in a fire, losing one minute can cost him his life".
- Residents have been coming to the Planning Commission for years to protest applications to add more mobile homes, and the Planning Commission has consistently denied those applications.

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- "From the four way stop to my house is probably 800 yards, roughly, and it backs up every day. And I've got video standing on my front porch where they're stopped in the road waiting to get through."
- "Traffic and everything on there around Sangaree School. You can't get there in the afternoons or in the mornings for people dropping or picking up kids there. They even park in the highway. You got to sit there and wait for them to get through before you can get through that intersection there around the school. Y'all need to come around there in the afternoons and see what kind of traffic we got on the road."
- "My concern is about traffic, safety and children"... "That's a big concern right there."..."It comes to a tipping point to where you know you got carrying capacity on the road. You got to look at the safety. And that's the direction I'm coming from. Totally." *Councilman Jack Schurlknight.* He also stated that he has been down Royle Road many times. He has seen a "lot of stuff" going on in the area. It does devalue the property.
- "I don't hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residents and children." *Supervisor and Chairman of County Council William Peagler.*
- One resident stated that he had counted thirteen mobile home parks on Royle Road, containing 316 mobile homes. He also stated that eleven applications to add mobile homes had been denied since 2002. He stated that he had put his house up for sale twice but his real estate agent told him that he can't get what the house is worth because of the mobile homes next to his property. He also complained about constant traffic and drug activity in the area. He complained about traffic safety, saying that he had seen someone hit by a car.
- One resident presented a petition signed by other neighbors opposing the application.

ANALYSIS AND FINDINGS OF FACT

A. Standard of Review

Though the parties emphasize different factors for consideration, they agree on the basic standards of review, which are well established: "Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and capricious. *Byrd, et al. v. City of North Augusta,* 261 S.C. 591, 201 S.E.2d 744 (1974)." *Knowles v. City of Aiken,* 305 S.C. 219, 407 S.E.2d 639 (S.C. 1991). "The governing

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bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon these matters than are the courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens." *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (S.C. Ct. App. 2009). "'Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action.' *Knowles v. City of Aiken,* 305 S.C. 219, 222, 407 S.E.2d 639, 642 (1991). 'In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable.' Id. at 224, 407 S.E.2d at 642. '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.' *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir.1995) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 187–88, 48 S.Ct. 447, 72 L.Ed. 842 (1928))." *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (S.C. 2013). A legislative zoning decision should not be overturned so long as the decision is "fairly debatable." *Rushing v. City of Greenville*, 265 S.C. 285, 217 S.E.2d 797 (1975). "[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." *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004).

The essential difference between the parties' legal positions is that the County asserts that the Council's March 27, 2017 vote on the Plaintiff's request for rezoning is a rational legislative action of Berkeley County government to which the Court must yield, while 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

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the County's express legislative decision in its Comprehensive Plan. The Plaintiff asserts that the County's political decision to deny the rezoning application under these circumstances reduces the decision to an arbitrary and capricious action that conflicts with the County's fact-based, rational legislative expression on Plaintiff's parcel.

B. Was Berkeley County's Action Arbitrary and Capricious Because it Was Based on Unsupported, Pejorative Speculation?

Plaintiff contends that the decision of Berkeley County Council to deny his rezoning request was arbitrary and capricious or unreasonable because it was based on nothing but unsupported, pejorative speculation that renders its decision an arbitrary and capricious one. In support of his contention Plaintiff relies on and cites the cases of *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) and *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000) as well as *Purdy v. Moise*, 223 S.C. 298, 75 S.E.2d 605 (1953) and *Wyndham Enterprises, Inc. v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012), among others.

Defendants rely on what they contend to be well-settled South Carolina law that provides that rezoning decisions are presumptively valid, and a property owner bears the burden of proving otherwise. *Bear Enterprises. v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). They contend that the decision not to rezone Plaintiff's property was at least fairly debatable, notwithstanding the intemperate and unsupported nature of some of the public comments in favor of the decision. In support of their position Defendants further cite *Lenardis v. City of Greenville*, 316 S.C. 471, 450 S.E.2d 597 (Ct. App. 1994) (propriety of city's decision in refusing to rezone property from office use to commercial use was not so unreasonable as to impair or destroy property owner's constitutional rights; owner bought property as speculative investment

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with full knowledge of existing zoning and surrounding commercial development, and vast majority of surrounding property in city was residential); *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), *as amended* (May 4, 2009) (City's denial of application to rezone property consisting of house on corner lot from residential to limited commercial use was fairly debatable and not so unreasonable as to impair or destroy property owner's constitutional rights, even though other similarly situated properties on one of two bordering streets were zoned for limited commercial use). Defendants further posit that to overcome the presumption of validity there must be an absence of any evidence supporting the legislative action of County Council. *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991). In *Willoughby* the court noted that the zoning ordinance was enacted "for the purpose of promoting the health, safety, morals, and general welfare of the community." *Id.* at 422, 412 S.E.2d at 425. Defendants contend that is also the case here.

Defendants also emphasize that Berkeley County Council has been vested with the following powers by state law:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties. *S.C. Code Ann. § 4-9-25.*

With respect to its zoning ordinances, Defendants contend that Berkeley County Council must abide by the following statutory mandate:

> (A) Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health,

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safety, morals, convenience, order, appearance, prosperity, and general welfare. *S.C. Code Ann. § 6-29-710.*

Defendants further point out that Berkeley County has adopted a county-wide zoning ordinance. It is known as the Berkeley County Zoning and Development Standards Ordinance, ("Zoning Ordinance") *effective August 28, 2001.* All purposes of the Zoning Ordinance are stated in Article 1.2. Defendants argue that there are many stated purposes, which are not mutually exclusive. They cite the "Purpose and Authority" article, which reads as follows:

ARTICLE 1. - PURPOSE AND AUTHORITY

1.1. - Authority.

This ordinance is adopted pursuant to the statutory authority conferred by S.C. Code 1976, § 6-29-710 et seq., as amended.

1.2. - Purpose.

It is the purpose of this ordinance to:

A. Implement the goals and policies outlined in the Berkeley County comprehensive plan;

B. Provide for adequate light, air, and open space;

C. Prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;

D. Facilitate the creation of a convenient, attractive, and harmonious community; to protect and preserve scenic, historic, or ecologically sensitive areas;

E. Regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, and public activities;

F. Facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, and disaster evacuation;

G. Distribution of population and traffic that will tend to create conditions favorable to health, safety, convenience, appearance, prosperity, morals, order, and the general welfare of the county.

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Defendants claim that the legislative actions of the Planning Commission, the Land Use & Economic Development Committee and the full County Council to retain the previously established R-2 zoning designation on the subject property are consistent with several of the purposes of the Zoning Ordinance.

Defendants also argue that it is significant that the matter before the court is not an appeal from the Board of Zoning Appeals, ("BZA"), which by county ordinance prescribes the duties and requirements of the BZA[3]. Defendants assert that the BZA is a quasi-judicial body not answerable to the voters. This court should distinguish the roles, functions and imperatives placed upon the BZA and that of County Council and the presumptions granted by law to the decisions of County Council. In other words, Defendants contend that County Council is not required, nor are individual members of Council required to announce the reasons for their decisions and actions in open session or in writing with associated findings and reasons. This court must, in Defendants' view, practice judicial restraint and not supplant its judgment for the local government's legislative judgment. *Lenardis, et al., supra.*

Defendants acknowledge that the County Planning staff here found that the requested rezoning was consistent with the Comprehensive Plan, but Defendants contend that the elected officials, possessed with their legislative authority, determined that staff's recommendation, although a proper consideration, was outweighed by other considerations rooted in public safety, health, and welfare, among other proper purposes. Defendants argue that the mere fact that the Planning Commission and the County Council reached a decision different from that

[3] Berkeley County Zoning Ordinance 21.6. - Decisions of the board of zoning appeals. All final decisions and orders of the board must be in writing and be permanently filed as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board, which must be delivered to parties of interest by certified mail.

recommended by Planning staff does not render the final decision arbitrary and capricious. The decision was for the Council to make, after due deliberations and taking into account all of the facts. *Greb v. Bd. of Comm'rs for Klamath County*, 32 Or. App. 39, 573 P.2d 733 (1978) (each county governing body is required to retain responsibility for land use planning within its county, and is therefore vested with authority to make county land use decisions; county board of commissioners is not bound by recommendations of county planning commission even if supported by substantial evidence); *Adams v. City of Richmond*, 340 S.W.2d 204 (Ky. 1960) (zoning is vested by statute in the city legislative body, and it had power to override or reject a recommendation of the zoning commission which merely makes recommendations).

I agree that there is a distinction between judicial appellate review of an administrative decision and judicial scrutiny of a legislative decision. A legislative body is not expected to make an evidentiary record or to articulate the bases for its decisions as would stand up to judicial appellate review. Rather – as the above-cited caselaw holds – legislative actions must be upheld if there is even a fairly debatable basis to support them.

I find that the Plaintiff made a compelling argument to the County in favor of his rezoning application and the Planning staff agreed with his argument. Plaintiff credibly promised to improve the overall character of the properties, which already contain mobile homes. The number of mobile homes that he proposed to add was very small compared to the number of mobile homes already on Royle Road. Plaintiff correctly pointed out that his proposal to increase availability of affordable housing was consistent with the County's Comprehensive Plan. On the other hand, not all of the reasons advanced in opposition to Plaintiff's application can be labeled unsupported, pejorative speculation. To be sure, some of the public comments made in opposition to Plaintiff's application were intemperate and unsupported by empirical evidence. Yet, legislative action or

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inaction must not be judged by the least compelling arguments advanced to support it. Plaintiff himself told the Planning Commission that his proposed mobile home park would not be "trash" or a "thug park." It would be unfair to judge the County's legislative decision because of public comments – however pejorative, uninformed, and speculative – that were made in that same vein. Further, neighbors' fears about increased housing density and its attendant aggravation of traffic congestion and increased burden on infrastructure are fairly debatable. Certainly Plaintiff's proposed addition to these social problems would be minimal in comparison to the existing burdens. However, evidence in the record suggests that the residents of that area had for years consistently opposed more mobile homes and the County had consistently denied applications for them. Arguably the County would be hard-pressed to deny future similar rezoning applications if it granted Plaintiff's application, so Council could reasonably believe that approving Plaintiff's application would lead them down a slippery slope.

My conclusion is best summarized by the following statement: "While the landowner here ... do[es] not embrace this choice of zoning, other residents in close proximity applaud this zoning. While the landowner may not agree and may be able to convince this Court not to agree with the City's zoning choice, that is not the issue before [me]. [I] cannot insinuate [my] judgment into a review of the City's decision. Rather, [I] must leave the City's decision undisturbed if the propriety of that decision is even 'fairly debatable.' *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *Hampton v. Richland County*, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct.App.1987), cert. denied, 296 S.C. 72, 370 S.E.2d 714 (1988)." *Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E.2d 639 (S.C. 1991). Based on the foregoing considerations, I find that Plaintiff has not met his considerable burden of proving that the Defendants' legislative action was arbitrary and capricious because it was based on factually unsupported, pejorative public opinion.

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C. Was Berkeley County's Action Arbitrary and Capricious Because it Violates the County's Comprehensive Plan?

I find more troubling Plaintiff's argument that the County's refusal to rezone his property to R-3 is arbitrary and capricious because it conflicts with the County's legislatively-enacted Comprehensive Plan. Plaintiff argues here, as he did before the Planning Commission and before County Council, that his application should be approved because it supports the goals expressed in the Comprehensive Plan and was in fact specifically provided for in the Plan. The Planning Commission staff found this argument compelling and recommended approval of the application on this basis. Plaintiff argues that the Comprehensive Plan was the product of extensive study, public input, and legislative deliberation. The Plan was adopted by ordinance, so it is entitled to at least as much judicial deference as the legislative decision that Plaintiff now challenges. Plaintiff contends that Council's refusal to rezone his property was arbitrary, capricious, and unreasonable not only because it was based on unsupported and pejorative opposition by nearby residents, but because that opposition was contrary to law as embodied in the Comprehensive Plan. I found this argument sufficiently troubling that I asked the parties to brief specifically the question whether the Comprehensive Plan has the force of law.

By way of counter to Plaintiff's contention that the Comprehensive Plan has the force of law, Defendants argue that while the Comprehensive Plan is undeniably the creation and product of a lawful process, the plan itself is not law. Defendants call attention to the words of the Plan. Specifically, Defendants cite the Introduction, which states in pertinent part:

> Since the passage of Berkeley County's 2004 Comprehensive Plan Update, continued growth and development has led to a changing set of issues, goals and needs for the jurisdiction. The 2010 Comprehensive Plan is a document intended to both identify the important positive attributes and components which continue to define Berkeley County, while *guiding* the growth and development of Berkeley County for the next fifteen to twenty years. It is, in essence, a new *blueprint* for the County's future.

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(emphasis added). Defendants further reference the Purpose of the Plan, which states in pertinent part:

> The purpose of the Plan is to provide a *snapshot* of where the County is currently, and to set forth *goals for future land use and development* with specific policies and *recommended strategies* for achieving these goals. The plan will *guide decision-makers when making decisions, policies and laws regarding the future development of land, provision of essential community facilities, and preservation of natural and cultural resources*. It is intended to generate local pride and enthusiasm about the future of the community, thereby ensuring that citizens are involved with the implementation of the Plan.
>
> The *goals* in this Plan do not supersede those adopted by individual jurisdictions, however identifies areas where coordinated planning should be done on inter-jurisdictional issues that affect both the County and its municipalities.
>
> The result is a concise, user-friendly document intended to operate in conjunction with adopted and amended zoning and land use regulations, in that issues identified in the Plan may be addressed through the development of suitable regulations and ordinances consistent with the *policies* identified in the Comprehensive Plan. The purpose of the 2010 Comprehensive Plan is to serve as a *mechanism for which future land use and development decisions can be made that will help shape the future of Berkeley County*.

(emphasis added). Defendants also highlight the Vision of the Plan, which states in pertinent part:

> Throughout the planning process, Planning Commission and citizen input has consistently come back to the same *basic ideas or principles* of how Berkeley County is envisioned. This includes concerns over issues such as rapid growth, adequate infrastructure and quality of life; and hopes such as better planning, more jobs and preservation.
>
> Based on the information gathered, the following overall vision has been expressed and embraced:
>
> Berkeley County is a vibrant community that embraces its history while promoting growth and development. The County will continue to promote sustainability and livability by implementing the following *five guiding principles* of the adopted comprehensive plan:
>
> - Protect and promote distinctive, diverse communities;
> - Manage infrastructure systems effectively and expand them efficiently;
> - Respect and enhance historical and natural resources and expand their public accessibility;

- Make recreational opportunities--- both active and passive---available county-wide; and
- Draft a clear, fair plan to be implemented through simplified costs and streamlined processes.

(emphasis added).

Defendants also point to the Plan Implementation section of the Plan, which states in pertinent part:

> The Comprehensive Plan *is part of an ongoing process... the policies in this Plan are intended to be building blocks* for future planning efforts and land development decisions.

(emphasis added).

Defendants further cite state law on the subject of a comprehensive plan. They claim that a plan is intended to be a guide to decision-makers. They call specific attention to Title 6, Chapter 7 of the South Carolina Code of Laws, under the heading *Planning by Local Governments* which provides as follows:

> The intent of this chapter is to enable municipalities and counties acting individually or in concert to preserve and enhance their present advantages, to overcome their present handicaps, and to prevent or minimize such future problems as may be foreseen. To accomplish this intent local governments are *encouraged to plan for future development*; to prepare, adopt, and from time to time revise, a *comprehensive plan to guide future local development*; and to participate in a regional planning organization to coordinate local planning and development with that of the surrounding region. As aids in the implementation of the comprehensive plan local governments are encouraged to adopt and enforce appropriate land use controls, and cooperate with other governmental authorities. (emphasis added).
>
> The provisions of this chapter are declared to be necessary for the promotion, protection, and improvement of the public health, safety, comfort, good order, appearance, convenience, prosperity, morals, and general welfare.
>
> Any county or municipality may, but shall not be required to, exercise any of the powers granted by this chapter. Whenever such a governing authority shall elect to exercise any of the powers granted by this chapter, such powers shall be exercised in the manner hereinafter prescribed. *S.C. Code Ann. § 6-7-10. Declaration of Purpose.*

(emphasis added).

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Within Title 6, Chapter 29 of the South Carolina Code of Laws, *The South Carolina Local Government Comprehensive Planning Enabling Act of 1994* are found the following:

> (A) The local planning commission shall develop and maintain a planning process which will result in the systematic preparation and continual re-evaluation and updating of those elements considered critical, necessary, and desirable *to guide the development and redevelopment of its area of jurisdiction. S.C. Code Ann. § 6-29-510. Planning process; elements; comprehensive plan.* (emphasis added).

and

> (A) Zoning ordinances must be for the general purposes of *guiding development* in accordance with existing and future needs and promoting the *public health, safety, morals, convenience, order, appearance, prosperity, and general welfare.* To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable:
>
> (1) to provide for adequate light, air, and open space;
>
> (2) to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;
>
> (3) to facilitate the creation of a convenient, attractive, and harmonious community;
>
> (4) to protect and preserve scenic, historic, or ecologically sensitive areas;
>
> (5) to regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes;
>
> (6) to facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements. "Other public requirements" which the local governing body intends to address by a particular ordinance or action must be specified in the preamble or some other part of the ordinance or action;
>
> (7) to secure safety from fire, flood, and other dangers; and
>
> (8) to further the public welfare in any other regard specified by a local governing body.

S.C. Code Ann. §6-29-710 (emphasis added).

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Not all of the text cited above is relevant to the inquiry here. Some of the cited subjective, aspirational language appears to be explanation of the considerations that went into the development of the Plan, not what the Plan would mean after it was legislatively adopted. Nevertheless, nothing in the Comprehensive Plan suggests that it was intended to supplant the County's zoning ordinance or preempt the legislative zoning authority vested in County Council. The Plan includes five "Guiding Principles", each of which is supported by various "Goals and Policies." The First Guiding Principle is, "Berkeley County will protect and promote the existence of distinctive and diverse, sustainable communities within its boundaries." In adopting the Plan, County Council did not declare that the Future Land Use Map would dictate all future zoning classifications. In fact, the Plan states (at p. 10) that "A summary of modifications proposed for the adopted Future Land Use Map is provided on subsequent pages, followed by a Future Land Use Map that has been revised *to illustrate these modifications* and is proposed for adoption." (Emphasis added).

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 requires counties to follow specific procedures when they propose to build infrastructure that conflicts with their comprehensive plans. The statute requires any new structure, use or project be compatible with the adopted plan. Any proposal found to be in conflict with the plan must undergo an intensive statutory process to include required comments and findings by the Planning Commission prior to approval. S.C. Code Ann. § 6-29-540. This process applies to county infrastructure improvements. No such provision exists with regard to zoning decisions for private property, either in state law or under Berkeley County ordinances. This omission strongly suggests that the Comprehensive Plan is not intended to dictate the County's zoning decisions for private property.

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The Comprehensive Plan does have the force of law, since it was formally adopted by Ordinance. Nevertheless, nothing in the Plan suggests that it was intended to dictate future zoning classifications for specific parcels of property. Indeed, the Plan itself is subject to review and revision every five years, so it cannot have been intended to decide all future zoning questions. 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.

CONCLUSIONS OF LAW

I conclude as a matter of law as follows:

1. This court has jurisdiction over the parties and the subject matter;
2. Venue is proper;
3. Plaintiff has failed to meet his burden of proving that the legislative decision of County Council in denying his rezoning request was arbitrary and capricious or unreasonable;
4. While members of County Council are not required to announce the reasons for their votes, and the standards applicable to a vote by County Council are not governed by the same requirements as the BZA, there is sufficient evidence in the record of expressed concerns by members of Council about traffic, safety, and quality of life which are legitimate and statutorily sanctioned legislative considerations;
5. While there are statements in the record made by members of the public in open session which were highly charged and emotionally based, there is no evidence in the record suggesting that Council adopted, embraced, approved, or sanctioned those comments or that the comments formed a basis for its vote;

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6. There are statements in the record by members of the public in open session which are based on their personal observations and experiences and are directed to traffic, safety and quality of life concerns;
7. The Comprehensive Plan, while legislatively adopted, does not supplant the County zoning ordinances or preempt County Council's future legislative zoning decisions;
8. The matter before County Council was fairly debatable and was fairly debated;
9. County Council's decision to deny Plaintiff's rezoning request was and is a proper exercise of its legislative prerogative;
10. The legislative decision by public vote of County Council should not be upset or set aside; and
11. The parties have agreed that the Plaintiff's constitutional arguments are not before the undersigned for decision. Accordingly, I make no findings as to any constitutional issue, unless and except to the extent that constitutional issues are necessarily implicated in finding that County Council's legislative decision was not arbitrary or capricious.

ORDER

Based on the record before me, which is ample, complete and proper, and the arguments of counsel, it is ordered, adjudged and decreed that Plaintiff's appeal, be and the same hereby is DENIED; provided, however, that I make no ruling on Plaintiff's constitutional claims except as stated above.

M. DAWES COOKE, JR.
Special Referee

May 5, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088

Todd Olds, Plaintiff, vs. Berkeley County, Berkeley County Planning Commission, Defendants.	)	CONSENT ORDER OF REFERENCE

Pursuant to § 15-31-150, S. C. Code, ann. and Rule 53 of the South Carolina Rules of Civil Procedure, the parties have consented to a reference of this case to M. Dawes M. Cooke, Jr., who shall have all the powers of the Circuit Court to make findings of fact and conclusions of law and enter a Final Order with any appeal to the South Carolina Court of Appeals or the South Carolina Supreme Court as provided by South Carolina law.

I consent:

s/Thomas R. Goldstein
S.C. Bar # 2186
BELK, COBB, INFINGER & GOLDSTEIN, PA
P.O. Box 71121
North Charleston, SC 29415
843-554-4291
tgoldstein@cobblaw.net
Attorneys for the Plaintiff

I consent:

s/ John S. West
S.C. Bar # 6035
WEST LAW FIRM, PA
207 Carolina Avenue
Moncks Corner, SC 29461
843-761-5626
jwestlaw@homesc.com
Attorneys for Defendants

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017 CP-08-01088

Todd Olds — PLAINTIFF(S)

Berkeley County — DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

2018 OCT -2 PM 1:16
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case Motion

Additional Information for the Clerk: ~~Request~~ for SUmmary Judgement is denied. There are Material issues of fact. DS

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2112
Judge Code

Sept. 19, 2018
Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**SUMMONS**
	)	(Jury Trial—Denial Substantive Due Process)
Berkeley County, Berkeley County Planning Commission,	)	
	)	
Defendants.	)	
	)	

FILED
2017 JUN 26 PM 4:36
CLERK OF COURT
BERKELEY COUNTY, S.C.

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you; and to serve a copy of your Answer to the said Complaint upon the subscribers at their offices at 2344 Cosgrove Avenue, Post Office Box 71121, Charleston, South Carolina, 29415-1121 within thirty (30) days after the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN FURTHER NOTICE that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, exclusive of the day of such service, judgment by default will be entered against you for the relief demanded in the Complaint.

June 21, 2017

Thomas R. Goldstein, #2186
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 fax
ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds,	)	
Plaintiff,	)	
vs.	)	**AMENDED COMPLAINT**
	)	(Jury Trial Demanded—Substantive Due Process)
Berkeley County, Berkeley County Planning Commission,	)	
Defendants.	)	

VB FILED
2017 JUN 26 PM 4:36
BERKELEY COUNTY, S.C.
CLERK OF COURT

The Plaintiff above named, complaining of the Defendants above named, alleges and says as follows:

1. The Plaintiff is a citizen and resident of the County of Charleston, South Carolina and owns an interest in the two parcels of real property involved in this action, which are located in Berkeley County.

2. The Defendant, Berkeley County, a county governmental entity organized and existing pursuant to the laws of the State of South Carolina, existing entirely in Berkeley County, State of South Carolina.

3. The Defendant, Berkeley County Planning Commission, is an agency of Berkeley County, organized and existing pursuant to the Local Comprehensive Planning Act of 1994, 6-29-10, *et. seq.* and has the duties proscribed by South Carolina law pursuant to § 6-29-710, S. C. Code Ann.

4. The real property involved is located on Royle Road, which is located in Berkeley County.

5. The Court has jurisdiction over the parties hereto and the subject matter herein in accordance with § 6-29-760. S. C. Code, ann.

6. This action is, in part, an appeal from a decision of the Berkley County Council, which voted 7-2 on Monday, March 27, 2017, to disallow the rezoning of the plaintiff's parcel

on Royle Road even though the County Planning Department Staff recommend that the request for rezoning be granted in order to bring the parcel in conformity with the County's future land use map and to be consistent with the County's Comprehensive Plan.

7. On January 27, 2017, the plaintiff filed a request for rezoning for a 1.29 acre parcel of land known as tax map # 233-09-02-046, Royle Road, near Farmington Road and Interstate 26. Plaintiff requested that the parcel be rezoned from R-2 (mobile home residential) to R-3 (mobile home commercial) to be in conformity with the zoning on the adjoining parcel, over which plaintiff also owns an executory interest, and to be consistent with Berkeley County's Future Land Use Map and its Comprehensive Plan. (There are currently 13 mobile homes on the adjoining parcel as allowed by R-3 zoning, and 2 mobile homes on the 1.29 acre parcel of land as legal, non-conforming uses.)

8. After filing the request for rezoning, the Berkeley County Planning Commission staff conducted a site visit and investigated the facts and circumstances surrounding the application. After the staff of the Berkeley County Planning Department completed its investigation, it prepared a report recommending approval of the request in order to bring the parcel in conformity with the surrounding zoning and to be consistent with the County's Future Land Use Map and the County's Comprehensive Plan:

> 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 to the areas 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 and 233-09-02-007 will be combined and recorded prior to third reading at County Council.

9. On February 28, 2017, the Planning Commission heard public comments on the request for rezoning and a number of residents appeared and spoke against the rezoning stating that allowing additional mobile homes in the area would lead to crime, drug use, threats to children, noise, and increased traffic. The residents asserted that it is well known that people residing in mobile homes are less likely to be law abiding citizens and more likely to engage in illegal drug use and commit crimes.

10. After listening to the complaints of neighbors about the difference in quality of persons who reside in mobile homes, the Planning Commission voted unanimously to

recommend to County Council that it deny the request based on the concerns of members of the public.

11. On Monday, March 27, 2017, the same members of the public appeared before County Council and made the same arguments to County Council that persons residing in mobile homes are more likely to use illegal drugs, commit crimes, create noise, and constitute a danger to children. The County Council voted 7 – 2 to deny the request stating that the decision is based on the concerns of the members of the public who showed up and made unsubstantiated allegations against people who live in mobile homes.

12. The decision of the Planning Commission and County Council is controlled by a clear error of law and based upon irrational, arbitrary conclusions based on unsupported prejudice that persons who live in mobile homes present a danger to the community.

13. The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 requires that Berkeley County prepare and adopt "a planning process which will result in the systematic preparation and continual re-evaluation and updating of those elements considered critical, necessary, and desirable to guide the development and redevelopment of its area of jurisdiction." § 6-29-510(A) In accordance with this directive, Berkeley County prepared and adopted a Comprehensive Plan that calls for the plaintiff's tract to be zoned R-3. Plaintiff's application for rezoning was to bring his parcel into zoning conformity with the adjoining parcels and to conform to the designation of the area as R-3 by the County's Comprehensive Plan.

14. The Berkeley County Comprehensive Plan calls for the plaintiff's tract to be zoned RR-4, which the governing authority is required to implement. § 6-29-720(A): "The zoning ordinance shall create zoning districts of such numbers have, and size as the governing authority determines to be best suited to carry out the purposes of this chapter." As determined by the Berkeley County Comprehensive Plan and Future Land Use Map, the County determined that the plaintiff's parcel is "best suited" as R-3 as that designation is consisted with the County's plan and consistent with the surrounding uses.

15. Rather than adhere to Berkeley County's Comprehensive Plan, the Planning Commission and the County Council voted to deny plaintiff's request based on its view that plaintiff's application is "not what the residents of Royle Road want." The residents of Royle

Road characterized the residents of mobile homes as being drug users, criminals, and a danger to the community despite such allegations being without any evidentiary support.

16. Because the County failed to comply with its 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 findings 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 the Comprehensive Plan, the Planning Commission and the County Council accepted complaining citizens'' unsupported allegations that that residents of mobile homes are more likely than other residents to commit crimes, make noise, or present a danger to children.

FOR A SECOND CAUSE OF ACTION
(Violation of Equal Protection)

(Appeal from City Council—substantive/procedural due process)

17. The plaintiff repeats the above allegations as if set forth here verbatim.

18. Berkeley County Council singled out plaintiff's parcel and treated it differently from the surrounding parcels solely because the County found that "the residents of Royal Road do not want this." There is no rational or scientific reason to treat the plaintiff's property differently from the identically situated parcels in the area that are zoned RR-4 in conformity with Berkeley County's Comprehensive Plan.

FOR A THIRD CAUSE OF ACTION
(Procedural Due Process)

19. The plaintiff repeats the above allegations as if set forth here verbatim.

20. By ignoring its statutory duty to adhere to the Berkeley County Comprehensive Plan and ignoring the findings and recommendations of staff and by accepting the unsubstantiated statements of property owners that the residents of mobile homes are more likely than residents of custom homes to cause crime, use illegal drugs, create noise, and constitute a danger to children, the County deprived the plaintiff of procedural due process.

FOR A FOURTH CAUSE OF ACTION
(§ 1983, U. S. C. ann.; Article I § 22 S. C. Constitution)

21. The plaintiff repeats the above allegations as if set forth here verbatim.

22. The City's refusal to adhere to its own Comprehensive Plan and Future Land Use Map based solely on unsubstantiated allegations that residents of mobile homes are undesirable persons is so arbitrary and capricious that it falls outside of the perimeter of the lawful exercise of legislative authority, and deprived the plaintiff of substantive due process and the right to use his property to its highest and best use. The County's action is so far beyond the limits of legitimate governmental action, that no process could cure the deficiency.

23. The plaintiff is entitled to trial by jury on his claim for violation of civil rights and for judgment against the City in such amounts as a jury may find to be due.

FOR A FIFTH CAUSE OF ACTION
(Damages and Attorney's fees § 15-77-300, 310, §30-4-100, S. C. Code, ann, 42 § 1988 U.S.C. Code, ann.)

24. The plaintiff repeats the above allegations as if set forth here verbatim.

25. As a direct and proximate result of the County's failure to adhere to its Comprehensive Plan and Future Land Use Map, relying instead on unsupported and prejudicial comments by members of the public directed against the residents of mobile homes as undesirable persons, the County's refusal to rezone the plaintiff's parcel to be consistent with the identically situated proprieties without substantial justification, and the County's refusal forced the plaintiff to incur attorney's fees and costs to protect his property rights, which the Defendants have denied him under color of law, and the plaintiff is entitled to an award of attorney's fees as authorized by § 15-77-300, S. C. Code, ann. And 42 § 1988 U.S.C. Code, ann.

26. The plaintiff is entitled to an award of a reasonable attorney's fees because the City's actions taken against him are without substantial justification and there are no circumstances that would make an award of attorney's fees in this case unjust.

FOR A SIXTH CAUSE OF ACTION
(Demand for Pre-litigation mediation § 6-29-825, S. C. Code, ann.)

27. The plaintiff demands pre-litigation mediation as set forth in § 6-29-825, S. C. Code, ann.

WHEREFORE, having fully set forth his complaint, the Plaintiff prays an order of the Court;

a. Granting the Plaintiff the right to pre-litigation mediation and in the event such mediation fails, then a trial by jury on the actions at law for damages and for judgment for both actual and punitive damages as determined by the jury;

b. Directing Berkeley County to rezone the plaintiff's parcel to be inconformity with the Berkeley County Comprehensive Plan and Future Land Use Map;

c. Vacating the action taken by County Council on March 27, 2017, as void as a matter of law;

d. For an award of attorney's fees against Berkeley County as allowed for under Sections 15-77-300 *et. seq.* and 42 U.S.C. § 1988, and

e. For a declaratory judgment against Berkeley County requiring the County to rezone plaintiff's parcel to conform to the Comprehensive Plan;

f. For costs of this action;

g. And for such other and further relief as this Court may deem just and proper.

June 21, 2017

Thomas R. Goldstein, #2186
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Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 fax
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for all parties in the foregoing matter with a copy of this pleading by:

☐ depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon

☐ handing counsel a copy thereof

☐ by facsimile and depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 23rd day of June, 2017

BY: T. R. Goldstein

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS CASE NO.: 2017-CP-08-1088
Todd Olds, Plaintiff, vs. Berkeley County and Berkeley County Planning Commission, Defendants	)	**ANSWER OF BERKELEY COUNTY AND BERKELEY COUNTY PLANNING COMMISSION**

Defendants Berkeley County and Berkeley County Planning Commission, by and through their undersigned counsel, would answer Plaintiff's Complaint herein, and show unto this Honorable Court as follows, to wit:

FOR A FIRST DEFENSE

1. Defendants deny and demand strict proof of each and every allegation contained in the Complaint, not herein specifically admitted, qualified or otherwise explained.
2. Defendants are without sufficient information to form an opinion as to the truth or falsity of the allegations contained in Paragraph 1 and the same are therefore denied.
3. Defendants admit the allegations of Paragraphs 2, 3, 4 and 5.
4. No answer is required to Plaintiff's description of the nature of his Complaint as set forth in Paragraph 6. Defendants admit so much of Paragraph 6 as alleges that Berkeley County Council voted in its meeting of March 27, 2017 to deny a rezoning request for the subject parcel. Defendants crave reference to the official record as to a vote tally. Defendants deny the remaining allegations and characterizations contained in Paragraph 6.

5. Defendants generally admit the allegations contained in Paragraphs 7 and 8. Defendants deny the characterizations and uses of the description "*to be in conformity*" and "*to bring the parcel in conformity*" as alleged in Paragraphs 7 and 8.
6. Defendants admit so much of the allegations contained in Paragraph 9 as alleges that public input was received by the Berkeley County Planning Commission in its February 28, 2017 meeting and that members of the public voiced their opposition to the rezoning request and their reasons therefor. Defendants crave reference to the record as to the specific testimony made and provided. To the extent that the actual testimony conflicts with the allegations contained in Paragraph 9, the same are denied.
7. Defendants admit so much of the allegations of Paragraph 10 as allege that the Berkeley County Planning Commission voted to recommend the denial of the rezoning request. Defendants crave reference to the official record as to a vote tally. Defendants deny the allegations contained in Paragraph 10 relative to the alleged basis for the vote.
8. Defendants deny the allegations contained in Paragraphs 11 and 12.
9. Defendants crave reference to the statutory references contained in Paragraphs 13 and 14. Defendants deny the remaining allegations contained in Paragraph 13 and 14.
10. Defendants deny the allegations contained in Paragraphs 15, 16, 18, 20, 22, 25 and 26; the averments contained in Paragraphs 17, 19, 21, 23 and 24 not requiring an answer or which invoke a right.

FOR A SECOND DEFENSE

11. Plaintiff's Complaint fails as a matter of law because this Court because Plaintiff fails to state a cause of action upon which relief may be granted. Defendants reserve the right to file a motion under SCRCP 12(b)(6).

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WHEREFORE, Defendants Berkeley County and Berkeley County Planning Commission pray judgment of this Honorable Court that Plaintiff's Complaint be dismissed with prejudice; for the costs of this action and for such other and further relief as this Court deems just and proper in the premises.

WEST LAW FIRM, LLC

J West

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PO Box 1869
Moncks Corner, SC 29461
843-761-5626 (Telephone)
843-761-5627 (Fax)
Jwestlaw@HomeSC.com

BERKELEY COUNTY ATTORNEY'S OFFICE

John O. Williams, II / JW with permission

By: John O. Williams, II, Esq.
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ATTORNEYS FOR DEFENDANTS BERKELEY COUNTY AND BERKELEY COUNTY PLANNING COMMISSION

June 13th, 2017
Moncks Corner, SC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing statement has been served upon Thomas R. Goldstein, Esq. by mailing a copy properly addressed with sufficient postage or by hand delivery affixed thereon this 13th day of June, 2017.

BY: J West
John S. West, Attorney at Law

3 of 3 JW

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MOTION
	)	FOR SUMMARY JUDGMENT
vs.	)	
	)	
Berkeley County,	)	
Berkeley County Planning	)	
Commission,	)	
	)	
Defendants.	)	
	)	

FILED
2018 AUG -2 AM 9:57
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

TO: John West, Esq., Attorney for Defendants:

Pursuant to Rules 56 of the *South Carolina Rules of Civil Procedure*, the plaintiff moves for an Order granting summary judgment to the plaintiff, or, in the alternative, an Order of Remand requiring the City Council to consider the plaintiff's application for rezoning applying the standards required by South Carolina law in *Helicopter Solutions v. Hinde* , 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015), *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012), and *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999). This motion is based further on the affidavit filed in support of the motion and the attached memorandum of law.

July 22, 2018

Thomas R. Goldstein, S. C. Bar # 2186
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Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds,	)	
	)	
Plaintiff,	)	PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
	)	
vs.	)	
	)	
Berkeley County, Berkeley County Planning Commission,	)	
	)	
Defendants.	)	
	)	

FILED
2018 AUG -2 AM 9:51
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

Personally appeared before me, Todd Olds, who being duly sworn, does depose and say:

I am the plaintiff in this action. I acquired the 1.29 acre of property that is the subject of this action in 2017. The parcel is known as 749-751 Royle Road, T.M.S. or T.M.S. No. 233-09-02046. Prior to purchasing the parcel, I did due diligence and saw that Berkeley County had designated the parcel to be rezoned from single family mobile home residence (R-2, which allows 3 units per acre) to multi-family mobile home residential (R-3, which allows 12 units per acre). The property is surrounded by mobile home parks, and the parcel to the South is zoned R-3. The parcel to the West is zoned OI (Office Industrial) and currently occupied by a church. The Planning Department describes the property as:

> The subject property currently contains multiple mobile homes and is adjacent to R-3 property along Royle Rd. The parcel is located just off Farmington Td./I-26, adjacent to a R-3 property also owned by Bonnell Meese. There are multiple R-3 mobile home parks as well as multiple non-conforming R-2 mobile home parks.
>
> "Existing Uses and Adjacent Property Information" Staff Report to County Council

On January 27, 2017, I filed a request for rezoning of the 1.29-acre parcel to bring it into conformity with the adjoining lot and in conformity with the County's Future Land Use Map and

Comprehensive Plan. As the Planning Department described it, Royle Road is a highly traveled arterial road near Farmington Road and Interstate 26. (See attached map.)

As required by County Ordinance and state law, the Planning Department staff prepared a report and recommendation recommending "APPROVAL" for the rezoning and reported its findings to the Planning Commission and to County Council that the Council should rezone the parcel to R-3 for the reasons set forth above.

On February 13, 2017, I appeared before the Planning Commission to be heard on my application. Consistent with their written report, the County Planning Staff recommended that the parcel be rezoned to R-3 to be consistent with the County's Comprehensive Plan and Future Land Use Map. See attached staff report. At the Planning Commission, and later before County Council, three residents voiced objections to the rezoning, articulating unsupported allegations about persons who reside in mobile homes, speculation about devaluation of property, and concerns with "traffic safety." According to the three residents who spoke, people who reside in mobile homes do not look after their property, support drug use, commit crimes, and do not care for their children. The opponents could not articulate any reason for disallowance other than complaints that the character of the area has changed from "country living" and their bias against persons who live in mobile homes and their unsupported claims that their property values would be diminished.

Even though the County's Planning Department recommended rezoning in order to bring the parcel into conformity with the surrounding zoning and to make the parcel consistent with the Future Land Use Map of the Comprehensive Plan, the Planning Commission voted unanimously to recommend to County Council to deny the request because of the objections voiced by residents in the area.

On March 27, 2017, the application came before the County Council, and the same residents appeared and voiced the same objections. Three residents of Royle Road spoke in opposition:

- Raymond Hedden, 760 Royle Road. Mr. Hedden told Council that he had counted 13 mobile home parks in the immediate area, apparently unware that this factor supports the rezoning. He told Council that there are 316 trailers on Royle Road between Highways 17-A and 78, again, apparently, unaware that this fact supports the rezoning. He then told Council that "they" are well aware of the "crime" issue and that he has personally witnessed cars travelling up and down dirt roads "looking for a particular trailer." He then complained that mobile home residents do not take care of their property because they "left everything out in the open and have no privacy fences." Chair Schurlknight then asked Mr. Hedden how long he lived there, and he replied since 1982, echoing the comments of the other speakers that they objected to the change of the area from "country living" to "trailer parks." In a colloquy with Chair Schurlknight, the Chair expressed that he too was concerned with "traffic safety" and "children."
- James E. Jackson, 769 Royle Road, spoke. He said that he leased the subject property for 18 years and that people who settled there, settled there for "country living" on lots of 3 acres and larger. He then said there is a huge problem with Sangaree school, which is 1.2 miles from the site.
- Mr. Francis Gibson, 1076 Royle Road spoke. He said he lived there since 1978 on "acreage." He said the "one thing" they do not need on Royle Road is "more trailers." **He said that the residents' concerns should outweigh the goals of the Comprehensive Plan because they live there**, and the owners of the mobile home

parks do not. He said: "we have to put up with trailers." (I had the emphasis to Mr. Gibson's testimony because this turned out to be the reason expressed by Chairman Schurlknight in arguing against the re-zoning.)

Council voted 7-2 to deny the request. The two members of the Council who are licensed attorneys voted in favor of the rezoning because the request for rezoning brings the property in conformity with the surrounding zoning and is consistent with the Berkeley County Comprehensive Plan. However, 7 members voted against the request because, as they stated: they would not vote for anything unless the residents supported it:

"Council Member Schurlknight stated that with that in mind, he has been down Royle Road many times. **He has seen a lot of stuff going on in the area.** It does devalue the property. He thinks they have suffered enough when it comes to development and quality of life. It concerns him that when the dust settles, they are going to be there. As Chairman of the Land Use Committee, he agrees with Council on the original recommendation of denial."

Minutes of City Council March 27, 2017 Council Meeting. (Emphasis added)

It is clear from the video of the Council meeting that the "stuff" Councilmember Shchurlknight is talking about are the comments of three residents of Royle Road who made broad statements, which are essentially about the undesirability of people who live in mobile homes. I am not a lawyer, but I am in the real estate business, and I have a number of tenants who reside in mobile homes, and I have never noticed that people in mobile homes sell drugs or ignore their children in any different proportion than any other segment of our society. (One Council member, Steve Davis, said that when he and his wife were first starting out in life, they lived in a mobile home.) To assume a mobile home resident is more likely than a condominium resident to commit a crime or fail to look after his or her children because he or she lives in a mobile home is shocking. As everyone who spoke in the meeting acknowledged, Berkeley County is in the midst of explosive growth, and while Royle Road may have been "country living" in the 1970's or 1980's, it has not been so for many years. (Interstate 26 was completed in 1969.) In my capacity as a property owner and a real estate

professional, I am aware that local governments have wide latitude in matters of local government, but they cannot categorize people based on whether they live in a mansion or a mobile home. I believe Council was out of line in refusing to rezone a parcel of real estate for purely prejudicial, unsupported reasons, especially where the proposed rezoning merely brings the parcel into conformity with the surrounding neighborhood as it already exists and makes the property conform to the Berkeley County Future Land Use Map. In this case, my application is consistent with Berkeley County's Comprehensive Plan, consistent with Berkeley County's Future Land Use Map, and supported by County Planning Department Staff's professional recommendation. In short, the Council denied my application only because residents showed up and protested by asserting unsupported, biased comments about the kind of people they believe live in mobile homes. As a result, I never got a fair hearing because the Council never considered the objective facts that the proposed rezoning only confirms what is already present and conforms to Council's Land Use Plan for the area. In other words, Council decided the rezoning against me for purely prejudicial reasons not supported by any evidence.

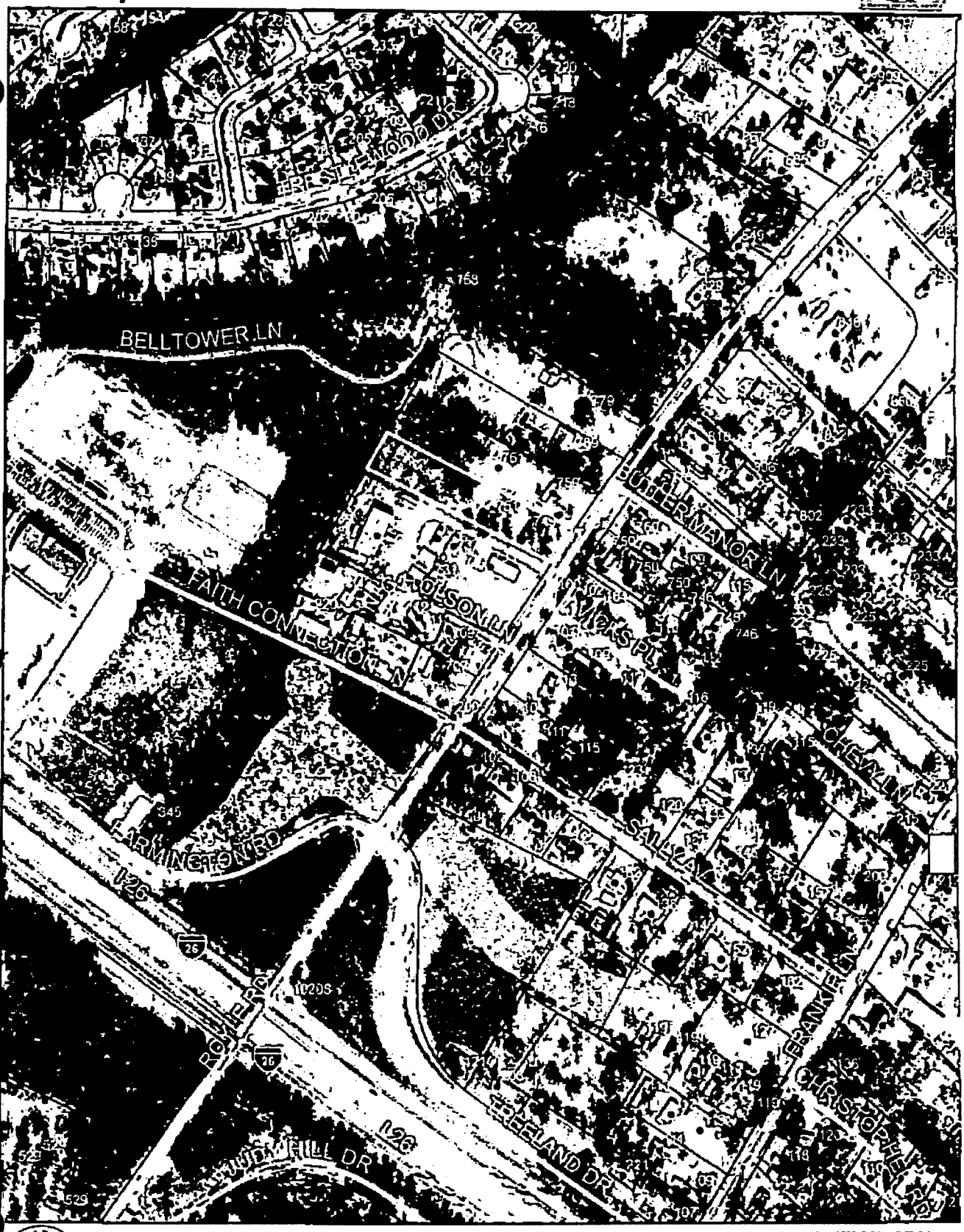
Further your deponent says not.

Todd Olds

SWORN TO BEFORE ME THIS
29th DAY OF JULY, 2018

Notary Public for South Carolina
My Commission expires: April 16, 2020

Site Map



Attachment: Aerial Imagery (2815 : R2 to R3 - 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26))

Berkeley County Planning Department
P.O. Box 6122
Moncks Corner, SC 29461
(p) 843.719.4095 | (f) 843.719.4053
http://cdc.berkeleycountysc.gov
Date: 2/13/2017

0 130 260 520 780 Feet

THE COUNTY OF BERKELEY AND ITS GIS DEPARTMENT DISCLAIMS ACCOUNTABILITY FOR THIS PRODUCT AND MAKES NO WARRANTIES EXPRESS OR IMPLIED CONCERNING THE ACCURACY THEREOF. RESPONSIBILITY FOR INTERPRETATION AND APPLICATION OF THIS PRODUCT LIES

STAFF SUMMARY
FOR The County Council

Topic: AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4
Prepared by: Alison Simmons, Director
Date: 2/21/2017 5:11 PM

STAFF SUMMARY

LAND USE COMMITTEE

Zoning Matter: Rezoning from R-2 to R-3
Prepared by: Ty Adley
Date: February 13, 2017
Location: 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26)
Total Acreage: ± 1.29 acres
Applicant: B. Todd Olds
Owner: Bonnell W. Meese
Council District: 4

Planning Commission Recommendation: DENIAL (Unanimous)

Background:

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 R3 zoned parcel (TMS 233-09-02-007). Upon combination, the 2-acre minimum lot size requirement for R3 zoning would be met.

Existing Uses and Adjacent Property Information:

The subject property currently contains multiple mobile homes and is adjacent to R-3 property along Royle Rd. The parcel is located just off Farmington Rd./ I-26, adjacent to a R-3 property also owned by Bonnell Meese. There are multiple R-3 mobile home parks as well as multiple non-conforming R-2 mobile home parks.

Adjacent property characteristics are listed below.

Adjacent Property Information		
	Zone	*Use*
North	R-3	Mobile Home Park
South	R-2	Commercial/ Mobile Home Park
East	R-2	Mobile Home Park
West	OI	Church

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 and 233-09-02-007 will be combined and recorded prior to third reading at County Council.

Planning Commission Recommendation: DENIAL IN A UNANIMOUS VOTE. After reviewing the requested change and hearing from many community stakeholders in opposition to the request, Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area, and diminution of property values and quality of life. A petition from stakeholders, Francis and Donald Gibson, is enclosed.

Potential Impacts:

Denial- The applicant will continue to be held to standards required in the R-2 zoning category, restricting the combination with the adjacent property and any associated residential uses.

Approval- The applicant will be held to the R-3 zoning requirements and pursue combination of this parcel with the adjacent R-3 parcel.

Attachments:

Maps

Application

Fiscal Impact:

Attachments:

Application Submittals (PDF)

Aerial Imagery (PDF)

Zoning (PDF)

FLU (PDF)

Petition provided by Resident in Opposition to Request (PDF)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT
	)	
vs.	)	
	)	
Berkeley County,	)	
Berkeley County Planning Commission,	)	
	)	
Defendants.	)	

FILED
2018 AUG -2 AM 9:57
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

As zoning appeals go, this case is pristine because the record demonstrates that the sole basis for denying the plaintiff's application for rezoning was Council's deference to the unsupported prejudice, which Council called "stuff," of neighbors who objected to "those kinds of people" in their neighborhood. As may be seen by the map attached to plaintiff's affidavit, the character of the neighborhood evolved over the years from its original country setting to a busy artery mere feet from Interstate 26 and is surrounded by other mobile home parks and a church. See attached Staff Report and maps, attached here and to plaintiff's affidavit. Even the residents who spoke in opposition noted that the area has "316 trailers on Royle Road between Highways 17-A and 78." See video of meeting; resident Raymond Hedden testified he counted "13 trailer parks" on Royle Road and "316 trailers." The residents' objections are nothing more than subjective complaints, not grounded on any evidentiary basis. As we shall see, the appellate courts, when faced with balancing residents' unsupported objections against a property owners' rights, uniformly hold that unsupported fears are not sufficient to prevent reasonable uses of property.

According to the Berkeley County Planning Staff, Royle Road (State Road S-8-535, which links Highways 78, Interstate 26 and Highway 17-A) carries a substantial amount of motor vehicle traffic as a major artery, and the County identified the area in its Future Land Use Map as appropriate for higher density residential development and specifically mobile home parks. Even though the County's Planning Department recommended approval of the rezoning request to conform to the property as currently being used and to conform to the County's Future Land Use Map, neighbors appeared and objected on purely subjective, unsupported grounds of prejudice. Their statements of objection included such unsupported statements as:

- People who live in mobile homes tend to be criminal
- People who live in mobile homes tend to have less pride in property
- People who live in mobile homes have a higher incidence of drug use
- People who live in mobile homes fail to supervise their children.

When appellate courts have been asked to review such unsupported prejudice as a basis to restrict the use of property, the appellate courts have unanimously instructed local governments that such unsupported prejudice is insufficient to deny an application for rezoning or special exception:

> 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 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*, S.C., S.E.2d (1999)

Thirteen years later, the Court of Appeals took up a similar issue in *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012). There, the property owner sought a special exception to own and operate a fireworks stand. Like this case and like *Bannum*,

neighbors protested, identifying all sorts of reasons—none of them supported by evidence—as to why the Board should deny the application:

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

Citing *Bannum*, the Court of Appeals pointed out that while residents are entitled to be heard and entitled to express their opinions, statements to the Board about the property must be based on some evidence, something more than subjective, unsupported statements:

> 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.

Three years after *Wyndham Enterprises*, in 2015 the Court of Appeals took up another zoning case. In *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015) a neighbor of Helicopter Solutions objected to the operation of a helicopter touring business in the Myrtle Beach "Amusement Commercial Zone." Hinde took the position that while the zoning ordinance allowed motor vehicle sight-seeing tours, it did not allow helicopter tours. Like the neighbors in this case, and like the neighbors in *Bannum*, and in *Wyndham*, Hinde contended, without evidence, that the operation of the helicopter business injured him and diminished his property values. Of course, he had no evidence, which is the common link through all these cases and the case now before the Court. Surprisingly, he convinced the Board of Zoning Appeals, and that Board instructed the property owner to shut down his business. 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);[1] 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)

Here, the plaintiff asked for nothing more than what the County Comprehensive Plan requires. Plaintiff's request does nothing more than bring the zoning into conformity with how the property has developed over the years and in conformity with the County's legislative decision on how best to address a critical housing shortage. Moreover, the County's Zoning Ordinance **requires** that the Zoning Code be amended to conform to the County's Comprehensive Plan. § 1-2 of the Zoning Ordinance defines the purpose of the ordinance as follows:

1.2. - Purpose.

It is the purpose of this ordinance to:

Implement the goals and policies outlined in the Berkeley County Comprehensive Plan;

[1] *Purdy v. Moise* deserves special mention as an example of arbitrary government action in this area. There, the City of Sumter informed a property owner that while the Zoning Ordinance allowed a "hotel" on his property, it did not allow a "motor court" or "tourist court."

In evaluating the plaintiff's application for rezoning the Planning Staff noted the plaintiff's application for rezoning brings the property in line with "the goals and policies outlined in the Berkeley County comprehensive plan." Thus, when Council rejected the recommendation of its own professional staff, it chose to adopt the residents' subjective, prejudicial, unsupported fears over its staff's objective findings. In doing so, the County Council not only failed to apply its own ordinance as written, but also reached a decision at variance with the comprehensive plan. Not to put too fine a point on it, but Council yielded to the tyranny of the majority, which the Supreme Court and the Court of Appeals made clear that a political body may not do. While the majority rules in elections, the rule of law governs in matters of fundamental rights. The right to use property to its highest and best use is circumscribed by law, not by raw prejudice of residents who **feel** they may be adversely affected.

Therefore under the holdings of the well-developed body of South Carolina law on this subject, the County Council cannot deny the applicant the right to the highest and best use of his property when such denial is based on nothing more than unsupported prejudice of neighbors. Therefore, the Court should reverse the decision of the County Council, or, in the alternative, remand the matter back to the Council with instructions to consider the applicant's application for rezoning and evaluate it only upon the proper, relevant evidence.

Respectfully submitted,

July 29, 2018

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CERTIFICATE OF SERVICE

This is to certify that I have served counsel for all parties to the foregoing matter with a copy of this pleading by:

☐ depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon;

☐ handing counsel a copy thereof;

☐ by facsimile and depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 29th day of July, 2018.

BY:

STAFF SUMMARY
FOR The County Council

Topic: AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4
Prepared by: Alison Simmons, Director
Date: 2/21/2017 5:11 PM

STAFF SUMMARY
LAND USE COMMITTEE

Zoning Matter: Rezoning from R-2 to R-3
Prepared by: Ty Adley
Date: February 13, 2017
Location: 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26)
Total Acreage: ± 1.29 acres
Applicant: B. Todd Olds
Owner: Bonnell W. Meese
Council District: 4

Planning Commission Recommendation: DENIAL (Unanimous)

Background:

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 R3 zoned parcel (TMS 233-09-02-007). Upon combination, the 2-acre minimum lot size requirement for R3 zoning would be met.

Existing Uses and Adjacent Property Information:

The subject property currently contains multiple mobile homes and is adjacent to R-3 property along Royle Rd. The parcel is located just off Farmington Rd./ I-26, adjacent to a R-3 property also owned by Bonnell Meese. There are multiple R-3 mobile home parks as well as multiple non-conforming R-2 mobile home parks.

Adjacent property characteristics are listed below.

Adjacent Property Information		
	Zone	***Use***
North	R-3	Mobile Home Park
South	R-2	Commercial/ Mobile Home Park
East	R-2	Mobile Home Park
West	OI	Church

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 and 233-09-02-007 will be combined and recorded prior to third reading at County Council.

Planning Commission Recommendation: DENIAL IN A UNANIMOUS VOTE. After reviewing the requested change and hearing from many community stakeholders in opposition to the request, Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area, and diminution of property values and quality of life. A petition from stakeholders, Francis and Donald Gibson, is enclosed.

Potential Impacts:

Denial- The applicant will continue to be held to standards required in the R-2 zoning category, restricting the combination with the adjacent property and any associated residential uses.

Approval- The applicant will be held to the R-3 zoning requirements and pursue combination of this parcel with the adjacent R-3 parcel.

Attachments:

Maps
Application

Fiscal Impact:

Attachments:
Application Submittals (PDF)
Aerial Imagery (PDF)
Zoning (PDF)
FLU (PDF)
Petition provided by Resident in Opposition to Request (PDF)

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS CASE NO.: 2017-CP-08-1088
Todd Olds, Plaintiff, vs. Berkeley County and Berkeley County Planning Commission, Defendants	)	**DEFENDANT BERKELEY COUNTY'S AND BERKELEY COUNTY PLANNING COMMISSION'S JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION AND FACTUAL SUMMARY

By application presented to the Berkeley County Planning Department, the applicant sought to rezone a parcel of land in Berkeley County, South Carolina[1], from an R-2 to an R-3 designation[2]. Plaintiff did not seek a special exception, but rather sought to rezone the parcel.

If allowed, the rezoning would have enabled the owner to increase the total number of mobile homes on a 1.29-acre parcel to fourteen (14). At the time of his application there were two (2) mobile homes on the subject parcel, each legally non-conforming.

Berkeley County Planning Department staff reviewed the application and recommended to the Planning Commission that the rezoning request be approved.

The Planning Commission held a hearing on February 28, 2017 upon the rezoning request, at which the applicant spoke in favor of the request and members of the public, including neighboring property owners, spoke out against the requested rezoning.

Summary minutes of that meeting are attached as Exhibit "A". Several members of the public spoke at the Planning Commission meeting. One of the speakers was former Berkeley County Coroner Wade Arnette, who spoke about his concerns for the "safety of children". After

[1] TMS #233-09-02-046

[2] R-2 is mobile home residential. R-3 is mobile home commercial.

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hearing from the public and considering the application for rezoning, the Planning Commission voted unanimously to recommend to the County Council that it deny the rezoning request.

The matter then procedurally continued in the ordinary course and was brought before the County's Land Use & Economic Development Committee on March 13, 2017. The matter was thoroughly debated there. In her presentation before the committee Planning and Zoning Director Alison Simmons testified as follows:

> "... *After reviewing the requested change and hearing from many community stakeholders and opposition to the request, the Planning Commission found the request incompatible and potentially detrimental...*"

The Land Use & Economic Development Committee voted 6-2 to deny the rezoning request. Summary minutes of that meeting are attached as Exhibit "B".

The matter was then presented to the full County Council on March 27, 2017. Members of the public appeared and expressed concerns in the "Public Discussion" period at the commencement of the hearing. Summary minutes of that meeting are attached as Exhibit "C".[3]

When the question of consideration of first reading on a proposed ordinance to rezone Mr. Olds' property came for a vote by County Council at the March 27th meeting, after deliberation and discussion, County Council voted 5-2 to deny the rezoning request [4].

As reflected in the minutes, throughout the legislative consideration of the proposal, opinions for and against the proposal were voiced and for a variety of reasons. This is of course reflective of the very nature of the legislative process.

When Plaintiff did not get what he wanted, that is to have the subject rezoned in order to place up to 14 mobile homes on a 1.29-acre lot, he sued the County and the Planning Commission

[3] Raymond Headding who resides on Royle Road near the subject spoke at the public hearing about "high traffic" on the "two lane road". James Jackson spoke at the same hearing about traffic near the Sangaree School testifying "... you can't get by there in the mornings or afternoons from people dropping off and picking up kids there."

[4] An excerpt from the 3-27-2017 County Council minutes reads as follows: "Council Member Schurlknight stated that he has a lot of concerns about the effect it is going to have on the individuals that live on Royle Road. They've been there a long time and have seen a lot. He is hearing that they have hosted a lot of development on the road, and it comes to a tipping point to where you must look at the capacity of the road, and safety. He understands that the Planning Commission denied, and Staff recommended, but he thinks Council has to lead the way in some of this stuff..."

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in this court. His causes of action will be separately addressed in the Discussion of Authority section below.

APPLICABLE SUMMARY JUDGMENT STANDARD OF REVIEW

In reviewing a motion for summary judgment, a trial court's task is well-known and well-settled. Under Rule 56, SCRCP, summary judgment is only proper when both:

(a) No genuine issue as to any material fact exists, and

(b) The moving party is entitled to judgment as a matter of law.

In making the determination of whether or not any triable issue of fact exists, it is settled South Carolina law that the evidence and all inferences that can reasonably be drawn must be viewed in the light most favorable to the nonmoving party. Our courts have consistently ruled that summary judgment should not be granted if further inquiry into the facts is desirable to clarify the application of the law. To prevail on a summary judgment motion, the moving party must show that there is no genuine issue as to any material fact. To determine whether any trial issues of fact exist for summary judgment purposes, the evidence and all inferences which can reasonably be drawn from the evidence must be viewed in the light most favorable to the non-moving party. Carolina Convenience Stores, Inc. v. City of Spartanburg, 398 S.C. 27, 727 S.E.2d 28 (Ct.App. 2012).

Summary judgment has been held to be appropriate only when plain, palpable and undisputed facts exist on which reasonable minds cannot differ. Bessinger v. Bi-Lo, 329 S.C. 617, 496 S.E.2d 33,34 (Ct.App.1998).

South Carolina Courts have also noted that summary judgment is such a drastic remedy that it calls for special caution to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000). Summary judgment should also be denied even when no dispute exists as to the evidentiary facts themselves but merely to the conclusions or inferences to be drawn from them. See Baugus v. Wessinger, 401 S.E.2d 169 (1991); Nelson v. Charleston County Parks & Recreational Comm'n, 605 S.E.2d 744 (S.C. App. 2004).

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DISCUSSION OF AUTHORITY

I. The Purpose of Berkeley County's Zoning Ordinance

Berkeley County's zoning ordinance is known as the "Berkeley County Zoning and Development Standards Ordinance". All purposes of the ordinance are stated in Article 1.2 of the ordinance. There are many stated purposes, which are not mutually exclusive. The "Purpose and Authority" article reads as follows:

ARTICLE 1. - PURPOSE AND AUTHORITY

1.1. - Authority.

This ordinance is adopted pursuant to the statutory authority conferred by S.C. Code 1976, § 6-29-710 et seq., as amended.

1.2. - Purpose.

It is the purpose of this ordinance to:

A. Implement the goals and policies outlined in the Berkeley County comprehensive plan;

B. Provide for adequate light, air, and open space;

C. Prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;

D. Facilitate the creation of a convenient, attractive, and harmonious community; to protect and preserve scenic, historic, or ecologically sensitive areas;

E. Regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, and public activities;

F. Facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, and disaster evacuation;

G. Distribution of population and traffic that will tend to create conditions favorable to health, safety, convenience, appearance, prosperity, morals, order, and the general welfare of the county.

The legislative actions of the Planning Commission, the Land Use & Economic Development Committee and the full County Council to retain the previously established R-2 zoning designation are wholly consistent with several of the stated purposes of the ordinance.

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Plaintiff has selected one purpose which he believes supports his position and declares the same to be dispositive. Other purposes conflict with his position. He opts not to mention them.

II. Arbitrary and Irrational Rezoning Decision

Plaintiff claims in his first cause of action that the decision of County Council to deny his rezoning request was arbitrary and irrational. Defendants deny the claim and the record does not support it.

It is well-settled in South Carolina that rezoning is a legislative matter [5], and a court has no power to zone property; a rezoning decision is presumptively valid, and a property owner bears the burden of proving otherwise. *(emphasis added). Bear Enterprises. v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995).[6] A presumption of validity can only be overcome by clear and convincing evidence established at trial.[7] *Lenardis v. City of Greenville*, 316 S.C. 471, 450 S.E.2d 597 (Ct. App. 1994) (propriety of city's decision in refusing to rezone property from office use to commercial use was not so unreasonable as to impair or destroy property owner's constitutional rights; owner bought property as speculative investment with full knowledge of existing zoning and surrounding commercial development, and vast majority of surrounding property in city was residential); *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), *as amended* (May 4, 2009) (City's denial of application to rezone property consisting of house on corner lot from residential to limited commercial use was fairly debatable and not so unreasonable as to impair or destroy property owner's constitutional rights, even though other similarly situated properties on one of two bordering streets were zoned for limited commercial use, where city had a vested interest in reserving the area's residential character, neighborhood

[5] The legislative process is reserved for those who are directly accountable to the public.

[6] The facts of *Bear Enterprises*, which involved a refusal to rezone property for a mobile home park, are discussed in the section on substantive due process, *infra*.

[7] In Footnote 1 to the *Bear Enterprises* opinion the Court noted:

"We note that Bear deposed Council members and presented their testimony as evidence to support Bear's argument that Council's decision was arbitrary. We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts. Although we feel it was inappropriate to examine Council members in this manner, the County did not object to the procedure in this case".

citizens were concerned that the area would become too commercial, and the property at issue acted as a buffer between residential area and a busier commercial area).

The Supreme Court of South Carolina has held that a zoning ordinance excluding mobile homes from all areas except mobile home districts was valid and enforceable. To overcome the presumption of validity there must be an absence of any evidence supporting the legislative action. *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991). Particular reasons for the mobile homes ordinance in *Willoughby* are not discussed in depth in that opinion, though the court noted that the zoning ordinance was enacted "*for the purpose of promoting the health, safety, morals, and general welfare of the community.*" *Id.* at 422, 412 S.E.2d at 425. That is precisely the case here. See 1.2 (G).

Of course, in the instant case, the County is not seeking to confine mobile homes in a particular district or districts, but *Willoughby* suggests in any case that the Plaintiff may defeat the rezoning decision only with clear and convincing evidence. *Willoughby* suggests that the decision was unobjectionable to the extent that it was based on <u>any evidence</u> that there would be a significant increase in noise or traffic congestion if the rezoning was approved.

Plaintiff also alleges that the Comprehensive Plan <u>requires</u> the tract in question to be zoned R-3, the classification he seeks in the rezoning process. That is not what the statute says. In pertinent part, the relevant statute speaks to the interplay between a comprehensive plan and a land use proposal as follows:

> When the local planning commission has recommended and local governing authority or authorities have adopted the related comprehensive plan element set forth in this chapter, no new street, structure, utility, square, park, or other public way, grounds, or open space or public buildings for any use, whether publicly or privately owned, may be constructed or authorized in the political jurisdiction of the governing authority or authorities establishing the planning commission until the location, character, and extent of it have been submitted to the planning commission for review and comment as to the compatibility of the proposal with the comprehensive plan of the community. In the event the planning commission finds the proposal to be in conflict with the comprehensive plan, the commission shall transmit its findings and the particulars of the nonconformity to the entity proposing the facility.
>
> If the entity proposing the facility determines to go forward with the project which conflicts with the comprehensive plan, the governing or policy making body of the

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> entity shall publicly state its intention to proceed and the reasons for the action. A copy of this finding must be sent to the local governing body, the local planning commission, and published as a public notice in a newspaper of general circulation in the community at least thirty days prior to awarding a contract or beginning construction. S.C. Code Ann. § 6-29-540 et seq.

The statute does not mandate approval of a proposal which is consistent with a comprehensive plan. That would render unnecessary any legislative consideration of a proposed zoning change which is consistent with the comprehensive plan. The County planning staff here accurately found that the requested rezoning was consistent with the comprehensive plan, but the elected officials, possessed with their legislative authority determined that staff's recommendation, although a proper consideration, was outweighed by other considerations rooted in public safety, health, and welfare, among other purposes.

The mere fact that the Planning Commission and the County Council reached a decision different from that recommended by planning staff does not render the final decision arbitrary and capricious. The decision was for the Council to make, after due deliberations and taking into account all of the facts. *See Greb v. Bd. of Comm'rs for Klamath County*, 32 Or. App. 39, 573 P.2d 733 (1978) (each county governing body is required to retain responsibility for land use planning within its county, and is therefore vested with authority to make county land use decisions; county board of commissioners is not bound by recommendations of county planning commission even if supported by substantial evidence); *Adams v. City of Richmond*, 340 S.W.2d 204 (Ky. 1960) (zoning is vested by statute in the city legislative body, and it had power to override or reject a recommendation of the zoning commission which merely makes recommendations).

Plaintiff cites three cases in his motion for summary judgment. Each case involves a matter originating before a local Board of Zoning Appeals in connection with an application for a special exception. That is not the case here. The BZA was acting in each instance in the cases cited by the Plaintiff in a "quasi-judicial role".[8] This is not an appeal from the BZA. Rather it is a challenge to the legislative function of County Council. A reviewing Court should practice judicial restraint and not supplant its judgment for the local government's judgment. *Lenardis, Id.*

[8] *Helicopter Solutions, Inc. v. Hinde, Wyndham Enterprises v. City of North Augusta and Bannum v. City of Columbia*

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II. Equal Protection

Plaintiff claims in his second cause of action that the decision of County Council to deny his rezoning request was a violation of equal protection. Defendants deny the claim and the record does not support it.

If there is no suspect or quasi-suspect class and no fundamental right is involved, a zoning ordinance's viability under the equal protection clause, or a zoning decision, should be tested under the "rational basis" standard. *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 504 S.E.2d 112 (1998); *King v. Rubenstein*, 825 F.3d 206 (4th Cir. 2016) (in general, unless a suspect class is involved, disparate treatment is presumed to be valid under equal protection clause and will be sustained if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose).

There are three steps in determining whether an ordinance (or decision) survives rational basis scrutiny under the equal protection clause: (1) whether plaintiff was treated differently than others similarly situated; (2) whether defendant intentionally discriminated against plaintiff and had a rational basis for doing so; and (3) whether the discrimination/classification bears a rational relationship to a legitimate government purpose or goal. *Bibco Corp.*, 332 S.C. at 52-53, 504 S.E.2d at 116. All the elements of the rational basis test are fact intensive.

In *Bibco Corp.*, a city residential zoning ordinance's exclusion of mobile homes from some, but not all, residential districts in the city was rationally related to legitimate government purposes of preserving land for low density, single-family dwellings, protecting surrounding property values, *guarding against increased crime*, *guarding against increased traffic flow and congestion*, and *maintaining aesthetics*, and thus the ordinance did not violate the equal protection clause.

The Fourth Circuit has held that discriminatory motivations of people who testified before a decision-making body could only be probative of the body's motivations for purposes of an equal protection analysis where (1) the public testimony was overwhelmingly opposed to the proposal; (2) for a distinct discriminatory reason; and (3) the body's members were clearly swayed by that public opposition, fully aware of its basis in discrimination and prejudice. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995). In *Sylvia Dev. Corp.*, a developer failed to establish,

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in his civil rights action alleging violation of the equal protection clause, that county commissioners' denial of his application for a special zoning designation was based on his status as nonresident of the county, even though an activist at a hearing on the application stated that she wanted to know where the developer "came from" and that "outside people" were developing the county; 10 other citizens testified at the hearing, there was no other comment or question on the subject of the developer's out-of-county residence, a commissioner noted the irrelevance of the activist's comments, and, in the ensuing debate among commissioners, no reference was made to the activist's comments.

III. Procedural Due Process

Plaintiff claims in his third cause of action that the decision of County Council to deny his rezoning request violated procedural due process. Defendants deny the claim and the record does not support it.

Due process does not require a trial-type hearing in every conceivable case of alleged government impairment of a private interest; rather, due process is flexible and calls for such procedural protections as the particular situation demands. *Olds v. City of Goose Creek*, 418 S.C. 573, 795 S.E.2d 163 (Ct. App. 2016). The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *S.C. Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445, 574 S.E.2d 730 (2002).

Plaintiff in this case received procedural due process[9]. His only specific complaint for this cause of action concerns alleged disagreement with those opposing the rezoning, and rejection of the staff recommendations.

The statutory procedure for an amendment of a zoning regulation is set out in S.C. Code Ann. § 6-29-760:

> (A) Before enacting or amending any zoning regulations or maps, the governing authority or the planning commission, if authorized by the governing authority, shall hold a public hearing on it, which must be advertised and conducted according

[9] Plaintiff and others took the podium at the Planning Commission meeting on 2-28-2017. The matter was thoroughly vetted at the 3-13-2017 meeting of the Land Use & Development Committee. A public hearing was conducted at the 3-27-2017 meeting of County Council at which Plaintiff appeared and presented his case for rezoning. Plaintiff does not allege a violation of the controlling statute.

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to lawfully prescribed procedures. If no established procedures exist, then at least fifteen days' notice of the time and place of the public hearing must be given in a newspaper of general circulation in the municipality or county. In cases involving rezoning, conspicuous notice shall be posted on or adjacent to the property affected, with at least one such notice being visible from each public thoroughfare that abuts the property. If the local government maintains a list of groups that have expressed an interest in being informed of zoning proceedings, notice of such meetings must be mailed to these groups. No change in or departure from the text or maps as recommended by the local planning commission may be made pursuant to the hearing unless the change or departure be first submitted to the planning commission for review and recommendation. The planning commission shall have a time prescribed in the ordinance which may not be more than thirty days within which to submit its report and recommendation on the change to the governing authority. If the planning commission fails to submit a report within the prescribed time period, it is deemed to have approved the change or departure. When the required public hearing is held by the planning commission, no public hearing by the governing authority is required before amending the zoning ordinance text or maps.

(B) If a landowner whose land is the subject of a proposed amendment will be allowed to present oral or written comments to the planning commission, at least ten days' notice and an opportunity to comment in the same manner must be given to other interested members of the public, including owners of adjoining property.

(C) An owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party.

(D) No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.

In *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), *as amended* (May 4, 2009), a property owner who sought to rezone property from residential use to limited commercial use was afforded procedural due process, where he received notice of the public hearing on the matter, was allowed to present his arguments at the planning commission and city council levels, and was given three levels of review of the decision not to rezone property. All of the above components of procedural due process were available to the Plaintiff in the instant case and he directly participated in the process.

With regard to a procedural due process claim, the Fourth Circuit in *Sylvia Development Corp.* ruled that a developer did not have a constitutionally protected property interest in approval of an application for a special zoning designation to develop agricultural land in county into subdivision of single-family homes, even though zoning ordinances required creation of special zoning areas; the location of special zoning areas was discretionary with the county commissioners, and the criteria imposed by a zoning ordinance for the land to qualify for special zoning were merely preconditions for consideration for approval. Moreover, a county planning commission's favorable recommendation with respect to the developer's application did not create a constitutionally protected property interest in approval of the application; while the county commissioners were required to seek the recommendation of the planning commission, the zoning ordinance required only that the commissioners consider, not follow, that recommendation. 48 F.3d at 826-27. Even a state court judgment reversing the county commissioners' denial of the developer's application did not indicate that the developer had a preexisting constitutionally protected property interest in approval of application.

The court further held that even if the developer had a constitutionally protected property interest in approval of his application for the special zoning designation to develop agricultural land into a subdivision of single-family homes, he failed to establish a violation of procedural due process with respect to denial of the application, notwithstanding his assertion that the county commissioners' decision was mistaken and lacked evidentiary support. The commissioners conducted an open hearing, following proper notice, at which they heard the positions of all interested parties, following the hearing the commissioners made their decision and stated the reasons for decision, and the developer was entitled to appeal the decision and did so successfully. Likewise, arguably the Plaintiff here has no property interest in obtaining the requested rezoning and, in any case, he was afforded all the process that was due.

In another case, landowners were provided with a meaningful opportunity to be heard at a hearing on a city planning commission's decision on the landowners' application to subdivide their property, and thus the landowners' procedural due process rights were not violated; the commission held a public hearing at which the landowners submitted 26 exhibits to support their application, and the commission did not preclude the landowners from accessing the evidence in opposition to their application, which mostly consisted of public information regarding the historical

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significance of the property. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 656 S.E.2d 346 (2008). As also stated in *Kurschner*, a trial-type hearing was not required, as that would greatly hinder the commission's ability to make an informed and reasoned decision, as well as intrude upon a municipality's statutorily granted legislative authority.

If there otherwise are sufficient procedures to satisfy the right to notice and an opportunity to be heard, including judicial review, general allegations of bias in a zoning decision should not be sufficient to support an allegation of denial of procedural due process. *See Pellegrino Food Prods. Co. v. City of Warren*, 136 F. Supp. 2d 391 (W.D. Pa. 2000) (bakery owner was not denied procedural due process, when it was granted administrative appeal of adverse zoning and building permit decisions, even though owner claimed that city officials were biased against it); *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 97 Cal. Rptr. 2d 467 (2000) (where no individual procedural errors occurred, cumulative effect of city's actions did not create appearance of bias resulting in violation of due process rights of billiard parlor during de novo review by city council of city planning commission's grant of conditional use permit allowing expansion of parlor); *John E. Long, Inc. v. Borough of Ringwood*, 61 F. Supp. 2d 273 (D.N.J. 1998) (property owners in New Jersey were not denied procedural due process by denial of rezoning application, despite allegation that local zoning authorities were biased; state provided full judicial mechanism for challenging decision), *aff'd*, 213 F.3d 628 (3d Cir. 2000).

The Sixth Circuit held, in *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564 (6th Cir. 2008), that landowners had no protected property interest in rezoning to allow a trailer park and other residential development on their land that was zoned for agricultural use, and thus no procedural due process violation occurred from a township's refusal to rezone; there was no showing of any policy, law, or understanding with the township to create a "rezoning benefit," and the township had the discretion to deny the request.

IV. Substantive Due Process

In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law; the burden of proving the invalidity of a zoning ordinance (or decision) is on the party attacking it, and it is incumbent upon the challenger to show the arbitrary and capricious character of the

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ordinance (or decision) through clear and convincing evidence. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 719 S.E.2d 660 (2011). As stated in *McMaster*, the validity of a particular zoning measure must be considered not in the abstract, but in connection with the locality and surrounding circumstances. The authority of a municipality to restrict the use of privately owned property through zoning is founded in the police power. *Id.* at 505, 719 S.E.2d at 663.

A property owner's substantive due process challenge to a zoning ordinance may be analyzed under the arbitrary and capricious framework. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013).

In *McMaster*, a zoning restriction withstood a substantive due process challenge. In that case, the court held that a zoning ordinance that limited to three the number of unrelated individuals who may live together as a single housekeeping unit was a valid exercise of the city's broad police power, and because a rational relationship existed between the city's decision to limit the number of unrelated individuals who may live together and *the legitimate governmental interests of controlling the undesirable qualities associated with mass student congestion*, the city's decision did not violate the Due Process Clause of the State Constitution. 395 S.C. at 508, 719 S.E.2d at 664 (citing *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 261 (Iowa 2007)[10]

[10] (citing *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 261 (Iowa 2007) ("Based on its experience with students living off campus, the Ames city council made a reasonable policy decision to limit to three the number of unrelated persons who may reside in a single-family dwelling in certain areas. It did so because groups of unrelated persons typically have different living styles in comparison to groups of related persons. . .By limiting the number of unrelated persons who may live together, Ames's ordinance furthers the City's goal of creating family-oriented neighborhoods that are safe and quiet for young children.").

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In the zoning context, substantive due process plaintiffs first must prove that the state deprived them of a property interest and that its action fell so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency, and they also must overcome a court's extreme reluctance to upset the delicate political balance at play in local land-use disputes. *Henry v. Jefferson County Comm'n*, 637 F.3d 269 (4th Cir. 2011). In determining whether a zoning action violates substantive due process, the court may consider, among other factors, whether (1) the zoning decision is tainted with fundamental procedural irregularity, (2) the action is targeted at a single party, and (3) the action deviates from or is inconsistent with regular practice. *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269 (4th Cir. 2008). Absent any of these factors, the rezoning denial must withstand a substantive due process challenge.

The principle that for a violation of substantive due process, there must be conduct by the defendant that "shocks the conscience" has been applied in the zoning context. *See Huggins v. Prince George's County*, 683 F.3d 525 (4th Cir. 2012) (even if property owner had residual protected property interest in operating salvage automobile wholesaling business on property under revoked permits, county's shutting down of business for owner's failure to obtain grading and occupancy permits did not approach conscience shocking threshold for substantive due process violation by executive action; county did not deliberately intended to injure owner, indeed, county worked with owner for over two years to help it obtain permits). The "shock the conscience" standard is a difficult one to satisfy, requiring more than mere arbitrariness.

Here, no fair reading of the record would indicate anything close to a "shock the conscience" scenario legislative process occurred in the instant case.

As was also recognized and followed in *Bear Enterprises*, only where a local government's zoning action (including a decision whether to rezone) is so unreasonable as to impair or destroy constitutional rights will courts declare the action unconstitutional, and if the propriety of the decision is even "fairly debatable," a reviewing court cannot inject its judgment into the review of the decision, but must leave the decision undisturbed. As in *Town of Iva*, it was incumbent upon the party challenging the zoning decision to show by clear and convincing evidence the arbitrary and capricious nature of that action. *Bear Enters.*, 319 S.C. at 140-41, 459 S.E.2d at 886. In upholding the refusal to rezone in *Bear Enterprises*, the court also stated that a local legislative

body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property.

V. Other Claims

All other claims are derivative and not ripe for determination.

CONCLUSION

This is not a case for summary judgment and Plaintiff's motion should be denied.

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EXHIBIT "A"

BERKELEY COUNTY GOVERNMENT

PLANNING COMMISSION

MINUTES • FEBRUARY 28, 2017

MONTHLY

Administration Building - Assembly Room **6:00 PM**

1003 HIGHWAY 52
MONCKS CORNER, SC 29461

CALL TO ORDER

Mr. Day called the Planning Commission meeting to order at 6pm and asked Thomas Evans to lead in the invocation.

Name	Title	Status	Arrived
eath	Board Member	Present	
. Day	Chairman	Present	
ner	Vice Chairman	Present	
ans	Board Member	Present	
no	Board Member	Excused	
	Board Member	Present	6:40 PM
r	Board Member	Absent	
er	Board Member	Present	

2. Planning Commission - Monthly - Jan 24, 2017 6:00 PM

Do I hear a motion to approve the January minutes? Mr. Sineath made a motion to approve the minutes and Mr. Evans second the motion.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	James Sineath, Board Member
SECONDER:	Marion Turner, Thomas Evans
AYES:	James Sineath, Kenneth W. Day, Marion Turner, Thomas Evans, Gina Glaze, Lynn Hoover
ABSENT:	Mark Carter
EXCUSED:	Jake Serrano

Revision 3 - Rules of Procedure

1. Revision 3 to the Rules of Procedure

Mrs. Simmons: Wanted to mention that Planning Commission makes a recommendation for approval or denial for County Council's consideration. County Council has the final decision making on all rezoning due it being a legislative matter. If an item progresses, it will be reviewed by Land Use Committee, which is County Council. Mr. Day: Do I hear a motion for the approval of the Revisions Rules and Procedures? Mr. Sineath moved to have the revisions approved and Mr. Evans second it.

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She noted that she currently lives there, and the applicant is not intending to move to the lot.

Mr. Sineath made a motion to approve & Mr. Evans second the motion. All were in favor of the motion.

RESULT:	**RECOMMENDATION OF APPROVAL [UNANIMOUS] Next: 3/13/2017 6:01 PM**
MOVER:	James Sineath, Board Member
SECONDER:	Thomas Evans, Board Member
AYES:	Sineath, Day, Turner, Evans, Glaze, Hoover
ABSENT:	Carter
EXCUSED:	Serrano

2. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO TERENCE ROSS FOR 0.365 ACRES ON A LOT INDICATED WITH TMS# 087-00-06-030, LOCATED ON WALTER ROAD NEAR HIGHWAY 17A, MACEDONIA; FROM FLEX-1, AGRICULTURAL DISTRICT TO GC, GENERAL COMMERCIAL DISTRICT IN COUNCIL DISTRICT 6

TMS: 087-00-06-030; Flex 1 to GC Ross

Frances Pinto presented an overview of the request, noting adjacent uses and zoning and the intent of the request. She noted that the requested change is within the Arterial Road Overlay District and pointed out the preliminary plat that was submitted to the Department.

Terrance Ross, 504 bonnie drive, approached the podium. Mr. Day asked the intended use. Mr. Ross noted that he intends to develop as commercial and that he is kicking around some ideas. He noted that he owns the GC zoned lot on the corner and would like to combine.

Mr. Day asked for oppostion. None opposed the request.

Mrs. Hoover made a motion to approve the request and Mr. Sineath second the motion. All were in favor.

RESULT:	**RECOMMENDATION OF APPROVAL [UNANIMOUS] Next: 3/13/2017 6:01 PM**
MOVER:	Lynn Hoover, Board Member
SECONDER:	James Sineath, Board Member
AYES:	Sineath, Day, Turner, Evans, Glaze, Hoover
ABSENT:	Carter
EXCUSED:	Serrano

3. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

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TMS:233-09-02-046; R2 to R3 Meese

Ty Adley presented an overview of the request. He noted the intent of the application and adjacent uses and zoning.

The applicant, Todd Olds; Stoney Point Court, N. Charleston SC, approached the podium. He noted that it is currently legally non-conforming. Sale of the property is contingent upon sale. He noted that he has standards for mobile homes in his park. Mr. Turner asked about whether or not the existing mobile homes would meet those standards. Mr. Olds noted that they would not. He said that typically he works with tenants to comply over a 6 - 12 month time frame.

Mr. Turner asked if the access drive would be improved. The applicant noted that he would. He noted that he would look at placing 18 - 22 mobile homes on the property. Mr. Sineath asked if there would be a Manager and policing. The applicant noted that he will grant access to the Police Department.

Wade Arnett, adjacent property owner, approached the podium and noted that thinks that there is an overabundance of mobile homes already in the area. He said that he did not think that the lot was big enough to accommodate the number of MHs proposed.

Mr. Olds noted that he is a licensed Realtor and will be the property management. Mr. Arnett further noted that he is concerned about the children. He is concerned about the safety in the children that currently live in the neighborhood as well as those that may reside in the future mobile home park.

Mr. Olds noted that there is a Keating Rule, noting limitations under Fair Housing Laws for number of occupants for a house of a certain number of rooms (2 persons per room).

Frances (Donald) O'Gibson, resident at Royal Road, presented and read from a letter. Since 2002, he and other residents have been coming up here to demonstrate opposition. Previous properties of similar requests have been routinely denied because of over saturation of mobile home parks. He noted that increased traffic, drug problems, increased crime, increased demand for police, and a precedent that was set for similar types of request. He asked that the rezoning request adhere to those that were evaluated in the past.

Susan Yoeh; 385 Frankie Lane: noted that she had a question for the existing mobile home parks in Stahl Road. She asked if the condition of this park would be similar to that one?

James Jackson;769 Royal Road: Is concerned about lighting and kids getting into his pool and is opposed to this the rezoning of this property.

Ann Jackson, 769 Royal Road, she noted that her fence separates this MH park and that she has had problems with trespassing into her yard and pontune boat.

Xxx resident xxx - he pointed out his house and that his appraised value is diminished because of adjacent mobile homes. He noted that he has had issues with animal abandonment. He noted that across the street is a mobile home with a burn barrel, HVAC junked in yard, and porch in poor condition. He noted that cars are parking on the side of the road, obstructing traffic. His wife approached the podium and noted that she did not have anything but problems; she asked that the PC consider the repercussions of these types of requests. She noted that she smells meth being cooked.

Mr. Day noted that the PC has a history of denying these types of requests in this

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community. Mr. Sineath noted that the PC cannot do anything about children, drugs, etc. However, a resident noted that community concerns extend beyond those things, but include traffic.

Mr. Day asked for a motion

Mrs. Hoover made the motion to deny the request, Sineath seconded the motion. All were in favor. (Denied)

RESULT:	**RECOMMENDATION OF DENIAL [UNANIMOUS] Next: 3/13/2017 6:01 PM**
MOVER:	Lynn Hoover, Board Member
SECONDER:	Kenneth W. Day, Chairman
AYES:	Sineath, Day, Turner, Evans, Glaze, Hoover
ABSENT:	Carter
EXCUSED:	Serrano

4. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO HEIRS OF JERRY FORDHAM FOR 7.43 ACRES ON A LOT INDICATED WITH TMS# 263-00-01-003, LOCATED ON CLEMENTS FERRY ROAD NEAR CAINHOY ROAD; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-4, MULTIFAMILY RESIDENTIAL DISTRICT IN COUNCIL DISTRICT 8

TMS: 263-00-01-003; R2 to R4 Fordham

Ron Hanna presented an overview of the request.

Wofford Strinbling approached the podium; he noted that the request is compatible with the FLU. However, he feels that if this was a 15 acre lot, that he would be able to provide twice the number of units. He noted that the lot has been for sale for a number of years and wetlands constrain the site. In order to make the project economically feasible, he noted that a town home project is necessary. He feels as though town homes will bring an affordable housing product to the area.

Layne Baker, 2722 Crooked Stick Lane (River Town), noted that he did a similar town home project in MTP where he provided 37 town homes on 3.3 acres. He noted that he is a boutique town home developer. He noted that the product contains metal roofs, hurricane windows/doors, hardy plank, etc. He noted that adjacent uses are commercial, so he does not know what this site will be if it doesnt develop as TH.

Mr. Sineath asked the proposed SF of each unit. The applicant noted that without the garage, 1300 SF, with garage - 1500 SF. HE noted that the price point will be $175 - $195k.

Mr. Carl Townsend, resident in Hanahan, noted that he traverses Clements Ferry Road and he feels as though traffic congestion is significant on this road and 49 town homes and the proposed school will make it worse.

Mr. Wofford noted that multi-car families are not the ones moving into these types of communities. He noted that TH will not generate as many trips as say commercial. He noted that he feels as though this is an extension of Mt. Pleasant. He feels as though this area is set up for growth.

EXHIBIT "B"

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BERKELEY COUNTY GOVERNMENT

LAND USE & ECONOMIC DEVELOPMENT COMMITTEE

MINUTES • MARCH 13, 2017

REGULAR COMMITTEE MEETING

Administration Building - Assembly Room **6:01 PM**

1003 HIGHWAY 52
MONCKS CORNER, SC 29461

CALL TO ORDER

During periods of discussion and/or presentations, minutes are typically condensed and paraphrased.

Chairman Jack Schurlknight called the meeting to order.

In accordance with the Freedom of Information Act, the electronic and print media were duly notified.

Attendee Name	Title	Status	Arrived
Jack H. Schurlknight	Chairman	Present	
Kevin Cox	Committee Member	Present	
Kenneth E. Gunn	Committee Member	Present	
Joshua Whitley	Committee Member	Present	
Dennis L Fish	Committee Member	Present	
Tommy Newell	Committee Member	Present	
Caldwell Pinckney	Committee Member	Present	
Steve Davis	Committee Member	Present	
Bill Peagler	Ex-Officio	Present	

EXECUTIVE SESSION

1. Executive Session to Discuss Possible Land Exchange with Private Landowner in the Moncks Corner Area

Chairman Schurlknight stated that there are two remaining Executive Sessions scheduled for this evening and, without objection, he would like to combine the two Sessions.

It was moved by Committee Member Whitley and seconded by Committee Member Newell to **Enter into Executive Session** to Discuss a **Possible Land Exchange with a Private Landowner** in the Moncks Corner Area, and to Discuss a **Claim by an Employee in the EMS Department** and **Receive Legal Advice Related Thereto.** The motion **passed** by unanimous voice vote of the Committee.

The Executive Session commenced at 7:19 p.m. and ended at 7:41 p.m. Mr. John O. Williams, County Attorney, reported that Council went into Executive Session for the reasons stated in the motion, and no action was taken.

APPROVAL OF MINUTES

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1. Land Use & Economic Development Committee - Regular Committee Meeting - Feb 13, 2017 6:00 PM

Chairman Schurlknight asked for approval of minutes for the Regular Committee on Land Use and Economic Development meeting held on February 13, 2017.

It was moved by Committee Member Newell and seconded by Committee Member Cox to **approve** the minutes as presented. The motion **passed** by unanimous voice vote of the Committee.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Tommy Newell, Committee Member
SECONDER:	Kevin Cox, Committee Member
AYES:	Jack H. Schurlknight, Kevin Cox, Kenneth E. Gunn, Joshua Whitley, Dennis L Fish, Tommy Newell, Caldwell Pinckney, Steve Davis

AGENDA ITEM

1. Provide Authority to Execute a Land Exchange with a Private Landowner in the Moncks Corner Area

Presenter - John O. Williams, II, County Attorney

It was moved by Committee Member Davis and seconded by Committee Member Newell to **approve** Providing the Authority to **Execute a Land Exchange with a Private Landowner** in the Moncks Corner Area. The motion **passed** by unanimous voice vote of the Committee. Committee Member Fish was excused during the vote.

RESULT:	**APPROVED AND REFERRED [UNANIMOUS] Next: 3/27/2017 6:04 PM**
MOVER:	Steve Davis, Committee Member
SECONDER:	Tommy Newell, Committee Member
AYES:	Schurlknight, Cox, Gunn, Whitley, Newell, Pinckney, Davis
EXCUSED:	Fish

CONSIDERATION PRIOR TO FIRST READING

1. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

Committee Member Davis moved for approval.

Committee Member Newell stated that since he is the Council Member for that District, he should have the right to move whether to approve or deny.

Committee Member Whitley inquired as to where it says that in Council Rules.

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Chairman Schurlknight stated that it is kind of an understood thing.

Committee Member Davis withdrew his motion.

Ms. Alison Simmons, Planning & Zoning Director, stated that the applicant is requesting to rezone in order to conform and combine with an adjacent 1.2-acre R-3 zoned parcel. She stated that, upon combination, the minimum lot size requirement for R-3 zoning would be met. She stated that the subject property is contained in the 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. She stated that, based on adjacent zoning and adjacent Uses in the Comprehensive Plan recommendation, Staff recommended approval. She stated that the Planning Commission recommended denial in a unanimous vote. She stated that, after reviewing the requested change and hearing from many community stakeholders and opposition to the request, the Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area, and the diminution of property values and quality of life. She stated that a petition from stakeholders was included in the Committee Members' agenda packets.

Committee Member Whitley inquired as to if the Planning Commission's decision is articulated within the Standards that would protect us from a legal standpoint.

Ms. Simmons stated that she thinks so. She stated that the reason is because, in her opinion, the best gauge of compatibility is public input. She stated that while the requested change is supported by the Comprehensive Plan, the existing zoning is, as well.

Committee Member Whitley stated that both parcels allow mobile homes. He stated that this would only change one to be in conformance - one is currently grandfathered in. He inquired as to if he was correct.

Ms. Simmons stated that the adjacent parcel is currently zoned R-3, so it supports the request. She stated that the adjacent property is grandfathered and supports a mobile home park.

Committee Member Whitley stated that either way, the protest against the mobile homes does not hold water because it has mobile homes and it is grandfathered in for mobile homes.

Ms. Simmons stated that there are currently only 2 mobile homes on this other parcel.

Committee Member Whitley inquired as to what the impact would be if this was rezoned.

Ms. Simmons stated that they would be able to provide additional mobile homes in accordance with the requirements for R-3 zoning.

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Committee Member Whitley inquired as to how many.

Ms. Simmons stated that it would allow for up to 27 mobile homes on both parcels upon combination.

Committee Member Whitley stated that on the one parcel where it is already allowed, that is part of the 27 mobile homes.

Ms. Simmons stated that 13 mobile homes are allowed on that lot. She stated that if the parcel is rezoned, 14 mobile homes would be allowed on the subject parcel.

Committee Member Whitley clarified that the change would be from 2 to 14 mobile homes.

Ms. Simmons stated that this was correct.

Committee Member Cox stated that the reason for the grandfathered-in part is that County Council has decided that this is not the appropriate zoning for that area, so as mobile homes are pulled out, they are no longer allowed to bring additional mobile homes in. He inquired as to if he was correct.

Ms. Simmons stated that if a mobile home is removed from the subject parcel for a period longer than 6 months, it cannot be brought back.

Committee Member Cox inquired as to if that meant the same mobile home or any mobile home.

Ms. Simmons stated that it could be any mobile home.

Committee Member Davis inquired as to if there can be an increase from 2 mobile homes to more mobile homes under the grandfather clause provision.

Ms. Simmons replied to the negative.

Committee Member Davis stated that it is always limited to 2 or extinction/complete removal.

Ms. Simmons stated that this was correct.

Committee Member Whitley stated that, with approval, you get 27 mobile homes and, with denial, you get 15 mobile homes.

It was moved by Committee Member Newell and seconded by Committee Member Gunn to ***deny*** **prior to First Reading, an Ordinance to Modify the Official Zoning and Development Standards Map of Berkeley County, South Carolina, in regard to Bonnell W. Meese for 1.29 Acres on a Lot Indicated with TMS#: 233-09-02-046, Located on Royle Road near Farmington Rd/I-26; from R-2 to R-3**

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District in Council District #4. The motion passed by majority voice vote of the Committee. Committee Member Whitley and Committee Member Pinckney voted Nay.

RESULT:	**DEFEATED [6 TO 2]**
MOVER:	Tommy Newell, Committee Member
SECONDER:	Kenneth E. Gunn, Committee Member
AYES:	Schurlknight, Cox, Gunn, Fish, Newell, Davis
NAYS:	Whitley, Pinckney

2. BILL NO. 17-08, AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO JERRY AND SUSAN SAIN FOR 15.20 ACRES ON A LOT INDICATED WITH TMS# 248-00-03-008, LOCATED ON CHARITY CHURCH ROAD IN HUGER; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO FLEX-1, AGRICULTURAL DISTRICT IN COUNCIL DISTRICT 8

It was moved by Committee Member Davis and seconded by Committee Member Newell to **approve prior to First Reading, an Ordinance to Modify the Official Zoning and Development Standards Map of Berkeley County, South Carolina, in regard to Jerry and Susan Sain for 15.20 Acres on a Lot Indicated with TMS#: 248-00-03-008, Located on Charity Church Road in Huger; from R-2 to Flex-1 District in Council District #8**.

RESULT:	**APPROVED AND REFERRED [UNANIMOUS] Next: 3/27/2017 6:04 PM**
MOVER:	Steve Davis, Committee Member
SECONDER:	Tommy Newell, Committee Member
AYES:	Schurlknight, Cox, Gunn, Whitley, Fish, Newell, Pinckney, Davis

3. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO HEIRS OF JERRY FORDHAM FOR 7.43 ACRES ON A LOT INDICATED WITH TMS# 263-00-01-003, LOCATED ON CLEMENTS FERRY ROAD NEAR CAINHOY ROAD; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-4, MULTIFAMILY RESIDENTIAL DISTRICT IN COUNCIL DISTRICT 8

This item is being **held** until the April 10, 2017 Committee on Land Use and Economic Development meeting.

RESULT:	**HELD [UNANIMOUS]** **Next: 4/10/2017 6:01 PM**
MOVER:	Jack H. Schurlknight, Chairman
AYES:	Schurlknight, Cox, Gunn, Whitley, Fish, Newell, Pinckney, Davis

4. BILL NO. 17-09, AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO TERENCE ROSS FOR 0.365 ACRES ON A LOT INDICATED WITH TMS# 087-00-06-030, LOCATED ON WALTER ROAD NEAR HIGHWAY 17A, MACEDONIA; FROM FLEX-1, AGRICULTURAL DISTRICT TO GC, GENERAL COMMERCIAL DISTRICT IN COUNCIL DISTRICT 6

EXHIBIT "C"

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BERKELEY COUNTY GOVERNMENT

COUNTY COUNCIL

MINUTES • MARCH 27, 2017

REGULAR MEETING

Administration Building - Assembly Room **6:04 PM**

1003 HIGHWAY 52
MONCKS CORNER, SC 29461

CALL TO ORDER

During periods of discussion and/or presentations, minutes are typically condensed and paraphrased.

In accordance with the Freedom of Information Act, the electronic and print media were duly notified.

Attendee Name	Title	Status	Arrived
Kevin Cox	District 1	Present	
Joshua Whitley	District 2	Present	
Kenneth E. Gunn	District 3	Present	
Tommy Newell	District 4	Present	
Dennis L Fish	District 5	Present	
Jack H. Schurlknight	Vice Chairman	Present	
Caldwell Pinckney	District 7	Excused	
Steve Davis	District 8	Present	
Bill Peagler	Council Chairman	Present	

APPROVAL OF MINUTES

1. County Council - Special Meeting - Jan 6, 2017 3:01 PM

It was moved by Council Member Whitley and seconded by Council Member Newell to **approve** the minutes, as presented. The motion **passed** by unanimous voice vote of Council.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Joshua Whitley, District 2
SECONDER:	Tommy Newell, District 4
AYES:	Kevin Cox, Joshua Whitley, Kenneth E. Gunn, Tommy Newell, Dennis L Fish, Jack H. Schurlknight, Steve Davis
EXCUSED:	Caldwell Pinckney

2. County Council - Public Hearing - Feb 13, 2017 6:29 PM

It was moved by Council Member Whitley and seconded by Council Member Newell to **approve** the minutes, as presented. The motion **passed** by unanimous voice vote of Council.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Joshua Whitley, District 2
SECONDER:	Tommy Newell, District 4
AYES:	Kevin Cox, Joshua Whitley, Kenneth E. Gunn, Tommy Newell, Dennis L Fish, Jack H. Schurlknight, Steve Davis
EXCUSED:	Caldwell Pinckney

PUBLIC DISCUSSION

1. Requests to be heard must be made prior to the Call to Order. [Comments on any Public Discussion items will be limited to four (4) minutes per speaker. A total of 30 minutes will be allotted for this Public Discussion period.]

Chairman Peagler explained the rules for addressing Council during Public Discussion.

Mr. Todd Olds, 431 Stoney Poynt Court, North Charleston, stated that he came before Council this evening on a request to rezone a property at Royle Road. There are some compelling facts and substantial issues that he wishes to present to Council this evening. The papers being passed out are some signatures of residents that live on the property and support the rezoning, in addition to some photos of Royle Road. One of the compelling facts he wishes to present tonight is if they base their decision this evening based on the people who are opposed to this, he'll probably go home a loser, if it is based on facts of the law, the area, its character, and what is near Royle Road, then he should walk out with approval. The Planning Director of the County has made a recommendation for approval. The Berkeley County Land Use Plan totally supports this rezoning. This rezoning request is harmonious in its entirety. Royal Road has 66 parcels. Out of 66 parcels that butt Royal Road, 42 of them have a mobile home or multiple mobile homes. The property that he is asking to be rezoned presently has two mobile homes. The adjacent property that he has beside it, has approval already for at least 13 mobile homes. The actual residents support the rezoning. The request does not negate in any way or create a negative character to the district, community or existing development of the area. They will hear consistently tonight about drugs, people in the street, traffic, that is subjective and arbitrary. There is nothing factual that can be presented to them to demonstrate that any property values have been decreased based on mobile homes. This is a mobile home community. It's an affordable living area. They are asking for a rezoning based on those facts. Based on what the County website says in bold print that the future land use and comprehensive plan is a strong guide for decision making and rezoning request. Therefore, they are asking they do this based on the law, Comprehensive Plan, the Planning Director's recommendation and not on anyone's subjective reasons, not being factual, and not being a supporter. Planning Commissions do not always get it right. They solely base their decision on subject, arbitrary reason.

Mr. Raymond Headding, 760 Royle Road, Ladson, stated that he is standing opposed to the property, TMS # 233-09-02-046, being changed from the present zone status R-2 to R-3, because there is high traffic on this road at certain times of the day. There are 13 trailer parks presently on Royle Road, that he personally counted, from I-26

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overpass, Northeast, to Highway 17-A. There are trailer parks on Royle Road, Southwest of I-26 overpass. There have been 11 applications denied since as far back as April of 2002. Here they have another, same type of application trying to be passed. There have been approximately 13 trailer parks along with parcels consisting of 2 to 4 trailer parked on them. A total count was done showing an approximate count of 316 trailers off of Royle Road off of Highway 17-A to Highway 78. He is concerned about where he lives, which is directly in front of this property that is trying to be rezoned. He has put his house up for sale twice and was told by the real estate agent that because of the trailers next door and around in the area, the value of his real estate, he couldn't get what it really is worth because it is depreciated. He has woken early in the mornings and have had suspicious people sitting in his driveway. He's witnessed a large amount of consistent traffic of coming and going, which is a common red flag to predict high drug trafficking. Sometimes there are cars, truck, and mopeds that frequent the same trailer as many as twelve times within an approximate three hour period. There are unusual and strange vehicles up and down the driveways and dirt roads in search of a specific trailer. The appearance of the homes is falling apart, skirting is missing, pieces or all of it, old vehicles parked in the yards without license plates on them, and everything left out in the open of all to see. There are no privacy fencing requirements. This is a two-lane road. All traffic has no alternate means of travel. He has witnessed a boy from one of the trailers on the same tract of land that is in question and he was hit.

Mr. James Jackson, 769 Royle Road, Ladson, stated he is adjacent to the property that is in question here. He has been there for 51 years. If there was something they could have done 45 or 55 years ago, they would have done it then. There wasn't Planning Commissions then or anything back then. Most of these parcels of land on this road are around three acres in size. They bought these properties out there 50 years ago, because they wanted a country style living, but the community around there and in the southern part of Berkeley County is growing tremendously. The Summerville area where they live is growing wild. The subdivision down the road from them that is going in, they still have more house being built. Around the Sangaree school, you can't get by there in the mornings or afternoons from people dropping off and picking up kids there. They even park in the highway, and you have to sit there and wait for them to get through before they can get through that section.

Mr. Francis Gibson, 1076 Royle Road, Ladson, stated that they have nine pages of a petition of residents that have signed in opposition of the rezoning. He has been coming here since 2002, and he has been living there since 1978. He has seen the area turn from acreage to trailers. They don't need any more trailers. The precedent has been set all those times. There's one common thing, every person that comes up here that wants to put trailers in the area, they don't live there. He just wants Council to keep in mind, that since 2002, there have been 12 TMS's that they have shot down. They don't need any more trailers in the area.

Mr. Auvo Kemppinen, 329 Lake Moultrie Drive, Bonneau, stated that he is here to express his concern about the present contract with Berkeley County and Republic Services about trash and recyclables disposal. He is an immigrant, retired citizen from Finland, and he feels responsible for separating trash and recyclables. He delivers paper and cardboard to the disposal center outside of Moncks Corner once a week. There, they

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don't accept recyclables like they used to. Republic Service now imposes a monthly charge of $15.00 per month for doing his civic duty. He wanted to deliver his recyclables to their gathering point, but they refused. To a retired person, this amounts to real money. Something is wrong. This $15.00 a month fine for doing his civic duty appalls him, leaving him no other option than throw it out with the trash. He would like to know who the brilliant attorney was who concocted this crazy scheme, and with Council's approval. He sincerely hopes this matter will be revisited.

CHAIRMAN OF COUNTY COUNCIL

REPORTS FROM STANDING COMMITTEES

1. *Committee on Finance*

Chairman Joshua S. Whitley, District No. 2

a. Fiscal Year 2017 Budget Status Report

Presenters: Tim Callanan/Johnette Connelley

Chairman Whitley stated that Mr. Tim Callanan provided a Fiscal Year 2017 Budget Status Report, and no action was taken.

(That concluded Chairman Whitley's report.)

RESULT:	INFORMATION ONLY

2. *Committee on Land Use & Economic Development*

Chairman Jack Schurlknight, District No. 6

a. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

Council Member Davis stated that he hears the citizens. Eventually, change is going to come. He is always leery of when the Planning Commission makes its decision, and when staff makes a decision. He has always been guided by those principals. It's no question that it fits within the Comprehensive Zoning Plan. Unfortunately, the fine citizens are trapped in the dilemmas of it. He told Mr. Olds that he would support it, because it fits the overall Comprehensive Plan and he wanted the folks to understand that he consistently follows this pattern. Change is hard, difficult and they don't deserve all the things happening out there, but at the same time the Comprehensive Zoning Plan was put in place for specific reasons.

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Council Member Schurlknight stated that he has a lot of concerns about the effects it is going to have on the individuals that live on Royle Road. They've been there a long time, and have seen a lot. He is hearing that they have hosted a lot of development on the road, and it comes to a tipping point to where you must look at the capacity of the road, and safety. He understands that the Planning Commission denied and Staff recommended, but he thinks Council has a lead way in some of this stuff. He likes to look at it by a case by case basis. He inquired to Mr. John O. Williams, County Attorney, if he has had a chance to look at this situation and if he would address the legality of it. If Council is within its legal right.

Mr. John O. Williams, County Attorney, replied in the affirmative, and Council is justified in a vote in either direction.

Council Member Schurlknight stated that with that in mind, he has been down Royle Road many times. He has seen a lot of stuff going on in the area. It does devalue the property. He thinks they have suffered enough when it comes to development and quality of life. It concerns him that when the dust settles, they are going to be there. As Chairman of the Land Use Committee, he agrees with Council on the original recommendation of denial.

Council Member Whitley stated that he thinks he was in the minority voting for approval for First Reading, and he would send it to at least Second Reading or Third Reading not committing to voting for the potential rezoning. He is hesitant to vote for a rezoning for a mobile home park unless it fits the character of the area. His understanding though, is this rezoning would change very little, except on the 10 overall units. He is going to vote consistent as he did in Committee, and send it to Second Reading.

On recommendation of the Committee, Chairman Schurlnight moved to **deny** an **Ordinance to Modify the Official Zoning and Development Standards Map of Berkeley County, South Carolina, in Regard to Bonnell W. Meese for 1.29 Acres on a Lot Indicated with TMS# 233-09-02-046, located on Royle Road near Farmington Rd/I-26; from R-2, Manufactured Residential District to R-3, Mobile Home District in Council District 4.** The motion to ***deny*** **passed** by majority voice vote of Council. Council Member Whitley and Council Member Davis voted Nay.

02/28/17 Planning Commission RECOMMENDATION OF DENIAL

03/13/17 Land Use & Economic Development Committee DEFEATED

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS CASE NO.: 2017-CP-08-1088
Todd Olds, Plaintiff	)	
vs.	)	**RESPONDENTS' BRIEF**
Berkeley County and Berkeley County Planning Commission, Defendants	)	

STATEMENT OF ISSUE ON APPEAL

Has the Appellant overcome the presumption of the validity of Berkeley County Council's decision to deny his rezoning request?

STATEMENT OF THE CASE

By application presented to the Berkeley County Planning Department, the applicant sought to rezone a lot of land in Berkeley County, South Carolina bearing TMS #233-09-02-046, from an R-2 to an R-3 zoning designation[1].

He did not seek a special exception or variance, but rather sought to rezone the parcel[2].

If allowed, the rezoning would have enabled the owner to increase the total number of mobile homes for rent on a 1.29 acre lot to fourteen (14).

At the time of his application there were two (2) mobile homes on the subject parcel, each legally non-conforming.

[1] R-2 is mobile home residential. R-3 is mobile home commercial.

[2] A special exception/variance application could have to have been presented to the Board of Zoning Appeals ("BZA"). Appellant opted to seek a zoning change.

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Berkeley County Planning Department staff reviewed Appellant's application and recommended (based solely on conformance with the Comprehensive Land-Use Plan) to the Planning Commission that the rezoning request be approved.

The Planning Commission held a hearing on February 28, 2017 upon the rezoning request, at which time the applicant spoke in favor of the request and members of the public, including neighboring property owners, spoke against the requested rezoning. No member of the general public spoke in favor of the request.

After hearing from the public and considering the merits of application for rezoning, the Planning Commission voted unanimously to recommend to the County Council that it deny the rezoning request.

The matter then procedurally continued in the ordinary course and was brought before the County's Land Use & Economic Development Committee on March 13, 2017. Planning staff reported on the status of the matter. Following receipt of input from the public and discussion by members of the committee, the Land Use & Economic Development Committee voted 6-2 to deny the rezoning request.

The matter was then presented to the full County Council for action on a proposed ordinance to rezone the subject property at its March 27, 2017 meeting. Members of the public appeared and expressed a variety of concerns in the "Public Discussion" period of the hearing.

When the question of consideration of first reading on the proposed ordinance to rezone the subject property came for a vote by County Council, on motion properly made and seconded, after deliberation and discussion, County Council voted 5-2 to deny the rezoning request.

As reflected in the summary minutes and the real time video recordings of the proceedings, throughout the legislative consideration of the rezoning proposal, opinions for and against the proposal were voiced and for a variety of reasons.

Appellant brought the instant case when he was denied his request to have the subject property rezoned in order to place up to 14 mobile homes for rent on the 1.29 acre lot.

The parties have consented to the appointment of a Special Referee and to adjudicate the matter before him as an appeal.

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STATEMENT OF FACTS

The following facts are undisputed:

(1) that at all times relevant to these proceedings, the only matter before Berkeley County government was Mr. Olds' rezoning request;

(2) that he was afforded the unrestricted opportunity to be heard at three public hearings on his application for rezoning;

(3) that in each forum Mr. Olds appeared in person, spoke at length and addressed all panels directly;

(4) that Mr. Olds "made his case" for rezoning in each forum;

(5) that various members of the general public appeared before each panel and voiced a variety of concerns, positions and opinions; and

(6) that his rezoning request was not favorably received in all instances;

What is in substantial dispute forms the basis of Appellant's appeal; that is to say, according to the Appellant the actions of the appointed and elected officials of Berkeley County in denying his rezoning request were based solely on subjective, arbitrary and capricious considerations.

The actual record establishes the rezoning request was at all times and in all venues fairly debatable.

In her presentation before the Land Use & Economic Development Committee on March 13, 2017, Planning and Zoning Director Alison Simmons testified as follows:

> *"... Planning Commission recommended denial in a unanimous vote after reviewing the requested change and hearing from many community stakeholders in opposition to the request. Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area and the diminution of property values and quality of life..."*

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Excerpts of testimony and comments from the video recording of the March 27th Council meeting include *inter alia*:

- "In a couple of those (pictures) you will see it is high traffic on this road at certain times of day"... "And yes, I can say that I have put my house up for sale twice and was told by the real estate agent that because of the trailers next door and around in my area that the value of my real estate, I could not get what it would really be worth because it has depreciated" ... "There is a two and a half mile stretch from 17A to 78. It takes approximately twenty to twenty-two minutes to travel both ways or one way in heavy traffic time. We are posed with a major problem with the safety factor of those emergency vehicles going to and from. One person being trapped in a fire, losing one minute can cost him his life". *Raymond Heddin.*
- "My concern is about traffic, safety and children"... "That's a big concern right there." *Councilman Jack Schurlknight.*
- "From the four way stop to my house is probably 800 yards, roughly, and it backs up every day. And I've got video standing on my front porch where they're stopped in the road waiting to get through." *Raymond Heddin.*
- "Traffic and everything on there around Sangaree School. You can't get there in the afternoons or in the mornings for people dropping or picking up kids there. They even park in the highway. You got to sit there and wait for them to get through before you can get through that intersection there around the school. Y'all need to come around there in the afternoons and see what kind of traffic we got on the road." *James Jackson.*
- "It comes to a tipping point to where you know you got carrying capacity on the road. You got to look at the safety. And that's the direction I'm coming from. Totally." *Councilman Jack Schurlknight.*
- "I don't hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residents and children." *Supervisor and Chairman of County Council William Peagler.*

ARGUMENTS

Berkeley County Council has been vested with the following powers by state law:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. *The powers of a county must be liberally construed in favor of the county* (emphasis added) and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties. *S.C. Code Ann. § 4-9-25.*

With respect to its zoning ordinances, Berkeley County Council must abide by the following statutory mandate:

(A) Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. *S.C. Code Ann. § 6-29-710.*

Berkeley County has adopted a county wide zoning ordinance. It is known as the Berkeley County Zoning and Development Standards Ordinance, ("Zoning Ordinance"). *Effective August 28, 2001.* There is no dispute here as to whether the Zoning Ordinance comports with state law.

All purposes of the Zoning Ordinance are stated in Article 1.2. There are many stated purposes, which are not mutually exclusive. The "Purpose and Authority" article reads as follows:

ARTICLE 1. - PURPOSE AND AUTHORITY

1.1. - Authority.

This ordinance is adopted pursuant to the statutory authority conferred by S.C. Code 1976, § 6-29-710 et seq., as amended.

1.2. - Purpose.

It is the purpose of this ordinance to:

A. Implement the goals and policies outlined in the Berkeley County Comprehensive Plan;

B. Provide for adequate light, air, and open space;

C. Prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;

D. Facilitate the creation of a convenient, attractive, and harmonious community; to protect and preserve scenic, historic, or ecologically sensitive areas;

E. Regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, and public activities;

F. Facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, and disaster evacuation;

G. Distribution of population and traffic that will tend to create conditions favorable to health, safety, convenience, appearance, prosperity, morals, order, and the general welfare of the county.

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The legislative actions of the Planning Commission, the Land Use & Economic Development Committee and the full County Council to retain the previously established R-2 zoning designation on the subject property are wholly consistent with several of the purposes of the Zoning Ordinance.

Appellant's Argument No. 1

Appellant first argues that the decision of County Council to deny his rezoning request was based on unsupported, subjective complaints of neighbors. The record does not support his contention.

What the whole record establishes and puts in open display is a much different picture, a snapshot of a very typical local legislative process. Sometimes the local legislative process can be boring. Sometimes it can be entertaining; sometimes ragged and occasionally raw. Rarely is it a version from a Civics Class.

It is undeniable here that there were folks who took the microphone and spoke freely, passionately and frankly on Appellant's rezoning request. Some of those sentiments were apparently not as "pure" or "politically correct" as Appellant would prefer. Some sentiments were calmly communicated. Others were more vociferous. Most testified as to what they actually saw and experienced in the neighborhood, all objectively observable and not utterly "subjective" as Appellant chooses to characterize them.

However, in an overly zealous insistence on a sanitized and fanciful version of every local legislative process, Appellant is demanding a process that does not exist in the real world. Moreover, in a not so subtle display of his own arbitrariness, Appellant is attempting to impute the words of citizen participants in a public forum to every appointed and elected official who disagreed with his zoning change request. In so doing, Appellant is staining the very process that he says was stained.

There is nothing in the entire record that evidences that any voting member of the Planning Commission or voting member of Council voted a specific way based on any improper consideration.[3] In other words, the subject was fairly debatable.

Moreover, it is well-settled in South Carolina that rezoning is a legislative matter [4], and a court has no power to zone property; a rezoning decision is presumptively valid, and a property owner bears the burden of proving otherwise. *(emphasis added). Bear Enterprises. v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995).[5] A presumption of validity can only be overcome by clear and convincing evidence.[6] *Lenardis v. City of Greenville*, 316 S.C. 471, 450 S.E.2d 597 (Ct. App. 1994) (propriety of city's decision in refusing to rezone property from office use to commercial use was not so unreasonable as to impair or destroy property owner's constitutional rights; owner bought property as speculative investment with full knowledge of existing zoning and surrounding commercial development, and vast majority of surrounding property in city was residential); *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), *as amended* (May 4, 2009) (City's denial of application to rezone property consisting

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[3] There is nothing in any County ordinance or in State law that requires a member of County Council to give a reason for why he/she votes on a particular legislative matter.

[4] The City of Aiken's zoning decision in the matter of *Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E. 2d 639 (1991), was not upset. Our Supreme Court restated well-settled law in this state that local zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable, citing Byrd, et al. v. City of North Augusta, 261 S.C. 591, 201 S.E.2d 744 (1974).

Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is "so unreasonable as to impair or destroy citizen's constitutional rights." Hampton v. Richland County, 292 S.C. at 503, 357 S.E.2d at 465 (Ct.App.1987) [quoting Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965)]; and the decision should not be overturned by a court so long as the decision is "fairly debatable." Ibid. [quoting Rushing v. City of Greenville, 265 S.C. at 288, 217 S.E.2d at 799 (1975)]. In *Knowles*, the Court held that even if the City's ordinance does constitute spot zoning, it cannot invalidate this zoning because its propriety is at the least "fairly debatable" and is not "so unreasonable as to impair or destroy citizen's constitutional rights" so as to allow us to second guess the City's wisdom in passing the ordinance.

[5] The facts of *Bear Enterprises*, which involved a refusal to rezone property for a mobile home park, are discussed in the section on substantive due process, *infra*.

[6] In Footnote 1 to the *Bear Enterprises* opinion the Court noted:

"We note that Bear deposed Council members and presented their testimony as evidence to support Bear's argument that Council's decision was arbitrary. We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts. Although we feel it was inappropriate to examine Council members in this manner, the County did not object to the procedure in this case".

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of house on corner lot from residential to limited commercial use was fairly debatable and not so unreasonable as to impair or destroy property owner's constitutional rights, even though other similarly situated properties on one of two bordering streets were zoned for limited commercial use, where city had a vested interest in reserving the area's residential character, neighborhood citizens were concerned that the area would become too commercial, and the property at issue acted as a buffer between residential area and a busier commercial area).

The Supreme Court of South Carolina has held that a zoning ordinance excluding mobile homes from all areas except mobile home districts was valid and enforceable. To overcome the presumption of validity there must be an absence of any evidence supporting the legislative action. *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991). Particular reasons for the mobile homes ordinance in *Willoughby* are not discussed in depth in that opinion, though the court noted that the zoning ordinance was enacted "*for the purpose of promoting the health, safety, morals, and general welfare of the community.*" *Id.* at 422, 412 S.E.2d at 425. That is precisely the case here.

Of course, in the instant case, the County is not seeking to confine mobile homes in a particular district or districts, but *Willoughby* suggests in any case that a Plaintiff may defeat the rezoning decision only with clear and convincing evidence. *Willoughby* suggests that the decision was unobjectionable to the extent that it was based on any evidence that there would be a significant increase in noise or traffic congestion if the rezoning was approved.

Appellant also alleges that the Comprehensive Plan requires the property in question to be zoned R-3, the classification he seeks in the rezoning process.

The County planning staff here found that the requested rezoning was consistent with the Comprehensive Plan, but the elected officials, possessed with their legislative authority determined that staff's recommendation, although a proper consideration, was outweighed by other considerations rooted in public safety, health, and welfare, among other purposes.

The mere fact that the Planning Commission and the County Council reached a decision different from that recommended by planning staff does not render the final decision arbitrary and capricious. The decision was for the Council to make, after due deliberations and taking into account all of the facts. *See Greb v. Bd. of Comm'rs for Klamath County*, 32 Or. App. 39, 573

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P.2d 733 (1978) (each county governing body is required to retain responsibility for land use planning within its county, and is therefore vested with authority to make county land use decisions; County Board of Commissioners is not bound by recommendations of County Planning Commission even if supported by substantial evidence); *Adams v. City of Richmond*, 340 S.W.2d 204 (Ky. 1960) (zoning is vested by statute in the city legislative body, and it had power to override or reject a recommendation of the zoning commission which merely makes recommendations).

Appellant cites three (3) cases in his brief. Each case cited involves a matter originating before a local Board of Zoning Appeals in connection with an application for a special exception. The BZA was acting in each instance in the cases cited by the Plaintiff in a "quasi-judicial role".

This is not an appeal from the BZA which by ordinance prescribes the duties of the BZA[7]. Rather it is a challenge to the legislative function of County Council. This Court should, as all Courts are required by law, practice judicial restraint and not supplant its judgment for the local government's legislative judgment. *Lenardis, Id. et al.*

Appellant's Argument No. 2

Appellant's second argument relates to substantive due process. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law; the burden of proving the invalidity of a zoning ordinance (or decision) is on the party attacking it, and it is incumbent upon the challenger to show the arbitrary and capricious character of the ordinance (or decision) through clear and convincing evidence. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 719 S.E.2d 660 (2011). As stated in *McMaster*, the validity of a particular zoning measure must be considered not in the abstract, but in connection with the locality and surrounding circumstances. The authority of a municipality to restrict the use of privately- owned property through zoning is founded in the police power. *Id.* at 505, 719 S.E.2d at 663.

[7] Berkeley County Zoning Ordinance 21.6. - Decisions of the board of zoning appeals. All final decisions and orders of the board must be in writing and be permanently filed as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board, which must be delivered to parties of interest by certified mail.

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A property owner's substantive due process challenge to a zoning ordinance may be analyzed under the arbitrary and capricious framework. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013).

In *McMaster*, a zoning restriction withstood a substantive due process challenge. In that case, the court held that a zoning ordinance that limited to three the number of unrelated individuals who may live together as a single housekeeping unit was a valid exercise of the city's broad police power, and because a rational relationship existed between the city's decision to limit the number of unrelated individuals who may live together and *the legitimate governmental interests of controlling the undesirable qualities associated with mass student congestion*, the city's decision did not violate the Due Process Clause of the State Constitution. 395 S.C. at 508, 719 S.E.2d at 664 (citing *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 261 (Iowa 2007)[8]

In the zoning context, substantive due process plaintiffs first must prove that the state deprived them of a property interest and that its action fell so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency, and they also must overcome a court's extreme reluctance to upset the delicate political balance at play in local land-use disputes. *Henry v. Jefferson County Comm'n*, 637 F.3d 269 (4th Cir. 2011). In determining whether a zoning action violates substantive due process, the court may consider, among other factors, whether (1) the zoning decision is tainted with fundamental procedural irregularity, (2) the action is targeted at a single party, and (3) the action deviates from or is inconsistent with regular practice. *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269 (4th Cir. 2008). Absent any of these factors, the rezoning denial must withstand a substantive due process challenge.

The principle that for a violation of substantive due process, there must be conduct by the defendant that "shocks the conscience" has been applied in the zoning context. *See Huggins v. Prince George's County*, 683 F.3d 525 (4th Cir. 2012) (even if property owner had residual

[8] (citing *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 261 (Iowa 2007) ("Based on its experience with students living off campus, the Ames city council made a reasonable policy decision to limit to three the number of unrelated persons who may reside in a single-family dwelling in certain areas. It did so because groups of unrelated persons typically have different living styles in comparison to groups of related persons. . .By limiting the number of unrelated persons who may live together, Ames's ordinance furthers the City's goal of creating family-oriented neighborhoods that are safe and quiet for young children.").

protected property interest in operating a salvage automobile wholesaling business on property under revoked permits, county's shutting down of business for owner's failure to obtain grading and occupancy permits did not approach conscience shocking threshold for substantive due process violation by executive action; county did not deliberately intended to injure owner, indeed, county worked with owner for over two years to help it obtain permits). The "shock the conscience" standard is a difficult one to satisfy, requiring more than mere arbitrariness.

Here, no fair reading and review of the record would indicate anything close to a "shock the conscience" scenario relative to the legislative process which played out in the instant case.

Appellant's Argument No. 3

Appellant's third argument relates to his claim that the decision of County Council to deny his rezoning request was a violation of equal protection. Respondents deny the claim and the record does not support it.

If there is no suspect or quasi-suspect class and no fundamental right is involved, a zoning ordinance's viability under the equal protection clause, or a zoning decision, should be tested under the "rational basis" standard. *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 504 S.E.2d 112 (1998); *King v. Rubenstein*, 825 F.3d 206 (4th Cir. 2016) (in general, unless a suspect class is involved, disparate treatment is presumed to be valid under equal protection clause, and will be sustained if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose).

There are three steps in determining whether an ordinance (or decision) survives rational basis scrutiny under the equal protection clause: (1) whether plaintiff was treated differently than others similarly situated; (2) whether defendant intentionally discriminated against plaintiff and had a rational basis for doing so; and (3) whether the discrimination/classification bears a rational relationship to a legitimate government purpose or goal. *Bibco Corp.*, 332 S.C. at 52-53, 504 S.E.2d at 116. All of the elements of the rational basis test are fact intensive.

In *Bibco Corp.*, a city residential zoning ordinance's exclusion of mobile homes from some, but not all, residential districts in the city was rationally related to legitimate government purposes of preserving land for low density, single-family dwellings, protecting surrounding property values, *guarding against increased crime, guarding against increased traffic flow and*

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congestion, and *maintaining aesthetics*, and thus the ordinance did not violate the equal protection clause.

The Fourth Circuit has held that discriminatory motivations of people who testified before a decision-making body could only be probative of the body's motivations for purposes of an equal protection analysis where (1) the public testimony was overwhelmingly opposed to the proposal; (2) for a distinct discriminatory reason; and (3) the body's members were clearly swayed by that public opposition, fully aware of its basis in discrimination and prejudice. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995). In *Sylvia Dev. Corp.*, a developer failed to establish, in his civil rights action alleging violation of the equal protection clause, that County Commissioners' denial of his application for a special zoning designation was based on his status as nonresident of the county, even though an activist at a hearing on the application stated that she wanted to know where the developer "came from" and that "outside people" were developing the county; ten (10) other citizens testified at the hearing, there was no other comment or question on the subject of the developer's out-of-county residence, a commissioner noted the irrelevance of the activist's comments, and, in the ensuing debate among commissioners, no reference was made to the activist's comments.

Here, no element of the *Bibco* analysis has been met.

Appellant's Argument No. 4

Appellant's fourth argument is based on his claim that the decision of County Council to deny his rezoning request violated procedural due process. Respondents deny the claim and the record does not support it.

Due process does not require a trial-type hearing in every conceivable case of alleged government impairment of a private interest. The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *S.C. Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445, 574 S.E.2d 730 (2002).

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Appellant clearly received procedural due process[9]. His only specific complaint for this cause of action concerns alleged disagreement with those opposing the rezoning, and rejection of the staff recommendations.

The statutory procedure for an amendment of a zoning regulation is set out in S.C. Code Ann. § 6-29-760:

> (A) Before enacting or amending any zoning regulations or maps, the governing authority or the planning commission, if authorized by the governing authority, shall hold a public hearing on it, which must be advertised and conducted according to lawfully prescribed procedures. If no established procedures exist, then at least fifteen days' notice of the time and place of the public hearing must be given in a newspaper of general circulation in the municipality or county. In cases involving rezoning, conspicuous notice shall be posted on or adjacent to the property affected, with at least one such notice being visible from each public thoroughfare that abuts the property. If the local government maintains a list of groups that have expressed an interest in being informed of zoning proceedings, notice of such meetings must be mailed to these groups. No change in or departure from the text or maps as recommended by the local planning commission may be made pursuant to the hearing unless the change or departure be first submitted to the planning commission for review and recommendation. The planning commission shall have a time prescribed in the ordinance which may not be more than thirty days within which to submit its report and recommendation on the change to the governing authority. If the planning commission fails to submit a report within the prescribed time period, it is deemed to have approved the change or departure. When the required public hearing is held by the planning commission, no public hearing by the governing authority is required before amending the zoning ordinance text or maps.
>
> (B) If a landowner whose land is the subject of a proposed amendment will be allowed to present oral or written comments to the planning commission, at least ten days' notice and an opportunity to comment in the same manner must be given to other interested members of the public, including owners of adjoining property.
>
> (C) An owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party.
>
> (D) No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.

[9] Plaintiff had more minutes of "podium time" with appointed and elected officials than any other speaker over the course of the three hearings.

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In *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), *as amended* (May 4, 2009), a property owner who sought to rezone property from residential use to limited commercial use was afforded procedural due process, where he received notice of the public hearing on the matter, was allowed to present his arguments at the planning commission and city council levels, and was given three levels of review of the decision not to rezone property. All of the above components of procedural due process were available to the Appellant and he directly participated in the process.

With regard to a procedural due process claim, the Fourth Circuit in *Sylvia Dev. Corp.*, ruled that a developer did not have a constitutionally protected property interest in approval of an application for a special zoning designation to develop agricultural land in the county into a subdivision of single-family homes, even though zoning ordinances required creation of special zoning areas; the location of special zoning areas was discretionary with the County Commissioners, and the criteria imposed by a zoning ordinance for the land to qualify for special zoning were merely preconditions for consideration for approval. Moreover, a County Planning Commission's favorable recommendation with respect to the developer's application did not create a constitutionally protected property interest in approval of the application; while the County Commissioners were required to seek the recommendation of the planning commission, the zoning ordinance required only that the commissioners consider, not follow, that recommendation. 48 F.3d at 826-27. Even a state court judgment reversing the County Commissioners' denial of the developer's application did not indicate that the developer had a preexisting constitutionally protected property interest in approval of application.

The court further held that even if the developer had a constitutionally protected property interest in approval of his application for the special zoning designation to develop agricultural land into a subdivision of single-family homes, he failed to establish a violation of procedural due process with respect to denial of the application, notwithstanding his assertion that the County Commissioners' decision was mistaken and lacked evidentiary support. The commissioners conducted an open hearing, following proper notice, at which they heard the positions of all interested parties, following the hearing the commissioners made their decision and stated the reasons for decision, and the developer was entitled to appeal the decision and did so successfully. Likewise, arguably, the Plaintiff here has no property interest in obtaining the requested rezoning and, in any case, he was afforded all the process that was due.

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In another case, landowners were provided with a meaningful opportunity to be heard at a hearing on a city planning commission's decision on the landowners' application to subdivide their property, and thus the landowners' procedural due process rights were not violated; the commission held a public hearing at which the landowners submitted 26 exhibits to support their application, and the commission did not preclude the landowners from accessing the evidence in opposition to their application, which mostly consisted of public information regarding the historical significance of the property. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 656 S.E.2d 346 (2008). As also stated in *Kurschner*, a trial-type hearing was not required, as that would greatly hinder the commission's ability to make an informed and reasoned decision, as well as intrude upon a municipality's statutorily granted legislative authority.

If there otherwise are sufficient procedures to satisfy the right to notice and an opportunity to be heard, including judicial review, general allegations of bias in a zoning decision should not be sufficient to support an allegation of denial of procedural due process. *See Pellegrino Food Prods. Co. v. City of Warren*, 136 F. Supp. 2d 391 (W.D. Pa. 2000) (bakery owner was not denied procedural due process, when it was granted administrative appeal of adverse zoning and building permit decisions, even though owner claimed that city officials were biased against it); *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 97 Cal. Rptr. 2d 467 (2000) (where no individual procedural errors occurred, cumulative effect of city's actions did not create appearance of bias resulting in violation of due process rights of billiard parlor during de novo review by city council of city planning commission's grant of conditional use permit allowing expansion of parlor); *John E. Long, Inc. v. Borough of Ringwood*, 61 F. Supp. 2d 273 (D.N.J. 1998) (property owners in New Jersey were not denied procedural due process by denial of rezoning application, despite allegation that local zoning authorities were biased; state provided full judicial mechanism for challenging decision), *aff'd*, 213 F.3d 628 (3d Cir. 2000).

The Sixth Circuit held, in *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564 (6th Cir. 2008), that landowners had no protected property interest in rezoning to allow a trailer park and other residential development on their land that was zoned for agricultural use, and thus no procedural due process violation occurred from a township's refusal to rezone; there was no showing of any policy, law, or understanding with the township to create a "rezoning benefit," and the township had the discretion to deny the request.

As was also recognized and followed in *Bear Enterprises*, only where a local government's zoning action (including a decision whether to rezone) is so unreasonable as to impair or destroy constitutional rights, will courts declare the action unconstitutional, and if the propriety of the decision is even "fairly debatable," a reviewing court cannot inject its judgment into the review of the decision, but must leave the decision undisturbed. As in *Town of Iva*, it was incumbent upon the party challenging the zoning decision to show by clear and convincing evidence the arbitrary and capricious nature of that action. *Bear Enters.*, 319 S.C. at 140-41, 459 S.E.2d at 886. In upholding the refusal to rezone in *Bear Enterprises*, the court also stated that a local legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property.

CONCLUSION

For the reasons set forth above, the legislative decision of Berkeley County Council to deny Appellant's rezoning request should and must as a matter of law be declared valid and affirmed.

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July 5, 2019

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Certificate of Service

I hereby certify that I served counsel for the Appellant with the within Respondents' Brief by placing the same in the US Mail on the 5th day of July 2019 at the following address:

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ELECTRONICALLY FILED - 2019 Dec 09 11:17 AM - BERKELEY - COMMON PLEAS - CASE#2017CP0801088

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS CASE NO.: 2017-CP-08-1088
Todd Olds, Plaintiff	)	**RESPONDENTS' SUPPLEMENTAL BRIEF**
vs.	)	
Berkeley County and Berkeley County Planning Commission, Defendants	)	

Respondents submit this Supplemental Brief to their July 5, 2019 Brief to elaborate on the question whether the 2010 Berkeley County Comprehensive Plan, ("Plan") standing alone has the force of law. Respondents incorporate their July 5, 2019 Brief by expressed reference.

The answer to the question posed is that while Plan is a creation and product of a lawful process, ***the Plan is not law***. That inescapable conclusion is found in the plain words of the Plan itself.[1]

Specifically, reference is made to the Introduction which states in pertinent part:

> Since the passage of Berkeley County's Comprehensive Plan Update, continued growth and development has led to a changing set of issues, goals and needs for the jurisdiction. The 2010 Comprehensive Plan is a document intended to both identify the positive attributes and components which continue to define Berkeley County, while ***guiding*** the growth and development of Berkeley County for the next fifteen to twenty years. It is in essence, a new ***blueprint*** for the County's future. (emphasis added).

Reference is also made to the Purpose of the Plan which states in pertinent part:

> The purpose of the Plan is to provide a ***snapshot*** of where the County is currently, and to set forth ***goals for future land use development*** with specific policies and ***recommended strategies*** for achieving these goals. The plan will ***guide decision-makers when making decisions, policies and laws regarding the future development of land, provision of essential community facilities, and preservation of natural and cultural resources***. It is intended to generate local

[1] The preamble to the Comprehensive Plan is attached hereto as Exhibit "A".

pride and enthusiasm about the future of the community, thereby ensuring the citizens are involved with the implementation of the Plan.

The ***goals*** in this Plan do not supersede those adopted by individual jurisdictions, however identifies areas where coordinated planning should be done on inter-jurisdictional issues that affect both the County and its municipalities.

The result is a concise, user-friendly document intended to operate in conjunction with adopted and amended zoning and land use regulations, in that issues identified in the Plan may be addressed through the development of suitable regulations and ordinances consistent with the ***policies*** identified in the Plan. The purpose of the 2010 Comprehensive Plan is to serve as a ***mechanism for which future land use and development decisions can be made that will help shape the future of Berkeley County,*** (emphasis added).

Reference is also made to the Vision of the Plan which states in pertinent part:

Throughout the planning process, Planning Commission and citizen input consistently come back to the same ***basic ideas or principles*** of how Berkeley County is envisioned. This includes concerns over issues such as rapid growth, adequate infrastructure and quality of life; and hopes such as better planning, more jobs and preservation.

Based on the information gathered, the following overall vision has been expressed and embraced:

Berkeley County is a vibrant community that embraces its history while promoting growth and development. The County will continue to promote sustainability by implementing the ***five guiding principals*** of the adopted comprehensive plan:

- Protect and promote distinctive, diverse communities;
- Manage infrastructure systems effectively and expand them efficiently;
- Respect and enhance historical and natural resources and expand their public accessibility;
- Make recreational opportunities--- both active and passive---available county-wide; and
- Draft a clear, fair plan to be implemented through simplified and streamlined processes.

Reference is also made to the Plan Implementation section of the Plan which states in pertinent part:

The Comprehensive Plan ***is part of an ongoing process... the policies in this Plan are intended to be building blocks*** for future planning efforts and land development decisions. (emphasis added).

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State law also contemplates that a comprehensive plan is intended to be a ***guide to decision-makers***. Title 6, Chapter 7 of the South Carolina Code of Laws, under the heading *Planning by Local Governments* provides as follows:

> The intent of this chapter is to enable municipalities and counties acting individually or in concert to preserve and enhance their present advantages, to overcome their present handicaps, and to prevent or minimize such future problems as may be foreseen. To accomplish this intent local governments are ***encouraged to plan for future development***; to prepare, adopt, and from time to time revise, a ***comprehensive plan to guide future local development***; and to participate in a regional planning organization to coordinate local planning and development with that of the surrounding region. As aids in the implementation of the comprehensive plan local governments are encouraged to adopt and enforce appropriate land use controls, and cooperate with other governmental authorities. (emphasis added).
>
> The provisions of this chapter are declared to be necessary for the promotion, protection, and improvement of the public health, safety, comfort, good order, appearance, convenience, prosperity, morals, and general welfare.
>
> Any county or municipality may, but shall not be required to, exercise any of the powers granted by this chapter. Whenever such a governing authority shall elect to exercise any of the powers granted by this chapter, such powers shall be exercised in the manner hereinafter prescribed. *S.C. Code Ann. § 6-7-10. Declaration of Purpose.*

Within Title 6, Chapter 29 of the South Carolina Code of Laws, *The South Carolina Local Government Comprehensive Planning Enabling Act of 1994* are found the following:

> (A) The local planning commission shall develop and maintain a planning process which will result in the systematic preparation and continual re-evaluation and updating of those elements considered critical, necessary, and desirable ***to guide the development and redevelopment of its area of jurisdiction***. *S.C. Code Ann. § 6-29-510. Planning process; elements; comprehensive plan.* (emphasis added).
>
> and
>
> (A) Zoning ordinances must be for the general purposes of ***guiding development*** in accordance with existing and future needs and promoting the ***public health, safety, morals, convenience, order, appearance, prosperity, and general welfare.*** To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable:
>
> (1) to provide for adequate light, air, and open space;

(2) to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;

(3) to facilitate the creation of a convenient, attractive, and harmonious community;

(4) to protect and preserve scenic, historic, or ecologically sensitive areas;

(5) to regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes;

(6) to facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements. "Other public requirements" which the local governing body intends to address by a particular ordinance or action must be specified in the preamble or some other part of the ordinance or action;

(7) to secure safety from fire, flood, and other dangers; and

(8) to further the public welfare in any other regard specified by a local governing body. *S.C. Code Ann. §6-29-710.*

CONCLUSION

The Plan, the County's Zoning Ordinance[2] and state law all plainly and consistently describe the Plan and associated zoning decisions in broad, purpose-driven terms. It would render the legislative and constitutional mandate and authority of County Council to carry out those purposes meaningless if it were otherwise.

[2] See Respondents' Brief, p. 5.

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December 9, 2019

ELECTRONICALLY FILED - 2019 Dec 09 11:17 AM - BERKELEY - COMMON PLEAS - CASE#2017CP0801088

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MOTION
	)	FOR RECONSIDERATION
vs.	)	
	)	
Berkeley County,	)	
Berkeley County Planning	)	
Commission,	)	
	)	
Defendants.	)	
	)	

TO: John West, Esq., Attorney for Defendants:

Pursuant to Rules 59 and 60 of the *South Carolina Rules of Civil Procedure*, the plaintiff requests that the Court amend or alter the Final Order entered May 12, 2020, on the ground that the Court overlooks important matters of fact and law as set forth more specifically in the Memorandum of Law being submitted simultaneously with this Motion. Specifically, the plaintiff contends that a government decision that is "fairly debatable," becomes arbitrary and capricious when the decision is grounded only upon pure speculation unsupported by a scintilla of evidence. The plaintiff also contends that the Court erred in applying "an extremely high burden of proof" on the plaintiff.

May 21, 2020

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2017-CP-08-01088
Todd Olds,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN SUPPORT
	)	OF MOTION FOR RECONSIDERATION
vs.	)	
	)	
Berkeley County, Berkeley County Planning Commission,	)	
	)	
Defendants.	)	
	)	

It is impossible to determine who dislikes Motions for Reconsideration more: judges or lawyers. However, the appellate courts do not hesitate to dismiss appeals on the ground that a party failed to give a trial court an opportunity to address an issue raised on appeal, so lawyers, being overly cautious humans, routinely file Motions for Reconsideration, which are just as routinely summarily denied by trial courts. (Although, to be fair to the Rule and to the capacity of the Bench for self-correction, on three occasions, the undersigned convinced three separate trial courts to reverse a decision.)

There is no dispute that the May 12, 2020, Order under review is a well-written and well analyzed judicial Order, and no party can question the time and thoroughness invested in its composition as is evident throughout. However, appellant respectfully submits that the conclusion reached in the Order is the result of an error of law, being controlled in equal parts by an improper inference and a misapplication of South Carolina law.

The error at the heart of the Court's reasoning starts with the legal conclusion reached by the Court on page 19; to wit, that Council's rejection of the rezoning request is a "fairly debatable" conclusion: "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." (Order page 19.) The Court's decision to hold appellant to an evidentiary standard of "extremely high burden" is erroneous. Appellant concedes that courts give deference to legislative bodies on legislative decisions, but when a governmental body takes up a citizen's request for equal treatment and makes a decision about a particular citizen's use of his property, the burden of showing the decision is controlled by either an error of law or an improper inference is no different than the burden imposed on any civil litigant in any civil dispute; to wit, a preponderance of the evidence.

In a powerful work of legal analysis that focused on whether the State of South Carolina has the power to require a convicted felon who is released from the Department of Corrections after serving her sentence must submit to lifetime electronic monitoring, the Supreme Court took up the question as to whether such legislative decision 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)

In 2013, the Supreme Court withdrew Justice Hearn's 2012 Opinion, 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 as Justice Hearn in 2012 concerning the burden of proof 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 the appellant must carry the burden of proof, it is not correct to characterize it as being "extremely high." Even the lower standard of review requires that a legislative decision be "rationally based."

As to the Court's conclusion that the legislative decision reached by County Council must be at least "fairly debatable," the parties stand on common ground. If Council's decision to deny Plaintiff's rezoning request is "fairly debatable," then the Court's conclusion is correct, and Plaintiff cannot prevail. However, if the decision is not "fairly debatable," then the Court's May 12, 2020, Order is based on an incorrect application of South Carolina law. The question is whether the record

contains any evidence to support the Court's conclusion that the Council's decision is "fairly debatable," and it is here that the Court errs.

First, the term cannot be either 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 in mathematics, everything and nothing, are interchangeable and equivalent. Therefore, because everything is "debatable," an analysis of this yields nothing useful and sheds no light on whether the Order under review is or is not controlled by an error of law.

Rather, it is the application of the adverb, "fairly," that requires careful attention and which, when analyzed, reveals the error of the Order under review because if the issue is not **fairly** debatable, then the decision is arbitrary. The Court makes a mistake on page 13 when it concludes 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[1] and the County consistently denied applications for them." This is incorrect. The only objective evidence in the case is the evidence presented by the County's Planning Department and the Council's decision in adopting the Comprehensive Plan. The 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

[1] As the video recording of the meetings depict, the complaining neighbors consistently emphasized the proposed homes as "trailers." Their emphasis on this pejorative term reveals their prejudice. Councilmember Davis spoke up on behalf of residents of mobile homes, informing the Council that he and his wife's first home was a mobile home. The author of this memorandum is a part time resident of a mobile home.

the opposite direction 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, and since Berkeley County is experiencing a residential boom, it is clear that this decision is premised on nothing more than an unsupported prejudice against mobile homes.

Since everything is subject to debate, even existence itself, when faced with the issue of whether a governmental action is or is not arbitrary and capricious, Courts have focused on whether the legislative debate is fair or unfair. As this Court correctly notes on page 7 of its order, 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.'" (Order under review at page 7) Thus a zoning decision is arbitrary if it is unsupported by **evidence** of a "substantial relation to public health." Courts express the distinction between substantial relation and arbitrary when they void legislative decisions determined to be "arbitrary" or "capricious." Expressed logically or mathematically, this formula is: "fairly debatable" = "not arbitrary" or "not capricious." A legislative decision that is "fairly debatable" cannot be simultaneously "arbitrary or capricious." By the commutative operation, a + b = b + a; if a decision is arbitrary and capricious, then it is not "fairly debatable." Either formulation allows the proposition to be put through the syllogistic rules of logic, which logicians call "Modus Tollens":

If p then q.	If fairly debatable then not arbitrary or capricious.
Not q.	Arbitrary and Capricious.
Therefore not p.	Therefore, not fairly debatable

Thus, the Court reached the correct conclusion if, and only if, the legislative decision to deny the landowner's request for rezoning is not arbitrary or capricious, and this requires the Court to apply the well-established legal definitions of arbitrary and capricious in South Carolina law to the record.

As this Court says on page 12 of the Order under review, "The decision was for the Council to make, **after due deliberations and taking into account all of the facts**." (Order under review at page 12, emphasis added). This sentence illustrates the Court's 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 summarized the lack of evidence by stating he was basing his decision on the fact that he has been down Royle Road and is concerned about the "stuff" going on out there. This despite the fact that there is not a scintilla of evidence in this case that supports "due deliberation," and the only "facts" in the record on which the Council could rely are those put forth by the Planning Department and the Council's own Comprehensive Plan. By stating that the decision is based on unsupported "stuff," and the putative devaluation of property values, the County Council conceded it was making its decision on prejudice. In short, there is no "due deliberation" in Council's decision making, and no taking into account "all of the facts"—and as this Order under review holds, only then may Council make its decision. The record lacks support for Council considering any fact, 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)[2] the Court of Appeals said:

[2] 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.)

Under the scope of review established in the APA, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003); *Long Cove Home Owners' Ass'n. v. Beaufort County Tax Equalization Bd.*, 327 S.C. 135, 488 S.E.2d 857 (1997). 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 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).

The Court of Appeals defines capricious for us:

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 judgment, is made at pleasure, without adequate determining principles, or is [286 S.C. 185] 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)

In the Order under review, the Court concluded that ". . . neighbors' fears about increased housing density and its attendant aggravation of traffic congestion and increased burden on infrastructure are fairly debatable." (Order under review at page 13) This error, as discussed above, is that while such assertions may be "debatable," the record lacks evidentiary support for them, and therefore the decision cannot be "fairly debatable." Thus, the decision becomes, by definition, arbitrary and capricious under the 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's concluded that the area has transformed over the years, 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. Thus, all the "fixed rules or standards" support the request for rezoning.

The precise legal issue of the need for evidentiary support 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. The Court of Appeals' analysis controls the outcome of this case as can be seen by substituting "mobile homes" for "fireworks" in the Court'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 & Envtl. 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) (reversing the denial of an injunction based upon a restrictive covenant and stating "Myrtle Beach Farms based its decision to withhold approval mainly on its opinion, which it was competent to make *as the owner of the surrounding property*, that the use of the subject property as a site for a helicopter ride service would have an adverse impact on the future marketability or desirability of the surrounding property" (emphasis added)).
>
> Additionally, none of the residents properly explained why Appellants' [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)

At oral argument, the County distinguishes this line of cases on the ground that they involved Boards of Zoning Appeals and not County Councils. The implication of this argument is concerning: Boards of Zoning Appeals must be rational, but elected officials can be arbitrary. First, there is no case law justifying a lower degree of reason for a legislative body. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995). Second, reason applies universally. Thus, while it may be a tautology to state that the issue—any issue—can be "debated," the question put before this Court is whether this record contains enough evidence to serve as the basis for a rational conclusion, *i.e.* "fairly debatable." To be rational must be more than pure speculation. If the premise providing underpinning for Council's refusal to rezone is nothing more than complaining neighbors, absent any supporting facts or evidence, then the question as to whether the application for rezoning was "fairly debated"

must be answered in the negative. Otherwise the Court places its imprimatur upon prejudice as a rationally based finding for legislative action.

Therefore, the Court should amend and alter its May 12th Order and conclude that based on the lack of evidence presented, County Council's decision cannot be supported as "fairly" debatable.[3] Or, as the Court of Appeals said in *Wyndham*, "not supported by competent, substantial, and material evidence, [but] was 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 the Supreme Court in *Bannum* said:

> 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 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*, 335 S.C. 202, 206, 516 S.E.2d 439, 441 (1999)

As discussed above, the Court of Appeals in *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012) 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.

[3] History is an effective reminder of legislative decisions that were "fairly debatable" though unsupported by evidence. Such decisions enslaved a race of people, denied women the right to vote, approved separate but equal education and accommodation, confined citizens in internment camps, *etc.* Each one of these legislative decisions claimed to be "fairly debatable." Whenever citizens' rights are impaired by canards, the decision can never be "fairly debatable," and courts exist to prevent such injustices. As one of South Carolina's preeminent jurists, Tommy Kemmerlin, often said: "The whole world envies us for it."

In order to evaluate whether such "evidence" is sufficient, the Court of Appeals relied on *Bannum*, and pointed out that while residents are entitled to be heard and entitled to express their opinions, statements to the Board about traffic or safety or property values must be based on something more than subjective, unsupported statements:

> 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.

The Court of Appeals reached the same conclusion for the same reason in 2015 in *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015). Like the neighbors in this case, and like the neighbors in *Bannum*, and in *Wyndham*, Hinde contended, **without evidence**, that the operation of the helicopter business injured him by diminishing his property values. He had nothing to support his opinion, which is the common link through all these cases with the case now before the Court. 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)

The holdings running through all these cases, included the cases cited in the quoted language is the same; to wit, that while the neighbors are entitled to be heard, their unsupported objections cannot form the basis of a decision. In short, prejudice and speculation 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 based on nothing more than prejudice. Both the summary of Council's deliberation as well as the recorded video of that body demonstrates that Council failed to deliberate "all of the facts" around this rezoning request to bring the subject parcel into conformity with adjacent parcel and in conformity with the County's legislative decision enacted in its Comprehensive Plan and Future Land Use Map. The Court's May 12, 2020 Order allows the appellant's property rights to be overruled by the barely disguised canards of complaining neighbors. It is the sole province of the Court to protect citizens' fundamental rights, and for this reason, the appellant respectfully requests that the Court examine the record and re-evaluate its conclusion that the debate before County Council reached the level of "fairly debatable."

Respectfully submitted,

May 20, 2020

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STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS CASE NO.: 2017-CP-08-1088
Todd Olds, Plaintiff, vs. Berkeley County and Berkeley County Planning Commission, Defendants	)	**DEFENDANT BERKELEY COUNTY'S AND BERKELEY COUNTY PLANNING COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION**

INTRODUCTION

On May 21, 2020, Plaintiff filed a Motion for Reconsideration pursuant to SCRCP 59 and SCRCP 60 of Special Referee M. Dawes Cooke's Order dated May 12, 2020 in the above captioned matter.

In support of their arguments below, Defendants hereby incorporate all of their prior briefs and memoranda and the full text of Judge Cooke's Order as if fully set forth herein *verbatim*.

APPICABLE RULES OF CIVIL PROCEDURE

SCRCP 59 provides:

> **(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which re-hearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
>
> **(b) Time for Motion.** The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter. In non-jury

actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

(f) Time for Appeal; End of Term. The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions. The time within which to make the motions under this Rule shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial was held. The motion may in the discretion of the court be determined on briefs filed by the parties without oral argument.

(g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

SCRCP 60 provides:

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court. The ending of a term of court or departure from the circuit shall not operate to deprive the trial judge of jurisdiction to correct such mistakes. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

"FAIRLY DEBATABLE" STANDARD IN ZONING DECISIONS

Plaintiff first contends Judge Cooke erred by concluding that the decision of Berkeley County Council in denying his rezoning request was "fairly debatable".

He admits the obvious in his memorandum that ... "If Council's decision to deny Plaintiff's rezoning request is 'fairly debatable', then the Court's conclusion is correct, and Plaintiff cannot prevail. However, if the decision is not 'fairly debatable', then the Court's May 12, 2020 Order is based on an incorrect application of South Carolina law." *Plaintiff's Memorandum, p. 3.*

Judge Cooke correctly concluded that Plaintiff's rezoning request was "fairly debatable and fairly debated" and the record supports his conclusions.

In his memorandum, Plaintiff artfully (and exhaustively) parses the words "fairly" and "debatable" into a non-existent legal construct.

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In so doing, he ignores the law in this state and the full, complete and ample record in this case.[1] He does so as if the matter of "fairly debatable" in a zoning context is a matter of first impression in South Carolina. This case is not the first case where the application of the "fairly debatable" standard was the subject of appellate scrutiny. There are many.

The *Harbit* case is a regularly and often cited authority on the subject of "fairly debatable" in a zoning context. In *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E. 2d 776, (Ct. App. 2009)[2], Mr. Harbit, an owner of property located at 7 Wesley Drive, applied for rezoning of the property based on its location within the Savannah Highway Overlay Zone. The Zone was created as a result of a comprehensive study of land surrounding the Ashley River Bridge in Charleston. 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 the owner's side of Wesley Drive within the Zone had been rezoned for limited commercial use.

The City of Charleston Planning Commission reviewed the owner's application, at which time the owner's counsel presented his position for rezoning the Wesley Drive property. The Planning Commission, however, voted to recommend denying the rezoning application. Charleston City Council received the Planning Commission's recommendation and held a public hearing to address Harbit's application. City Council denied Harbit's request.

After City Council's denial of his application, Harbit appealed the zoning decision to the circuit court and asserted additional grounds for relief, including causes of action for due process and equal protection violations. The City filed a motion for summary judgment on all claims, which the circuit court granted. Harbit appealed.

The Court of Appeals was unmoved by Harbit's assertion that City Council's refusal to rezone Harbit's property was so unreasonable that the appellate Court should invalidate City Council's decision. The Court affirmed the lower court and restated well-settled law in South Carolina:

> **Rezoning is a legislative matter**. *Lenardis v. City of Greenville,* 316 S.C. 471, 471, 450 S.E.2d 597, 597 (Ct.App.1994). **The legislative body's decision in zoning matters is presumptively valid, and the property owner has the burden of proving to the contrary**. *Rushing v. City of Greenville,* 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975). The authority of a municipality to enact zoning ordinances that restrict the use of privately-owned property is founded in the municipality's police power. *Rush v. City of Greenville,* 246 S.C. 268, 276, 143 S.E.2d 527, 530–31 (1965). **The governing bodies of municipalities clothed with authority to decide residential and industrial districts are**

[1] See "The Record", Order pp. 3, 4, 5 and 6.

[2] *Harbit* is cited in Judge Cooke's Order. A Westlaw search indicates that *Harbit* has 97 citing references associated with it.

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better qualified by their knowledge of the situation to act upon these matters than are the courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens. *Id.* As in this case, the determinative question is whether the city council's refusal to change the zoning of the owner's property is so unreasonable as to impair or destroy the owner's constitutional rights. *Rushing,* 265 S.C. at 288, 217 S.E.2d at 799. **We cannot insinuate our judgment into a review of the city council's decision but must leave that decision undisturbed if the propriety of that decision is even "fairly debatable."** *Knowles v. City of Aiken,* 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991).

Additionally, there is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and when the planning commission and the city council of a municipality have acted after reviewing all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or in clear abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority. *Bob Jones Univ., Inc. v. City of Greenville,* 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963). **Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the court's function to pass upon the wisdom or expediency of municipal ordinances or regulations.** *Id.*

We find that City Council's decision is "fairly debatable" because the City proffered several reasonable grounds for the denial of Harbit's rezoning application. First, the Planning Commission and City Council concluded that rezoning Harbit's property would not be in the community's best interests because the City has a vested interest in preserving the area's residential character and in minimizing commercialization. As stated in the Ashley Bridge District Plan, one of the major concerns in this area was increased commercialization due to rezoning. Further, both the Planning Commission and City Council cited concerns of neighborhood residents who feared loss of residential use in the area and the possibility that continued rezoning would create a domino effect. While all of the residents' concerns might not be well-founded, City Council's response to public opposition does not rise to the level of a constitutional violation. *See Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach,* 420 F.3d 322, 329 (4th Cir.2005) (in finding the state court of appeals' decision was not res judicata of the developers' § 1983 due process and equal protection claims, the Fourth Circuit Court of Appeals determined the city council's improper denial of the zoning application in response to public opposition did not rise to the level of a constitutional violation because "matters of zoning are inherently political, and it is a zoning official's responsibility to mediate disputes between developers and local residents").

Additionally, City Council specifically cited the unique location of Harbit's property as opposed to other properties on Wesley Drive that were zoned for limited commercial use, noting that two of its sides are situated on the interior of the neighborhood. Moreover, because it is a corner lot, the property effectively serves as a buffer between the heavier-traveled Wesley Drive and the purely residential Stocker Drive. *See Hampton v. Richland*

County, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct.App.1987) (finding the city council's refusal to rezone property from an office and industrial classification to a general commercial classification was "fairly debatable" because the property lay between commercial and residential properties thus creating a buffer between the two zones).

While other similarly situated properties on Wesley Drive are zoned for limited commercial use, the record does not indicate that Harbit was the subject of purposeful, invidious discrimination. *See Sylvia Dev. Corp. v. Calvert County, Md.,* 48 F.3d 810, 825 (4th Cir.1995) (internal citations omitted) ("If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim."). For instance, there are other properties on Harbit's side of Wesley Drive that are currently zoned residential, and with the exception of one property cornering on Savannah Highway and Wesley Drive, all of the properties on the other side of Wesley Drive are zoned residential. The properties on his side of Wesley Drive that are zoned for limited commercial use are distinguishable in that they either also front on Savannah Highway or are not accessed by a purely residential street.

Based on the evidence in the record, the City properly denied Harbit's rezoning application in an effort to hold the line on commercial development in the area and protect its residential nature. **We will not invalidate City Council's decision as its propriety is at least "fairly debatable" based on the facts and is not "so unreasonable as to impair or destroy constitutional rights.**" *See Knowles,* 305 S.C. at 224, 407 S.E.2d at 642. **As such, it is not this Court's function to pass upon the wisdom or expediency of City Council's decision.** *See Bob Jones Univ., Inc.,* 243 S.C. at 360, 133 S.E.2d at 847. (Emphasis added).

Under the heading "The Record" in Judge Cooke's Order, p. 4 of 20, there is an especially telling and informative excerpt, which captures the fact that the matter of Plaintiff's rezoning request was "fairly debatable" and embodies the very essence of the term:

"The matter was then presented to the full County Council for action on the proposed ordinance to rezone the subject property at its March 27, 2017 meeting. A Planning staff member again introduced the application and explained it. Plaintiff/applicant spoke in favor of his application. Members of the public appeared and expressed a variety of concerns in the "Public Discussion" period of the hearing, similar to the concerns previously voiced to the Planning Commission. When the question of consideration of first reading on the proposed ordinance to rezone the subject property came for a vote by County Council, Council voted 5-2 to deny the rezoning request.

As reflected in the summary minutes and the video recordings of the proceedings, throughout consideration of the rezoning proposal, opinions for and against the proposal were voiced and for a variety of reasons."

There can be no genuine doubt from the excerpt above and from the whole record that the "fairly debatable" standard was met and satisfied here.

ELECTRONICALLY FILED - 2020 May 27 9:55 AM - BERKELEY - COMMON PLEAS - CASE#2017CP0801088

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PLAINTIFF'S BURDEN

Plaintiff next contends that the Court misapplied the standard of review seizing upon language on Page 19 of the Order:

> *"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."*

Plaintiff protests the use of the cited language as if it was not true. It is. The Court accurately described the Plaintiff's burden and accurately applied the correct standard. The standard for the Plaintiff is high.

The Court did not create law in this case. The law is clear, well-settled and amply summarized in Judge Cooke's Order. The "presumption of validity" granted to a legislative body is a high burden to overcome. "Judicial restraint" is a governing principal which can only be overcome in the most egregious cases by a legislative body. "Any evidence" is a high burden for Plaintiff to overcome.

The cases and statutes cited by the Court in its Order form the bedrock of zoning law in South Carolina. *See Order, pp. 6-13.*

CONCLUSION

In his contemporaneously filed memorandum in support of his motion, Plaintiff says:

> *"There is no dispute that the May 12, 2020 Order under review is a well-written and well analyzed judicial order, and no party can question the time and thoroughness invested in its composition as is evident throughout."*

Notwithstanding what can only be interpreted to be his "nod to the Judge", Plaintiff then contends that the Judge made "improper inferences" and "misapplied South Carolina law."

In other words, Plaintiff argues that the Judge did everything right except rule his way.

Defendants agree with the first observation by Plaintiff regarding the quality of Judge Cooke's Order. They disagree with Plaintiff's second observations as being without merit.

The Judge came to the right conclusion under the facts and the law. There is no basis under SCRCP 59 or SCRCP 60 for the Court to grant a new trial or to amend his Order.

For the reasons set forth herein, Plaintiff's Motion For Reconsideration should be **DENIED**.

s/ John S. West
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207 Carolina Avenue
PO Box 1869
Moncks Corner, SC 29461
843-761-5626
jwestlaw@homesc.com

s/ John O. Williams, II
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Berkeley County Attorney
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ATTORNEYS FOR DEFENDANTS

May 26, 2020

ELECTRONICALLY FILED - 2020 May 27 9:55 AM - BERKELEY - COMMON PLEAS - CASE#2017CP0801088

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED
AUG 10 2020
SC Court of Appeals

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

Case No. 2017-CP-08-01088

Todd Olds..... Appellant,

vs.

Berkeley County and Berkeley County Planning Commission, ... Respondents,

---

NOTICE OF APPEAL

Todd Olds appeals the Final Order of the Honorable M. Dawes Cooke, Special Referee, filed May 12, 2020, and thereafter the Order denying Reconsideration filed July 23, 2020.

August 6, 2020

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Other counsel of Record:
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West Law Firm, L.L.C.
P. O. Box 1869
Moncks Corner, S.C. 29461

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED
AUG 10 2020
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APPEAL FROM BERKELEY COUNTY
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M. Dawes Cooke, Special Referee, Circuit Court Judge

Case No. 2017-CP-08-01088

Todd Olds..... Appellant,

vs.

Berkeley County and Berkeley County Planning Commission, ... Respondents,

---

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent, Berkeley County, by depositing a copy of it in the United States Mail, postage prepaid, on August 6, 2020, addressed to its attorney of record, John S. West, West Law Firm, L.L.C., P. O. Box 1869, Moncks Corner, S. C. 29461.

August 6, 2020

Thomas R. Goldstein, #2186
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P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291
Attorneys for the Appellant

BERKELEY COUNTY COUNCIL

William W. Peagler, III - Supervisor & Chairman
Jack H. Schurlknight – Vice Chairman (District No. 6)

COMMITTEE CHAIRMEN

District 1
C. Kevin Cox
Committee on
Water & Sanitation

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Joshua S. Whitley
Committee on
Finance

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Kenneth E. Gunn, Jr.
Committee on
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& Purchasing

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Dennis L. Fish
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Committee on
Land Use & Economic
Development

District 7
Caldwell Pinckney, Jr.
Committee on
Facilities & Code
Enforcement

District 8
Steve C. Davis
Committee on
Community Services

BERKELEY COUNTY
APR 30 2018
LEGAL DEPARTMENT

April 26, 2018

Ms. Alison Simmons
Planning & Zoning Director
P.O. Box 6122
Moncks Corner, SC

Re: Ordinance 18-04-11, to adopt the 5-Year (2017) review of the 2010 Comprehensive Plan

Dear Ms. Simmons:

You will find enclosed a certified copy of the above referenced Ordinance adopted by Berkeley County Council at a Regular Meeting of Council on April 23, 2018.

If any additional information is required, please do not hesitate to give our office a call.

With kind regards,

Catherine R. Windham
Clerk to Council

Enclosure: as stated

Les Blankenship, Deputy Supervisor Operations
✓ John O. Williams, II, County Attorney
Wilson Baggett, Assessor
Mary P. Brown – for filing

Berkeley County Administration Building, PO Box 6122, 1003 Hwy. 52- Moncks Corner, SC 29461-3707
Moncks Corner (843) 719-4092 **Charleston** (843) 723-3800 **St. Stephen** (843) 567-3136
Fax: (843) 719-4158

ORDINANCE NO. 18-04-11

BILL NO. 17-70, AN ORDINANCE ADOPTING THE 5-YEAR (2017) REVIEW OF THE 2010 COMPREHENSIVE PLAN FOR THE COUNTY OF BERKELEY PURSUANT TO THE STATE OF SOUTH CAROLINA COMPREHENSIVE PLANNING ENABLING ACT OF 1994.

WHEREAS, the Berkeley County Council adopted a Comprehensive Plan for Berkeley County in 1999, and a subsequent ten-year update in 2011; and

WHEREAS, the Comprehensive Plan is intended to be a living document that is responsive and relevant to changing conditions; and

WHEREAS, the Berkeley County Planning Commission found it necessary and appropriate, in accord with the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, to conduct a five-year review of the Berkeley County Comprehensive Plan as updated in 2010 with particular focus on the Transportation and Land Use Elements; and

WHEREAS, the Berkeley County Planning Commission convened in a series of workshops over the course of a year, engaging multiple stakeholder groups and consulting with various County departments and agencies to ensure consistency with other adopted or ongoing plans and studies; and

WHEREAS, the Berkeley County Planning Commission reviewed all elements of the 2010 Berkeley County Comprehensive Plan and consequently resolved on August 22, 2017 to recommend to County Council amendments to the Future Land Use Map and Sections 1 and 2 of the text; and

WHEREAS, Berkeley County Council convened in a workshop on February 5, 2018 to obtain public input and discuss with staff trends in growth, recommended amendments to the Comprehensive Plan, and growth management strategies; and

WHEREAS, with support from the Berkeley County Planning Commission, the Berkeley Charleston Dorchester Council of Governments (BCDCOG), and the Berkeley County Planning and Zoning Department, Berkeley County Council identified appropriate future land use map and policy recommendations that seek to better align growth and development with existing and planned capacities of infrastructure and community facilities; and

NOW, THEREFORE BE IT RESOLVED by Berkeley County Council that, having met the requirements of Chapter 29 of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 for a five-year review of the 2010 Berkeley County Comprehensive Plan, does hereby adopt the *Berkeley County Comprehensive Plan 5-Year Review* recommended amendments.

Certified True and Correct Copy of Original Record

Clerk to Council
County Council Berkeley County SC

18-04-11

ADOPTED this 23rd day of April, 2018.

BERKELEY COUNTY, SOUTH CAROLINA

William W. Peagler, III, Chairman
Berkeley County Council

ATTEST:

Catherine R. Windham
Clerk to County Council

Approved as to form:

John O. Williams, II
County Attorney

First Reading:	November 27, 2017
Second Reading	December 11, 2017
Public Hearing:	April 23, 2018
Third Reading:	April 23, 2018

2010 Berkeley County Comprehensive Plan 5-year Review

Executive Summary

Overview

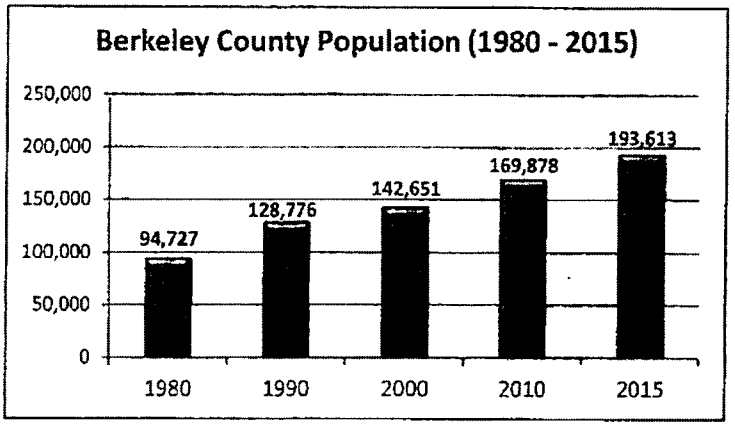
SC Code Section 6-292-510(E), mandates that the Planning Commission review its adopted County Comprehensive Plan or elements thereof not less than once every five years to determine whether changes in the amount, kind, or direction of development or other reasons make it desirable to make additions or amendments to the plan. In 2015, the Planning Commission determined that while most of the adopted 2010 Comprehensive Plan elements are still applicable, announcement of the planned Volvo manufacturing facility on a mega-industrial site outside the Principal Growth Area merited deeper consideration of how future development patterns might be impacted and place additional demands on community facilities and public infrastructure. As a result, the County Planning Commission met several times during 2016 and 2017 to consider current and future plans for growth, the County's transportation, water, and sewer systems, and whether changes in the adopted Land Use policies and/or the Future Land Use Map were needed.

After adoption of the 2010 Comprehensive Plan, not only did housing construction in the County accelerate as the nation recovered from the Great Recession, but Berkeley County announced that future economic investments totaling more than $1 billion had been committed by new corporate arrivals. In anticipation of more than 4,100 new jobs by these companies, it is expected that there will be even greater demand for housing and services in the near future. As a result, the updated data presented in this addendum establishes a more recent picture of the County's growth and justification for the proposed updates to policies and strategies in the County's Land Use Element.

A Snapshot of Growth

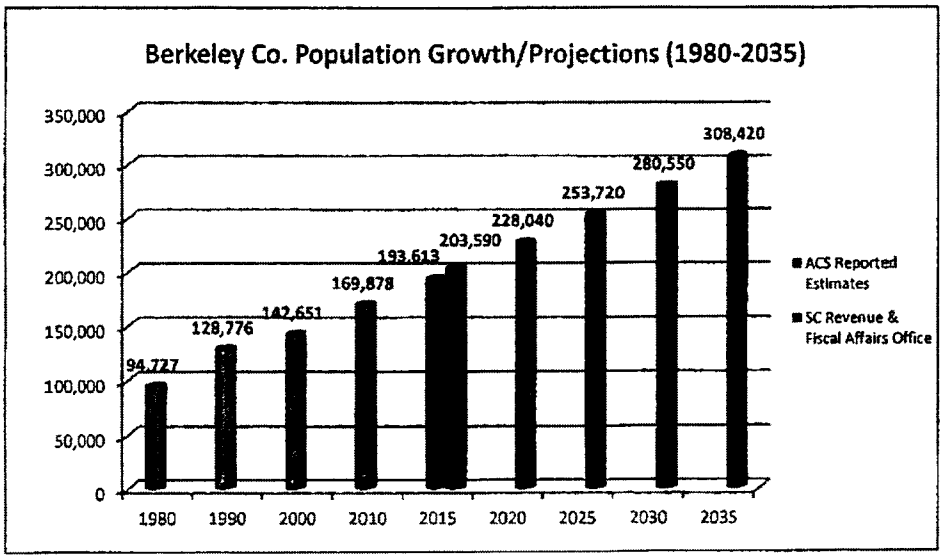
Population and Housing

In the first five years of this decade (2010-2015), Berkeley County experienced significant growth, with a 13.9% increase in population. This growth rate was even higher, by about one-third, than that of the previous decade (2000-2010) when a 19% increase occurred over ten years. In 2010, the SC Office of Research and Statistics projected the County's population would reach 194,000 around the year 2025. However, the US Census Bureau American Community Survey (ACS) has estimated that projected population has already been reached. As a result, the SC Office of Research and Statistics has projected an even greater growth rate into the future, such that it is anticipated the County's population will continue to reach or exceed previous projections at least 10 years ahead of time.



Source: US Census Bureau, 2011-2015 American Community Survey

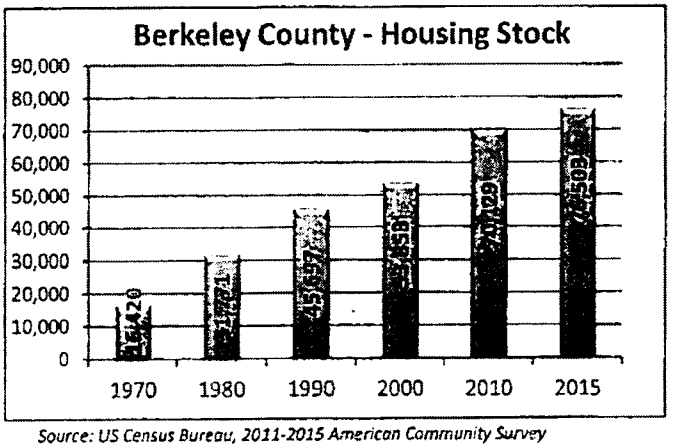
Berkeley County is now expected to have the highest population growth rate in the region over the next two decades, 24.6%, reaching over 250,000 people by 2025 and over 300,000 residents by 2035.



Source: US Census Bureau, 2011-2015 American Community Survey; SC Revenue & Fiscal Affairs Office

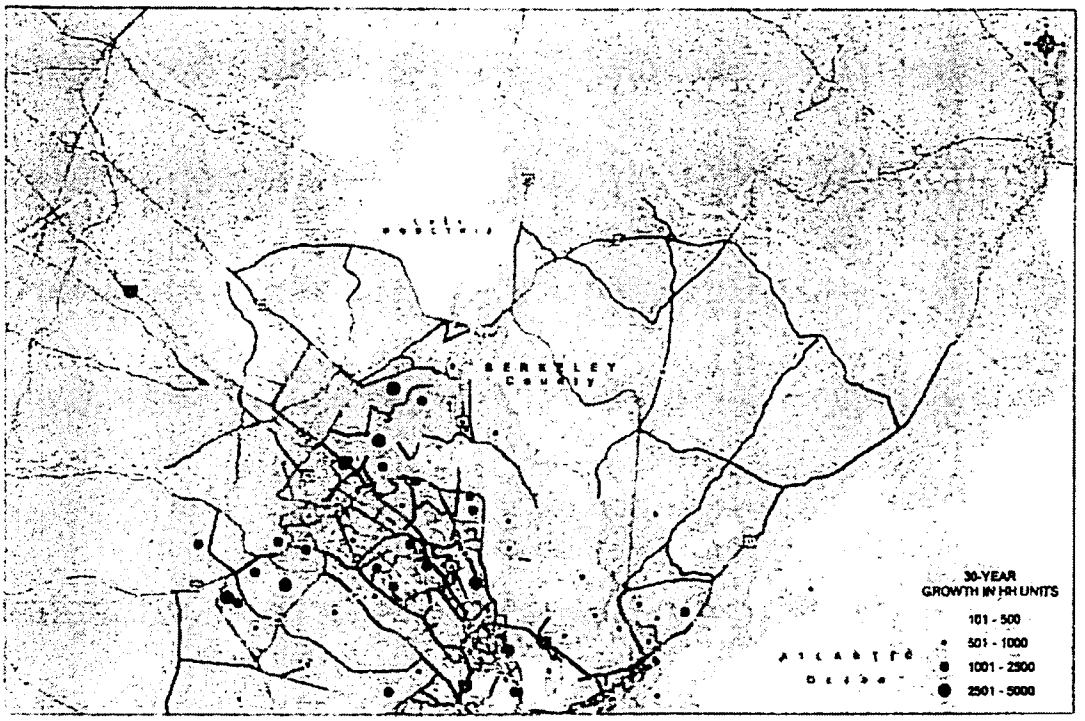
As population estimates have continually increased in the County, it would be assumed that the number of households rose proportionately. However, from 2000 to 2010, the number of households grew 31.0% (from 49,922 households to 65,419). Currently, the US Census bureau estimates that the number of households in the past five years increased only 13.4% (from 65,419 to 74,167). Given the relative population increase, this indicates that household sizes are increasing to accommodate the discrepancy.

While the number of households has been increasing, so has the housing stock. A significant portion of the County's housing stock was built between 2000 and 2010 causing an increase in the total number of housing units of just over 30%. Since 2010, the number of housing units has increased at a slower rate, with an estimated increase of only 9.1% units, much less than half of growth in the previous decade, yielding a total housing stock estimated at 76,503 units in 2015.



Source: US Census Bureau, 2011-2015 American Community Survey

Building permit data for all of Berkeley County shows that 1,373 housing units were permitted for construction in 2016, including 58 multifamily units. This 1.79% increase in housing units for the one year is comparable to the rate of increase experienced between 2010 and 2015.

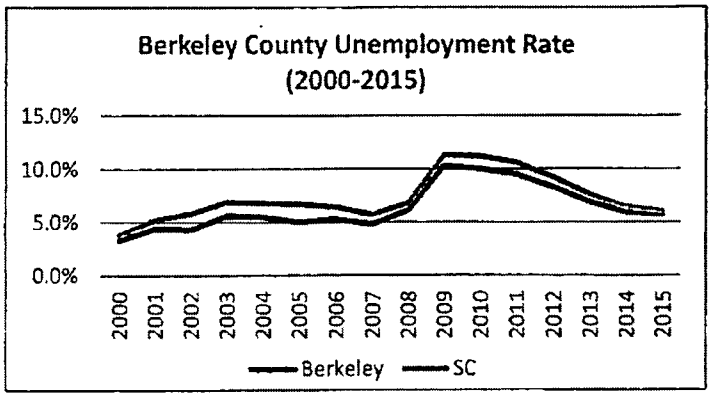


The regional travel demand model, maintained by the Berkeley Charleston Dorchester Council of Governments, demonstrates where growth in household units will occur over the next thirty years so the County can plan accordingly.

Jobs and Incomes:

A slightly lower percentage (65.2%) of the County's potential labor force (residents 16 years of age and older) are actively employed or seeking employment than were participating in the labor force in 2010 (68.3%). Given improvements in the job market since 2010, this drop could be an indication that more retirees are moving to the County.

Unemployment rates spiked in 2009-2010 during the Great Recession, yet Berkeley County consistently had a slightly lower unemployment rate than that for the state. Since the County's unemployment rate peaked in 2009 at approximately 10%, unemployment rates have continued a downward progression, reaching slightly below 6% as of 2015.



Source:

Employment by Industry

As seen in the table below, very little has changed in the type of industries that employ the County's labor force. In the first five years of the decade, employment in the Construction industry actually decreased as well as employment in Transportation, Warehousing and Utilities.

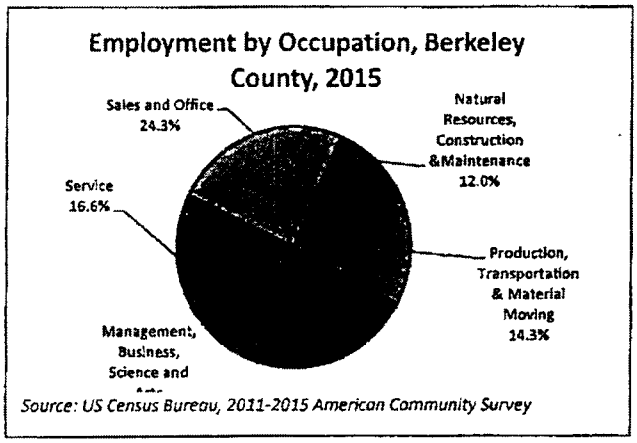
The largest increases of employment in special industry sectors over the past five years were in the Professional, Scientific and Management as well as Educational Services, Health Care and Social Assistance industries. Employment in manufacturing has increased only slightly. Should Volvo and the anticipated spin-off industries employ Berkeley County residents or bring in employees that chose to live in Berkeley County, the distribution of industries employing the County's labor force could change dramatically as those facilities are completed.

Employment Industries of Berkeley County's Labor Force	2010	2015
Agriculture, Forestry, etc.	0.4%	0.4%
Construction	10.4%	8.0%
Manufacturing	12.0%	**12.8%**
Wholesale Trade	2.5%	2.4%
Retail Trade	11.9%	**12.8%**
Transportation, Warehousing & Utilities	7.3%	6.0%
Information	2.0%	**2.3%**
Finance, Insurance & Real estate	5.4%	4.5%
Professional, Scientific & Management	10.8%	**12.1%**
Educational Services, Health Care & Social Assistance	17.6%	**19.3%**
Arts, Entertainment, Accommodation, etc.	8.8%	7.6%
Other Services	5.0%	**5.1%**
Public Administration	5.9%	6.7%

Note: Red indicates decreases, bold black are increases

Employment by Occupation

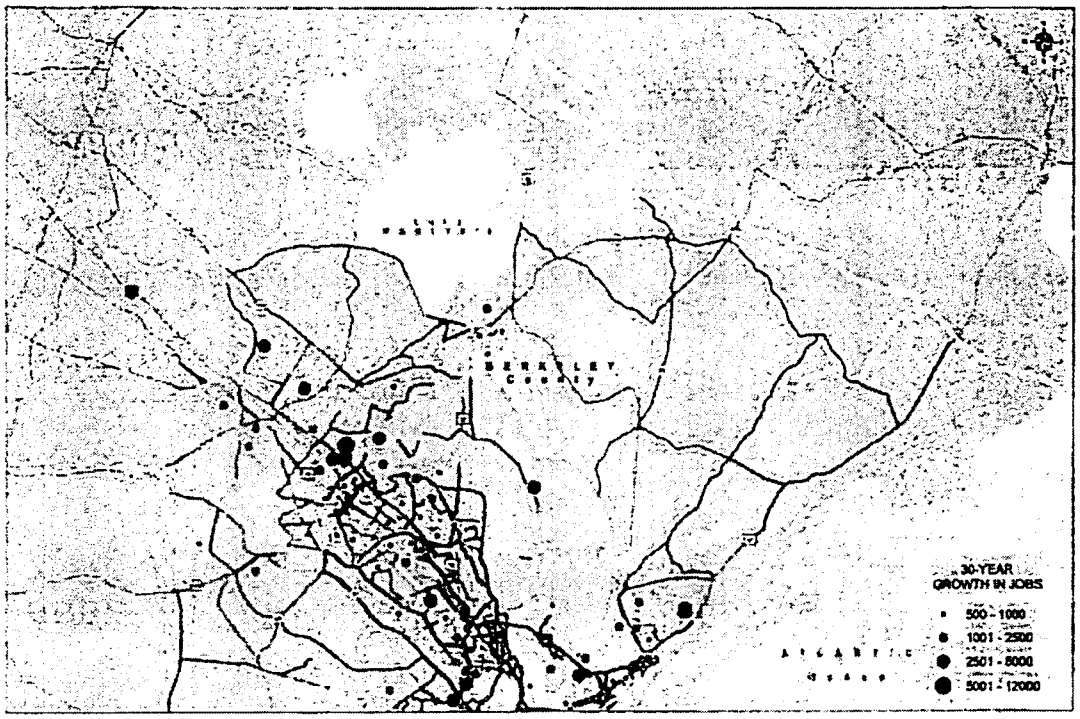
Approximately one-third, of the County's labor force work in Management, Business, Science and Arts occupations (32.9%). Much of this can be attributed to the growth of information and technology companies in the County, as well as expansions in distribution facilities. Some of these companies include Fruit of the Loom, Gildan, AGRO and Blackbaud. As these occupations have increased, employment in other occupations have decreased slightly.



Source: US Census Bureau, 2011-2015 American Community Survey

Despite increases in employment opportunities, almost half of the County's labor force still commutes outside the county for employment, with an average commute of about 26 minutes each way. The County has been successful increasing employment opportunities within the County itself, however recent assessments of the County's economic status concur with the regionally recognized challenge of ensuring that the demands for workforce development and career preparation are met. As a result, there are a number of initiatives, either

ongoing or being planned, to ensure that the County's future labor force is educated and trained to meet the needs of future industries.

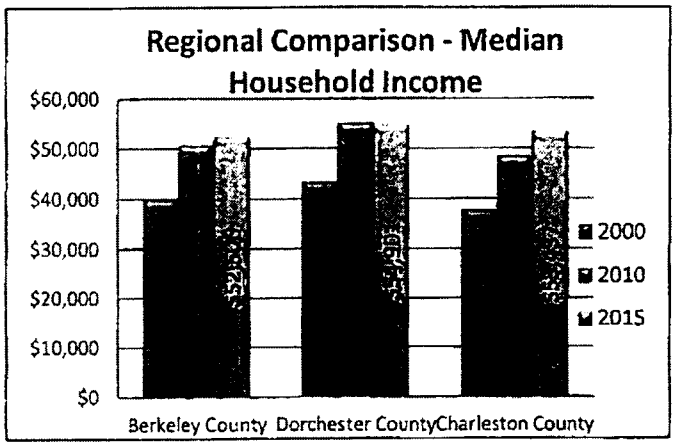


As with households, the BCDCOG regional travel demand mode demonstrates where employment growth is projected to occur over the next thirty years. Berkeley County is poised to provide more employment opportunities for its residents.

Keeping Pace

Median Household Income

In 2015, the median household income (MHI) in Berkeley County was $52,506, 7.6% less than the national MHI of $56,500 for that year. Although the County's MHI is still the lowest in the Tri-County region, it has increased 3% since 2010. By comparison, Dorchester County's MHI income has consistently been the region's highest since 2000, albeit decreased slightly during the first same period (2010-2015), while Charleston County's MHI increased by slightly more than 10%. As a result, for the first time in this century, the MHI for all three counties is relatively similar.

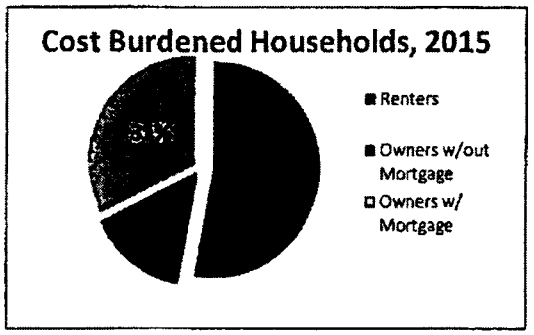


Source: US Census Bureau, 2011-2015 American Community Survey

Should all committed economic investments prove to be successful, the County's median household income should continue to rise. However, whether or not incomes can keep pace with relative changes in the affordability of housing is of great concern as a lack of housing affordable to employees can be a deterrent to the location of new industries.

Housing Costs

Housing is considered to be "affordable" when its cost is no more than 30% of a household's income. Despite the fact that many newcomers to the region have chosen to live in some of Berkeley County's developing subdivisions even if not near the region's employment centers, the proportion of households paying more than 30% of their income on housing is still significant. Similar to other counties in the region, Berkeley County households that are renting are more "cost-burdened" (paying more than 30% of the household income on housing) than homeowners.

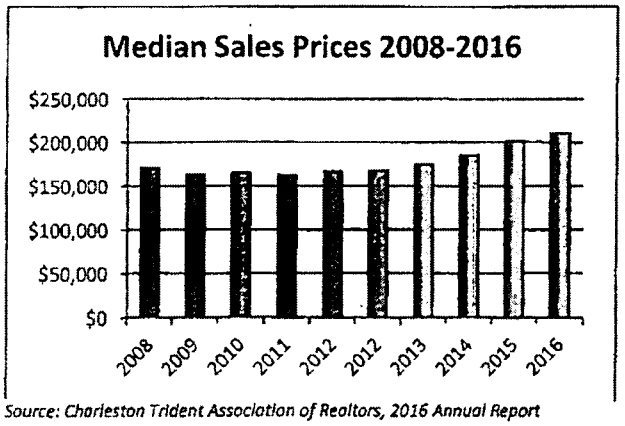


Source: US Census Bureau, 2011-2015 American Community Survey

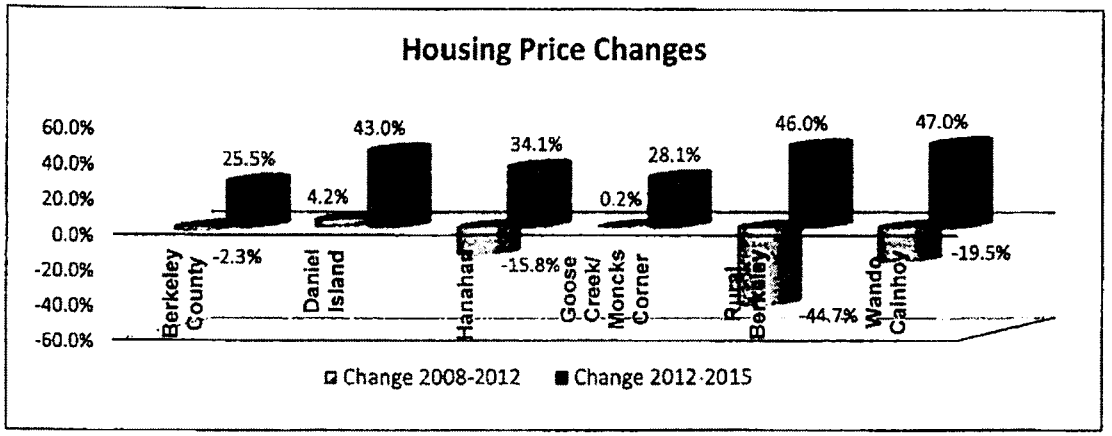
Although the median household income increased slightly more for renters (8.0%) than owners (7.3%) between 2010 and 2015, the average cost of rent increased by 16.2% while the monthly housing costs for homeowners remained relatively stable. Indications are that there was a higher demand for rental units regionally during this period as the proportion of units that were owner occupied decreased. This could be a result of the recession when many homeowners were foreclosed upon or forced to sell and to rent housing. Reports of lower vacancy rates in rental units support the notion that higher demand may be justifying higher rents for landlords.

Overall, housing prices in Berkeley County have been relatively stable over the past decade. During the period from 2008-2012, prices were almost flat with an actual decline countywide of 2.3% from $171,010 to $165,000. As shown on the follow page, Rural Berkeley sales took the largest hit of the recession, decreasing over 44% while Daniel Island prices increased slightly (4.2%).

However, the post-recession recovery in median sales prices was less diverse from area to area. Across the county, median sales prices regained the loss and more, increasing 25.5% between 2012 and 2016 from $167,413 to $210,143. During this period, not only did median sales prices on Daniel Island increase 43%, but prices in Hanahan increased by 34%, in Goose Creek/Moncks Corner by 28.1%, and in Rural Berkeley by 46%.



Source: Charleston Trident Association of Realtors, 2016 Annual Report



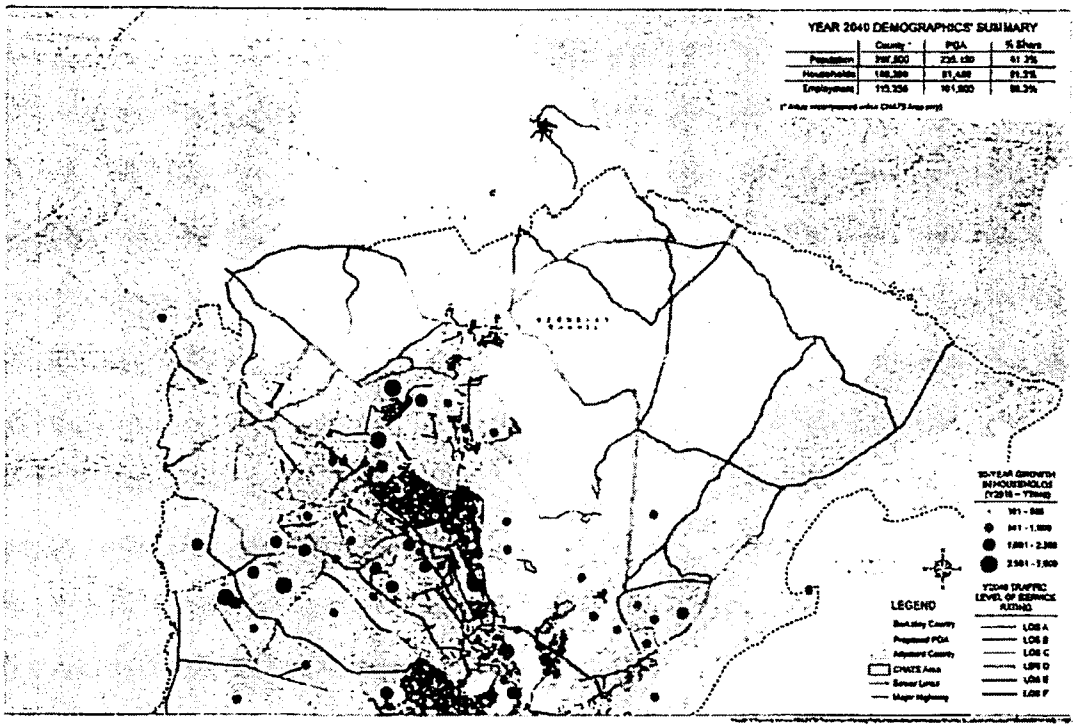
Source: Charleston Trident Association of Realtors Annual Report, 2016

Considering the median income of households in the county only increased by 3.4% between 2010 and 2015, home prices are increasingly less affordable for current residents. For example, a household had to earn $55,000 or 108% of the median household income to afford the median priced home in 2010. By comparison, a household had to earn $66,960 or 128% of the county's median household income to afford the median priced home in 2015. Looking at the trend in household numbers compared to changes in housing stock, this discrepancy appears to result from a delay in construction of developments approved prior to the Great Recession. Efforts should continue to bring those units into the market, increasing the supply of housing that is needed to keep pace with the demand expected to accompany new employment and overall regional growth.

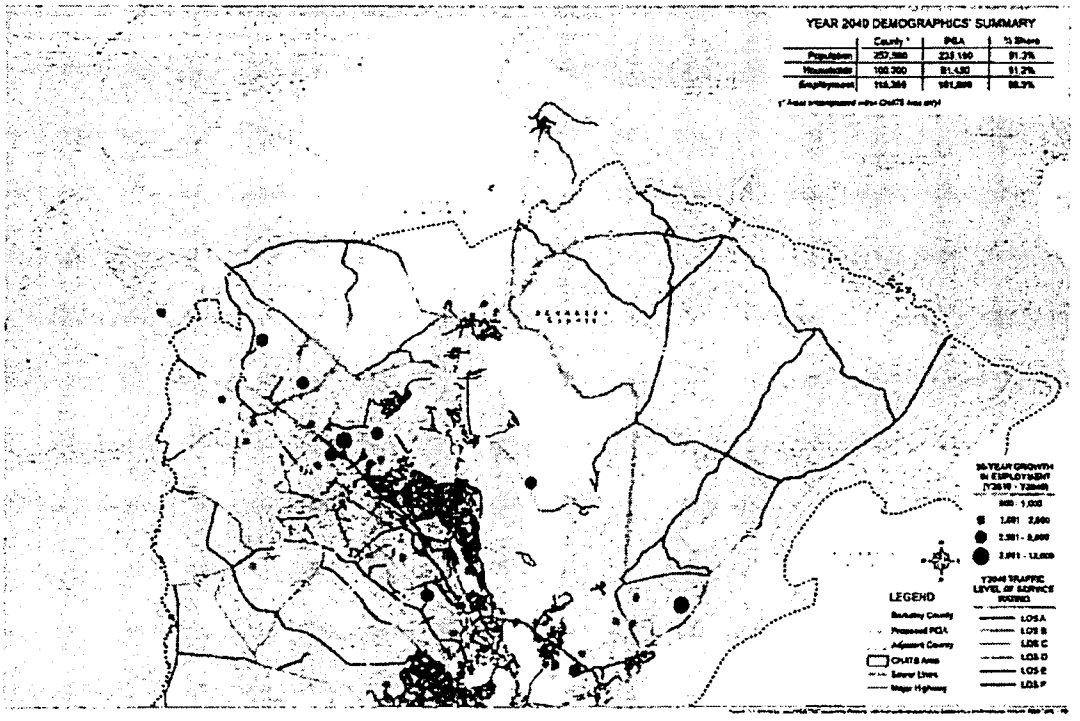
Infrastructure

Employment locations and a supply of affordable housing are directly related to the provision of adequate infrastructure. Ensuring the provision of adequate community facilities through a Capital Improvements Program, including the transportation system, balanced with preservation of the County's rural areas and natural resources through strategic land use plan implementation remain priorities for investments in the County. During review of the 2010 Comprehensive Plan, the Commission was presented with information on the state of transportation infrastructure and planned improvements. Likewise, the Commission considered the County's master planning for its public water and sewer systems and coordination with school facilities planning.

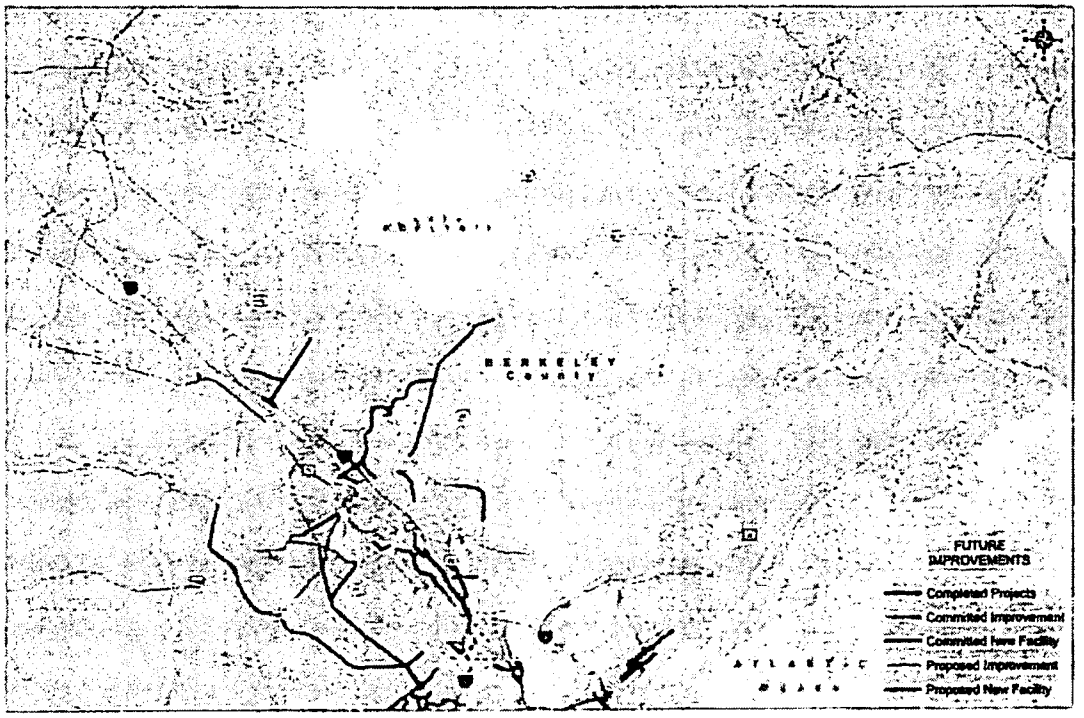
Berkeley County has recognized a need to increase its capacity to provide water and sewer for development approved and not yet constructed, in addition to future development approvals. In order to ensure adequate water and sewer service capacities to accommodate the County's projected growth, Berkeley County Water and Sewer (BCWS) is conducting studies on and has budgeted for necessary upgrades to the Lower Berkeley and Center Berkeley Wastewater Treatment Plants. Moreover, the water treatment plant is being upgraded to provide an additional capacity of approximately 4 MGD to our system when completed. BCWS is planning additional water transmission mains, flow control valves, and redundant mains to ensure service area coverage and service reliability.



Projected growth in housing units and households dictate the need for expansion of the County's sewer system. Maintaining current development intensities outside the Principal Growth Area will enable the County to serve new developments already approved within the PGA, as well as new employment areas.



Berkeley County uses a comprehensive transportation planning process to identify and plan needed network improvements in a Capital Improvements Program that is annually presented to Council. The County's one-cent transportation sales tax and CTC funds support a number of transportation projects to accommodate increased demands on the network. These projects are coordinated both with the region's Metropolitan Planning Organization (MPO) or CHATS to leverage investment of federal funding for major transportation improvements in the urbanized area and SCDOT's program for maintenance and safety improvements of the rural road system. The Transportation Sales Tax program was renewed in 2014 for a period of seven (7) years or until $230 billion are collected. Many of the projects to be funded will alleviate increased demands resulting from developments approved since 2000. The County continues to agree that careful consideration must be given to whether the transportation system can accommodate additional land developments or new capacity improvements will be needed as it evaluates future land development proposals.



Significant capacity improvements to Clements Ferry Road, the Henry Brown Boulevard extension, construction of the Sheep Island Parkway/I-26 interchange in conjunction with Nexton Parkway as well as widenings of I-26 and US176 are being funded to accommodate new developments approved in the past 15 years.

Berkeley County's School District is a separate entity that relies on the County's comprehensive plan to provide guidance where to anticipate future needs for additional school facilities. A study by the Strom Thurmond Institute, completed in 2015, identified a need for up to 22 additional school facilities by 2035. A presentation by the School District on its master plan process confirmed that new school facilities and facility expansions are currently planned where population and enrollment projections indicate a deficit in existing or future capacity. The School District passed a referendum in 2012 to build five new schools and add to two of its high schools as a means of relieving capacity deficits from the Cainhoy peninsula to Moncks Corner. Discussions by the Commission and the School District identified the need for continuous coordination on the review of future land development proposals and planning processes.

Adjusting to Changes

The primary objective of the 5-year review process was to consider whether policies in the adopted 2010 Comprehensive Plan remain valid and sufficient to support goals for the County's future. Early in the review process, it was determined that the County remains committed to the Guiding Principles adopted in the 2010 Plan; to:

1. *Protect and promote the existence of distinctive and diverse, sustainable communities within its boundaries;*
2. *Manage development and expansion of infrastructure systems efficiently in order to effectively serve residents and employees within the County;*
3. *Respect and enhance historic, cultural and natural resources, while providing expanded public access to them;*
4. *Ensure that both active and passive recreational opportunities are available to residents countywide;*
5. *Have an adopted plan that is clear, fair and can be implemented through simplified costs and streamlined processes.*

Significant consideration was given during a 15-month series of monthly workshops as to how the existing policies and processes within the County align with the second guiding principle, ensuring that adequate infrastructure systems are provided in an efficient manner to serve residents and industries. As previously discussed, the Planning Commission gave careful consideration to the County's plans for economic development, planned improvements to its transportation, water and sewer systems, and the Berkeley County School District's plans for school facilities. All workshops were open to the public, several being designated for stakeholder input on consideration of changes to the goals and strategies implementing Guiding Principal #2 above.

Since the County adopted its first Comprehensive Plan in 1999, the adopted Future Land Use Map and Land Use Goals have included a Principal Growth Area, where the County foresees an intensity of development and land uses that will necessitate public water and sewer as well as a more robust transportation network. However it was found that there is ambiguity within the existing policies as to whether and how consideration might be given to adjusting the extent of this area outside the process for updating the Plan every ten years. As a result, the bulk of the 5-year review discussions were focused on considering two elements of the Plan: (1) Adjustments to the future land use map and (2) Amendments to the policies in the Section 1: Issues and Opportunities, Guiding Principle 2, Goal G2.1.

Careful consideration of recent development approvals and coordination with the Future Land Use Map (FLUM) were made particularly in designating the area of anticipated development at the Camp Hall Tract as a major Employment Center, clarifying designations of Village Centers and Rural Crossroads to be consistent with location and infrastructure considerations, ensuring that employment areas align with the County's economic development plan, and expanding policies to help ensure that infrastructure and public facilities needs keep pace with new development. A summary of modifications proposed for the adopted Future Land Use Map is provided on subsequent pages, followed by a Future Land Use Map that has been revised to illustrate these modifications and is proposed for adoption.

Revisions to Section 2: Land Use and Development Principles of the adopted plan are proposed as clarifications to be consistent with revisions proposed to the Future Land Use Map in Attachment A.

Future Land Use Map Summary of Modifications

1. The *Constrained Residential Growth* area has been renamed *Constrained Growth.*
2. The *Village Center* designation has been applied to the incorporated towns outside the Principal Growth Area where public water and/or sewer service exists.
3. *Neighborhood and/or Village Centers* previously designated within the Constrained Growth area that are not incorporated have been re-designated as *Rural Crossroads* in order to reflect context and suitability for nonresidential development. Specifically:
   a. The Highway 27/Interstate 26 *Neighborhood Center* is now designated as a *Rural Crossroad.*
   b. The *Village Center* designation at the Diversion Canal in Cross is now designated as a *Rural Crossroad*
4. With the exception of the incorporated municipalities within the Constrained Growth area, all other *Village Centers* and *Neighborhood Centers* are now contained within the PGA (Suburban Area). Please note that a few of the *Neighborhood Center* designations were shifted to more accurately align with nonresidential intersections.
5. All *Rural Crossroads* are designated outside the PGA or Suburban Area with the exception of those in Cainhoy and Wando, neither of which have public systems.
6. *Commercial Corridors* were removed in order to emphasize the goal of focusing commercial development at highly-visible intersection nodes (as designated) and to discourage strip-commercial development, which, with the proliferation of curb-cuts, can impede vehicular flow/level of service over time.
7. A *Town Center* designation was added to Highway 176 at Cane Bay Marketplace and Nexton frontage. The two *Neighborhood Centers* along this corridor were consolidated into the *Town Center*, overlaying a Moderate Density Suburban area.
8. A *Town Center* designation, overlaying an employment area, was placed at the future Sheep Isle Road interchange as there is commercial office and employment uses proposed for this location in the Nexton PD.
9. Highway 78 in the Ladson Community was designated as an *Employment Corridor* as there are many existing industrial and commercial uses and zoning designations. An aside, Charleston County reached out to Berkeley County to collaborate on a more in-depth assessment of this corridor through a joint small area planning effort.
10. The *Employment Center* designation that encompasses Camp Hall was expanded to align with the property boundaries for the Camp Hall assemblage. The PGA was modified to encompass the Camp Hall assemblage property boundaries as well.
11. A gradient was applied to all land use designations in order to establish fluidity for reasonable transition of land uses and flexibility in interpretation. This flexibility will be reflected in the written policies and strategies as well.
12. Inclusion of a Rural Crossroads designation at Highway 27 and 176 in the Holly Hill vicinity.
13. Modified delineation of the PGA to exclude the Nucor/Hagen Plantation Conservation Easement assemblage AND include existing suburban residential zoned/developed areas along the Charity Church Road corridor that are already served by existing water and sewer services (e.g. Brightwood Subdivision).
14. The I-26/Jedburg Road Interstate Interchange Employment Center designation has been trimmed so to remove existing residential uses south of Old Dairy Road/Woodpatch Hill Lane based on community feedback at the July 26 Regular Planning Commission meeting.

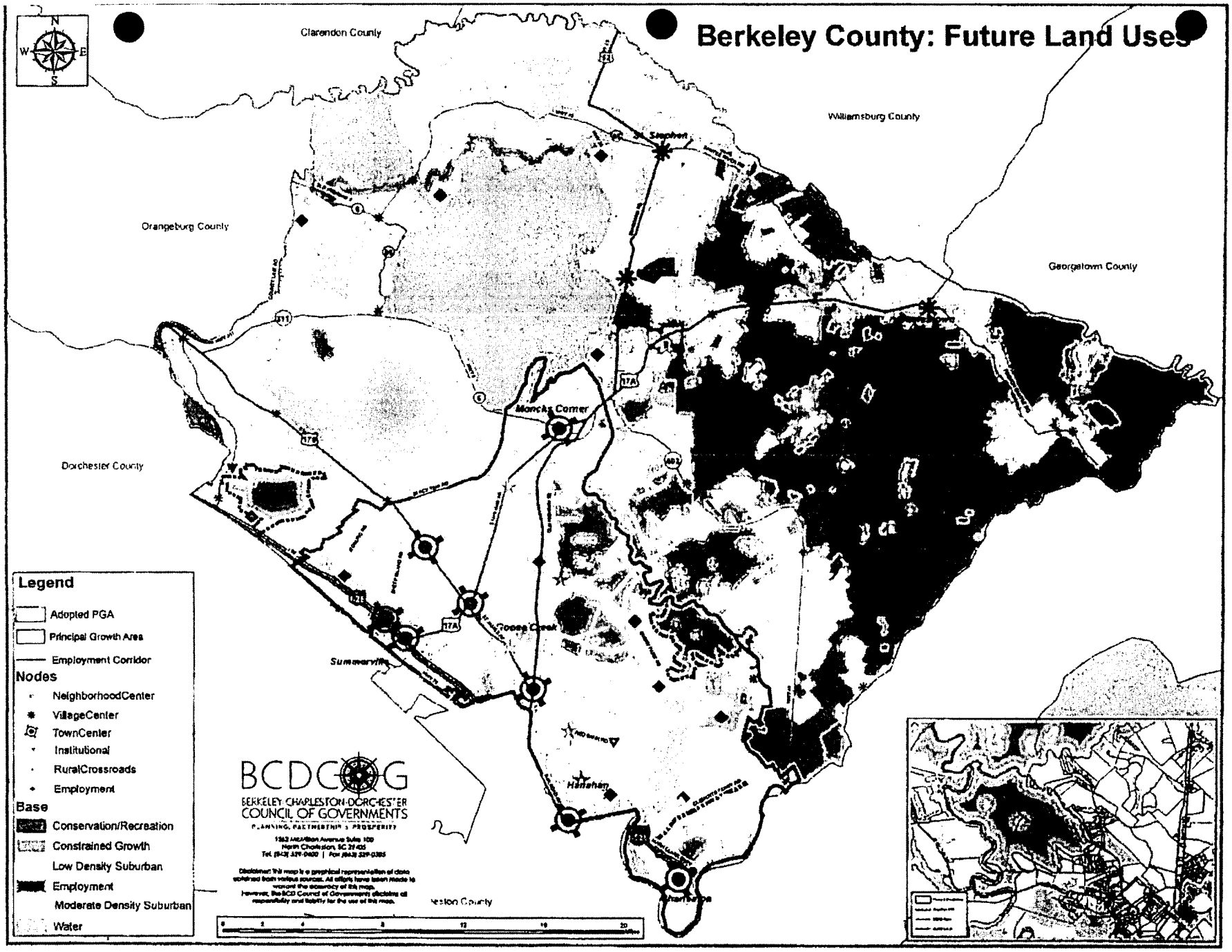
15. In order to direct and cluster commercial development at designated intersection nodes that boast high-visibility and easy accessibility for motorists and pedestrians, staff defined the following radii:
    a. Town Center Designation: 1-Mile Radii (Page 2-7)
    b. Rural Crossroads Designation: ¼-Mile Radii (Page 2-9)
    c. Village Center Designation: ½-Mile Radii (page 2-2; 2-6)
    d. Neighborhood Center Designation: ½-Mile Radii (Page 2-6)

Section 1: Issues and Opportunities of the adopted 2010 Plan sets forth goals and strategies for implementation of the Guiding Principles. While some minor edits have been proposed to provide a more updated explanation of current issues and opportunities, substantive revisions are proposed to reflect the County's desire to continue aligning development of land with the availability of infrastructure. Section 1: Issues and Opportunities has been revised in Attachment B to include the proposed revisions to these goals and strategies.

As previously stated, at the onset of its 5-year review, the Planning Commission determined that it would focus discussions on whether the Land Use and/or Transportation elements of the adopted Plan warranted reconsideration. While these elements have not been rewritten, proposed revisions to Section 1: Issues and Opportunities and Section 2: Land Use and Development Principles reflect the County's desire to strengthen its coordination with other planning processes and agencies with the objective of better aligning growth and development with existing and planned capacities of infrastructure and community facilities.

Attachments:

A: Section 2: Land Use and Development Principles
B: Section 1: Issues and Opportunities


Berkeley County: Future Land Uses
Clarendon County
Williamsburg County
Georgetown County
Orangeburg County
Dorchester County
St. Stephen
Moncks Corner
Goose Creek
Summerville
Hanahan
Legend
Adopted PGA
Principal Growth Area
Employment Corridor
Nodes
NeighborhoodCenter
VillageCenter
TownCenter
Institutional
RuralCrossroads
Employment
Base
Conservation/Recreation
Constrained Growth
Low Density Suburban
Employment
Moderate Density Suburban
Water
BCDCOG
BERKELEY-CHARLESTON-DORCHESTER
COUNCIL OF GOVERNMENTS

18-04-11

Berkeley County strives for a greater overall balance of housing and employment opportunities within areas where infrastructure exists or is planned while rural and natural areas are conserved. The Plan, therefore, designates a defined Principal Growth Area (PGA) within Berkeley County. The Principal Growth Area is the area within which more intense development of various uses should occur, to be served by existing, and efficiently expanded infrastructure and other public facilities and services. Remaining portions of the County remain designated for limited development and land uses that complement the County's abundant natural and agricultural lands. This Plan places emphasis on goals and strategies that will ensure future development of any land uses throughout the County will occur such that sensitive cultural and natural resources will not be adversely impacted.

Principal Growth Area

The Principal Growth Area (PGA) includes the County's more urbanized area including larger incorporated towns, as well as limited abutting rural areas already experiencing some transitional development west of Highway 17A, where infrastructure has become available and some intensification might occur. Development within the PGA is encouraged to focus around existing and identified town and neighborhood centers. The goals and objectives herein emphasize infill and redevelopment of land within the PGA to promote more accessible environments with centers that have connections to nearby neighborhoods. A mix of housing types within these centers will better serve the diverse population growth, providing attainable housing and a variety of other needs. By placing community services within designated neighborhood centers, close to where people live and work, residents have greater mobility options, including cycling and walking, between destinations. Development outside the PGA in areas designated for constrained growth and conservation/recreation should also be concentrated in and around existing Village Centers and Rural Crossroads identified on the Future Land Use Map.

Land Use Categories

The County seeks to preserve a unique composite of natural and man-made environments. Development objectives seek to maintain a visual and spatial distinction between suburban development and designated conservation areas within the rural areas of the County. The Berkeley County Future Land Use map shows the anticipated distribution of conservation, residential, non-residential, mixed-use, employment, and institutional land uses. The following sections describe the land use categories depicted on the Future Land Uses map. Each category described below includes a description of the general characteristics and location of each land use type, a listing of primary uses, and development objectives.

Conservation/Recreation

Characteristics and Location:

Conservation/Recreation areas are prioritized for greater protection from development activities in order to maintain natural habitats, provide flood protection, and protect water quality. These areas are also prioritized to provide for recreational opportunities, water access and water-oriented commercial activities. Any development in these areas should be constrained to disturb only highlands and to minimize impacts to these natural features and assets that are environmentally sensitive.

Primary Uses:

Active recreation, passive recreation, eco-tourism establishments, wildlife refuges, water-oriented commercial, community and neighborhood parks.

Development Objectives:

1. The County will consider establishment of a conservation zoning designation for application to properties within these areas that incorporates a combination of regulations and incentives to ensure development adequately mitigates any impacts to areas of significant cultural and natural resources. Such techniques may include low impact development standards, minimum buffer requirements along riparian zones, wetlands, and/or floodplains, and wildlife management areas.
2. Limited development of individual properties within designated conservation areas in conjunction with placement of conservation easements will be encouraged.
3. Potential linkages between designated conservation areas and cultural resources with existing trail systems to establish a natural recreation corridor will be identified and encouraged for development by both the public and private sector in accord with the County's Green Infrastructure Plan.
4. Establishment of recreational facilities and accommodations in these areas will be limited to low-impact uses at an appropriate scale.
5. Scenic byway and historic designations will be pursued for identified roads of significance.

Constrained Growth

Characteristics and Location:

Areas outside the PGA are designated for Constrained Growth where agricultural lands and low density residential development are integrated with Conservation/Recreation lands. The Constrained Growth areas will remain rural in character and developed at densities that can be served by onsite water and wastewater systems except where public infrastructure can be extended by the municipality to abutting parcels. Land owners may develop large lot single-family rural residential neighborhoods with high proportions of open space (typically 50-70%) or cluster the residential units on smaller lots to conserve comparable open space, agricultural land, historically significant areas, and other natural features. More intense development of residential and nonresidential uses will be preferably focused in or adjacent to the incorporated towns, designated as Village Centers, and/or Rural Crossroads.

Primary Uses:

Traditional land practices such as forestry and agriculture, rural residential/detached single-family residences, supporting and complementary uses, including open space and recreation, equestrian uses, schools, places of worship, and other public uses.

Development Objectives:

1. Public sewer should not be extended to serve development in Constrained Growth areas except where an employment use is proposed within the ½ mile radius of a designated Village Center. Individual well and septic systems may be replaced with communal well and septic systems where justified and approved by SCDHEC.
2. Rural road standards for a network compatible with low density development and the rural character will be supported by the County.
3. New development will fully integrate the elements of green infrastructure and establish natural open spaces as predominant visual elements and enhance the area's natural environment.
4. Green infrastructure elements provided in each development will link with that in adjacent developments to facilitate connectivity and access to conservation areas.

5. The County will encourage clustering of residential lots through a density bonus approach. Clustering should occur near the edges of parcels, close to principal access roads to minimize need for driveways and maximize the amount of land left undeveloped.
6. Larger scale residential developments (greater than 10 lots) will develop in clusters as conservation subdivisions.

Low Density Suburban

Characteristics and Location

Low Density Suburban areas will be developed with diverse housing choices, in neighborhoods that promote a sense of community, providing an aesthetically pleasing transition from Constrained Growth Areas to higher-density residential, nonresidential and mixed-use nodes. Development will be approved for densities in locations where it can be served efficiently by existing infrastructure, facilities and services, and transportation networks. All development activity will be designed to mitigate adverse impacts on any cultural and/or natural resources.

Primary Uses:

Single-family residential detached housing, continuation of agricultural uses, open space, civic and recreation, and mixed-uses where appropriate.

Development Objectives.

1. New developments will provide or complement a mix of land uses and project designs to ensure the long-term sustainability, or economic and environmental health, of both the individual and broader community in which it is located.
2. Communities will be developed as efficient, compact, pedestrian oriented communities with a range of residential lot sizes and measurable standards of open space.
3. Connections to key centers of employment, commerce, service and other developments will be provided for, and between, communities.
4. New developments must be served by or demonstrate the ability to be served by existing or extensions of existing public water and sewer systems.
5. Interconnectivity between adjacent communities will be fostered to minimize overloading of single access/entrance points onto principal access roads for each development.
6. Significant areas of sensitive natural resources and protective buffers will be designated for use as passive recreation or conservation areas, while reallocating development potential of those areas back to privately developed lots within each community.
7. Residential communities will provide a mix of open spaces, including active and passive and/or natural open spaces as appropriate to the scale and location of the site. At least 60% of any required open space should be useable and accessible land, with the majority of it located within the interior of the community. Required buffer areas and outparcels should not account for more than 25% of the total open space required.
8. Density bonus incentives will be considered for developments that conserve open space areas and/or provide buffer areas in excess of ordinance requirements.
9. Development densities of individual communities may average up to 4.0 dwelling units per acre, depending on the adequacy of roads, utilities, and full complement of public services and facilities.

Moderate Density Suburban

Characteristics and Location:

Moderate Density Suburban areas are designated within the Principal Growth Area in locations where such development can provide a transition from low density suburban to, and infrastructure can support more concentrated developments of, residential and commercial uses.

These areas identified are already proposed for development with various new communities that should strive to include walkable neighborhood units within the community. To the extent possible, future communities developed at moderate densities should be co-located with neighborhood centers of nonresidential development or within 1 mile of a designated Town Center. New neighborhoods/neighborhood units should each include a system of interconnected trails or sidewalks that will provide access to parks, recreation, and open space areas focused near and in between residential communities.

Primary Uses:

Single-family residential detached housing, single-family attached and multi-family housing, neighborhood-oriented commercial and/or mixed-uses, civic and recreation facilities.

Development Objectives:

Development Objectives (1) through (8) for Low Density Suburban communities should apply **in addition** to the following:

1. Principal accessibility to moderate density developments will be coordinated with regional transportation systems. Communities shall each provide for a hierarchy of internal facilities for vehicular, cycling and pedestrian use.
2. New development proposals within these designated areas will demonstrate linkages, or potential linkages, to public transportation facilities.
3. Performance standards will foster integration of compatible use groups. Application of form-based codes will be encouraged.
4. Development densities of individual communities may average up to 12.0 dwelling units per acre, depending on the adequacy of roads, utilities, and full complement of public services and facilities.

Employment Centers/Corridors

Characteristics and Location:

Locations designated for Employment within the Principal Growth Area as identified on the Future Land Use Map are intended for development of large scale office and light-industrial uses by a major employer or a cluster of multiple employers with a mix of supporting or ancillary uses, such as restaurants, hotels, and limited service retail. Future employment developments within designated centers and corridors will feature high visual quality site design and accommodate uses of high traffic generation. Clustering of buildings within these centers is preferred to preserve open space within the development site. Site plans, building design and landscaping will be sensitive to the natural features of the site, including views. Smaller employment centers may be located adjacent to or in conjunction with Town Centers and/or planned communities. Specific industrial/employment nodes for heavier industrial uses are designated within employment areas on the Future Land Uses Map (FLUM).

Primary Uses:

Office, light industry, and ancillary retail/services for employees, some commercial services, accommodations and public/institutional uses.

Development Objectives:

1. Employment centers will be located with indirect access to primary highways and arterials as shown on the FLUM.
2. Access to employment areas will be provided via internal collector roads to provide safe and efficient movement of traffic, including trucks, without impeding movement on adjacent roadways.
3. Employment uses within the PGA will be served by public water and sewer facilities.
4. Development plans will meet established performance standards that foster environmentally sensitive design to complement existing natural features and reduce potential visual impacts on adjacent residential communities.
5. Employment developments will possess adequate on-site parking, storage and loading areas, as well as landscaped screening of these functions from surrounding neighborhoods.
6. Light industrial uses will be limited to those that do not require outdoor storage and have negligible externalities (i.e., noise, odor, vibration).
7. Provision of safe, convenient and attractive pedestrian access to nearby residential areas and local businesses with ancillary retail services and goods will be evaluated for individual proposals.

Industrial/Employment Nodes ◆

Characteristics and Location:

A limited number of Industrial/Employment Nodes are designated throughout the County to accommodate large labor intensive industrial and heavy commercial uses that produce noxious externalities. Parcels developed with these uses will be large enough to include land and buffers that ensure that negative impacts on adjacent properties are mitigated. These areas are not conducive to mixed use development, however in some cases, less intensive industrial uses may be co-located within these nodes to provide the transition between the industrial use and adjacent communities and/or natural areas of environmental sensitivity.

Primary Uses:

Industrial, supporting office, commercial, wholesale, and warehousing.

Development Objectives:

1. Heavy industry will be located along major roadway corridors that provide direct access to interstates and other major transportation facilities, including existing rail lines.
2. Employment nodes within the PGA will be served by public water and sewer facilities.
3. Performance standards will be applied to new industrial development to ensure adequate land for separation and buffering from incompatible/lower intensity land uses, including nearby residential and business uses.
4. Proposals for less intense uses within these nodes will be evaluated for potential incompatibility to ensure development does not jeopardize the viability and functional mobility of existing industries.

Institutional Facilities

Characteristics and Location

Institutional areas designated on the Future Land Use Map are intended to accommodate single uses and activities that already exist and are not compatible with other land use designations both within and outside the PGA. The characteristics and locational requirements of institutional needs will vary on an individual basis. All new institutional facilities of the same magnitude should be co-located with existing areas whenever possible.

Primary Uses

Public institutional uses such as prison, military, and other regional public facilities.

Development Objectives:

1. Institutional uses will be located along major roadway corridors that provide direct access to communities and other major transportation facilities.
2. Future development of institutional areas within the PGA will be served by public water and/or sewer facilities.
3. Development of new institutional uses outside the PGA will be located within or abutting Village Centers within ½ mile of the municipal boundary or Rural Crossroads.
4. Performance standards will be applied to ensure adequate land for separation and buffering from incompatible/lower intensity land uses, including nearby residential and business uses.

Neighborhood Centers

Characteristics and Location:

Neighborhood Centers are areas of community-oriented commercial uses that serve needs of nearby neighborhoods and shall be established in locations designated on the future land use map. Neighborhood Centers are an integral part of the residential communities they serve, particularly when established as part of a planned development or through a development agreement. The size and scale should relate to the size of the communities it intends to serve or its market area. Neighborhood Centers, which are much smaller in size than Town Centers, will host a variety of uses, including retail and service options that are accessible to the neighborhoods they serve via various forms of transportation.

Primary Uses

Community institutional and/or gathering places (e.g. schools, parks, churches, community centers, etc.) along with convenience retail, personal and professional service establishments that serve residents of the immediate vicinity.

Development Objectives:

1. Neighborhood centers will be located within the Principal Growth Area adjacent to or within walking distance of established or planned residential developments on major or minor collector roads.
2. Site development will be compact in form and within ½-mile radii of the designated intersection, designed to accommodate pedestrian and vehicular traffic with a full complement of services and amenities.

3. Application of form based codes will be encouraged.
4. The overall concept for design of a community center will complement the character of surrounding communities, so the interrelationship of its parts (commercial, office, civic, public open space, etc.) is evident.
5. Adequate buffering and landscaping will be provided to minimize impacts on natural resources.

Town Centers

Characteristics and Location

The County will promote development, infill and redevelopment, of areas designated as Town Centers. These centers serve as the "downtowns" of unincorporated communities within the County and will be the primary location for future development of mixed land uses that accommodate commerce, employment and civic activities. Nonresidential, supported by higher density residential uses, will be focused within these centers to foster creation of balanced communities.

Primary Uses

Infill development, mixed-uses, retail, commercial, office, high density residential, cultural, and institutional.

Development Objectives

1. Town Centers will be located only at nodes designated on the Future Land Uses Map (FLUM), where developments are accessed directly from major collector and/or arterial roads.
2. Town Centers may range up to 50 acres in size yet will be compact development(s), within a one-mile radius of the designated intersection, to encourage pedestrian mobility within the centers, while still accommodating vehicular accessibility, with a full complement of services and amenities, including access to future transit services.
3. The County will consider adoption of Access Management Policies or plans to manage the placement and frequency of curb cuts and require shared access points along arterial and major collector roads to foster maximum mobility along the corridors feeding Town Centers.
4. Development applications will demonstrate a configuration of streets and public/landmark parcels, along with the pedestrian network, preferably through the use of a grid street pattern.
5. On street parking and centralized parking facilities will be interspersed within the development to facilitate mobility within the Town Center without vehicles.
6. Parking, loading and outdoor storage areas will be restricted and screened between buildings and public accessways.
7. Large setbacks will be provided (100 foot minimum) along arterials and major collectors, with minimum setbacks between similar uses and local travelways.
8. Open space areas within each Town Center will be provided to foster natural management of stormwater and impacts on air quality.

Village Centers ✱

Characteristics and Location:

Village Centers are envisioned as mixed-use communities with residential and nonresidential uses integrated to create pedestrian friendly self-sustaining developments with a mix of housing options outside the Principal Growth Area. Village Centers are designated where incorporated communities exist with a range of complementary uses within distinct neighborhoods. These Centers are distinct physical settlements surrounded by protected or constrained growth areas used for agriculture or conservation purposes. Variations in parcel sizes and base densities within designated Village Centers will provide opportunities for innovative blends of new development. Additional Village Centers may be developed outside the Principal Growth Area provided they have public water and sewer systems and the County approves an amendment to the adopted FLUM.

Primary Uses:

Medium density rural residential, civic, institutional, social/cultural, small neighborhood commercial and retail services, home businesses or local offices.

Development Objectives:

1. Densities and open space requirements for development within Village Centers beyond boundaries of the incorporated towns will vary from center to center, ranging up to two dwelling units per acre where public or communal water/wastewater systems are available.
2. Defined edges of Village Centers will be compatible with the surrounding rural area and should provide identity and a sense of place to the surrounding countryside.
3. Nonresidential uses will be organized around a compact community core to serve individual communities or combinations of neighborhood developments. The community core may vary in scale, design and use depending on the size of the community it serves.
4. The County will support establishment of larger employment uses around the periphery of a Village Center provided they can be served by adequate facilities.
5. New civic uses will be located at prominent locations within the core, at a scale compatible with the residential nature of the Village Center. Large-scale civic or institutional uses will be located on the periphery of an individual neighborhood or the village.
6. Open spaces associated with Village Centers will be dispersed as to be conveniently located to residents. These areas will serve both a recreational and design function.
7. Village Centers will accommodate and promote pedestrian travel, with interconnected (and generally rectilinear) street patterns.

Rural Crossroads ✱

Characteristics and Location

Rural Crossroads are nodal and/or village developments at secondary road intersections, with commercial and community/civic uses clustered within one-quarter mile of an intersection identified on the Future Land Use Map in the constrained growth areas. Development of crossroads is limited in scale, compatible with the surrounding rural area and should provide identity and a sense of place to the surrounding countryside.

Primary Uses

Rural Residential, social/cultural and neighborhood commercial, personal service establishments, and institutional uses

Development Objectives.

1. Rural Crossroad areas are limited in land area, with commercial uses located within ¼ mile of the actual intersection.
2. Standards for development in Rural Crossroad areas will ensure that turning movements at the intersection are not interrupted by access to/from individual lots.
3. Limited parking in Rural Crossroad areas will be sited to the side and rear of commercial, civic and/or social uses.
4. Pedestrian linkages from nonresidential uses will be provided to surrounding residences, and between commercial and social uses.

Overview

This updated section continues to organize the various issues and opportunities discussed during a comprehensive review of the adopted 2010 Comprehensive Plan, in relationship to existing conditions in Berkeley County, the future vision and adopted Guiding Principles of this Plan. Along with a summary of these issues and opportunities, are goals, policies and implementation strategies related to each Guiding Principle. These issues and goals were identified as part of the comprehensive planning process during the public participation phase, which included discussions of existing conditions and future scenarios. They have been updated to reflect changes in the County that have occurred since adoption of the plan in 2012 and discussions during the 5-year review. The goals are intended to attain an ultimate vision for the County, one that achieves a balance between managing growth while protecting and preserving the character and quality of life for Berkeley County residents.

Following goals and policies are tables of implementation strategies for achieving each guiding principle, along with a suggested time frame and a list of agencies responsible for implementation. Short term projects are to be completed in one to five years, while long term projects are to be completed in five to ten years. Ongoing projects are either already occurring or should be occurring on a regular basis.

Guiding Principle 1

Berkeley County will protect and promote the existence of distinctive and diverse, sustainable communities within its boundaries.

Summary of Issues

Experiencing significant growth over the past sixty years, Berkeley County has more than doubled its population since 1980. To accommodate this growth, large tracts of land in areas previously considered rural have been developed mostly by large planned communities in the urbanized area. However, this growth has also been accommodated by development of single family residences on large lots outside the urbanized area by those seeking to live in a rural area. While the County is open to new residences in its rural areas, it is cognizant that increasing demands will not only quickly consume the County's agricultural and forested land but will also place demand for additional infrastructure beyond existing service areas and increase congestion on the rural road network.

It is also important that as the population becomes more prevalent and diverse, the County strives to find the balance between continued growth while maintaining the level of quality of life for its residents. This includes continuing to provide diverse housing options and businesses in order to meet various needs of its population.

In addition, protection of rural Berkeley County's historic communities, such as Pringletown, Cross, Lebanon and Honey Hill, along with its natural resources, including the Cooper River and Lake Moultrie, is becoming increasingly important due to these development pressures. By planning for growth pressures, these communities are more likely to retain their individual characteristics.

During the public participation phase of the planning process, participants repeatedly expressed their concerns regarding the loss of character and quality of life of their communities. In addition, preservation of community character and quality of life was one of their greatest hopes for the future of Berkeley County. Growth or density of development was also of great concern to participants, meaning they were concerned about the type of development taking place throughout the County.

Goals and Policies

G1.1 Berkeley County will support the provision of community services, essential for all population groups.

1. The County will promote land use regulations that provide appropriate locations for quality health care, day and elderly care, and other services.
2. The County will encourage the establishment of social services by institutions or community groups.
3. The County will encourage allocation and efficient management of educational facilities that provide opportunities for residents to enjoy the same, or better, standard of living.
4. The County will ensure residents in new development are provided with adequate public safety services and facilities.

G1.2 Berkeley County will support the development of affordable housing and diverse housing types.

1. The County will encourage the provision of diverse housing types within planned developments.
2. The County will provide incentives for creative housing developments that provide affordable housing or workforce housing in close proximity to existing and future employment centers.
3. The County will promote housing availability for low to moderate income households and special needs populations.

G1.3 Berkeley County will plan and implement mitigation strategies to protect existing communities and neighborhoods from physical deterioration due to natural hazards and/or neglect.

1. The County will protect the quality of existing communities and neighborhoods through increased code enforcement and regulations.
2. The County will support redevelopment or enhancement of existing communities and neighborhoods that have suffered from physical deterioration.

G1.4 Berkeley County will promote the development of complete communities within the Principal Growth Area (PGA) as designated on the Future Land Use Map (FLUM).

1. The County will make decisions on new development based on their contribution to the community's character and sense of place.
2. The County will support creation of walkable, safe and attractive neighborhoods with a mix of uses, where appropriate, throughout the Principal Growth Area in accord with Section 2: Land Use and Development Principles.

GP I Strategies	Implementation Partners	Timeline
Serve existing communities and support the location of accessible institutions, including appropriate school and social services siting.	County Council, Planning Commission	Ongoing
Work to identify and reduce regulatory barriers to affordable housing.	County Council, Planning Commission, Planning Staff, Lowcountry Housing Trust	Short-Term
Consider developing an affordable/workforce housing master plan.	County Council, Planning Commission, HUD, BCDCOG	Short-Term
Promote community housing partnerships and home buyer education programs.	County Council, Planning Commission, Lowcountry Housing Trust	Ongoing
Enforce standard building codes and FEMA flood hazard regulations.	County Building and Code Enforcement Department	Ongoing
Provide incentives for maintenance and renovation of older structures.	County Council, Planning Commission, Planning Staff, Lowcountry Housing Trust, Berkeley County Historic Society	Ongoing
Work with private, non-profit and other government organizations to offer housing options.	County Council, Planning Commission, Lowcountry Housing Trust, Developers	Ongoing
Coordinate with or establish a County housing agency to serve as central point of contact for assistance in the rehabilitation of substandard housing units.	County Council, Planning Commission, Planning Staff, Lowcountry Housing Trust	Short-Term
Explore ways to educate citizens regarding vulnerability to natural hazards so that the community may be more resilient should a disaster occur.	Berkeley County Emergency Preparedness Division	Ongoing
Ensure County's DMP addresses mitigation of development in known areas of unstable soils or geologic features.	County Building and Code Enforcement Department	Short-Term
Ensure new developments are complete and integrated communities with a mix of uses, ample open space, and network of mobility options.	County Council, Planning Commission, Planning Staff, Developers	Ongoing
Ensure implementation of strategies in its DMP to assure the resiliency of all communities in the County.	County Council, Planning Commission, Planning Staff, Developers	Ongoing

Guiding Principle 2

Berkeley County will manage development and expansion of infrastructure systems efficiently in order to effectively serve residents and employees within Berkeley County.

Summary of Issues

As growth and development pressures continue, Berkeley County must consider the cost of providing facilities and services for new developments, particularly as it relates to gaps in service provision. Inadequate public facilities, longer response times for emergency services, lack of local employment opportunities, potential impact on existing communities, and longer travel and commuting times for residents are all issues to consider when evaluating the feasibility of a new project or development.

One of the greatest concerns coming out of the visioning process for the adopted plan, and again during the five-year review workshops, was the lack of infrastructure "concurrency," meaning that the capacity and availability of roads, sewer and water lines, schools, and other public facilities should be available to keep pace with demand for services that accompany new development in order to maintain the County's quality of life.

Quality of life often requires economic prosperity; therefore, there is a need to promote economic well-being within the County and to provide diverse employment opportunities. By doing so, residents have employment options within the County rather than commuting to neighboring jurisdictions for employment purposes. This leads to decreased mobility and less traffic congestion on the roadways.

The creation of wealth is important not only for individuals and households, but also for the community as a whole, in terms of quality and range of facilities and services available, and for the maintenance of the built and natural environment.

Goals and Policies

G2.1 Berkeley County will guide population growth to areas where supporting infrastructure exists or can efficiently be expanded.

1. The County will make efficient use of existing infrastructure and public facilities in order to minimize the need for costly new/expanded facilities and services.
2. The County will plan infrastructure ahead of growth in identified growth areas, and direct intense land uses to areas where infrastructure and carrying capacity already exist.
3. The County has identified a Principal Growth Area on the Future Land Use Map where existing infrastructure exists and/or is planned and will not support the extension of infrastructure to areas that are outside of the Principal Growth Area (PGA) and areas specified for resource protection.
4. The County will establish a process to evaluate the adequacy of infrastructure and public facilities with rezoning applications within and outside of the PGA.
5. The County will evaluate the growth capacity and projected demand for developable land within the PGA every five years and amend if necessary in order to continue to focus development within areas that are served by efficient extension of existing utilities as consistent with the County's Comprehensive Plan, Water and Sewer Master Plans, and other infrastructure or capital improvements plans.

G2.2 Berkeley County will encourage the provision of infrastructure as needed to support economic and workforce development initiatives.

1. The County will consider impacts on infrastructure, including rail access, and natural resources when making locational decisions on economic and workforce development projects.
2. The County will identify and promote development of manufacturing/industrial corridors and employment/technology corridors where infrastructure exists.
3. The County will increase recruitment efforts and support the establishment of industries that generate economic development.
4. The County will support workforce development programs that provide skilled labor for existing and recruited industries from County population base.
5. The County will promote establishment and expansion of port-related industries.
6. The County will support the local agricultural industry.
7. The County will support development of employment uses in the constrained growth area when adjacent to rural towns where such uses may be supported by infrastructure extensions from the municipalities.

G2.3 Berkeley County will improve the operation and efficiency of its transportation network to serve residents and employers.

1. The County will prioritize transportation improvements that support desired development patterns, better serve residents and employers, and promote connectivity while accommodating multiple functions.
2. The County will continue to support a strategic transportation plan for system improvements addressing existing and projected demand for all modes of transportation countywide.
3. The County will encourage connectivity by expanding the number of alternative routes and the provision of multimodal corridors throughout the County road network for local traffic.

GP 2 Strategies	Implementation	
	Partners	Timeline
Develop and adopt a process for amending the Principal Growth Area where new development adjacent to its boundaries can be served by efficient extension of infrastructure.	Planning Commission, Planning Staff	Ongoing
Identify potential linkages between housing and jobs during development review process.	Planning Commission, Planning Staff	Ongoing
Require developers to provide, or provide access to, public amenities.	Planning Commission, Planning Staff, Developers	Ongoing
Participate in regional efforts to strengthen economic impact of the port and related industries.	County Council, Planning Commission, South Carolina Ports, Berkeley Chamber, Charleston Metro Chamber	Ongoing
Continue development of Clements Ferry Road as a manufacturing corridor.	Planning Commission, Berkeley Economic Development Department, SCDOT	Ongoing
Develop US 52 as a technology corridor.	Planning Commission, Berkeley Economic Development Department, SCDOT	Short-Term
Build a permanent farmers market.	Berkeley Economic Development Department, Berkeley Chamber	Short Term
Encourage the County school district to serve student lunches comprised of products grown locally and/or regionally.	County Council, Berkeley County School District	Short Term

GP 2 Strategies (continued)	Implementation	
	Partners	Timeline
Improve the effectiveness of existing major collector roads by conducting corridor studies and through adoption and implementation of a complete streets policy, addition of sidewalks and/or bike lanes.	Planning Commission, Berkeley County Engineering, Roads and Bridges, SCDOT	Ongoing
Study the existing sidewalk network and develop an overall sidewalk improvement plan based on gaps.	Planning Commission, Berkeley County Engineering	Short-Term
Participate in regional efforts to establish commuter rail, including a line from Moncks Corner to Charleston	Planning Commission, CHATS, CARTA	Long-Term
Adopt consistent standards for provision of various community facilities for each new development.	County Council, Various Public Agencies	Short-Term
Consider using public transit as a development incentive to organize the arrangement of higher density land uses, such as multi-family housing, and to provide equitable access to jobs and amenities.	County Council, Planning Commission	Long-Term

Guiding Principle 3

Berkeley County will respect and enhance historic, cultural and natural resources, while providing expanded public access to them.

Summary of Issues

Berkeley County has an abundance of cultural and natural resources that provide many benefits to the community. These identify the County's unique character, help to foster civic pride, offer economic opportunities by helping attract new residents, businesses and visitors, and contribute to the overall quality of life for residents.

Many of the concerns expressed during citizen input revolved around the impact development has had or will have on the County's historic and cultural resources, as well as its agricultural lands. More specifically, citizens want to ensure: development is occurring in areas where suitable soil and geologic features exist; where impacts on the quality of wetlands and other water resources and natural habitats of site development, infrastructure, and/or structures can be mitigated; and such that air quality standards are maintained and industrial noise reduced or mitigated.

Sites that exemplify Berkeley County's character and landscape include, but are not limited to, the Francis Marion National Forest, Lakes Marion and Moultrie, Medway Plantation, and Cypress Gardens. Sites such as these provide scenic value, cultural and recreational opportunities, and natural habitats to be protected and enjoyed. Because these resources play such an important role, they should be protected and, where possible, shared with the greater community.

Goals and Policies

G3.1 Berkeley County will support local agricultural and forestry practices through the preservation of its rural areas.

1. The County will support the protection of agriculture and farmlands, including timberlands, from development pressures, recognizing the contributions of farming and the rural character of the community.
2. The County will support policies and programs that provide opportunities for agricultural activities to remain an integral part of the community.
3. The County will promote agri-tourism opportunities.
4. The County will support the aquaculture industry through preservation of water quality.

G3.2 Berkeley County will develop and market heritage and eco-tourism opportunities based on its cultural and natural resources.

1. Protection and conservation of the County's cultural and natural resources will play a vital role in the decision-making process.
2. The County will promote and support the protection and enhancement of the County's unique historic resources.

G3.3 Berkeley County will adopt and apply land use principles and development practices which ensure development works in harmony with cultural and natural resources.

1. The County will encourage new development to locate in suitable locations in accord with Section 2: Land Use and Development Objectives in order to protect and preserve natural resources, environmentally-sensitive areas, or valuable historic or cultural resources from encroachment.
2. The County will adopt and implement policies and standards that minimize impacts of site development, including land disturbance, infrastructure and structures, on the quality of wetlands and other nonrenewable natural resources.

GP 3 Strategies	Implementation Partners	Timeline
Increase local agricultural production and education programs by encouraging local farming cooperatives through Berkeley County Schools.	Berkeley County School District	Short-Term
Enhance the value and capacity of the aquaculture industry.	Berkeley Economic Development Department	Ongoing
Develop a plan to promote agri-tourism opportunities through educational programs, special events, festivals, farm tours, etc.	Planning Commission, Berkeley Economic Development Department, Berkeley Chamber	Short-Term
Consider provisions for voluntary establishment of agricultural preservation districts with special tax assessments.	County Council, Planning Commission, Planning Staff	Short-Term
Designate areas of sensitive natural and/or scenic and/or historic resources for conservation or resource protection.	County Council, Planning Commission, SCDNR, SCDHEC	Ongoing
Support promotion of the Blueways Trail System.	Planning Commission, Lowcountry Paddlers, SCDHEC-OCRM, SCDNR, South Carolina Sea Grant Consortium	Ongoing
Work with SCDAH to identify funding and professional resources to update existing inventory of historic and archaeological resources.	County Council, Planning Commission, SCDAH, Berkeley County Historical Society	Short-Term

GP 3 Strategies (continued)	Implementation Partners	Timeline
Promote and support enhancement of Cypress Gardens.	County Council, Berkeley Chamber	Ongoing
Market the County as a travel destination through the establishment of an interpretive center for the County's resources in conjunction with a visitor's center at a County Gateway Welcome/Visitor's Center.	County Council, Berkeley Economic Development Department, Berkeley Chamber	Long-Term
Designate Cainhoy Road and Highway 402 as scenic highway heritage corridors.	County Council, Planning Commission, SCDOT	Short-Term
Endorse efforts of preservation, civic and tourism groups to protect and interpret resources, such as the Cooper River Historic District.	County Council, Planning Commission, Planning Staff	Ongoing
Establish a heritage loop or corridor that provides accessibility to identified significant sites as a basis for ecotourism.	County Council, Planning Commission, SCDOT, Berkeley Chamber	Long-Term
Coordinate with community groups and private industries/property owners to establish managed public accessibility to resources under private ownership.	County Council, Planning Commission, Private Property Owners	Ongoing
Limit land uses or development patterns in conservation areas to low-impact residential and environmentally compatible recreational uses.	County Council, Planning Commission, Planning Staff, Developers	Short-Term
Consider density bonus incentives to developers in return for conservation of open spaces meeting specific criteria.	County Council, Planning Commission, Planning Staff, Developers	Short-Term
Evaluate establishment of a Transfer of Development Right (TDR) program to channel development into priority development areas and away from resources to be conserved.	County Council, Planning Commission, Planning Staff, SCDHEC	Short-Term
Support the establishment of collaborative partnership between private property owners and conservation nonprofits to promote placement of easements through tax incentives	County Council, Planning Commission, Private Property Owners, Nonprofits, Lord Berkeley Land Trust	Ongoing
Review effectiveness of existing special area permit requirements in evaluating existence of sensitive resources prior to land development approvals.	County Council, Planning Commission, Planning Staff	Short-Term
Require BMP's for all developments to mitigate negative impacts of stormwater on the quality of the County's water resources.	County Council, Planning Commission, Planning Staff	Ongoing

Guiding Principle 4

Berkeley County will make sure that both active and passive recreational opportunities are available to its residents countywide.

Summary of Issues

Berkeley County has many recreational resources, most of which are commonly found in association with the area's natural and cultural resources. Examples of these include: recreational boating at Lions Beach on the shore of Lake Moultrie; recreational boating on Lake Marion; Richardson Landing boat-launching facility at Bonneau Beach; boating and fishing on the upper Cooper River and Santee River; and the Berkeley County Blueways paddling trail system.

Despite these resources, citizens who participated in the public workshops expressed concern over the lack of public recreation facilities, playgrounds, and ballparks, particularly in rural areas of the County. Berkeley County has many opportunities to enhance and promote existing facilities while developing new ones to meet the needs of the community.

An exercise conducted at the public workshops asked participants to review photographs of various community components and choose what they felt would be an appropriate addition to their communities. One of the most popular images chosen was that of a neighborhood playground. While these facilities may be provided within a planned community, they are not easily accessed by most rural residents. The need for these types of facilities was concentrated in two rural areas on maps at the community planning workshops: Wando-Huger and New Hope-Longridge.

Community recreation was also desired around Lake Moultrie, often near boat launches; on the west side of Moncks Corner, near existing public schools; and in or near the communities of Pringletown, Sangaree, Oakley, and Macedonia. Participants also expressed a need for access to water on the southwest side of Lake Moultrie, the Goose Creek Reservoir, the upper reaches of the Cooper River, the Wando River, and Four Holes Swamp. There were comments expressing a need for upgrades to existing facilities on the Lake as well.

Goals and Policies

G4.1 Berkeley County is committed to providing pleasant, accessible public gathering places and parks throughout the community.

1. The County will support initiation of a countywide park planning program, to include trails and blueways networks.
2. The County will promote a balance of recreation opportunities between identified growth areas and existing communities.
3. The County will invest in parks and open space to enhance the quality of life for its citizens.

G4.2 Berkeley County will increase public accessibility to recreation areas within the County.

1. The County will promote connectivity between existing recreational sites and cultural/scenic resources, and communities, using its Green Infrastructure Plan as a guide.
2. The County will explore opportunities for increased and enhanced public access to waterways.
3. The County will seek to establish public beach areas along lake shores to better serve residents.

GP-4 Strategies	Implementation	
	Partners	Timeline
Consider inclusion of open space protection in the Capital Improvements Program (CIP).	County Council, Planning Commission, County Finance Department	Short-Term
Work with state and federal agencies to establish linkages with existing trail facilities.	County Council, Planning Staff, SCPRT	Short-Term

GP-4 Strategies	Implementation Partners	Timeline
Coordinate connectivity of parks with cultural and scenic resources.	Berkeley County Municipalities, County Council, Planning Commission	Long-Term
Develop a master recreational plan.	County Council, Planning Commission, Planning Staff	Short-Term
Consider establishment of County parks and recreation department to manage implementation of the developed plan.	County Council, Planning Staff	Short-Term
Establish a beach on the shore of Lake Moultrie (particularly southwest side).	County Council, Santee Cooper, MWV	Long-Term
Collaborate with nonprofits and private property owners to develop better accessibility to facilities and resources.	County Council, Planning Commission, Planning Staff, Private Property Owners, Nonprofits	Ongoing
Formalize relationships between the County and boat landings to better serve residents.	County Council, County Public Works	Ongoing

Guiding Principle 5

Berkeley County will adopt a clear, fair plan that can be implemented through simplified costs and streamlined processes.

Summary of Issues

One of the best ways to strengthen a community is to create opportunities for citizens to work collaboratively on the challenges that shape their community. The same applies to the development of a comprehensive plan. A comprehensive plan must be created from diverse public input in order to be successfully implemented.

It is through this public participation that the County was able to adequately define its vision for the future and identify goals and strategies for achieving that vision.

It is even more important for citizens to understand that the comprehensive plan is a document intended to guide all development, regardless of size or scope. Therefore, the County has created a comprehensive plan that establishes a clear intent and policy base which can be used to develop and interpret local regulations. The Plan should be used to assist local elected and appointed officials in making land use decisions that are fair, consistent, and impartial.

This means that all development proposals and requests for changes in land use and zoning should be considered consistently and processed in a timely and fair manner.

It is also vital that as growth does occur, the County strive towards improved service delivery at all levels of public service. During the public workshops citizens expressed concern over the growth taking place and the burden on taxpayers to build the infrastructure to service this new growth. The County will need to explore new ways of funding these additional facilities and infrastructure in order to mitigate a decline in current levels of service.

Goals and Policies

G5.1 **Berkeley County will encourage public participation in achieving goals to ensure that all communities have a voice.**

1. The County will seek opportunities to share information and engage the public regarding issues that are likely to have an impact on the community.
2. The County will explore ways to increase public awareness with regards to public meetings and hearings.

G5.2 Berkeley County will make improvements to its service delivery.

1. The County will ensure that new development does not cause a decline in existing levels of service for the community's residents and employers.
2. The County will support sequential, phased extension of utilities and services to encourage rational expansion of development to areas immediately contiguous to already developed areas of the community.
3. The community will use planned infrastructure expansion to promote development in areas identified (in the comprehensive plan) as ready for development.
4. The County will explore ways in which infrastructure for new development does not cause a burden on current residents.

GP 5 Strategies	Implementation	
	Partners	Timeline
Encourage attendance at public meetings and hearings through various outreach avenues.	County Council, Planning Commission	Ongoing
Provide opportunities for meaningful public involvement in the decision-making process.	County Council, Planning Commission	Ongoing
Launch public education and outreach programs that serve to better engage residents and stakeholders.	County Council, Planning Commission	Ongoing
Coordinate with the City of Charleston on annexation of "donut holes" and establishment of municipal boundaries.	Berkeley County, City of Charleston	Short-Term
Ensure fair and equitable funding of public transportation improvements.	County Council, SCDOT, County Engineering Staff	Ongoing
Coordinate major public investments with proposed development patterns.	County Council, Planning Commission	Ongoing
Utilize Residential Improvement Districts (RID's) to help pay for new infrastructure.	County Council, Planning Commission	Short-Term

18-04-11

MEMBERS OF COUNTY COUNCIL

C. KEVIN COX	Voting YES	DENNIS L. FISH	Voting
JOSHUA S. WHITLEY	Voting YES	JACK H. SCHURLKNIGHT	Voting YES
KENNETH E. GUNN, JR.	Voting YES	CALDWELL PINCKNEY, JR.	Voting YES
JOE T. NEWELL	Voting YES	STEVE C. DAVIS	Voting YES

BERKELEY COUNTY PLANNING AND ZONING

1003 Highway 52 • P.O. Box 6122
Moncks Corner, SC 29461-6120

APPLICATION FOR REZONING

BERKELEY COUNTY ZONING ORDINANCE NO. 01-8-35, AS AMENDED

GENERAL INFORMATION:

OWNER'S NAME(s):	Bonnell W. Reese	
MAILING ADDRESS:	P.O. Box 600, Ladson, SC 29456	
PHONE	HOME:	MOBILE:
EMAIL:		
NAME OF APPLICANT (IF DIFFERENT FROM OWNER):	B. Todd Olds	
MAILING ADDRESS:	4381 Stoney Point Ct., N. Chas, SC 29405	
PHONE	HOME:	MOBILE: 843-200-1813
EMAIL:	btoddolds@gmail.com	

PLEASE INDICATE THE PREFERRED METHOD OF CONTACT:

☐ EMAIL ☐ HOME PHONE ☒ MOBILE PHONE ☐ MAILING ADDRESS

PROPERTY INFORMATION:

PARCEL NUMBER(S) (TMS):	233-09-02-046
PHYSICAL LOCATION OF SUBJECT PARCEL(S):	749-751 Royle Rd, Ladson
PRESENT ZONING CLASSIFICATION:	R2 mobile home residential
REQUESTED ZONING CLASSIFICATION:	R3 mobile home commercial
REASON FOR REQUEST:	Rezone to R3 so as to conform with adjacent property @ TMS# 233-09-02-007 which is already zoned R3. The existing R2 property already has multiple occupied mobile homes located on it.

Attachment: Application Submittals (2815 : R2 to R3 - 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26))

BERKELEY COUNTY COMPREHENSIVE PLAN CONSIDERATIONS:

Future Land Use Map Recommendation(s):

Is the subject parcel(s) located within the Principal Growth Area (PGA)? ☒ **Yes** ☐ **No**

If you selected **NO** to the above, please indicate whether or not your intended use will require the extension of water/sewer infrastructure or facilities (including, the establishment of a community sewage system). Please note that the installation of individual septic systems or private wells is not considered "infrastructure extension".

☐ **YES**, my project will require the extension of water/sewer infrastructure.

☐ **NO**, my project will be served by private well/septic or existing water/sewer utilities.

If **YES**, please explain:

_____

_____

_____

THE FOLLOWING INFORMATION MUST BE SUBMITTED WITH THIS APPLICATION:

1. **RECORDED PLAT** - A copy of the most current recorded plat (8x11) archived at the Register of Deeds (ROD), depicting the Conceptual Site Plan if available. The Conceptual Site Plan should show **ALL** existing and proposed buildings, roads, driveways, parking spaces, fences, etc., in relation to the intended use.) **Where only a portion of a parcel is subject to rezoning, a preliminary subdivision plat shall be submitted along with this application. In such case, the subdivision plat is required to be approved and recorded before the requested rezoning can progress to third (3rd) reading by County Council.**

2. **$250.00 NON-REFUNDABLE APPLICATION FEE** - (MAKE CHECK PAYABLE TO "**BERKELEY COUNTY**")

ACKNOWLEDGEMENT:

I, the Applicant, hereby acknowledge by my signature that this application is complete and accurate, and I am the owner of the subject property or the authorized representative of the owner(s). I authorize the subject property to be posted and/or inspected. I further acknowledge that **all fees are non-refundable**.

B. Todd Olds — PRINTED NAME OF APPLICANT

Jan 24, 2017 — DATE

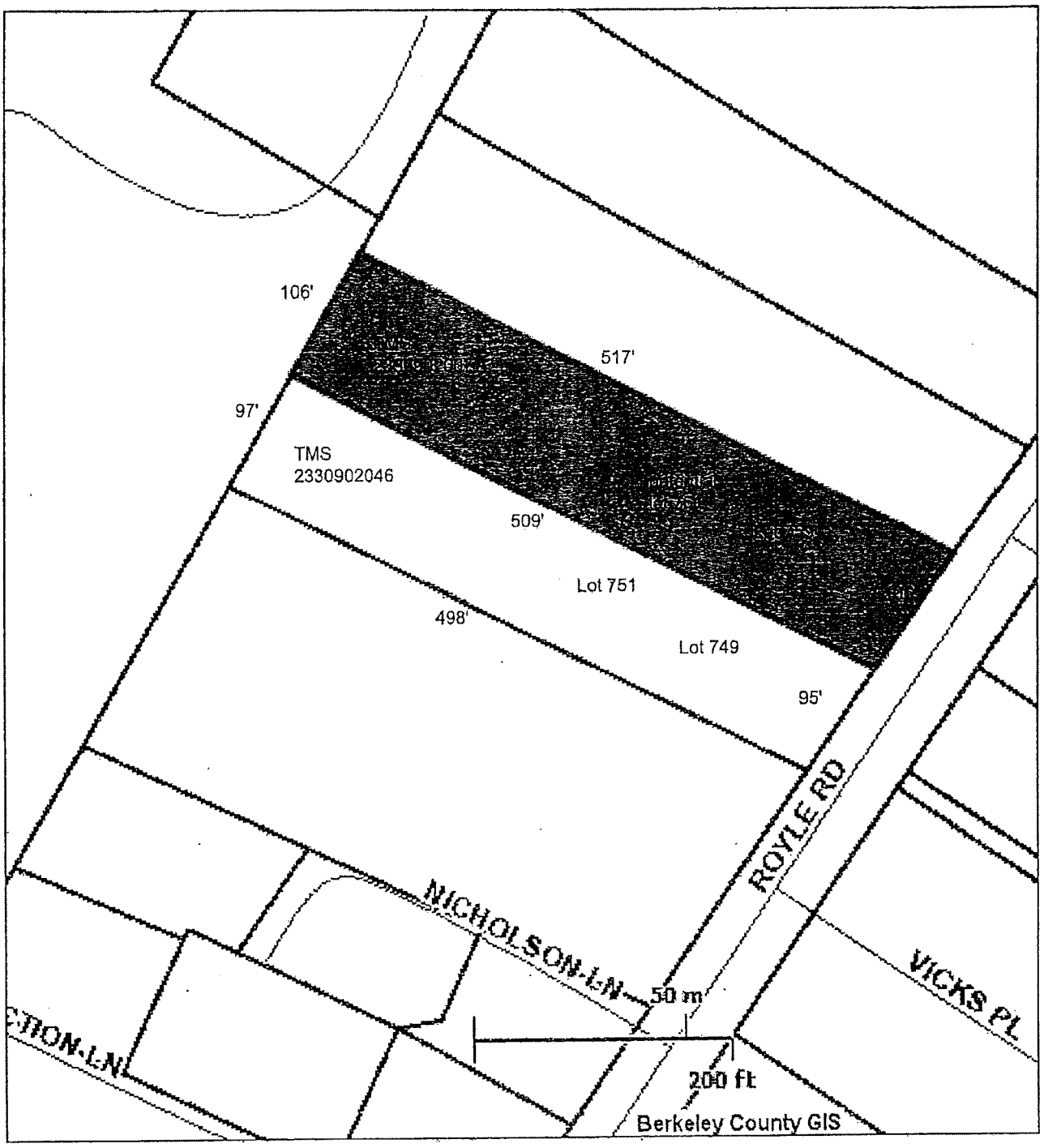
[signature] — SIGNATURE OF APPLICANT

Jan. 24, 2017 — DATE

Last revised on 12.29.16

For assistance fulling out this form, please contact the Planning Department at 843.719.4095

Attachment: Application Submittals (2815 : R2 to R3 - 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26))



BERKELEY COUNTY
GIS
GEOGRAPHIC INFORMATION SYSTEM

Berkeley County EGS Mapping

The county of Berkeley and its GIS Department disclaims accountability for this product and makes no warranty express or implied concerning the accuracy thereof. Responsibility for interpretation and application of this product lies with the user.

Thursday, September 29, 2016

N

Attachment: Application Submittals (2815 : R2 to R3 - 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26))

STAFF SUMMARY

FOR The Land Use & Economic Development Committee

Topic: AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

Prepared by: Alison Simmons, Director

Date: 2/21/2017 5:11 PM

STAFF SUMMARY

LAND USE COMMITTEE

Zoning Matter: **Rezoning from R-2 to R-3**

Prepared by: **Ty Adley**

Date: **February 13, 2017**

Location: **233-09-02-046 (Royle Rd Near Farmington Rd/ I-26)**

Total Acreage: **± 1.29 acres**

Applicant: **B. Todd Olds**

Owner: **Bonnell W. Meese**

Council District: **4**

Planning Commission Recommendation: DENIAL (Unanimous)

Background:

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 R3 zoned parcel (TMS 233-09-02-007). Upon combination, the 2-acre minimum lot size requirement for R3 zoning would be met.

Existing Uses and Adjacent Property Information:

The subject property currently contains multiple mobile homes and is adjacent to R-3 property along Royle Rd. The parcel is located just off Farmington Rd./ I-26, adjacent to a R-3 property also owned by Bonnell Meese. There are multiple R-3 mobile home parks as well as multiple non-conforming R-2 mobile home parks.

Adjacent property characteristics are listed below.

Adjacent Property Information		
	Zone	***Use***
North	R-3	Mobile Home Park
South	R-2	Commercial/ Mobile Home Park
East	R-2	Mobile Home Park
West	OI	Church

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 and 233-09-02-007 will be combined and recorded prior to third reading at County Council.

Planning Commission Recommendation: DENIAL IN A UNANIMOUS VOTE. After reviewing the requested change and hearing from many community stakeholders in opposition to the request, Planning Commission found the request incompatible and potentially-detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area, and diminution of property values and quality of life. A petition from stakeholders, Francis and Donald Gibson, is enclosed.

Potential Impacts:

Denial- The applicant will continue to be held to standards required in the R-2 zoning category, restricting the combination with the adjacent property and any associated residential uses.

Approval- The applicant will be held to the R-3 zoning requirements and pursue combination of this parcel with the adjacent R-3 parcel.

Attachments:

Maps

Application

Fiscal Impact:

Attachments:

Application Submittals (PDF)

Aerial Imagery (PDF)

Zoning (PDF)

FLU (PDF)

Petition provided by Resident in Opposition to Request (PDF)

AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

WHEREAS, Berkeley County Council adopted a Zoning and Development Standards Ordinance, including Official Zoning and Development Standards Maps, on April 26, 1999, pursuant to Title 6, Chapter 29, of the Code of Laws of South Carolina, 1976, as amended; and

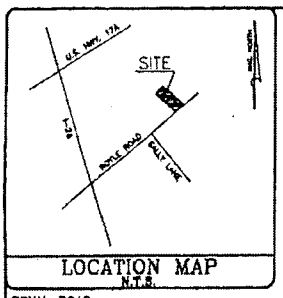
WHEREAS, Berkeley County Council adopted such regulations for the purpose of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare of the County; and

WHEREAS, the Berkeley County Council has determined that the rezoning or reclassification of the land designated herein is for the public good, the morals and the general welfare of the County of Berkeley and its citizens, and that it is consistent with the Berkeley County Comprehensive Plan, which was adopted on April 26, 1999;

NOW, THEREFORE, BE IT ORDAINED that the official Zoning and Development Standards Maps for Berkeley County, South Carolina, which were adopted pursuant to Ordinance No. ##-#-## shall be modified in the following regard:

> That portion of the official Zoning Map which contains that portion of property identified as TMS:233-09-02-046; and as is more clearly shown on "Exhibit A", which is attached hereto and made a part hereof. This Property Has Previously Been Designated as R-2 and will hereafter upon approval of this ordinance be reclassified as R-3 District.

BE IT FURTHER ORDAINED that all ordinances in conflict with this modification are repealed to the extent necessary to give this ordinance full force and effect.



LOCATION MAP
N.T.S.

ROYAL ROAD
THIS LOT IS LOCATED IN FLOOD ZONE X, SEE FIRM COMMUNITY PANEL NO. 450029 0290 C MAP REVISED: MAY 6, 1996. TMS NO. 233-09-02-007 & 046 THE SAME BEING SHOWN AS LOT 4, BLOCK A, ON A PLAT OF PINE VISTA SUBDIVISION DATED JULY 1956 BY J. O'HEAR SANDERS, JR. AND RECORDED IN THE RMC OFFICE FOR BERKELEY COUNTY IN PLAT BOOK L, AT PAGE 77 & DEEDS RECORDED IN THE RMC OFFICE FOR BERKELEY COUNTY IN DEED BOOK A411, AT PAGE 145 & DEED BOOK A416, AT PAGE 008.

Magnetic North

FAITH ASSEMBLY OF GOD
TMS NO. 233-00-00-042

N 00°03'19" E 205.00'

1.33" OPEN TOP PIPE FOUND

1" INCH TOP PIPE FOUND

PROPERTY LINE TO BE ABANDONED

LOT 4C
BLOCK A
1.189 Ac
51,793 SF

S 85°01'11" W 263.20'

N 85°14'31" E 245.20'

line is being abandoned

LOT 3, BLOCK A
TRI-COUNTY MACHINE & FABRICATION INC.
TMS NO. 233-09-02-008

LOT 5, BLOCK A
ANN & JAMES E. JACKSON
TMS NO. 233-09-02-006

N 04°58'49" W 101.58'

N 04°58'49" W 101.67'

3/4" REBAR SET

5/8" REBAR SET

10' 10'

LOT 4B
BLOCK A
0.614 Ac
26,752 SF

4' CHAIN LINK FENCE OWNED BY LOT 5

LOT 4A
BLOCK A
0.575 Ac
25,041 SF

S 85°08'13" W 255.43'

NEW 20' INGRESS-EGRESS EASEMENT

S 85°01'11" W 238.80'

N 85°14'31" E 272.07'

METAL SHED

WOOD SHED

MOBILE HOME

PORCH

C.L. OF DRIVE

Doc# 000038765
PLAT CABINET P PAGE 344
Filed and Recorded
06/07/2001 09:40:43AM
Cynthia B. Forte
Register of Deeds Berkeley Co. SC

S 04°21'36" W 102.50'

S 04°21'36" W 102.50'

S 04°21'36" W 205.00'

1" OPEN TOP PIPE FOUND

3/4" OPEN TOP PIPE FOUND

3/4" REBAR SET

ROYLE ROAD 50' R/W
(S-8-535)

344

PLAT SHOWING
THE RE-SUBDIVISION OF
LOT 4, BLOCK A, PINE VISTA SUBDIVISION
INTO LOT 4A, LOT 4B & LOT 4C
LOT 4A OWNED BY
BONNELL W. MEESE
LOT 4B OWNED BY
CLAUDE W. MEESE
LOT 4C ABOUT TO BE CONVEYED TO
WILLIAM B. HOLLENBAUGH
LOCATED IN
BERKELEY COUNTY, SOUTH CAROLINA

Berkeley County Planning Commission
Exempt
(Reason)
6-7-01
Date

BY THE RECORDING OF THIS PLAT, I HEREBY DEDICATE THE 20' INGRESS-EGRESS EASEMENT SHOWN HEREON TO ALL PURCHASERS AND SUCCESSORS IN INTEREST OF THIS PROPERTY. NOTHING IN THIS DEDICATION SHALL BE CONSTRUED TO IMPLY AN ACCEPTANCE BY BERKELEY COUNTY OF ANY ROADWAYS OR AS CREATING ANY DUTY BY BERKELEY COUNTY TO MAINTAIN ANY ROADWAYS OR RIGHTS-OF-WAY SHOWN HEREON.

Bonnell W. Meese
BONNELL W. MEESE (PROPERTY OWNER)

Claude W. Meese
CLAUDE W. MEESE (PROPERTY OWNER)

SCALE : 1" = 50'
0' 50' 100'
MAY 28, 2001

ASHLEY SURVEYING, INC.
SURVEYING * PROJECT MANAGEMENT * PLANNING
306 SANGAREE PARKWAY SUMMERVILLE, SC 29483
TELEPHONE (843) 871-4418 FAX (843) 871-9538

SOUTH CAROLINA REGISTERED LAND SURVEYOR 14181 PAUL C. LAWSON, JR.

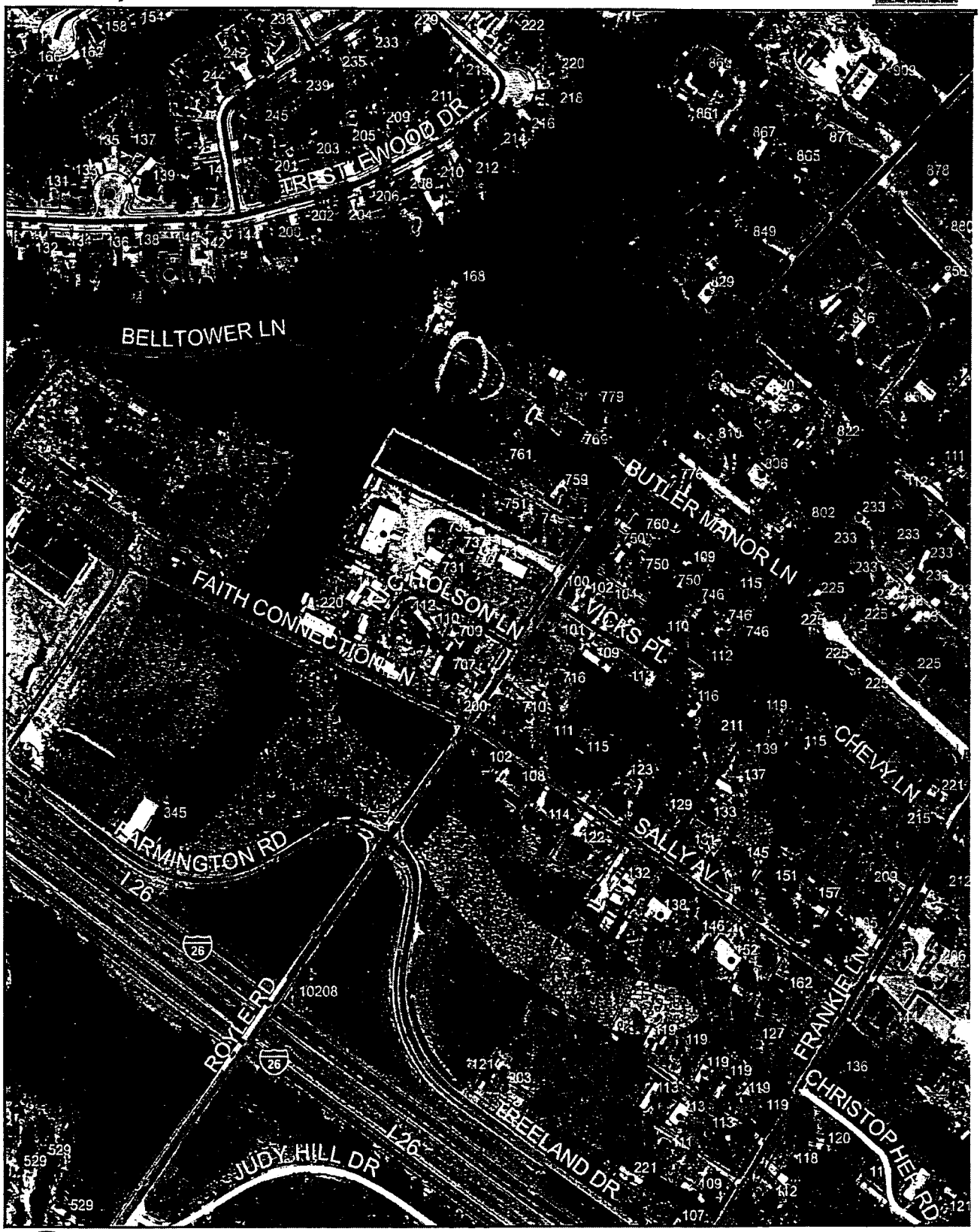
SOUTH CAROLINA CERTIFICATE OF AUTHORIZATION ASHLEY SURVEYING, INC. No. C00758

I HEREBY STATE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS A SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.

Paul C. Lawson
PAUL C. LAWSON, JR. S.C. REG. N
JOB NO. 010313-003

Attachment: Application Submittals (2815 : R2 to R3 - 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26))

Site Map



Attachment: Aerial Imagery (2815 : R2 to R3 - 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26))

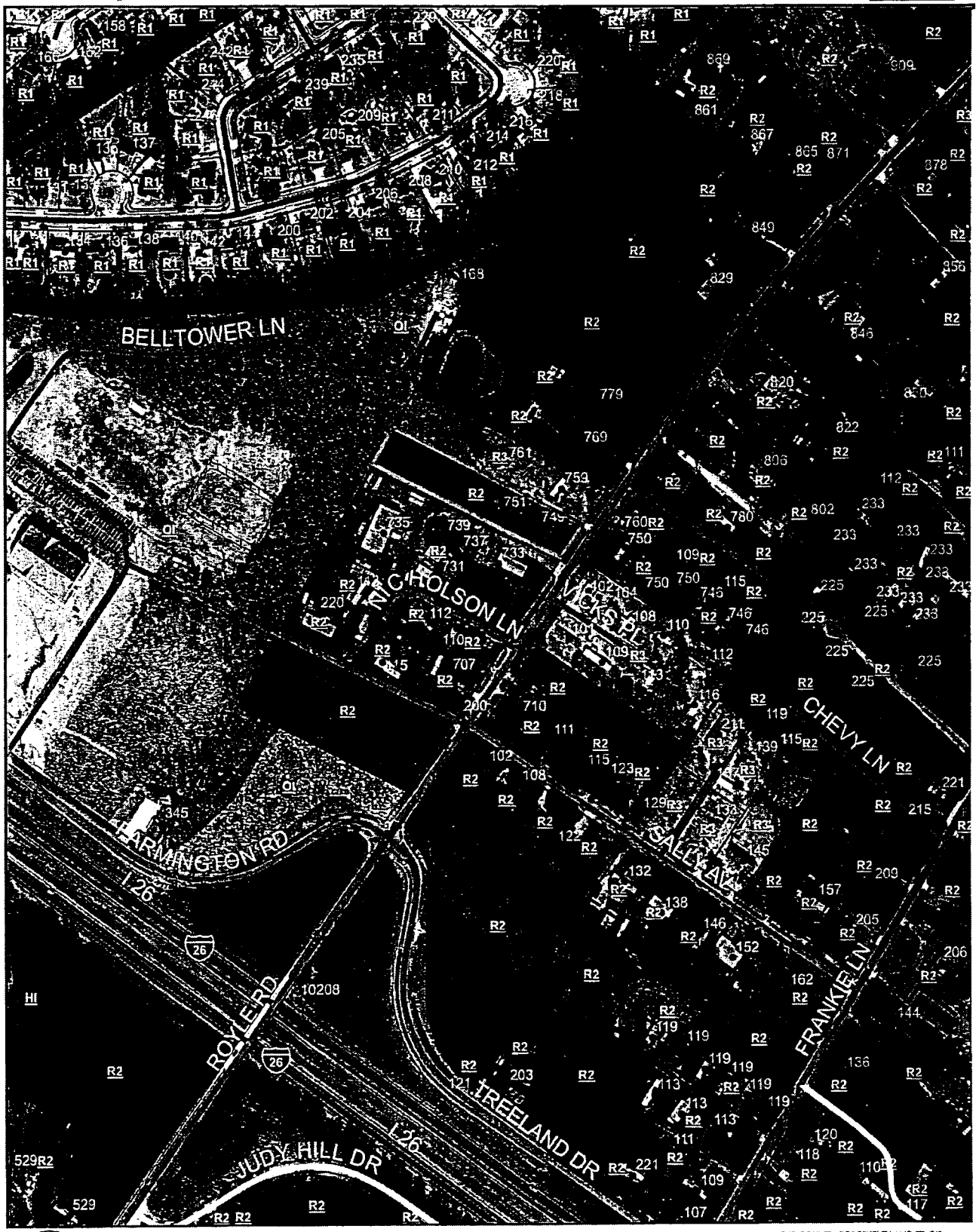
Berkeley County Planning Department
P.O. Box 6122
Moncks Corner, SC 29461
(p) 843.719.4095 | (f) 843.719.4053
http://gis.berkeleycountysc.gov
Date: 2/13/2017

0 130 260 520 780 Feet

THE COUNTY OF BERKELEY AND ITS GIS DEPARTMENT DISCLAIMS ACCOUNTABILITY FOR THIS PRODUCT AND MAKES NO WARRAN EXPRESS OR IMPLIED CONCERNING THE ACCURACY THEREOF. RESPONSIBILITY FOR INTERPRETATION AND APPLICATION OF THIS PRODUCT LIES

User: tyoadley saved: 2/13/2017 file: G:\Ty GIS Basic.mxd

Site Map



Attachment: Zoning (2815 : R2 to R3 - 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26))

Berkeley County Planning Department
P.O. Box 6122
Moncks Corner, SC 29461
(p) 843.719.4095 | (f) 843.719.4053
http://gis.berkeleycountysc.gov
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0 130 260 520 780 Feet

THE COUNTY OF BERKELEY AND ITS GIS DEPARTMENT DISCLAIMS ACCOUNTABILITY FOR THIS PRODUCT AND MAKES NO WARRAN EXPRESS OR IMPLIED CONCERNING THE ACCURACY THEREOF. RESPONSIBILITY FOR INTERPRETATION AND APPLICATION OF THIS PRODUCT LIES

User: ty.adley saved: 2/5/2017 file: G:\Ty GIS Basic.mxd

Site Map

Attachment: FLU (2815 : R2 to R3 - 233-09-02-046 (Royle Rd Near Farmington Rd/ I-26))

Berkeley County Planning Department
P.O. Box 6122
Moncks Corner, SC 29461
(p) 843.719.4095 | (f) 843.719.4053
http://gis.berkeleycountysc.gov
Date: 2/13/2017

0 130 260 520 780 Feet

THE COUNTY OF BERKELEY AND ITS GIS DEPARTMENT DISCLAIMS ACCOUNTABILITY FOR THIS PRODUCT AND MAKES NO WARRAN EXPRESS OR IMPLIED CONCERNING THE ACCURACY THEREOF. RESPONSIBILITY FOR INTERPRETATION AND APPLICATION OF THIS PRODUCT LIES

User: ly.adley saved: 1/25/2017 file: G:\Ly GIS Basic.mxd

2/28/2017

To: Berkeley County Office of the Planning and Zoning Commission
From: Francis O Gibson (Resident 1076 Royle Rd., Ladson S. C.
Subject: Rezoning request per TMS# 233-09-02-046
References: TMS# 233-06-00-015 & 016 04/2/2002
TMS# 233-10-00-003 07/2/2002
TMS#233-06-00-015 & 016 11/12/2002
TMS#233-09-02-017 05/3/2005
TMS#233-09-02-029 03/04/2003
TMS#233-10-00-030 3/6/2007
TMS#233-10-00-046 05/01/2007
TMS#233-09-02-030 02/05/2008
TMS#233-06-00-12 12/17/2013
TMS#233-09-02-030 1/24/2017

The subject rezoning request is seeking to change the zoning from R2 manufactured residential status to R3 Mobile Home Park. This type rezoning in Council District 4 has been previously requested in the Pine Vista area. The zoning change request location on this TMS number is close and adjacent to the previous property request presented to this Planning Commission.

The referenced (TMS numbers and dates) were all denied by this committee. In the past we have provided signed petitions by the homeowners in the Pine Vista area stating the concerns of adding any additional Mobile Home Parks to an area that is already overly saturated with the now many existing Mobile Home Parks. The area in question now has drug problems, increased traffic, too many children with no playgrounds, theft and crime increase, require a much increase in additional fire and police department coverage and will add to the already too many transit renters now located in our area.

A correct denial precedent was made by this Planning and Zoning Commission to not allow any additional Mobile Home Parks for this small community in the Pine Vista area located in Ladson. All denials were issued on the above references.

I respectfully ask that this rezoning request follow those already set precedents and this request also be denied.
Thank you once again for your time and the opportunity of being heard.

Best Regards

Francis O. Gibson

Francis O. Gibson
1076 Royle Rd
Ladson, SC

CONSIDERATION PRIOR TO FIRST READING

AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

- The applicant, B. Todd Olds, is requesting to rezone in order to conform and combine with the adjacent 1.2-acre R3 zoned parcel (TMS 233-09-02-007). Upon combination, the 2-acre minimum lot size requirement for R3 zoning would be met.
- The subject property currently contains 2 mobile homes.
- The adjacent R-3 zoning appears to have been in place since the late 1990s.
- There are multiple R-3 mobile home parks as well as multiple non-conforming R-2 mobile home parks in the vicinity.
- 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.
- R-1 and R-2 zoning is also consistent with the Comprehensive Plan recommendation.
- Staff recommended approval.
- Planning Commission Recommendation: DENIAL IN A UNANIMOUS VOTE. After reviewing the requested change and hearing from many community stakeholders in opposition to the request, Planning Commission found the request incompatible and potentially-detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area, and diminution of property values and quality of life. A petition from stakeholders, Francis and Donald Gibson, was enclosed in your Agenda Packet.
- The R3, 1.2 acre parcel can accommodate up to 13 mobile homes.
- Upon rezoning and combination, the zoning could support up to 27 MHs. (14 on the subject property).

AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO HEIRS OF JERRY FORDHAM FOR 7.43 ACRES ON A LOT INDICATED WITH TMS# 263-00-01-003, LOCATED ON CLEMENTS FERRY ROAD NEAR CAINHOY ROAD; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-4, MULTIFAMILY RESIDENTIAL DISTRICT IN COUNCIL DISTRICT 8.

Wofford Stribling has requested to hold the item until the April 10 Land Use Committee in order to pursue an amendment to the R-4 minimum lot size requirements concurrent to his rezoning request through coordination with the Planning Department.

ARTICLE 22. - AMENDMENTS

22.1. - General provisions.

This zoning and development standards ordinance, including the official zoning and development standards map, may be amended from time to time by the county council, either on its own initiative or in response to a petition from a landowner with respect to his property. all requests by landowners for amendments to this ordinance must be submitted in writing on a form provided by the planning and zoning department. Only one zoning classification may be requested by the property owner/applicant for the subject parcel. Should a landowner wish to request a rezoning classification for a portion of his property, that portion shall be subdivided and an approved plat of this subdivision of property shall be duly recorded with Berkeley County prior to the landowner submitting a written request to rezone the newly created parcel.

(Ord. No. 04-11-68, 11-23-2004; Ord. No. 05-08-58, 8-29-2005)

22.2. - Planning commission review.

All proposed amendments must be submitted to the Berkeley County Planning Commission for its review and recommendation. The planning commission shall have 30 days within which to submit its report. If said commission fails to submit a report within the 30-day period, it shall be deemed to have recommended approval of the requested amendment.

22.3. - Public notice.

22.3.1. *Public hearing.* Before enacting an amendment to this ordinance, county council shall hold a public hearing thereon, at least 15 days' notice of the time and place of which shall be published in a newspaper of general circulation in the county.

22.3.2. *Posting.* The zoning administrator shall post at least one sign, of a size and in a location so that it is clearly visible from the abutting road, on all property for which a zoning change has been requested. Such sign(s) shall be posted at least seven days prior to the planning commission's review of the amendment request. The developer or landowner must maintain such sign(s) so that they remain clearly visible from the abutting road, and shall notify the zoning administrator immediately upon discovery that a sign has been damaged or removed. No person, except an authorized Berkeley County employee, shall remove a sign once it has been posted.

22.4. - Fees.

A nonrefundable fee of $250.00 shall accompany any rezoning request submitted by a property owner or owners. If two or more parcels (identified by separate TMS numbers) are involved in the rezoning request, and all are owned by the same person(s), one fee shall be submitted. However, if two or more parcels (identified by separate TMS numbers) are involved, and are not owned by the same person(s), separate fees shall be submitted by the owner(s) of each parcel.

For properties rezoning as a planned development with a development plan, the fee for rezoning and approval of the plan shall be nonrefundable in the amount of $1,500.00.

(Ord. No. 04-11-68, 11-23-2004; Ord. No. 08-10-63, 10-27-2008)

BERKELEY COUNTY GOVERNMENT

PLANNING COMMISSION

MINUTES • FEBRUARY 28, 2017

MONTHLY

Administration Building - Assembly Room **6:00 PM**

1003 HIGHWAY 52
MONCKS CORNER, SC 29461

CALL TO ORDER

Mr. Day called the Planning Commission meeting to order at 6pm and asked Thomas Evans to lead in the invocation.

Name	Title	Status	Arrived
eath	Board Member	Present	
. Day	Chairman	Present	
ner	Vice Chairman	Present	
ans	Board Member	Present	
no	Board Member	Excused	
	Board Member	Present	6:40 PM
r	Board Member	Absent	
er	Board Member	Present	

2. Planning Commission - Monthly - Jan 24, 2017 6:00 PM

Do I hear a motion to approve the January minutes? Mr. Sineath made a motion to approve the minutes and Mr. Evans second the motion.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	James Sineath, Board Member
SECONDER:	Marion Turner, Thomas Evans
AYES:	James Sineath, Kenneth W. Day, Marion Turner, Thomas Evans, Gina Glaze, Lynn Hoover
ABSENT:	Mark Carter
EXCUSED:	Jake Serrano

Revision 3 - Rules of Procedure

1. Revision 3 to the Rules of Procedure

Mrs. Simmons: Wanted to mention that Planning Commission makes a recommendation for approval or denial for County Council's consideration. County Council has the final decision making on all rezoning due it being a legislative matter. If an item progresses, it will be reviewed by Land Use Committee, which is County Council. Mr. Day: Do I hear a motion for the approval of the Revisions Rules and Procedures? Mr. Sineath moved to have the revisions approved and Mr. Evans second it.

She noted that she currently lives there, and the applicant is not intending to move to the lot.

Mr. Sineath made a motion to approve & Mr. Evans second the motion. All were in favor of the motion.

RESULT:	**RECOMMENDATION OF APPROVAL [UNANIMOUS] Next: 3/13/2017 6:01 PM**
MOVER:	James Sineath, Board Member
SECONDER:	Thomas Evans, Board Member
AYES:	Sineath, Day, Turner, Evans, Glaze, Hoover
ABSENT:	Carter
EXCUSED:	Serrano

2. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO TERENCE ROSS FOR 0.365 ACRES ON A LOT INDICATED WITH TMS# 087-00-06-030, LOCATED ON WALTER ROAD NEAR HIGHWAY 17A, MACEDONIA; FROM FLEX-1, AGRICULTURAL DISTRICT TO GC, GENERAL COMMERCIAL DISTRICT IN COUNCIL DISTRICT 6

TMS: 087-00-06-030; Flex 1 to GC Ross

Frances Pinto presented an overview of the request, noting adjacent uses and zoning and the intent of the request. She noted that the requested change is within the Arterial Road Overlay District and pointed out the preliminary plat that was submitted to the Department.

Terrance Ross, 504 bonnie drive, approached the podium. Mr. Day asked the intended use. Mr. Ross noted that he intends to develop as commercial and that he is kicking around some ideas. He noted that he owns the GC zoned lot on the corner and would like to combine.

Mr. Day asked for oppostion. None opposed the request.

Mrs. Hoover made a motion to approve the request and Mr. Sineath second the motion. All were in favor.

RESULT:	**RECOMMENDATION OF APPROVAL [UNANIMOUS] Next: 3/13/2017 6:01 PM**
MOVER:	Lynn Hoover, Board Member
SECONDER:	James Sineath, Board Member
AYES:	Sineath, Day, Turner, Evans, Glaze, Hoover
ABSENT:	Carter
EXCUSED:	Serrano

3. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

TMS:233-09-02-046; R2 to R3 Meese

Ty Adley presented an overview of the request. He noted the intent of the application and adjacent uses and zoning.

The applicant, Todd Olds; Stoney Point Court, N. Charleston SC, approached the podium. He noted that it is currently legally non-conforming. Sale of the property is contingent upon sale. He noted that he has standards for mobile homes in his park. Mr. Turner asked about whether or not the existing mobile homes would meet those standards. Mr. Olds noted that they would not. He said that typically he works with tenants to comply over a 6 - 12 month time frame.

Mr. Turner asked if the access drive would be improved. The applicant noted that he would. He noted that he would look at placing 18 - 22 mobile homes on the property. Mr. Sineath asked if there would be a Manager and policing. The applicant noted that he will grant access to the Police Department.

Wade Arnett, adjacent property owner, approached the podium and noted that thinks that there is an overabundance of mobile homes already in the area. He said that he did not think that the lot was big enough to accommodate the number of MHs proposed.

Mr. Olds noted that he is a licensed Realtor and will be the property management. Mr. Arnett further noted that he is concerned about the children. He is concerned about the safety in the children that currently live in the neighborhood as well as those that may reside in the future mobile home park.

Mr. Olds noted that there is a Keating Rule, noting limitations under Fair Housing Laws for number of occupants for a house of a certain number of rooms (2 persons per room).

Frances (Donald) O'Gibson, resident at Royal Road, presented and read from a letter. Since 2002, he and other residents have been coming up here to demonstrate opposition. Previous properties of similar requests have been routinely denied because of over saturation of mobile home parks. He noted that increased traffic, drug problems, increased crime, increased demand for police, and a precedent that was set for similar types of request. He asked that the rezoning request adhere to those that were evaluated in the past.

Susan Yoeh; 385 Frankie Lane: noted that she had a question for the existing mobile home parks in Stahl Road. She asked if the condition of this park would be similar to that one?

James Jackson;769 Royal Road: Is concerned about lighting and kids getting into his pool and is opposed to this the rezoning of this property.

Ann Jackson, 769 Royal Road, she noted that her fence separates this MH park and that she has had problems with trespassing into her yard and pontune boat.

Xxx resident xxx - he pointed out his house and that his appraised value is diminished because of adjacent mobile homes. He noted that he has had issues with animal abandonment. He noted that across the street is a mobile home with a burn barrel, HVAC junked in yard, and porch in poor condition. He noted that cars are parking on the side of the road, obstructing traffic. His wife approached the podium and noted that she did not have anything but problems; she asked that the PC consider the repercussions of these types of requests. She noted that she smells meth being cooked.

Mr. Day noted that the PC has a history of denying these types of requests in this

community. Mr. Sineath noted that the PC cannot do anything about children, drugs, etc. However, a resident noted that community concerns extend beyond those things, but include traffic.

Mr. Day asked for a motion

Mrs. Hoover made the motion to deny the request, Sineath seconded the motion. All were in favor. (Denied)

RESULT:	**RECOMMENDATION OF DENIAL [UNANIMOUS] Next: 3/13/2017 6:01 PM**
MOVER:	Lynn Hoover, Board Member
SECONDER:	Kenneth W. Day, Chairman
AYES:	Sineath, Day, Turner, Evans, Glaze, Hoover
ABSENT:	Carter
EXCUSED:	Serrano

4. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO HEIRS OF JERRY FORDHAM FOR 7.43 ACRES ON A LOT INDICATED WITH TMS# 263-00-01-003, LOCATED ON CLEMENTS FERRY ROAD NEAR CAINHOY ROAD; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-4, MULTIFAMILY RESIDENTIAL DISTRICT IN COUNCIL DISTRICT 8

TMS: 263-00-01-003; R2 to R4 Fordham

Ron Hanna presented an overview of the request.

Wofford Strinbling approached the podium; he noted that the request is compatible with the FLU. However, he feels that if this was a 15 acre lot, that he would be able to provide twice the number of units. He noted that the lot has been for sale for a number of years and wetlands constrain the site. In order to make the project economically feasible, he noted that a town home project is necessary. He feels as though town homes will bring an affordable housing product to the area.

Layne Baker, 2722 Crooked Stick Lane (River Town), noted that he did a similar town home project in MTP where he provided 37 town homes on 3.3 acres. He noted that he is a boutique town home developer. He noted that the product contains metal roofs, hurricane windows/doors, hardy plank, etc. He noted that adjacent uses are commercial, so he does not know what this site will be if it doesnt develop as TH.

Mr. Sineath asked the proposed SF of each unit. The applicant noted that without the garage, 1300 SF, with garage - 1500 SF. HE noted that the price point will be $175 - $195k.

Mr. Carl Townsend, resident in Hanahan, noted that he traverses Clements Ferry Road and he feels as though traffic congestion is significant on this road and 49 town homes and the proposed school will make it worse.

Mr. Wofford noted that multi-car families are not the ones moving into these types of communities. He noted that TH will not generate as many trips as say commercial. He noted that he feels as though this is an extension of Mt. Pleasant. He feels as though this area is set up for growth.

BERKELEY COUNTY GOVERNMENT

LAND USE & ECONOMIC DEVELOPMENT COMMITTEE

MINUTES • MARCH 13, 2017

REGULAR COMMITTEE MEETING

Administration Building - Assembly Room **6:01 PM**

1003 HIGHWAY 52
MONCKS CORNER, SC 29461

CALL TO ORDER

During periods of discussion and/or presentations, minutes are typically condensed and paraphrased.

Chairman Jack Schurlknight called the meeting to order.

In accordance with the Freedom of Information Act, the electronic and print media were duly notified.

Attendee Name	Title	Status	Arrived
Jack H. Schurlknight	Chairman	Present	
Kevin Cox	Committee Member	Present	
Kenneth E. Gunn	Committee Member	Present	
Joshua Whitley	Committee Member	Present	
Dennis L Fish	Committee Member	Present	
Tommy Newell	Committee Member	Present	
Caldwell Pinckney	Committee Member	Present	
Steve Davis	Committee Member	Present	
Bill Peagler	Ex-Officio	Present	

EXECUTIVE SESSION

1. Executive Session to Discuss Possible Land Exchange with Private Landowner in the Moncks Corner Area

Chairman Schurlknight stated that there are two remaining Executive Sessions scheduled for this evening and, without objection, he would like to combine the two Sessions.

It was moved by Committee Member Whitley and seconded by Committee Member Newell to **Enter into Executive Session** to Discuss a **Possible Land Exchange with a Private Landowner** in the Moncks Corner Area, and to Discuss a **Claim by an Employee in the EMS Department** and **Receive Legal Advice Related Thereto**. The motion **passed** by unanimous voice vote of the Committee.

The Executive Session commenced at 7:19 p.m. and ended at 7:41 p.m. Mr. John O. Williams, County Attorney, reported that Council went into Executive Session for the reasons stated in the motion, and no action was taken.

APPROVAL OF MINUTES

1. Land Use & Economic Development Committee - Regular Committee Meeting - Feb 13, 2017 6:00 PM

Chairman Schurlknight asked for approval of minutes for the Regular Committee on Land Use and Economic Development meeting held on February 13, 2017.

It was moved by Committee Member Newell and seconded by Committee Member Cox to **approve** the minutes as presented. The motion **passed** by unanimous voice vote of the Committee.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Tommy Newell, Committee Member
SECONDER:	Kevin Cox, Committee Member
AYES:	Jack H. Schurlknight, Kevin Cox, Kenneth E. Gunn, Joshua Whitley, Dennis L Fish, Tommy Newell, Caldwell Pinckney, Steve Davis

AGENDA ITEM

1. Provide Authority to Execute a Land Exchange with a Private Landowner in the Moncks Corner Area

Presenter - John O. Williams, II, County Attorney

It was moved by Committee Member Davis and seconded by Committee Member Newell to **approve** Providing the Authority to **Execute a Land Exchange with a Private Landowner** in the Moncks Corner Area. The motion **passed** by unanimous voice vote of the Committee. Committee Member Fish was excused during the vote.

RESULT:	**APPROVED AND REFERRED [UNANIMOUS] Next: 3/27/2017 6:04 PM**
MOVER:	Steve Davis, Committee Member
SECONDER:	Tommy Newell, Committee Member
AYES:	Schurlknight, Cox, Gunn, Whitley, Newell, Pinckney, Davis
EXCUSED:	Fish

CONSIDERATION PRIOR TO FIRST READING

1. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

Committee Member Davis moved for approval.

Committee Member Newell stated that since he is the Council Member for that District, he should have the right to move whether to approve or deny.

Committee Member Whitley inquired as to where it says that in Council Rules.

Chairman Schurlknight stated that it is kind of an understood thing.

Committee Member Davis withdrew his motion.

Ms. Alison Simmons, Planning & Zoning Director, stated that the applicant is requesting to rezone in order to conform and combine with an adjacent 1.2-acre R-3 zoned parcel. She stated that, upon combination, the minimum lot size requirement for R-3 zoning would be met. She stated that the subject property is contained in the 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. She stated that, based on adjacent zoning and adjacent Uses in the Comprehensive Plan recommendation, Staff recommended approval. She stated that the Planning Commission recommended denial in a unanimous vote. She stated that, after reviewing the requested change and hearing from many community stakeholders and opposition to the request, the Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area, and the diminution of property values and quality of life. She stated that a petition from stakeholders was included in the Committee Members' agenda packets.

Committee Member Whitley inquired as to if the Planning Commission's decision is articulated within the Standards that would protect us from a legal standpoint.

Ms. Simmons stated that she thinks so. She stated that the reason is because, in her opinion, the best gauge of compatibility is public input. She stated that while the requested change is supported by the Comprehensive Plan, the existing zoning is, as well.

Committee Member Whitley stated that both parcels allow mobile homes. He stated that this would only change one to be in conformance - one is currently grandfathered in. He inquired as to if he was correct.

Ms. Simmons stated that the adjacent parcel is currently zoned R-3, so it supports the request. She stated that the adjacent property is grandfathered and supports a mobile home park.

Committee Member Whitley stated that either way, the protest against the mobile homes does not hold water because it has mobile homes and it is grandfathered in for mobile homes.

Ms. Simmons stated that there are currently only 2 mobile homes on this other parcel.

Committee Member Whitley inquired as to what the impact would be if this was rezoned.

Ms. Simmons stated that they would be able to provide additional mobile homes in accordance with the requirements for R-3 zoning.

Committee Member Whitley inquired as to how many.

Ms. Simmons stated that it would allow for up to 27 mobile homes on both parcels upon combination.

Committee Member Whitley stated that on the one parcel where it is already allowed, that is part of the 27 mobile homes.

Ms. Simmons stated that 13 mobile homes are allowed on that lot. She stated that if the parcel is rezoned, 14 mobile homes would be allowed on the subject parcel.

Committee Member Whitley clarified that the change would be from 2 to 14 mobile homes.

Ms. Simmons stated that this was correct.

Committee Member Cox stated that the reason for the grandfathered-in part is that County Council has decided that this is not the appropriate zoning for that area, so as mobile homes are pulled out, they are no longer allowed to bring additional mobile homes in. He inquired as to if he was correct.

Ms. Simmons stated that if a mobile home is removed from the subject parcel for a period longer than 6 months, it cannot be brought back.

Committee Member Cox inquired as to if that meant the same mobile home or any mobile home.

Ms. Simmons stated that it could be any mobile home.

Committee Member Davis inquired as to if there can be an increase from 2 mobile homes to more mobile homes under the grandfather clause provision.

Ms. Simmons replied to the negative.

Committee Member Davis stated that it is always limited to 2 or extinction/complete removal.

Ms. Simmons stated that this was correct.

Committee Member Whitley stated that, with approval, you get 27 mobile homes and, with denial, you get 15 mobile homes.

It was moved by Committee Member Newell and seconded by Committee Member Gunn to ***deny*** **prior to First Reading, an Ordinance to Modify the Official Zoning and Development Standards Map of Berkeley County, South Carolina, in regard to Bonnell W. Meese for 1.29 Acres on a Lot Indicated with TMS#: 233-09-02-046, Located on Royle Road near Farmington Rd/I-26; from R-2 to R-3**

District in Council District #4. The motion **passed** by majority voice vote of the Committee. Committee Member Whitley and Committee Member Pinckney voted Nay.

RESULT:	**DEFEATED [6 TO 2]**
MOVER:	Tommy Newell, Committee Member
SECONDER:	Kenneth E. Gunn, Committee Member
AYES:	Schurlknight, Cox, Gunn, Fish, Newell, Davis
NAYS:	Whitley, Pinckney

2. BILL NO. 17-08, AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO JERRY AND SUSAN SAIN FOR 15.20 ACRES ON A LOT INDICATED WITH TMS# 248-00-03-008, LOCATED ON CHARITY CHURCH ROAD IN HUGER; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO FLEX-1, AGRICULTURAL DISTRICT IN COUNCIL DISTRICT 8

It was moved by Committee Member Davis and seconded by Committee Member Newell to **approve prior to First Reading, an Ordinance to Modify the Official Zoning and Development Standards Map of Berkeley County, South Carolina, in regard to Jerry and Susan Sain for 15.20 Acres on a Lot Indicated with TMS#: 248-00-03-008, Located on Charity Church Road in Huger; from R-2 to Flex-1 District in Council District #8.**

RESULT:	**APPROVED AND REFERRED [UNANIMOUS] Next: 3/27/2017 6:04 PM**
MOVER:	Steve Davis, Committee Member
SECONDER:	Tommy Newell, Committee Member
AYES:	Schurlknight, Cox, Gunn, Whitley, Fish, Newell, Pinckney, Davis

3. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO HEIRS OF JERRY FORDHAM FOR 7.43 ACRES ON A LOT INDICATED WITH TMS# 263-00-01-003, LOCATED ON CLEMENTS FERRY ROAD NEAR CAINHOY ROAD; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-4, MULTIFAMILY RESIDENTIAL DISTRICT IN COUNCIL DISTRICT 8

This item is being **held** until the April 10, 2017 Committee on Land Use and Economic Development meeting.

RESULT:	**HELD [UNANIMOUS]** **Next: 4/10/2017 6:01 PM**
MOVER:	Jack H. Schurlknight, Chairman
AYES:	Schurlknight, Cox, Gunn, Whitley, Fish, Newell, Pinckney, Davis

4. BILL NO. 17-09, AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO TERENCE ROSS FOR 0.365 ACRES ON A LOT INDICATED WITH TMS# 087-00-06-030, LOCATED ON WALTER ROAD NEAR HIGHWAY 17A, MACEDONIA; FROM FLEX-1, AGRICULTURAL DISTRICT TO GC, GENERAL COMMERCIAL DISTRICT IN COUNCIL DISTRICT 6

BERKELEY COUNTY GOVERNMENT

COUNTY COUNCIL

MINUTES • MARCH 27, 2017

REGULAR MEETING

Administration Building - Assembly Room **6:04 PM**

1003 HIGHWAY 52
MONCKS CORNER, SC 29461

CALL TO ORDER

During periods of discussion and/or presentations, minutes are typically condensed and paraphrased.

In accordance with the Freedom of Information Act, the electronic and print media were duly notified.

Attendee Name	Title	Status	Arrived
Kevin Cox	District 1	Present	
Joshua Whitley	District 2	Present	
Kenneth E. Gunn	District 3	Present	
Tommy Newell	District 4	Present	
Dennis L Fish	District 5	Present	
Jack H. Schurlknight	Vice Chairman	Present	
Caldwell Pinckney	District 7	Excused	
Steve Davis	District 8	Present	
Bill Peagler	Council Chairman	Present	

APPROVAL OF MINUTES

1. County Council - Special Meeting - Jan 6, 2017 3:01 PM

It was moved by Council Member Whitley and seconded by Council Member Newell to **approve** the minutes, as presented. The motion **passed** by unanimous voice vote of Council.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Joshua Whitley, District 2
SECONDER:	Tommy Newell, District 4
AYES:	Kevin Cox, Joshua Whitley, Kenneth E. Gunn, Tommy Newell, Dennis L Fish, Jack H. Schurlknight, Steve Davis
EXCUSED:	Caldwell Pinckney

2. County Council - Public Hearing - Feb 13, 2017 6:29 PM

It was moved by Council Member Whitley and seconded by Council Member Newell to **approve** the minutes, as presented. The motion **passed** by unanimous voice vote of Council.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Joshua Whitley, District 2
SECONDER:	Tommy Newell, District 4
AYES:	Kevin Cox, Joshua Whitley, Kenneth E. Gunn, Tommy Newell, Dennis L Fish, Jack H. Schurlknight, Steve Davis
EXCUSED:	Caldwell Pinckney

PUBLIC DISCUSSION

1. Requests to be heard must be made prior to the Call to Order. [Comments on any Public Discussion items will be limited to four (4) minutes per speaker. A total of 30 minutes will be allotted for this Public Discussion period.]

Chairman Peagler explained the rules for addressing Council during Public Discussion.

Mr. Todd Olds, 431 Stoney Poynt Court, North Charleston, stated that he came before Council this evening on a request to rezone a property at Royle Road. There are some compelling facts and substantial issues that he wishes to present to Council this evening. The papers being passed out are some signatures of residents that live on the property and support the rezoning, in addition to some photos of Royle Road. One of the compelling facts he wishes to present tonight is if they base their decision this evening based on the people who are opposed to this, he'll probably go home a loser, if it is based on facts of the law, the area, its character, and what is near Royle Road, then he should walk out with approval. The Planning Director of the County has made a recommendation for approval. The Berkeley County Land Use Plan totally supports this rezoning. This rezoning request is harmonious in its entirety. Royal Road has 66 parcels. Out of 66 parcels that butt Royal Road, 42 of them have a mobile home or multiple mobile homes. The property that he is asking to be rezoned presently has two mobile homes. The adjacent property that he has beside it, has approval already for at least 13 mobile homes. The actual residents support the rezoning. The request does not negate in any way or create a negative character to the district, community or existing development of the area. They will hear consistently tonight about drugs, people in the street, traffic, that is subjective and arbitrary. There is nothing factual that can be presented to them to demonstrate that any property values have been decreased based on mobile homes. This is a mobile home community. It's an affordable living area. They are asking for a rezoning based on those facts. Based on what the County website says in bold print that the future land use and comprehensive plan is a strong guide for decision making and rezoning request. Therefore, they are asking they do this based on the law, Comprehensive Plan, the Planning Director's recommendation and not on anyone's subjective reasons, not being factual, and not being a supporter. Planning Commissions do not always get it right. They solely base their decision on subject, arbitrary reason.

Mr. Raymond Headding, 760 Royle Road, Ladson, stated that he is standing opposed to the property, TMS # 233-09-02-046, being changed from the present zone status R-2 to R-3, because there is high traffic on this road at certain times of the day. There are 13 trailer parks presently on Royle Road, that he personally counted, from I-26

overpass, Northeast, to Highway 17-A. There are trailer parks on Royle Road, Southwest of I-26 overpass. There have been 11 applications denied since as far back as April of 2002. Here they have another, same type of application trying to be passed. There have been approximately 13 trailer parks along with parcels consisting of 2 to 4 trailer parked on them. A total count was done showing an approximate count of 316 trailers off of Royle Road off of Highway 17-A to Highway 78. He is concerned about where he lives, which is directly in front of this property that is trying to be rezoned. He has put his house up for sale twice and was told by the real estate agent that because of the trailers next door and around in the area, the value of his real estate, he couldn't get what it really is worth because it is depreciated. He has woken early in the mornings and have had suspicious people sitting in his driveway. He's witnessed a large amount of consistent traffic of coming and going, which is a common red flag to predict high drug trafficking. Sometimes there are cars, truck, and mopeds that frequent the same trailer as many as twelve times within an approximate three hour period. There are unusual and strange vehicles up and down the driveways and dirt roads in search of a specific trailer. The appearance of the homes is falling apart, skirting is missing, pieces or all of it, old vehicles parked in the yards without license plates on them, and everything left out in the open of all to see. There are no privacy fencing requirements. This is a two-lane road. All traffic has no alternate means of travel. He has witnessed a boy from one of the trailers on the same tract of land that is in question and he was hit.

Mr. James Jackson, 769 Royle Road, Ladson, stated he is adjacent to the property that is in question here. He has been there for 51 years. If there was something they could have done 45 or 55 years ago, they would have done it then. There wasn't Planning Commissions then or anything back then. Most of these parcels of land on this road are around three acres in size. They bought these properties out there 50 years ago, because they wanted a country style living, but the community around there and in the southern part of Berkeley County is growing tremendously. The Summerville area where they live is growing wild. The subdivision down the road from them that is going in, they still have more house being built. Around the Sangaree school, you can't get by there in the mornings or afternoons from people dropping off and picking up kids there. They even park in the highway, and you have to sit there and wait for them to get through before they can get through that section.

Mr. Francis Gibson, 1076 Royle Road, Ladson, stated that they have nine pages of a petition of residents that have signed in opposition of the rezoning. He has been coming here since 2002, and he has been living there since 1978. He has seen the area turn from acreage to trailers. They don't need any more trailers. The precedent has been set all those times. There's one common thing, every person that comes up here that wants to put trailers in the area, they don't live there. He just wants Council to keep in mind, that since 2002, there have been 12 TMS's that they have shot down. They don't need any more trailers in the area.

Mr. Auvo Kemppinen, 329 Lake Moultrie Drive, Bonneau, stated that he is here to express his concern about the present contract with Berkeley County and Republic Services about trash and recyclables disposal. He is an immigrant, retired citizen from Finland, and he feels responsible for separating trash and recyclables. He delivers paper and cardboard to the disposal center outside of Moncks Corner once a week. There, they

don't accept recyclables like they used to. Republic Service now imposes a monthly charge of $15.00 per month for doing his civic duty. He wanted to deliver his recyclables to their gathering point, but they refused. To a retired person, this amounts to real money. Something is wrong. This $15.00 a month fine for doing his civic duty appalls him, leaving him no other option than throw it out with the trash. He would like to know who the brilliant attorney was who concocted this crazy scheme, and with Council's approval. He sincerely hopes this matter will be revisited.

CHAIRMAN OF COUNTY COUNCIL

REPORTS FROM STANDING COMMITTEES

1. ***Committee on Finance***

Chairman Joshua S. Whitley, District No. 2

a. Fiscal Year 2017 Budget Status Report

Presenters: Tim Callanan/Johnette Connelley

Chairman Whitley stated that Mr. Tim Callanan provided a Fiscal Year 2017 Budget Status Report, and no action was taken.

(That concluded Chairman Whitley's report.)

RESULT:	**INFORMATION ONLY**

2. ***Committee on Land Use & Economic Development***

Chairman Jack Schurlknight, District No. 6

a. AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACRES ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4

Council Member Davis stated that he hears the citizens. Eventually, change is going to come. He is always leery of when the Planning Commission makes its decision, and when staff makes a decision. He has always been guided by those principals. It's no question that it fits within the Comprehensive Zoning Plan. Unfortunately, the fine citizens are trapped in the dilemmas of it. He told Mr. Olds that he would support it, because it fits the overall Comprehensive Plan and he wanted the folks to understand that he consistently follows this pattern. Change is hard, difficult and they don't deserve all the things happening out there, but at the same time the Comprehensive Zoning Plan was put in place for specific reasons.

Council Member Schurlknight stated that he has a lot of concerns about the effects it is going to have on the individuals that live on Royle Road. They've been there a long time, and have seen a lot. He is hearing that they have hosted a lot of development on the road, and it comes to a tipping point to where you must look at the capacity of the road, and safety. He understands that the Planning Commission denied and Staff recommended, but he thinks Council has a lead way in some of this stuff. He likes to look at it by a case by case basis. He inquired to Mr. John O. Williams, County Attorney, if he has had a chance to look at this situation and if he would address the legality of it. If Council is within its legal right.

Mr. John O. Williams, County Attorney, replied in the affirmative, and Council is justified in a vote in either direction.

Council Member Schurlknight stated that with that in mind, he has been down Royle Road many times. He has seen a lot of stuff going on in the area. It does devalue the property. He thinks they have suffered enough when it comes to development and quality of life. It concerns him that when the dust settles, they are going to be there. As Chairman of the Land Use Committee, he agrees with Council on the original recommendation of denial.

Council Member Whitley stated that he thinks he was in the minority voting for approval for First Reading, and he would send it to at least Second Reading or Third Reading not committing to voting for the potential rezoning. He is hesitant to vote for a rezoning for a mobile home park unless it fits the character of the area. His understanding though, is this rezoning would change very little, except on the 10 overall units. He is going to vote consistent as he did in Committee, and send it to Second Reading.

On recommendation of the Committee, Chairman Schurlnight moved to **deny** an **Ordinance to Modify the Official Zoning and Development Standards Map of Berkeley County, South Carolina, in Regard to Bonnell W. Meese for 1.29 Acres on a Lot Indicated with TMS# 233-09-02-046, located on Royle Road near Farmington Rd/I-26; from R-2, Manufactured Residential District to R-3, Mobile Home District in Council District 4.** The motion to ***deny*** **passed** by majority voice vote of Council. Council Member Whitley and Council Member Davis voted Nay.

02/28/17 Planning Commission RECOMMENDATION OF DENIAL

03/13/17 Land Use & Economic Development Committee DEFEATED

BERKELEY COUNTY COUNCIL

Johnny Cribb - Supervisor & Chairman
Joshua S. Whitley – Vice Chairman (District No. 2)

COMMITTEE CHAIRMEN

District 1
C. Kevin Cox
Committee on
Public Utilities

District 2
Joshua S. Whitley
Committee on
Finance

District 3
Kenneth E. Gunn, Jr.
Committee on
Auxiliary Services

District 4
Thomas Newell
Committee on
Land Use

District 5
Brandon L. Cox
Committee on
Administrative Services

District 6
Jack H. Schurlknight
Committee on
Justice & Public Safety

District 7
Caldwell Pinckney, Jr.
Committee on
Operations

District 8
Steve C. Davis
Committee on
Community Services

I, the undersigned, Clerk of Berkeley County Council, DO HEREBY CERTIFY:

That the following DVD constitutes a true, correct and verbatim copy of the meeting video footage regarding AN ORDINANCE TO MODIFY THE OFFICIAL ZONING AND DEVELOPMENT STANDARDS MAP OF BERKELEY COUNTY, SOUTH CAROLINA, IN REGARD TO BONNELL W. MEESE FOR 1.29 ACREAS ON A LOT INDICATED WITH TMS# 233-09-02-046, LOCATED ON ROYLE ROAD NEAR FARMINGTON RD/I-26; FROM R-2, MANUFACTURED RESIDENTIAL DISTRICT TO R-3, MOBILE HOME DISTRICT IN COUNCIL DISTRICT 4 before the Planning Commission on February 28, 2017, the Land Use Committee on March 13, 2017, and the Berkeley County Council on March 27, 2017.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1stth day of July, 2019.

Catherine R. Windham, Clerk
BERKELEY COUNTY COUNCIL

Berkeley County Administration Building, PO Box 6122, 1003 Hwy. 52- Moncks Corner, SC 29461-3707
Moncks Corner (843) 719-4092 **Charleston** (843) 723-3800 **St. Stephen** (843) 567-3136
Fax: (843) 719-4158

Chapter 13

Planning and Land Development

Mark W. Tollison, Greenville County Attorney

Planning Fundamentals

Identifying Basic Planning

A county making a decision to "plan" can be described as establishing the method and design for accomplishing a particular act or goal. The term "planning" is commonly used to describe local government activities conducted to prepare and organize for the future. For purposes of discussion in this chapter, planning will be defined as an orderly process used by county governments to:

- Identify county problems and needs;
- Collect information and facts necessary to study the county's problems and needs;
- Arrive at consensus on county goals and objectives;
- Develop plans and programs for fulfilling the adopted goals and objectives: and
- Execute plans and programs in an efficient, organized manner.

When a local government applies the process described above to all private and public actions affecting the development and uses of property within its jurisdiction, it is implementing "land use planning." The definition of land use planning also includes the activities undertaken by a county government to influence the appearance and growth of the county. Often referred to as "planning," land use planning is the most visible form of planning because of its impact on the physical makeup of a county. It is important to distinguish land use planning from "zoning." Zoning is just one of the regulatory tools available to counties carrying out land use planning that can lend a community some influence on the private use of land.

With the local planning activities described above, public input is vital. **Citizens' direct involvement in plan preparation is the primary source for developing accurate assessments of a county's problems and needs**, which in turn can give support to the adoption of a final set of community goals and objectives. Developing plans and programs for a county requires close collaboration between citizens and local government officials. Without a measure of public support and understanding of local planning activities, the county's plans can result in hollow documents, placing the success of the entire planning process at risk.

Planning History in Brief

Planning and zoning have been around the U.S. since the early part of the last century and are recognized as a function of local governments. The U.S. Supreme Court, in the landmark decision of *Village of Euclid v. Ambler Realty Company*, upheld the constitutionality of local government zoning in 1926.[1] Around the time of the *Euclid* decision, the U.S. Department of Commerce published two documents: *A Standard State Zoning Enabling Act* and *A Standard City Planning Enabling Act.*[2] These publications greatly influenced the shape of the local planning enabling legislation passed by state legislatures, including early local laws in South Carolina.

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[1] 272 U.S. 365, 47 S.Ct. 365 (1926).

[2] Herbert H. Smith, *The Citizen's Guide to Zoning* (Chicago: APA Planners Press, 1983).

Model planning acts permitted local governments to plan for and control land use and development occurring within their jurisdictions through the oversight of local planning commissions. In South Carolina, the General Assembly passed planning enabling legislation for counties in 1942, after granting similar planning authority to municipalities in 1924.[3] Enabling legislation in South Carolina has been reenacted many times over the years, with the last major reenactment occurring in 1994. The General Assembly passed the 1994 S.C. Local Government Planning Enabling Act, which consolidated county and municipal planning laws into one code chapter, the source of current local land use planning and zoning authority.[4]

Planning in the Counties: Behind the Ordinances

Suburban Growth and Changing Rural Landscapes

Urbanized parts of South Carolina have experienced significant growth in both population and building activity in the past six decades. Much of this growth has been experienced in the unincorporated areas of South Carolina's counties. Often, this type of increased development activity is termed "suburban" growth, because it occurs outside the traditional urban/downtown area of communities. The natural impact of suburban growth in the counties is the conversion of once rural, agricultural areas into newly-developed residential and commercial communities.

Planning programs allow counties to foresee and direct the public resources necessary to accommodate new suburban growth.

Changing land uses tend to increase the demand for local government services and infrastructure, as people move out to new developing communities in unincorporated areas of the counties. Planning programs allow counties to foresee and direct the public resources necessary to accommodate new suburban growth. A lack of planning in the suburbs tends to leave impacted local governments unprepared to keep up with the growing demand for public facilities and services. For example, increased residential and commercial traffic on former "farm-to-market roads" can rapidly take up existing capacity and create traffic backups more reminiscent of downtown than the rural area where the congestion is occurring.

Some jurisdictions have attempted to maintain the resources and quality of life that attracted new growth by engaging in planning for the change from rural to suburban. When growth pushes out into the rural areas of a county, planning can play a vital role in preserving open space as well as protecting valued natural, scenic and historic resources. Specialized zoning can protect historic sites from activities that would otherwise disrupt or destroy their character, while other land use policies can provide levels of identification and preservation for natural areas such as forests, mountains, wetlands and coastal areas. In those areas seeking to harmonize land development with the existing rural character of a community, county planning can assist in the conservation of open space and farmland.

Economic Development

The economic life of a county can be aided by an established planning program. For example, information gathered and analyzed on county demographics and the local economy is a frequently utilized tool in successful economic development efforts. Planning studies can benefit industrial prospects looking to invest, as well as counties assessing their economic growth needs. Through the land use planning process, planners can catalog information about appropriate industrial and development sites, which can be utilized by both prospective industries and local economic development recruiters.

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[3] Act No. 681 of 1942 and Act No. 642 of 1924.

[4] Act No. 355 of 1994.

Avoidance of Adverse Impacts

Planning can also provide indirect economic benefits to residents and industry through appropriate land use controls. When land use planning is in full swing, it has the potential to assist in the stabilization of land values.

Planning has an important role in a county council's determinations for the location, capacity and expansion of public facilities, while potentially aiding efforts to strengthen the local economy.

An established land use policy, when implemented through appropriate zoning and land development regulations, can foster attractive communities and ensure that incompatible land uses are separated or buffered. The prospect of adjoining and incompatible land uses—such as the placement of heavy industrial activity next to an established single-family, residential neighborhood—can produce a degree of uncertainty that can destabilize a community. An industry may want equal assurance that adequate buffers exist between their location and future residential, educational and community developments.

Alternatively, when cities adopt planning programs and enforce strict development regulations within their municipal boundaries, the unincorporated areas of the county can become sites for undesirable and unplanned land uses. In these instances, the outlying areas of the county may become the unwilling depository for activities that have been forced outside of the municipal boundaries of cities with planning programs. This can result in the arrival of activities such as sexually-oriented businesses, junk yards, landfills, hazardous waste sites and noxious industries.

Adequate Infrastructure

Planning has an equally important role in a county council's determinations for the location, capacity and expansion of public facilities, while potentially aiding efforts to strengthen the local economy. A well-managed capital improvement program integrated with land use plans can assist county council in directing the proper amount of public resources. For example, studies on projected county population and land uses can reveal infrastructure needs that allow for the prior identification of potential sites for public facilities. This can reduce infrastructure costs by allowing the county to plan for the future through early acquisition or protection of expansion sites.

The 1994 Planning Act: Providing the Basis for County Planning

Through legislation passed at the state level, local governments in South Carolina are granted the authority to create and maintain a comprehensive planning process, including land use regulations. As previously noted, the General Assembly last passed major legislation in 1994 to reestablish the organization and powers that counties and municipalities can utilize in their planning efforts.

The 1994 Planning Act as Fundamental Enabling Legislation

The S.C. Local Government Comprehensive Planning Enabling Act (the 1994 Planning Act)[5] recodified existing planning law into a single location in the S.C. Code of Laws. The 1994 Planning Act accomplished two important goals.[6] First, it consolidated existing planning legislation that was previously scattered throughout Titles 4, 5 and 6 of the Code into one location.[7] Second, it updated the old law with contemporary planning practice, providing for several new tools to assist in local government planning.

Counties with planning and zoning programs in place must maintain compliance with the provisions of the 1994 Planning Act. However, for those counties that are not interested in planning, the General Assembly has never passed enabling legislation mandating that counties adopt plans and enact zoning ordinances. The 1994 Planning Act continued the "no mandate to plan" rule, leaving counties under no requirement from the state to engage in planning programs, including zoning, for their jurisdictions.

In discussing the key legal requirements counties must comply with in order to plan and zone, the focus of this chapter will be on the provisions of the 1994 Planning Act. The act affects all aspects of county planning, from how the county organizes its planning-related boards to the actual regulatory powers exercised in its plans and ordinances.

Local Planning Organization

Local government organization for planning in South Carolina is largely rooted in the 1994 Planning Act. When the requirements of the act and common planning practice are combined, county planning organization breaks out into the following four integral parts:

- County Council
- Planning Commission
- Planning staff
- Other boards concerned with zoning

The following overview will focus on the county council, planning commission and staff. A discussion of the role of the other boards will appear in the section on zoning.

The need for public input is essential for local government planning to be successful.

Absent from the organizational framework listed above is an extremely vital, but not to be forgotten element—the public. As stated at the outset of this chapter, the need for public input is essential for local government planning to be successful. The level of public understanding and involvement in the planning process, whether acting as concerned citizens or participating as planning board members, can dictate the success or failure of a county's planning program.

County Council

A major factor in determining the direction of a county planning program rests with the county council. As the policy-making body for county government, county council has the power, through planning activities, to set the agenda on how the community grows and develops.

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[5] Act No. 355 of 1994.

[6] S.C. Code Ann. §§ 6-29-310 *et seq.*

[7] S.C. Code Ann. §§ 4-27-10 *et seq.*; §§ 5-23-10 *et seq.* and §§ 6-7-10 *et seq.* Title 4 was the first county planning act. However, Title 5 (municipalities) and Title 6 (counties and municipalities) have been the main statutes utilized by local governments for planning authorization prior to passage of the 1994 Planning Act.

The vitality of a local planning program can be judged by how county council decides issues affecting the county's development and how closely decisions reflect adopted plans and policies.

The county council makes decisions in other areas of governance that have a significant impact on the planning process beyond those directly affecting specific plans and programs. For example, through the annual approval of the county budget, the council determines the level of funding for the departments and boards/commissions that are responsible for carrying out planning activities. Moreover, county council decisions can also influence planning through their approval of various capital projects and public improvements. Another area where county council has a major impact on the success of the planning program is the appointment process. The caliber of county council appointments to the planning commission, board of zoning appeals or board of architectural review can have a large impact on the quality of the planning program.

Planning Commission

The creation of a county planning commission is the first step that a county council takes to develop a planning process. In essence, the planning commission serves as a citizens' advisory group to the county council on planning matters. The planning commission's advice is embodied in the recommendations it makes to county council for the adoption of plans and ordinances.

Appointing the members of the planning commission is the responsibility of county council. Planning commission membership is typically comprised of laypersons from the community. The 1994 Planning Act requires that membership on the planning commission represent a broad cross-section of the interests and concerns within the jurisdiction. To that end, the law states that planning commission appointments be made in consideration of the member's professional expertise, knowledge of the community and concern for the future welfare of the total community. The permissible size of the planning commission varies, based on the number of jurisdictions it serves. A typical county planning commission may not have less than five nor more than 12 members.[8]

A primary function of a planning commission is "to undertake a continuing planning program for the physical, social and economic growth, development and redevelopment of the area within its jurisdiction."[9] The planning commission fulfills its responsibilities through oversight and recommendations on planning matters. The planning program is embodied in the planning commission's initial preparation of—and amendments to—the comprehensive plan, zoning ordinance and land development regulations. Finally, in order to ensure that the planning commission can carry out its responsibilities, the commission has the flexibility to contract for staff and experts, if necessary, so long as it is consistent with funds appropriated.[10]

Planning Staff

In order to fulfill its statutory duties, a planning commission requires assistance, which most jurisdictions provide through a full-time professional planning staff. Comprised of citizen volunteers, a planning commission by itself lacks the time and expertise to ensure that the information necessary to the planning process is gathered and analyzed in a professional manner. A planning staff typically operates "in-house" as a department of the local government under the county administration. Whether employed through contract or in-house, a planning staff provides both research time and professional expertise to the county planning process. By physically conducting the studies and constructing the background information for plans and appeals, the planning staff's role is vital to the planning commission's work.

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[8] S.C. Code Ann. §§ 6-29-320. 6-29-350.

[9] S.C. Code Ann. § 6-29-340.

[10] S.C. Code Ann. § 6-29-350(C).

Beyond assisting in the production of plans and studies, a zoning administrator is also needed to enforce the requirements of the zoning ordinance. The role of the zoning administrator will be discussed in the section on zoning.

The Comprehensive Plan

The foundation of the planning process is the comprehensive plan. It forms a blueprint for the county's future growth and development. The comprehensive plan should reflect the county's current physical development and predict where future development will occur. A plan should indicate the extent and character of projected land use activities in the county. The "extent" of development refers to the policy decisions reflected in the plan that forecast where future growth will be encouraged or discouraged, as well as the amount of growth. The "character" of development refers to which areas will be developed for residential, commercial, industrial, agricultural and any other land uses appropriate for the county.

Plan Elements

Under the 1994 Planning Act, the comprehensive plan must be organized into nine separate elements:[11]

1. *Population.* Considers historic trends and projections, household numbers and sizes, educational levels and income characteristics.

2. *Economic Development.* Considers labor force and labor force characteristics, employment by place of work and residence, and analysis of the economic base.

3. *Natural Resources.* Considers coastal resources, slope characteristics, prime agricultural and forest land, plant and animal habitats, parks and recreation areas, scenic views and sites, wetlands and soil types.

4. *Cultural Resources.* Considers historic buildings and structures; commercial districts; residential districts; unique, natural or scenic resources; archeological and other cultural resources.

5. *Community Facilities.* Considers water supply, treatment and distribution; sewage system and wastewater treatment; solid waste collection/disposal; fire protection, emergency medical services and general government facilities; educational facilities; and libraries and other cultural facilities.

6. *Housing.* Considers location, types, age and condition of housing; owner and renter occupancy; and affordability of housing.

7. *Land Use.* Considers existing and future land use by categories, including residential, commercial, industrial, agricultural, forestry, mining, public and quasi-public, recreation, parks, open space, and vacant or undeveloped.

8. *Transportation.* Considers transportation facilities—including major road improvements, new road construction, transit projects, pedestrian and bicycle projects and other elements of the network—coordinated with the land use element.

9. *Priority Investment.* Considers the likely federal, state and local funding available for public infrastructure and facilities during the next 10 years; recommends the projects for expenditure of those funds for infrastructure such as roads, water, sewer and schools. Recommendations are accomplished through coordination with adjacent jurisdictions and area service providers.

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[11] S.C. Code Ann. § 6-29-510(D).

The comprehensive plan's land use element alone does not regulate the use of land. It is merely a vision of future land uses. **If a county seeks to implement the land use element, a zoning ordinance must be adopted in order to regulate uses of private property.** Counties should be ready to reconcile and correct large-scale inconsistencies between the land use element and any later enacted zoning ordinances and amendments.

The 1994 Planning Act also requires that each of the nine elements include at a minimum the following three items:

- Inventory of existing conditions;
- Statement of needs and goals; and
- Implementation strategies with time frames.[12]

These three requirements form an underpinning for bringing the plan elements to life as part of a continuing planning process. Meeting these three requirements can be accomplished through a process that involves both public input and studies of the specific considerations listed in each element of the comprehensive plan, with policymaker input into final strategies.

Plan Formation through Studies

Background studies provide the necessary groundwork for goal and policy formulation that is in turn reflected in the completed elements of the comprehensive plan. The ability to set out a blueprint for the location of all public infrastructure allows the county to begin a process of accommodating and coordinating future growth patterns. Much of the information necessary for planning studies is revealed in the subject matter described in each of the nine elements of the comprehensive plan. The information, once gathered and analyzed, builds a foundation for assessing the county's current and future needs.

Beyond the studies suggested by the planning elements themselves, certain information is typically gathered and analyzed by the planning staff that is indispensable to making informed planning decisions. To that end, planners generally need to research, analyze and bring forward the following types of information in the planning process:

- *Survey and assessment of county demographics.* This effort involves examining recent and past trends in population growth, which can be accomplished with the aid of U.S. Census data. Population and demographic information provides a picture of the past, present and future attributes of the people in the county. Understanding the characteristics of the county's population—such as sex, age, race, education and other characteristics—lends insight about current problems and future county needs.

- *Data illustrating the makeup of the county's economy by means of economic analysis of the county.* Characteristics describing the nature and extent of the county's employment and labor force can aid in understanding and describing the local economy. In turn, information about the local economy aids in the formulation of plans designed to direct resources where they will be of maximum use. Economic studies also assess the county's strengths and weaknesses, which is important in tailoring efforts geared toward fostering new industrial and business development.

- *Assessment of existing public infrastructure.* This study should consider issues of current capacity as well as expansion plans for the future. All public facilities should be studied including utilities, schools, libraries, parks, cultural facilities and hospitals. Issues of capacity and expansion concerning the provision of services should be examined for law enforcement, fire, emergency medical (EMS), social service delivery and other relevant services.

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[12] S.C. Code Ann. § 6-29-510(C).

- *Studies on land uses in the county, to include both the natural conditions and the existing physical development.* Surveys should be conducted mapping the location and qualities of the county's natural features and landscape—such as prime agricultural lands, wetlands, soil types, topography, drainage, forests, surface and groundwaters, and all other natural resources of the county. Inherent in a study of the land and its uses is a survey of the man-made developments in the county. These surveys should record the existing transportation system—including transit by road, rail, water and air. The existing transportation network should be paired with the location and character of all current improvements to the land—including industrial, commercial, residential, governmental and other uses.[13]

In line with the 1994 Planning Act's encouragement of coordinating the plans across multiple jurisdictions, the listed surveys and studies for the comprehensive plan need to include an identification of potential conflicts with adjacent jurisdictions, along with a consideration of regional plans or issues.

Plan Adoption

Oversight of the studies and strategies that set the foundation for comprehensive plan adoption rests with the planning commission. After integration of the studies into the plan elements, the planning commission recommends a plan and transmits its recommendation to county council. The planning commission can recommend an entire plan or only transmit separate elements of the plan.[14]

Prior to adopting the plan or an element, the governing body must hold a public hearing and give 30 days notice.

Formal and final adoption of the plan or elements is accomplished by ordinance of county council. Prior to adopting the plan or an element, the governing body must hold a public hearing and give 30 days notice.[15] Finally, all adopted comprehensive plan elements must be reviewed for possible changes not less than once every five years, and the plan in its entirety must be "updated at least every 10 years."[16]

After Plan Adoption—Public Facilities Review

It is interesting to note that completion of a comprehensive plan sets up the possibility for an ongoing public facility review by the planning commission. Under a little used provision of the 1994 Planning Act, no new public facility "construction" may occur until the location, character and extent of it has been submitted to the planning commission for review and comment as to its compatibility with the comprehensive plan.[17] **By requesting review of local infrastructure decisions within its jurisdiction, the planning commission has an opportunity to bring infrastructure decisions back to the adopted, public facilities related elements in the comprehensive plan.**

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[13] S.C. Code Ann. § 6-29-510(B).

[14] S.C. Code Ann. §§ 6-29-520(B), 6-29-530.

[15] S.C. Code Ann. § 6-29-530.

[16] S.C. Code Ann. § 6-29-510(E).

[17] S.C. Code Ann. § 6-29-540.

Zoning and Land Development Regulations

Zoning

Zoning's Role

The most common tool utilized by a local government to implement a county's land use plan is zoning. In general, a zoning ordinance divides the land within a county's jurisdiction into different districts. Within each district, the zoning ordinance can designate the use, location and size of any structures placed on property. Adoption and enforcement of a zoning ordinance is an exercise of fundamental county authority to protect and preserve the health, safety and general welfare of the county through the regulation of land. Counties derive the ability to enact and enforce zoning through a combination of the Home Rule Act of 1975 and the Planning Act of 1994.[18] These two, long-standing pieces of legislation combine to establish the "police power" of county government and how zoning ordinances are adopted, amended and enforced.

Through a zoning ordinance, a county can determine to undertake a wide array of objectives to encourage outcomes such as: minimum development and design standards; higher aesthetic benefits and values in the community; varied land uses appropriately positioned to avoid potential conflicts; and sufficient land and infrastructure availability for future development.

The control of land use influences the development of the county which, in turn, places importance on how a county conducts its use of zoning. Moreover, zoning actions can have significant impact on the use and value of privately owned lands. Zoning actions are subject to a high degree of scrutiny by citizens' groups and landowners both in favor and against a particular adoption or change. Sometimes, disputes arise over the legality of county zoning actions based on constitutional concerns and private property rights. Because of these heightened interests and potential impacts, **zoning can be one of the most controversial activities undertaken by a local government.**

Zoning Ordinance Structure

A zoning ordinance generally includes two parts: a text and a map. Included in the text of the zoning ordinance are the regulations that will apply in each of the zoning districts and the process governing amendments to the text and the map. The role of the map is to set out graphically the location of the zoning districts. The text and the map combine to partition the land within the county's planning jurisdiction into zoning districts. Within each district, land can be limited through regulations governing: 1) use; 2) dimensions, density and setback requirements; and 3) other guidelines and specifications—such as screening, tree preservation, landscaping, buffers, required public improvements, signage controls, off-street parking and loading.[19]

Three of the most commonly utilized zoning districts are residential, commercial and industrial. A typical zoning ordinance incorporates these common zoning districts along with an assortment of other special districts—such as public use, agricultural, mobile home park, office and institutional, and planned unit development. However, districts may be much broader than that, providing for many types of development with variations for lot sizes, density and dwelling types.

Zoning Provisions in the Planning Act

After adoption of at least the land use element of the comprehensive plan, the county council can adopt a zoning ordinance to help implement the plan.[20]

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[18] S.C. Code Ann. § 4-9-10 *et seq.*

[19] S.C. Code Ann. § 6-29-720(A).

[20] S.C. Code Ann. § 6-29-720(A).

Zoning ordinances must be designed for the general purposes of "guiding development in accordance with existing and future needs" and promoting the "public health, safety, morals, convenience, order, appearance, prosperity, and general welfare."[21] Some examples of specific purposes that the 1994 Planning Act references for possible zoning ordinance consideration are:

- Providing adequate open space;
- Preventing the overcrowding of land, lessening congestion in the streets;
- Facilitating the creation of a convenient, attractive and harmonious community;
- Protecting scenic, historic or ecologically sensitive areas; and
- Facilitating the availability of transportation, police and fire protection, recreational facilities, and other public services and requirements.[22]

Nonconformities and Variances

Certain uses and buildings may not conform to the regulations set forth in a new zoning ordinance or amendment. Enforcement of the zoning ordinance can create nonconforming uses, otherwise known as "nonconformities." A nonconforming use results from conditions on the property existing prior to the adoption of zoning regulations, such as buildings in violation of height and setback rules, lots that violate width and total area rules, or former land uses.

By allowing existing uses to be exempt from the ordinance, zoning ordinances can "grandfather" nonconformities. However, the ordinance can also require that once the use is changed, the previous exemption from the ordinance is dissolved and all future new uses of the site or buildings must comply with the ordinance. Another approach to nonconformities is to encourage the discontinuation of the use after a reasonable time period. This approach is generally referred to as "amortization," and it is among the powers granted to local governments in the 1994 Planning Act.[23]

A variance is a device that can grant a property owner relief from the provisions of a zoning ordinance when strict application of the ordinance would result in an unnecessary hardship. For example, a variance may be granted to reduce yard and setback requirements or the number of parking or loading spaces. In order to receive a variance, the hardship must be beyond a mere inconvenience or monetary considerations. The authority to grant variances is vested in the county's zoning board of appeals, which will be discussed later in this chapter.

Zoning Ordinance Amendments

A zoning ordinance is subject to amendment as needed. In general, amendments to the zoning ordinance alter the zoning district classification of individual properties or descriptions of uses allowed for properties throughout the county within a particular district. The ability to seek a zoning amendment is not an exclusive right vested in any one individual, group or body. The process for amending the zoning ordinance is set forth for each county in the 1994 Planning Act and the local zoning ordinance. **Only county council has the final authority to enact amendments to the zoning ordinance** (after planning commission review). A public hearing must be held prior to final action for a zoning ordinance amendment, and the act sets out explicit public notice and comment requirements.[24]

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[21] S.C. Code Ann. § 6-29-710(A).

[22] S.C. Code Ann. § 6-29-710(A).

[23] S.C. Code Ann. § 6-29-730.

[24] S.C. Code Ann. § 6-29-760.

Zoning Enforcement

A key part of zoning enforcement rests with the zoning administrator, who is commissioned to enforce the requirements of the zoning ordinance. The zoning administrator is responsible for ensuring that submitted plans are in compliance prior to the issuance of certificates of occupancy or building permits. Additionally, nonconformities and direct violations of the ordinance are under the purview of the zoning administrator. The zoning administrator has the authority to withhold building or zoning permits and to issue stop orders against any work undertaken without proper building, zoning or subdivision permits.[25]

The Board of Zoning Appeals

Once established by county council, the board of zoning appeals becomes an integral part of the administrative mechanism designed to enforce the zoning ordinance. County council provides for the board's existence in the zoning ordinance text and appoints the membership of the board, which may have three to nine members.[26]

In hearing appeals and other requests, the board of zoning appeals acts like a court of law.

A board of zoning appeals has three general responsibilities under the law: 1) they hear appeals from decisions and actions of the zoning administrator; 2) they have authority to grant variances from the strict application of the zoning ordinance; and 3) they may permit certain uses by special exception.[27] In discharging its duties, the board is required to adopt rules of procedure and follow prescribed public notice and meeting requirements.

When it is alleged that an administrative official made an error in enforcing the zoning ordinance, the board of zoning appeals hears and decides appeals. In hearing appeals and other requests, the board acts like a court of law, rendering a decision based on the evidence heard and interpreting the provisions of the zoning ordinance. Decisions by the board are appealable to the state judicial system through the circuit court.[28]

Additionally, the board may grant a variance from requirements of the ordinance "when strict application of the provisions of the ordinance would result in unnecessary hardship."[29] A variance may be granted in an individual case of unnecessary hardship, if the board finds:

- Extraordinary and exceptional conditions pertaining to a particular piece of property;
- Conditions that do not generally apply to other property in the vicinity;
- Because of these conditions, application of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property; and
- Authorization of a variance would not be of substantial detriment to adjacent property or to the public good, and the character of the district would not be harmed by the granting of the variance.

The board may attach conditions when granting a variance. As stated earlier, the 1994 Planning Act makes it clear that increased profit accruing to property based on a zoning change may not be considered as grounds for granting a variance.[30]

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[25] S.C. Code Ann. § 6-29-950.

[26] S.C. Code Ann. § 6-29-780(A).

[27] S.C. Code Ann. § 6-29-800.

[28] S.C. Code Ann. § 6-29-800.

[29] S.C. Code Ann. § 6-29-800.

[30] S.C. Code Ann. § 6-29-800.

As a general rule, the board may not grant use variances. A "use variance" involves the establishment of a use not otherwise permitted in a zoning district, extends physically a nonconforming use of land, or changes the zoning district boundaries shown on the official zoning map. However, the 1994 Planning Act does allow a county council to authorize the board of zoning appeals to grant "use variances" under certain conditions as set by council.[31]

The Board of Architectural Review

Municipalities and counties that undertake efforts to preserve and protect valued historic districts or scenic corridors have traditionally utilized boards of architectural review. To further historic preservation efforts, boards of architectural review have been employed to govern the exterior appearance of buildings and structures within defined zoning districts. The boards derive their authority through the text of the zoning ordinance.

A board of architectural review may be created when the county council has adopted a "zoning ordinance which makes specific provisions for historic and architecturally valuable districts and neighborhoods or significant or natural scenic areas, or protects or provides, or both, for the unique, special, or desired character of a defined district, corridor, or development area or any combination of it...."[32] Review and approval by the board of architectural review is required prior to the undertaking of various building activities within a defined district. The ordinance provisions establishing a board of architectural review must be designed to protect districts through restrictions that govern "the right to erect, demolish, remove in whole or in part, or alter the exterior appearance of all buildings or structures within the area...."[33] Additionally, the board hears appeals on the decisions of the zoning administrator concerning "matters under the purview" of the board of architectural review.[34]

The general organization and procedures of the board of architectural review are established in similar fashion to the board of zoning appeals. County council may appoint up to 10 members to a board of architectural review and can compensate them for their service. For example, the process for taking appeals to and from the board of architectural review generally duplicates the procedures set up for the board of zoning appeals.[35]

Land Development Regulations

Land Subdivision and Development

This area of state law enables local regulations concerning the conversion of raw land into subdivided lots for the construction of buildings and other structures. Often referred to as "subdivision regulations," land development regulations control site design, street layout, provisions for water and sewer service, and other matters relating to the conversion of the land for development. The basis for these types of regulations stems from the idea that the act of subdividing tracts of undeveloped property into separate parcels indicates that once vacant land will now be available for construction. By its nature, the sale, purchase and development of the new subdivision parcels will create an increased demand for public services and facilities.

When land is subdivided, subdivision regulations can require the approval of subdivision plats by the designated county agency as a prerequisite to the recording of a final plat. These requirements provide the county an opportunity to ensure that prior to the final subdivision of land, the necessary utilities, streets, drainage and other public improvements servicing the new parcels are provided by the developer.

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[31] S.C. Code Ann. § 6-29-800.

[32] S.C. Code Ann. § 6-29-870(A).

[33] S.C. Code Ann. § 6-29-870(A).

[34] S.C. Code Ann. § 6-29-880.

[35] S.C. Code Ann. §§ 6-29-890, 6-29-940.

The 1994 Planning Act gives a broad definition of land development regulations to include the types of building activities that are potentially subject to regulation—such as "the changing of land characteristics through redevelopment, construction, subdivision into parcels, condominium complexes, apartment complexes, commercial parks, shopping centers, industrial parks, mobile home parks, and similar developments for sale, or lease...."[36] County council may adopt land development regulations when the community facilities, housing and priority investment elements of the comprehensive plan have been adopted. The planning commission has the responsibility to prepare and recommend the regulations to the county council.[37] Recent additions of note to the land development regulations in state law include definitions for "affordable housing," "market-based incentives" and "traditional neighborhood design."[38]

Review Process for County Development

Land development regulations may specifically provide for staff review of development activity, including requirements for the submission of sketch plans, preliminary plans, and final plans for review and approval. Through a preliminary review process, the developer and the planning staff can assess which requirements will be necessary in order to obtain final approval. The review process typically utilizes sketch plans, followed by preliminary plats to ensure that the developer is providing the required public improvements in the development. The review process includes coordination from all county departments and outside agencies concerned with specific aspects of development plans—such as law enforcement, fire, utilities, public works, transportation, stormwater, and other potential service providers or responsible parties.

Developers can be required to make subdivision improvements, such as the proper construction of streets and the adequate provision of utilities and drainage prior to plan approval. Under the 1994 Planning Act, developers can be required to post a surety bond, certified check, letter of credit or other instrument readily convertible to cash, where site improvements are required prior to approval of a final development plan.[39] This can be utilized as a tool to ensure proper construction and completion of the needed public improvements. Upon final inspection and completion, the county may ultimately accept dedicated lands and public improvements shown on approved plats.

Jurisdiction Agreements

Counties and municipalities in South Carolina typically only exercise authority to plan for the areas within their recognized boundaries. For example, the extent of a county's planning jurisdiction is the entire unincorporated area of the county, while a municipality's planning jurisdiction is limited to the area within its corporate limits. However, planning enabling legislation has historically allowed the extension of planning jurisdictions beyond established boundaries. **Two approved methods for extending the overall planning jurisdiction are joint city-county planning commissions and grants of extraterritorial jurisdiction.**

The sale, purchase and development of new subdivision parcels creates an increased demand for public services and facilities.

[36] S.C. Code Ann. § 6-29-1110.

[37] S.C. Code Ann. §§ 6-29-1120, 6-29-1130.

[38] S.C. Code Ann. § 6-29-1110.

[39] S.C. Code Ann. § 6-29-1180.

Joint City-County Planning Commissions

The establishment of a joint city-county planning commission is one method for increasing the scope of a local government's planning jurisdiction. Through a formal agreement between county and city officials, a single planning commission can be formed to oversee planning activities without regard for traditional jurisdictional boundaries.[40]

Extraterritorial Jurisdiction

Counties can exercise planning jurisdiction within the boundaries of incorporated municipalities after approval of a city council request that the county planning commission be designated as the official planning commission for that city. Alternatively, municipalities may exercise extraterritorial planning jurisdiction in the unincorporated areas of the county adjacent to municipal boundaries upon receiving permission from county council.[41] The extension of planning jurisdiction by a county or municipality must be done by ordinance.

Additional Planning Issues

Growth Management

Designing land use regulations to manage the location and pace of suburban growth is a concept that has been promoted in some parts of the country as a panacea for problems associated with rapid development. The call for better planning has stemmed in part from development patterns that fall under the descriptive phrase "sprawl." Sprawl is a term that has worked its way into planning terminology over the past decade and is used to describe high paced, unplanned development patterns that extend away from established communities. Two outcomes frequently associated with sprawling development are outstripped infrastructure (roads, schools, etc.) and high rates of raw land conversion.[42]

At local and regional levels, growth management efforts are designed to provide for the coming suburban growth while attempting to mitigate or avoid anticipated negative impacts. Typically, growth management programs tie together land use/development regulations with capital improvement/infrastructure decisions. Some examples of growth management practices that have been utilized nationally are:

- Requiring that adequate public facility capacity be in place before approving new developments;
- Providing incentives for developments that preserve open space;
- Zoning that allows/supports mixed use developments (residential, commercial, office);
- Timing of growth/infrastructure through the use of urban growth boundaries; and
- Increased coordination of land use plans by adjoining jurisdictions.

In many South Carolina counties, the lack of command over some key infrastructure decisions (such as schools and water) can limit growth management possibilities; however, intergovernmental agreements and regional cooperation have potential for overcoming planning authority gaps.

Vested Rights

Court rulings over the past several decades have provided a source of law defining property rights in land use disputes between developers, private landowners and local governments.

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[40] S.C. Code Ann. § 6-29-350(A).

[41] S.C. Code Ann. § 6-29-330.

[42] Robert H. Freilich. *From Sprawl to Smart Growth* (Chicago: American Bar Association, 1999), Ch. 2.

One form of property right that had long been recognized was formally adopted in 2004 by the General Assembly. Known as "vested rights," the 2004 law codifies the rule recognizing that once a permit or development plan has been officially approved by a governmental entity, the successful applicant has the right to proceed with construction.[43] **Prior "vested rights" (approval) cannot be subsequently taken away by a later action by the government.** The new law allows for a defined period of time that landowners and developers can hold and use permits and plan approval.

Alternative Dispute Resolution

Appeal rights from zoning and land development decisions by counties have been expanded under state law to include a direct path to mediation. This form of mediation is sometimes referred to as alternative dispute resolution, which is a mechanism for bringing the parties and their attorneys together in an informal setting with a certified mediator, typically an experienced attorney. In mediation, the parties are allowed to discuss their respective claims and see if there is mutual agreement or a settlement that can be reached. If settlement is not possible, the lawsuit will move to circuit court for a hearing and determination.[44]

Continuing Planning Education

Since adoption of the 1994 Planning Act, local planning-related activities have increased across the state. To improve the qualifications and training for local planning/zoning staff as well as board and commission members, the General Assembly has mandated continuing education requirements. The requirements include a minimum of six hours of orientation training for new staff and planning/zoning board members and three hours of continuing education annually as prescribed by state law.[45]

Additional Resources

- Visit www.sccounties.org/planning-and-zoning to review the South Carolina Association of Counties planning and zoning library, which offers a sampling of county land use/management ordinances, regulations and standards, comprehensive plans, zoning ordinances and other planning documents.
- For information on required training for local planning and zoning officials and employees, visit the State Planning Education Advisory Committee's website at www.scstatehouse.gov/SCPEAC/index.htm.
- To learn more about national and state planning efforts and resources, visit the American Planning Association's website at www.planning.org and the S.C. Chapter of the American Planning Association's website at www.scapa.org.
- For information on emerging land use trends and issues, creative solutions and best practices, visit the Urban Land Institute's website at www.uli.org.
- To learn more about historical preservation, visit the State Historic Preservation Office, S.C. Department of Archives and History, at http://shpo.sc.gov.

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[43] S.C. Code Ann. §§ 6-29-1510 *et seq.*

[44] S.C. Code Ann. §§ 6-29-825, 6-29-915, 6-29-1155. Act. No. 39 of 2003 established a clear path to alternative dispute mediation in zoning and land use appeals, whereby property owners have the ability to seek mediation in advance of a circuit court appeal.

[45] S.C. Code Ann. § 6-29-1310 *et seq.*

2010

Berkeley County Comprehensive Plan

Planning the Future while Preserving the Past

Introduction

Since the passage of Berkeley County's 2004 Comprehensive Plan Update, continued growth and development has led to a changing set of issues, goals and needs for the jurisdiction. The 2010 Comprehensive Plan is a document intended to both identify the important positive attributes and components which continue to define Berkeley County, while guiding the growth and development of Berkeley County for the next fifteen to twenty years. It is, in essence, a new blueprint for the County's future.

The Plan is comprehensive in that it relates long-range objectives to a number of interdependent elements and incremental changes, including population trends and characteristics, housing, economic development, transportation networks, land use, natural environment, and many other factors that impact the quality of life for Berkeley County residents.

The Plan was created through a collaborative effort involving the Berkeley County Planning Commission, interested officials and entities, citizen input, and data research and analysis. An in-depth summary of the public process and input garnered, which serves as the basis for this Plan, is provided as Appendix J.

Purpose

The purpose of the Plan is to provide a snapshot of where the County is currently, and to set forth goals for future land use and development with specific policies and recommended strategies for achieving these goals. The plan will guide decision-makers when making decisions, policies and laws regarding the future development of land, provision of essential community facilities, and preservation of natural and cultural resources. It is intended to generate local pride and enthusiasm about the future of the community, thereby ensuring that citizens are involved with the implementation of the Plan.

The goals in this Plan do not supersede those adopted by individual jurisdictions, however identifies areas where coordinated planning should be done on inter-jurisdictional issues that affect both the County and its municipalities.

The result is a concise, user-friendly document intended to operate in conjunction with adopted and amended zoning and land use regulations, in that issues identified in the Plan may be addressed through the development of suitable regulations and ordinances consistent with the policies identified in the Comprehensive Plan. The purpose of the 2010 Comprehensive Plan is to serve as a mechanism for which future land use and development decisions can be made that will help shape the future of Berkeley County.

Vision

Throughout the planning process, Planning Commission and citizen input has consistently come back to the same basic ideas or principles of how Berkeley County is envisioned. This includes concerns over issues such as rapid growth, adequate infrastructure and quality of life; and hopes such as better planning, more jobs and preservation.

Based on the information gathered, the following overall vision has been expressed and embraced:

Berkeley County is a vibrant community that embraces its history while promoting economic growth and development. The County will continue to promote sustainability and livability by implementing the following five guiding principles of the adopted comprehensive plan:

- *Protect and promote distinctive, diverse communities;*
- *Manage infrastructure systems effectively and expand them efficiently;*
- *Respect and enhance historical and natural resources and expand their public accessibility;*
- *Make recreational opportunities – both active and passive – available county-wide; and*
- *Draft a clear, fair plan to be implemented through simplified costs and streamlined processes.*

This vision will be achieved through a planning process that ensures all development is consistent with the Comprehensive Plan and does not diminish the quality of life for future generations of Berkeley residents.

Goals and Policies

G1.1 Berkeley County will support the provision of community services, essential for all population groups.

1. The County will promote land use regulations that provide appropriate locations for quality health care, day and elderly care, and other services.
2. The County will encourage the establishment of social services by institutions or community groups.
3. The County will encourage allocation and efficient management of educational facilities that provide opportunities for residents to enjoy the same, or better, standard of living.
4. The County will ensure residents in new development are provided with adequate public safety services and facilities.

G1.2 Berkeley County will support the development of affordable housing and diverse housing types.

1. The County will encourage the provision of diverse housing types within planned developments.
2. The County will provide incentives for creative housing developments that provide affordable housing or workforce housing in close proximity to existing and future employment centers.
3. The County will promote housing availability for low to moderate income households and special needs populations.

G1.3 Berkeley County will plan and implement mitigation strategies to protect existing communities and neighborhoods from physical deterioration due to natural hazards and/or neglect.

1. The County will protect the quality of existing communities and neighborhoods through increased code enforcement and regulations.
2. The County will support redevelopment or enhancement of existing communities and neighborhoods that have suffered from physical deterioration.

G1.4 Berkeley County will promote the development of complete communities within the Principal Growth Area (PGA) as designated on the Future Land Use Map (FLUM).

1. The County will make decisions on new development based on their contribution to the community's character and sense of place.
2. The County will support creation of walkable, safe and attractive neighborhoods with a mix of uses, where appropriate, throughout the Principal Growth Area in accord with Section 2: Land Use and Development Principles.

Guiding Principle 2

Berkeley County will manage development and expansion of infrastructure systems efficiently in order to effectively serve residents and employees within Berkeley County.

As growth and development pressures continue, Berkeley County must consider the cost of providing facilities and services for new developments, particularly as it relates to gaps in service provision. Inadequate public facilities, longer response times for emergency services, lack of local employment opportunities, potential impact on existing communities, and longer travel and commuting times for residents are all issues to consider when evaluating the feasibility of a new project or development.

One of the greatest concerns coming out of the visioning process for the adopted plan, and again during the five-year review workshops, was the lack of infrastructure "concurrency," meaning that the capacity and availability of roads, sewer and water lines, schools, and other public facilities should be available to keep pace with demand for services that accompany new development in order to maintain the County's quality of life.

Quality of life often requires economic prosperity; therefore, there is a need to promote economic well-being within the County and to provide diverse employment opportunities. By doing so, residents have employment options within the County rather than commuting to neighboring jurisdictions for employment purposes. This leads to decreased mobility and less traffic congestion on the roadways.

The creation of wealth is important not only for individuals and households, but also for the community as a whole, in terms of quality and range of facilities and services available, and for the maintenance of the built and natural environment.

G2.1 Berkeley County will guide population growth to areas where supporting infrastructure exists or can efficiently be expanded.

1. The County will make efficient use of existing infrastructure and public facilities in order to minimize the need for costly new/expanded facilities and services.
2. The County will plan infrastructure ahead of growth in identified growth areas, and direct intense land uses to areas where infrastructure and carrying capacity already exist.
3. The County has identified a Principal Growth Area on the Future Land Use Map where existing infrastructure exists and/or is planned and will not support the extension of infrastructure to areas that are outside of the Principal Growth Area (PGA) and areas specified for resource protection.
4. The County will establish a process to evaluate the adequacy of infrastructure and public facilities with rezoning applications within and outside of the PGA.
5. The County will evaluate the growth capacity and projected demand for developable land within the PGA every five years and amend if necessary in order to continue to focus development within areas that are served by efficient extension of existing utilities as consistent with the County's Comprehensive Plan, Water and Sewer Master Plans, and other infrastructure or capital improvements plans.

G2.2 Berkeley County will encourage the provision of infrastructure as needed to support economic and workforce development initiatives.

TRANSCRIPTION OF:

BERKELEY COUNTY GOVERNMENT PLANNING COMMISSION MEETING, FEBRUARY 28, 2017;

LAND USE AND ECONOMIC DEVELOPMENT COMMITTEE MEETING, MARCH 13, 2017;

BERKELEY COUNTY COUNCIL MEETING, MARCH 27, 2017

TRANSCRIBED BY: EVE WILBANKS, RPR, and NOTARY PUBLIC

BERKELEY COUNTY GOVERNMENT PLANNING COMMISSION MEETING, FEBRUARY 28, 2017:

CHAIRMAN: The next item, an ordinance to modify the official zoning and development standards map of Berkeley County, South Carolina, in regard to Bonnell W. Meese for 1.29 acres on a lot indicated by TMS 223-09-02-046, located on Royle Road near Farmington Road/I-26, from R-2 to R-3. This is in Council District 4.

MR. TY ADLEY: Ty Adley with the Berkeley County Planning Department. Um, as you stated, this is the Meese property with the applicant, Mr. Olds. The property is currently roughly 1.29 acres. Um, there's a couple mobile homes on the property, and the intention of this property is to be combined with an adjacent R-3 property to meet the minimum R-3 standard for acreage.

Uh, adjacent zoning and land uses to the north is the R-3 property, which is the one that's subject to combination with this lot. To the south is an R-2 lot with what appears to be a commercial business on the property, as well as a couple mobile homes.

To the east is a mobile home park with multiple mobile homes on it. And to the west there is a church and an OI district, or office institutional.

Um, you can see in the middle of the screen is a small rectangle, which is the property in the question, the R-2 lot. And just to the north of that is a lighter color, which is the R-3 designation. You can see here the entire area is designated as low-density suburban for the future land use map.

A few pictures surrounding the property. The first one on the left is looking into the property, and then the one in the lower right-hand corner is looking to the north along Royle Road.

BOARD MEMBER: Are these two pieces that -- go back to that previous picture. These two pictures, are they across the street or across the road from each other?

MR. TY ADLEY: No. The one on the top left is looking straight into the R-2 property in question looking to be rezoned. The one in the lower right-hand corner is looking down

Royle Road away from the interstate.

BOARD MEMBER: How close are these two pictures in relationship to --

MR. TY ADLEY: I would -- I did not post this sign, but I believe they turned 90 degrees and looked down the roadway and took the picture.

(Inaudible audience member.)

MR. TY ADLEY: Does that answer your question?

BOARD MEMBER: Yeah.

MR. TY ADLEY: Okay. Two additional pictures, I believe this is the driveway that enters the property, which is the one I was seeing in the previous picture. And the picture to the lower right-hand corner is looking south towards the interstate.

Um, in terms of the comprehensive plan, we believe it is in conformance with the Future Land Use in terms of low-density suburban and kind of offering a diverse amount of housing choices for the area. And then in terms of staff recommendation, we recommend approval based on the conformance with the comprehensive plan.

BOARD MEMBER: Okay. Is the applicant here?

Yeah. Please state your name and address for the record.

MR. TODD OLDS: Todd Olds, 43-(inaudible) Stoney Poynt Court in North Charleston, South Carolina. Any questions, it's basically straightforward, as Mr. Addington (sic) has presented it. It's currently a legal non-conforming use. I don't own the property. The property is under contract, contingent on the rezoning.

It is my intent to put a quality mobile home park. I hear gestures from others about mobile homes. I own three mobile home parks throughout Berkeley County and Charleston County, and I am not wanting to classify or misclassify persons, but I believe you do have class -- people that say you have a slumlord and a landlord.

I am a quality landlord. I have a park of 42 spaces on one of the worst crime-ridden areas in the City of North Charleston on Stall Road that has become the number one park on Stall Road, generating 950 to $1,000 rents.

So it's not my intent to put any trash here. I know there are numerous existing park homes around this surrounding area. My standards are much higher. All homes will have to be vinyl-sided; all homes will have to meet a certain year, uh, of the home.

The park will have security lighting, which will be installed by Berkeley Electric Co-Op, which we will pay for. So this is not looking to be a -- just throw $5,000 boxes in there and let -- I don't want to misstate it, but I call it like I see it. It's not going to be a thug park, if you will.

I've invested near a million dollars in Stall Road in North Charleston, and I have quality tenants, zero crime, zero crime. We've ridded prostitutes, we've ridded drug dealers, and we've ridded all the problems within our park that I bought with 13 homes in it with 42 vacant spaces -- 42 total spaces and had 13 occupied homes in it, and now it's filled all except three lots.

CHAIRMAN: Do we have any questions of the applicant?

MARION TURNER: I've got a question.

MR. TODD OLDS: Yes, sir.

MARION TURNER: The existing homes that was on the -- that were on the pictures that were shown by the planning person, do they meet those standards you're talking about?

MR. TODD OLDS: Mr. Turner, that's a good question. They do not. And upon our ownership, what we do with tenants that are existing, we allow them a certain period of time, of six months to a year usually, to bring their standards into conformity.

We even work with them as far as skirting due to financial hardships on people. We realize we can't just go in there, and it's not the right thing to do, to put a hardship on someone and say, You've got to put skirting and siding on within 30 days or 60 days. We give them usually a year. If they can't meet that requirement, then we usually work it out with them. We will put the siding on the home; we will skirt the home. And we will allow them to add it to their rents, to pay it back to us.

So we're not in any intent, way, shape or form looking to displace anybody. We're

just wanting to get the property to be totally conforming instead of a non- -- legal nonconforming situation. And we love tenants. We want to keep everybody we can as long as they pay their rent and conform and comply with the rules. Our motto is, you pay, you stay; if you don't comply, you go bye-bye.

MR. MARION TURNER: I've got another question. Since we're talking about the mobile homes, I'm looking at this road condition and this -- leading into this thing. Is that going to be fixed as well?

MR. TODD OLDS: Absolutely. We will -- the ingress present -- ingress/egress that's there right now, which is an easement, we will enhance that even further, probably putting pea gravel or pea 57 rock there throughout the park. Each home will have its own individual lot, as specified per the county requirements and ordinances. I believe it has to be a minimum of 4,000 square feet with the proper setbacks. We will conform to all of that.

Each property, home, will have a driveway. And, more than likely, we are going to own all the homes except what's there now.

So it's our intent to put our homes in the park and rent them and set each lot up.

BOARD MEMBER: Mr. Sineath?

MR. JAMES SINEATH: Yes. I think you've already answered one question that I was going to ask. But first, how many lots are going to be in -- when you buy this, you start operating it, it's yours, how many houses do you think will be put in there? How many houses do you have -- capable of being put in there?

MR. TODD OLDS: Presently, Mr. Sineath, there are three homes. If this becomes all one parcel, there's three homes. Based on the current ordinances and all we've looked at, we see a maximum potential of 24, but we're probably looking at around 18 to 22.

MR. JAMES SINEATH: But you would own those homes that are being put in there. You will not just rent space to somebody who wants to bring their own home in there?

MR. TODD OLDS: We don't have a park now -- the only -- all of our parks now, we own the homes, with the exception of persons that were in them when we purchased it. For

instance, if these three existing homes pay their rent -- lot rent -- I don't go in and displace them. They will have the right to stay there and pay lot rent.

MR. JAMES SINEATH: I understand.

MR. TODD OLDS: So all the additional homes, it is our intent to own, obviously, for the business model that we have. And I don't foresee that being a problem. We've put 33 homes in Stall Road in the last 22 months.

MR. JAMES SINEATH: But he asked one of the questions that I was going to ask too. In looking at this road, it looks like it's a mud trap, dirt road going down in there. Do you plan on making it a lot nicer?

MR. TODD OLDS: Absolutely, yes, sir. We don't --

MR. JAMES SINEATH: You're not going to pave it, but possibly putting rock like you were talking about?

MR. TODD OLDS: Paving and concrete we won't probably put in due to the expense and the business model. But the sufficient and more than adequate road buildup, elevation, proper drainage, pea 57, most likely would be

what it is. We don't like ROC because -- you know, pea 57 generates dust, but ROC is always something white, you know. So we prefer the pea 57. It gives it a little better drainage and look; aesthetically, we like that better.

MR. JAMES SINEATH: Are you going to have an on-site manager to -- you mentioned it, so since you brought it up, I'm going to follow through with it. You called it a "thug" park. And I guess that's from the North Charleston area. There are some bad areas back where we're looking at right now.

So you intend, if you own this property, to police it, I guess, for lack of a better word, so that there's no illegal activity going on in there; is that correct?

MR. TODD OLDS: Yes, sir. Absolutely.

MR. JAMES SINEATH: You're going to vet people when they come in, I guess?

MR. TODD OLDS: We vet them; we screen them; we have a very stringent lease policy. We just -- you know, we do not discriminate. We follow Fair Housing laws. But the point is, you have to conform to the rules or you don't stay in the park.

We have a plan already. The plan for the park name is Royle Park Estates. We own Palmetto Park Estates, Creekside Estates and Bonneau Beach Estates. Bonneau Beach Estates is one of our parks that we've had the least amount of input in so it's for sale. We've got an interest to sell; someone has an interest to purchase it.

So we're sort of looking at transitioning from that to this and being in closer proximity. As to policing, I will definitely -- I will work very diligently with the sheriff's department. We will give them total access and authority at all times to enter the premises. So we want good, quality parks, and we want to provide affordable housing.

MR. JAMES SINEATH: Thank you.

MR. TODD OLDS: Thank you.

CHAIRMAN: Is there anyone that -- do we have any more questions for the applicant?

BOARD MEMBER: No. You have some opposition.

CHAIRMAN: Wait just a minute.

Sir, state your name.

MR. WADE ARNETT: Bear with me, if you will. Wade Arnett. I live at 731 Royle Road, adjacent to this property. I am not against mobile homes. I've inspected mobile homes for -- (inaudible) -- space after I retired as coroner. I am concerned -- and I am not against mobile homes at all. I live in one next door. But pride in mobile homes means a lot. And there's a lot of mobile homes in this territory out there now -- I think there's an overabundance of them.

I don't know -- and I was trying to listen to you, and I'm sorry, I'm a little hard of hearing. How many units did you say you were going to have out there?

MR. TODD OLDS: We would have no more than 22. I think it would only allow 24.

MR. WADE ARNETT: This place is not big enough. And I think you gentlemen and ladies are going to make this decision, but this is a small area there. They're going to have to build another road I think to go into that park, unless you use the one my son-in-law uses to go to the machine shop back there.

MR. TODD OLDS: If I may, Mr. Arnett.

MR. WADE ARNETT: Sure.

MR. TODD OLDS: We're not here to do outside the scope of what is legally allowed or what the ordinance permits. If we can only get 16 and that's what it permits, that's what we're looking for. You know, I don't have a problem, and I understand and appreciate green space accessibility, ingress, egress. But apparently this property has already been approved for the R-3 status with -- and has the easement -- or the adjacent property has an R-3 status.

So with respect to Mr. Arnett, and there's no dispute of it, there are -- and I qualified that in the beginning of my conversation with you guys. There are existing parks around here. But, Mr. Arnett, I think you've known me for years from Berkeley County. I'm -- I'm not wanting to sit here and boast and I'm not looking for pats on the back, but when we do something or I do something, I do it right.

MR. WADE ARNETT: I've known you a long time.

MR. TODD OLDS: I -- it's an investment,

and it's an investment for my future and for my retirement. It's not something I'm looking at, and I don't have it on the radar in any near future plan to go in and take this property, upfit it and sell it. That's not my plan. I could have sold my park several times over that I already own, but it's not my plan. It's my source of income. I have children; I have one fixin' to go to college.

So this is all me. And to you, Mr. Sineath, I am actually the property manager. I'm a licensed real estate agent in South Carolina. I do all the property management. I do all the leases. Mobile homes do have a negative connotation or -- not -- not such a good appeal to some people. But the pride that Mr. Arnett made a comment about -- the pride is taken from me, the owner. That's why we want control. We don't want to allev- -- it's more of a problem having people renting your lot and then trying to enforce them to fix the roof, fix the window, or the blinds are dishambled (sic) in the window. You know, you've got three blinds that don't look right and three -- or is dishambled because the kids

have tore them up. We try not to have those kind of things and we try to police it.

So the best way for us to do it is to own the home.

MR. WADE ARNETT: I'd like to make another comment, if you --

MR. TODD OLDS: Sure.

MR. WADE ARNETT: And this is concern for the children out there. I was coroner of this county for 12 years, as most of you know, and I'm not just using that. I've seen children play in the road, up in Royle Road. I've gotten them out of there. But this is not a main street in there inside the mobile home park. They'd probably have to build one like that. But these children do play in that road all the time.

And what kind of pride are you going to have -- what are you going to do about the mobile homes, protecting it?

MR. TODD OLDS: As far as the safety, Mr. Wade, what we plan is to put maybe a picket fence. I can't be responsible for parental responsibility of others. That's a parental responsibility for people, if they're

letting their children play in Royle Road. But the park will be adequate enough. You've got to figure, the present ordinances allow and call for 4,000 square feet minimum for a mobile home. Well, that's a 40-by-100-feet lot.

So each person occupying a home will have that amount of space. And with their neighbor, if they're common good neighbors, they would be sharing. So if there's anybody in that road, I can't be responsible for that, like nobody else can.

MR. WADE ARNETT: (Inaudible) -- get them out.

MR. TODD OLDS: Right. But a good point. And I just -- as to the access, the size, you know, we don't like the parking to be so restricted and limited to where people are backing into one another or they're going to hit our home. So we look at standard 18-, 20-foot-wide driveways to allow two cars. We try to put a restriction on it and tell them that we don't want any more than two to three cars at the home. And if they have that, they have to pull it in -- further into the yard

and not park on the street so we will not have street obstruction.

MR. WADE ARNETT: Okay. Now -- right now there's two mobile homes on that lot. Am I correct on that?

I wish you could see this, ladies and gentlemen, this place out there. It's not a bad place, but it is not large enough for a big mobile home park. And I can tell you, as the former commissioner -- just got off of the human affairs, if people come in there with five or six children, I don't know how you're going to restrict that.

MR. TODD OLDS: I'm sorry?

MR. WADE ARNETT: How are you going to restrict how many children they have in there, playing in there? They're going to be playing out there, and they're going to be there. I just don't believe this place is adequate and suitable for more children in that road that are going to be out there.

MR. TODD OLDS: I hear him loud and clear. Again, I can't control that, and I can't get into that. That would put me in a situation of housing discrimination and things

of that nature. And I don't think the body nor myself wants to go that route.

MR. WADE ARNETT: Well, I know you can't control that unless -- I don't know how you're going to say you're going to allow three children or two children, whatever.

MR. TODD OLDS: There is a law called the Keating rule that actually allows you to -- if you have two rooms in a home, you can't have seven or eight people in the home. But you have to use reasonable judgment under Fair Housing laws as to what, you know -- if you have a family with a husband and wife and they have three children and they want to rent a two-room house, is it reasonable -- reasonableness comes into play whenever you look at your trailer, look at the size of the trailer; and if you have a 10-by-10 room, it's not reasonable to have three to four children sleeping in one room.

The Keating rule normally calls for two persons per room. So there are ways and mechanisms that we can control, and we do do it now in our other parks, because we have multiple people wanting to come in and rent

them.

MR. WADE ARNETT: I do want you to consider this: If you live in a mobile home or any unit, you're going to have one or two cars. Where are they going to park? I want you to think about that. I wish you could drive out there and look at this location. It's not bad. I live next door. We've got probably lots of acreage next door, and there's a big machine shop going in there. These big trucks are coming and going at all times. That is a private driveway.

But I wish you could see that. And this is why I'm concerned about more kids going in there. All right. If he's going to put up a big fence, how are you going to keep those kids from being in that road? As the former coroner of this county, that's what I'm concerned about. And I just do not think this place is an adequate place or otherwise to have any more mobile homes out there. And I thank you very much.

CHAIRMAN: Thank you. Thank you.

State your name and --

MR. FRANCIS O. GIBSON: My name is

Francis O. Gibson. I live at 1067 Royle Road, Ladson, South Carolina, right down the street from this property. Most of the people that know me call me Donald. I've got a letter, and the reason I write the letter is I don't want to get up here and stumble all over myself.

This is to the Berkeley County Office of the Planning and Zoning Commission from Francis O. Gibson, residence 1076 Royle Road, Ladson, South Carolina, subject rezoning request TMS No. 233-09-02- 046. And you have a copy of the letter.

You notice that since 2002 we've been coming up here, and it has all the references of the TMS's that we came up here for. The subject rezoning request is seeking to change the zoning from R-2, manufactured residential status, to R-3, mobile home park.

This type of rezoning in Council District 4 has been previously requested in the Pine Vista area. The zoning change request located on this TMS number is close and adjacent to the previous property's request presented to this Planning Commission.

The referenced TMS numbers and dates were all denied by this committee.

In the past, we have provided signed petitions by the homeowners in the Pine Vista area stating the concerns of adding any additional mobile home parks to an area that is already overly saturated with the now-many existing mobile home parks. And today a lot of the people are here representing this fact.

The area in question now has drug problems, increased traffic, too many children but no playgrounds, theft and crime increase, requiring much increase in additional fire and police department coverage, and will add to the already too many transient renters now located in our area.

A correct denial precedent was made by this Planning and Zoning Commission to not allow any additional mobile home parks for this small community in the Pine Vista area located in Ladson. All denials were issued on the above references. I respectfully ask that this rezoning request follow those already-set precedents and this request also be denied.

And, again, I thank you for your time

and opportunity at being heard, Francis Gibson.

CHAIRMAN: Thank you, sir. I'll allow one more in opposition, and then we're going to call for a motion.

MS. SUSAN YOEH: Can I please ask the gentleman a question? And I am in opposition, but I just want to ask him a question.

CHAIRMAN: Okay. You'll be the last spokesperson for the opposition.

Very good. Thank you, sir.

Thank you, ladies and gentleman.

UNKNOWN PERSON: I own property next door to it, so I want to say something.

UNKNOWN PERSON: I have property right across the street and so I'd like to say something.

CHAIRMAN: Just limit the time to one or two minutes, something like that.

MS. SUSAN YOEH: Hi, I'm Susan Yoeh. I reside at 385 Frankie Lane in Ladson on Pine Vista area. I just have a question for the gentleman. He said he also owned property off of Stall Road in North Charleston. I was wondering if he would provide us with the name

of that property on Stall Road. What was the name of the property that you said that you owned on Stall Road?

MR. TODD OLDS: Palmetto Park Estates.

MS. SUSAN YOEH: And how long have you owned that?

MR. TODD OLDS: Since September of 2014.

MS. SUSAN YOEH: Okay. So I work in North Charleston. Is the trailer park you're proposing now -- is that going to be anything near what that one is over there?

MR. TODD OLDS: Well, when you're referring to what that one is over there, what are you referring to specifically?

MS. SUSAN YOEH: Okay. Well, I heard the requirements you said you were going to have for the potential here. I know that area of Stall well. I know that particular trailer park. I have to go that way all the time. If it's going to be in comparison to that, sir --

MR. TODD OLDS: Well, I think you're making statements that may be out of character here. Because what is it you know about this park? Because you have seven parks over there.

MS. SUSAN YOEH: Appearance sake, sir.

MR. TODD OLDS: Oh, good.

MS. SUSAN YOEH: Yes, sir.

MR. TODD OLDS: Apparently we're talking two different parks. But I'm not here to debate that with them.

UNKNOWN PERSON: Yeah, we don't need to get into a debate.

MS. SUSAN YOEH: That's all I wanted to say. Thank you. I appreciate it.

CHAIRMAN: Thank you, ma'am.

And I'll allow you a minute and a half and the gentleman --

JAMES JACKSON: I'm James Jackson. I live at 769 Royle Road, right next door to the property there. I used to lease that property for 18 years to keep trailers from coming in there. My house is about 20 foot from that line of property there, and I don't want lights or trailers or anything. I've even got a swimming pool in my backyard that I don't want nobody to mess with. If kids come across the fence, they'd be in my pool, and there's a liability problem right there.

And that's why I say, I've been in that

area 50 years. If I could have kept these trailers when they first started in there, which wasn't allowed back then, there wouldn't be no more in there right now.

BOARD MEMBER: Thank you.

MR. JAMES JACKSON: Thank you.

MS. ANN JACKSON: My name is Ann Jackson. I live at 679 Royle Road. Our fence separates our yard from this trailer park. I have a picture that shows my house that is directly adjacent to this park. And we have had problems with kids coming across our fence, partying in our pontoon boat, doing whatever they want in our yard. And I do not want to see -- we have lived there for -- the two of us have lived there for 50 years. I lived there before that. I do not want to see another trailer park, and I do not want to see one right beside of me. And I would like to see it denied.

CHAIRMAN: Thank you, ma'am.

MS. ANN JACKSON: Do you want to see the pictures?

CHAIRMAN: Yeah, you can pass them -- pass them down.

Sir?

MR. RAYMOND HEADDEN: I'm Raymond Headden. I live at 760 Royle Road, Ladson. I live right across the street from where this trailer park is being talked about, and I've been living there since 1982. Could you go back to the picture prior to this one? Yeah. Okay. That's it right there. If you look on the right-hand side at the house over there, that's my house. And I've had my house appraised. And because of so many mobile home parks, if you want to call them parks, my house will not appraise for what it's really worth, and it's not going to improve my situation whatsoever.

And I am really against another mobile home park coming in there. And I have seen so many things go on with the one right next door to me, where I've had to go to many court cases for animals that were abused, animals left, um, unattended that come over to my property. There is no restriction on how well they keep these homes up.

And, you know, I hate to stereotype, but it is what it is, and we've got problems with

too many mobile home parks there now. And if you were to come into my home and sit down to watch television with the door open, which I have a full glass storm door, which we like to sit there with the door open, and you look outside, you're looking straight at a mobile home that has had a porch that is -- I don't know how the people walk up on it -- air-conditioners sitting out in the yard with a burn barrel next to it, and the grass gets cut maybe three times out of the summer.

And I just don't want to see another mobile home park coming in there. And not only that, the traffic has got to a point to where if any of you were to travel Royle Road in the middle of the day during the school time, you couldn't get through. You have to stop. The cars are parked on the side of the road.

This is going to cause more kids to come in, which is going to make that situation even worse. So I am against the mobile home park.

CHAIRMAN: Thank you, sir.

MRS. HEADDEN: Sir, I know you said -- I live in the same house right there. And I was

brought home to that.

MR. RAYMOND HEADDEN: From the hospital --

MRS. HEADDEN: From the Summerville Hospital. And we have not had anything but problems with the trailer parks that is there at Royle Road and Frankie Lane and Sally Avenue. And I really hope that you all will consider the people that has been there for so many years before these trailer parks even come. And that was the worst thing that ever happened to Pine Vista, to Royle Road now, is all of these trailer parks.

And if you all had to live beside the one that I live beside and across from the one that this gentleman is talking about, you wouldn't want to see another trailer pulled in anywhere. Because we see Berkeley County -- it's on 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.

MRS. HEADDEN: And they've actually busted some. We appreciate that.

MR. RAYMOND HEADDEN: Now, if this gentleman would like to buy my house, then I would go for it. But other than that, I'm dead against it.

MRS. HEADDEN: We're got other people around us. They don't --

BOARD MEMBER: I don't think he wants to do that. Thank you.

MR. TODD OLDS: Chairman Day, if I may

close?

CHAIRMAN: I'll give you a minute.

MR. TODD OLDS: Thank you, sir.

With all respect to the community and their concerns, you know, I feel like I'm being tainted here. I respect what they feel about mobile homes and parks. I am a person who bought one and who had revitalized it. There is such a thing as affordable housing, and we're here tonight before the body, and I think the comprehensive plan permits it. I think it's conducive. I think it's the most appropriate thing to do to bring it all into legal conformity. And I can assure this body and this body of concerned citizens here tonight that I would sit down willingly with each one of you. And your property concerns, your property values, whether you think it's a sale or not, you would respect the fact that I took the property over.

And one note to mention, I have the property under contract. A portion of it is already zoned R-3, so I can put 14 homes there per the ordinance. If we're limited to that, then that's what we'll go with. But I do

believe it's appropriate to rezone it and include all of it.

CHAIRMAN: Thank you, sir.

We have had this commission before us, as Mr. Gibson has provided a number of denials over the history of going back to 2002. Ms. Hoover and I and maybe Ms. Glaze have been around as part of that. And we have supported the community's opposition to trailer parks in that area. And as chairman, I don't have a vote, unless we tie.

Do any of you other commissioners have any comments?

BOARD MEMBER: Not -- you know, this doesn't have anything to do -- well, I guess it does have to do with what you're wanting to do tonight and what they're not wanting us to do. But I've heard a lot of talk, and this is something that comes up in a lot of political activities, that people start talking about children. They bring children in a lot of times to try to get somebody to make a decision.

And I've been sitting here the whole time listening to everybody talk. I'm a South

Carolina State constable, and I work with the sheriff's office and I'm familiar with what these folks are saying about that area. And that's the only thing I know about that area, is the bad things that I see. And I don't know how that can be controlled. I don't know that you can have any control over it. I don't know that you all can have any control over it. But if the children are creating problems or if there are problems that are created because the children are there, if the children need something, why don't you all get together as a community and try to build a playground, try to get something in that area that will keep these kids off the street, keep them out of Royle Road?

I mean, I don't know what to tell you. I don't know -- we can't do anything -- this commission can't do anything about it. But just my conscience tells me that I had to say something about that. And if that's what you all are really concerned about, then do something about it. That's what I have to say.

UNKNOWN PERSON: That's just one of the

things. It's the traffic, the drugs, and there's no place to build. Everything is built up. The trailers --

BOARD MEMBER: I understand.

UNKNOWN PERSON: Anybody can park on that road. There's a school right down the road there; they've got a playground. The kids can go down there and they can play down there.

(Inaudible conversations.)

BOARD MEMBER: Well, the only thing I heard was that kids were playing; they come into you all's yard and get into your swimming pool and all that sort of thing. So, you know, maybe there's something you can do to control that. I don't know.

(Inaudible conversation.)

BOARD MEMBER: Well, that's true. And nobody here has control over that except if you have any parents in here.

CHAIRMAN: Do I hear a motion?

LYNN HOOVER: Mr. Chairman, I move to deny.

CHAIRMAN: Do I hear a second?

BOARD MEMBER: Second --

CHAIRMAN: We've got a motion to deny. All in favor of denial?

(Answers of "aye.")

Motion is denied. Sir?

MR. TODD OLDS: So, Mr. Chairman, it's denied in spite of the ordinance calling for its appropriate zoning?

CHAIRMAN: It's denied.

MR. TODD OLDS: Thank you, sir.

CHAIRMAN: But this is only a recommendation to county council.

MR. TODD OLDS: Yes, sir. Thank you.

(End of February 27th meeting.)

LAND USE AND ECONOMIC DEVELOPMENT COMMITTEE MEETING, MARCH 13, 2017:

CHAIRMAN: Motion carries. Next is consideration prior to first reading, and an ordinance to modify the official zoning and development standards map of Berkeley County, South Carolina, in regard to Bonnel W. Meese for 1.29 acres on a lot indicated with TMS No --

UNKNOWN PERSON: Move for approval.

CHAIRMAN: -- 233-09-02-046 located on Royle Road near Farmington Road/I-26 from R-2 to R-3 district in Council District No. 4.

MR. TOMMY NEWELL: Mr. Chairman --

CHAIRMAN: Councilman Newell?

MR. TOMMY NEWELL: I think myself being the councilman for that district, I should have the right to say approval or denial.

MR. JOSH WHITLEY: Where is that in the council rules?

MR. STEVE DAVIS: It's newly adopted.

CHAIRMAN: It's kind of an understood thing.

Councilman Davis --

MR. STEVE DAVIS: I'll withdraw it.

CHAIRMAN: Thank you, sir. If I can have a motion in a second, we'll have a discussion.

BOARD MEMBER: Motion for denial.

BOARD MEMBER: Second.

CHAIRMAN: All right. We have a motion and a second.

Ms. Simmons?

MS. ALISON SIMMONS: Great. Thank you, Mr. Chairman. The applicant is requesting to rezone in order to conform and combine with an adjacent 1.2 acre R-3 Zoned parcel. Upon combination, the minimum lot size requirement for R-3 zoning would be met.

The subject property is contained in the Future Land Use Plan recommendation of low-density suburban, which seeks to include diverse housing choices and will act as a transition from the constrained growth areas to higher density residential and commercial areas based on adjacent zoning and adjacent uses zones in the comp plan recommendation, staff recommended approval. However, the Planning Commission recommended -- recommended denial in a unanimous vote.

After reviewing the requested change and hearing from many community stakeholders in opposition to the request, the Planning Commission found the request incompatible and potentially detrimental in the context of the community concern.

Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area and diminution of property values and quality of life. Also a petition from stakeholders was included in your agenda packet.

CHAIRMAN: Thank you, ma'am.

Do we have any other discussion? We have a motion for denial.

MR. JOSHUA WHITLEY: Mr. Chairman?

CHAIRMAN: Councilman Whitley.

MR. JOSHUA WHITLEY: Is the planning commission's decision articulated within the standards that would protect us from a legal standpoint?

MS. ALISON SIMMONS: I do. I think so. The reason is, is because, in my opinion, the best gauge of compatibility is public input. While the requested change is supported by the

comprehensive plan, the existing zoning is as well.

MR. JOSHUA WHITLEY: Well, part of this parcel already allows -- I guess both parcels allow mobile homes. This would only change one to be in conformance. One is currently grandfathered in; is that correct?

MS. ALISON SIMMONS: Um, the adjacent parcel is currently zoned R-3, so it supports --

MR. JOSHUA WHITLEY: Mobile homes? It supports the request?

MS. ALISON SIMMONS: Right. So the adjacent parcel supports a mobile home park.

MR. STEVE DAVIS: Maintaining mobile homes?

MS. ALISON SIMMONS: The adjacent parcel is grandfathered.

MR. JOSHUA WHITLEY: So either way the process against the mobile homes doesn't hold water because it has mobile homes and it's grandfathered in for mobile homes?

MS. ALISON SIMMONS: Right. There's currently only two mobile homes on the subject parcel.

MR. JOSHUA WHITLEY: So what would be the impact if this was resumed?

MS. ALISON SIMMONS: Um, then they would be able to provide additional homes in accordance with the requirements of R-3 zoning.

MR. JOSHUA WHITLEY: So you're talking about five, six --

MS. ALISON SIMMONS: Up to 27.

MR. JOSHUA WHITLEY: On that one piece?

MS. ALISON SIMMONS: On both parcels, upon combination.

MR. JOSHUA WHITLEY: I get you. But on the one piece it's already allowed, that's certainly a part of the 27.

MS. ALISON SIMMONS: Right. Thirteen mobile homes are allowed on that lot. If the parcel is rezoned, 14 would be allowed on the subject parcel.

MR. JOSHUA WHITLEY: So it could be -- the change would be from two to 14?

MS. ALISON SIMMONS: Right.

MR. KEVIN COX: Mr. Chairman?

CHAIRMAN: Councilman Cox?

MR. KEVIN COX: The grandfathered in

part, the reason for that is county council has decided that it's not the appropriate zonings for that area. So as mobile homes are pulled out, they are no longer allowed to bring additional mobile homes in, correct?

MS. ALISON SIMMONS: If a mobile home is removed from the subject parcel for a period longer than six months, it can't be brought back.

MR. KEVIN COX: The same mobile home or any mobile home?

MS. ALISON SIMMONS: Any mobile home.

MR. STEVE DAVIS: But can there be an increase from two to more mobile homes under the grandfather clause provision?

MS. ALISON SIMMONS: For the subject parcel? No, sir.

MR. STEVE DAVIS: So it's always limited to two or extension, complete removal?

MS. ALISON SIMMONS: That's correct.

MR. JOSHUA WHITLEY: But the difference at the end of the day, approval you get 27 mobile homes; denied, you get 15?

MS. ALISON SIMMONS: Yes, that is correct.

CHAIRMAN: Any other discussion?

Hearing -- do I have a motion and a second to deny this request? All in favor of the denial?

(Answers of "aye.")

CHAIRMAN: Opposed?

(Answers of "nay.")

CHAIRMAN: I have one nay?

UNKNOWN PERSON: No. Two nays.

CHAIRMAN: Two nays. Excuse me. The motion carries for denial.

(End of March 13, 2017, transcription.)

BERKELEY COUNTY COUNCIL MEETING, MARCH 27, 2017:

CHAIRMAN: Speak into the microphone. There is a time limit of four minutes.

MR. JOSHUA WHITLEY: Do you want me to time that?

CHAIRMAN: Yeah, you can do that. First on the agenda is Mr. Todd Olds.

MR. TODD OLDS: Thank you, ladies and gentlemen. My name is Todd Olds, 4381 Stoney Poynt Court in North Charleston, South Carolina.

Ladies and gentlemen, I come before you tonight as a request to rezone a property at Royle Road, which you've already had before you on your agenda. There are some compelling facts and substantial issues that I wish to present to you tonight, and I will be talking as I hand up these documents to preserve my time.

Thank you.

What you will have before you is some signatures of residents who actually live on the property and support the rezoning, in addition to some photos of the aerial of Royle

Road. Some compelling facts I wish to present to you tonight: One is, if you base your decision tonight on the majority of the people who are opposed to this, I'll probably go home a loser.

If you base it on the facts of the law, the area, its character and what is in the vicinity of Royle Road, then I should walk out with approval.

Let me present to you the compelling facts. One and most importantly, I think, is the planning director of this county has made the recommendation for approval. Two is that the South Carolina -- or the Berkeley County Land Use Plan and Comprehensive Plan totally supports this requested rezoning.

This rezoning request is harmonious in its entirety. The entire road -- Royle Road, out of 66 parcels -- what you see before you on the GIS map that I've pulled, out of 66 parcels that abut Royle Road, 42 of them have a mobile home or either multiple mobile homes.

The property that I'm asking to be rezoned presently has two mobile homes. The adjacent property that I have beside it has

approval already for a total of 13 mobiles homes.

The actual residents, as I've said, support it. The request that I'm asking for it to be approved does not negate in any way or create a negative character to the district, to the community or to the existing development of this area.

You will hear consistently tonight about drugs, about people in the street, about traffic. My friends, that's subjective and arbitrary. There is nothing factual that can be presented to you to show or demonstrate that any property values have been decreased based on mobile homes. This is a mobile home area; it's a mobile home community. It's an affordable living area. We're only asking for a rezoning based on those facts and based on the facts of what your own website says in bold print, that the future Land Use and Comprehensive Plan is a, quote, strong -- your website says "strong" guide for decisionmaking rezoning requests.

Therefore, we're asking that you do this based on the law, the comp plan, your planning

director's recommendation, not on anyone's subjective reasons, not being substantial, not being factual and not being supported.

The residents who are in opposition to this, their opposition is somewhat like wanting to cast disparate and discriminate treatment to others, against mobile home people. Let me tell you, we all know, drugs occur in single-family homes, they occur in single-family residences. Traffic is in there, meth labs are in there. You cannot and should not base your decision based on what you will hear from the public outcry tonight.

I respectfully ask you, uphold the law, uphold the comp plan, and uphold your planning director's rezoning recommendation.

Lastly, planning commissions do not always get it right. They solely base their decision on subjective arbitrary reasoning. Thank you for your time. I appreciate your support.

BOARD MEMBER: Mr. Raymond Headden?

MR. RAYMOND HEADDEN: Good evening. My name is Raymond Headden. I live at 760 Royle Road, Ladson, 29456. I'm standing opposed to

the property TMS 233-09-02-046 being changed from the present zone status of R-2 to R-3 because I noticed that he said -- Mr. Olds said that he had an aerial view. Well, I've got several ground level views I would like to pass out.

In a couple of those you will see that it is high traffic on this road at certain times of the day. I also have additional pictures and videos, but I think that this will suffice.

There are 13 trailer parks presently on Royle Road that I personally counted from I-26 overpass northeast to Highway 17-A. There are trailer parks on Royle Road southwest of I-26 overpass; then Frankie Lane, which is the very next road behind Royle Road, which I haven't even got to that yet to find out how many trailer parks that they have in there.

And, yes, all of this is within walking distance. So it affects everyone that we're talking about here. There have been 11 applications denied since as far back as April of 2002, yet here we have another of the same type application trying to be passed.

After completing a short time survey, there has been a count of approximately 13 trailer parks along with parcels consisting of two to four trailers parked on them. A total count was done showing an amount of approximately 316 trailers off of Royle Road from 17-A to Highway 78.

The next thing that I'm concerned about is where I live, which is directly in front of this property that he's talking about. And, yes, I can say that I have put my house up for sale twice and was told by the real estate agent that because of the trailers next door and around in my area, that the value of my real estate, I could not get what it would really be worth because it's depreciated.

And crime in the area -- well, you better believe I'm going to talk about the crime in the area. And I'm sure that all of you council members are aware of the crime issue. And sometimes there is -- I have awakened early in the morning and I have had suspicious people sitting in my driveway. I've witnessed a large amount of consistent -- or constant traffic coming and going, which is

a common red flag to predict high drug trafficking. Sometimes there are cars, vans, trucks and mopeds that frequent the same trailers as many as 10 to 12 times within an approximate three-hour period, unusual strange vehicles up and down the driveways and dirt roads as -- in search for a specific trailer.

The next thing on the agenda was regulations. What regulations? The appearance of the homes are falling apart, skirting missing, pieces or all of it; old vehicles left parked in the yards without license plates on them. Everything just left out in the open for all to see, no privacy fencing requirements.

Most of all is the safety factor. This is a two-lane road only from start to finish, which means all traffic has no alternate means of travel. I have witnessed, just within the last year, a boy from one of the trailers on the same tract of land that is in question --

CHAIRMAN: Mr. Headden, if you have -- your four minutes are expired. Please wrap it up. Okay?

MR. RAYMOND HEADDEN: And he was hit.

Well, to make a long story short, I'm a certified National Fire Academy Instructor. I'm certified to teach an EVDT. There's a two and a half mile stretch from 17-A to 78. It takes approximately 20 to 22 minutes to travel both ways or one way in heavy traffic time. And being that I have taught and am certified to teach emergency vehicle driver training, I'm a retired captain of over 38 years in the fire department.

We are posed with a major problem with the safety factor, these emergency vehicles going to and from. One person being trapped in a fire, losing one minute of time could cost him his life. And I appreciate council taking this into consideration. Could I possibly ask for those that are opposed to it to stand just briefly?

CHAIRMAN: Please, if you would, stand.

MR. RAYMOND HEADDEN: Thank you.

BOARD MEMBER: Mr. Chairman, if you don't mind -- Mr. Hailey (sic) -- I have a couple of questions for you, if you don't mind.

MR. RAYMOND HEADDEN: Yes, sir.

BOARD MEMBER: How long have you been living in this area here?

MR. RAYMOND HEADDEN: I've been living -- I got married in '72. I lived there for about four years. I moved into Summerville for three years and moved back. I've been there absolutely since 1982 until the present time.

BOARD MEMBER: This group has been there a good long time and seen a lot of changes in that area. The next question is, my concern is about traffic --

MR. RAYMOND HEADDEN: Yes, sir.

BOARD MEMBER: -- safety and children. And are there a lot of young kids in that area out there also?

MR. RAYMOND HEADDEN: Yes, sir.

BOARD MEMBER: So that's a big concern right there.

MR. RAYMOND HEADDEN: What I was speaking of, on the same tract of land that we're talking about tonight --

BOARD MEMBER: Correct.

MR. RAYMOND HEADDEN: -- one of the kids that was a resident from that particular place

was hit by a vehicle. I was outside the day that it happened. And he was hit by a mirror. I've had people go -- run into my yard and tear up my azalea bushes and stuff, a two-lane highway. And we've got traffic that -- from the four-way stop to my house is probably 800 yards roughly, and it backs up every day. And I've got a video standing on my front porch where they're stopped in the road waiting to get through.

BOARD MEMBER: Correct. Yes, sir. Thank you.

MR. RAYMOND HEADDEN: We just have a major problem. Thank you.

BOARD MEMBER: Thank you.

CHAIRMAN: Thank you, sir. James Jackson?

BOARD MEMBER: Good to see you, James.

MR. JAMES JACKSON: Yeah, good evening -- (inaudible).

Good evening, Council. I just want to present -- my names is James E. Jackson. I live at 769 Royle Road. I'm adjacent to the property that's been in question here. I've been there for 51 years. I even leased that

property one time from the gentleman that owned it for 18 years to keep from trailers coming in there. That property around there -- as a gentleman come into some money and bought a lot of land around there and started all these trailer parks, if there's something we could have done back 55 or 45 years ago, we could have done it then. But there was no planning commissions or anything.

The people wanted to do what they wanted to. Most of these parcels of land on this road are around 3 acres in size. And we bought these properties out there 50 years ago that we wanted the country style living. But the community around there in the southern part of Berkeley County has grown tremendously.

The Summerville area right there where we live and everything is going wild. Subdivisions down the road there from us is going -- they've still got more houses to put in down there. That's why I say the traffic and everything around there, around Sangaree school, you can't get by there in the afternoons or in the mornings for people

dropping or picking up kids there. They even park in the highway. You've got to sit there and wait for them to get through before you can get through that section down around the school. So you all need to come around there in the afternoons and see what kind of traffic we've got on that road. And I thank you for this.

CHAIRMAN: Thank you.

Ms. Francis Gibson -- Mr. Francis Gibson. Okay. Thank you.

MR. FRANCIS GIBSON: Thank you. My name is Francis Gibson. I live at 1067 Royle Road, Ladson, South Carolina. What our representatives failed to mention a while ago, we have nine pages of people that have signed petitions against this trailer park. You know, I've been coming up here since 2002. I've been living there since 1978. I have seen that area turn from acreage to trailers. We don't need any more trailers. You know, all this traffic and, you know, the children problems, I've been coming up here -- I've got all the TMS's listed. I gave them to my councilman. He's got them, and they've got

the dates listed. They started in 2002 when I started coming up here. And all I did every time was just listed another TMS. And every time we've come up here it's been unanimous to the planning board to turn this down.

And basically, the precedent has been set all those times. And, you know, there's one common thing that I can tell you guys about. Every person that comes up here that wants to put trailers in our area, they don't live there. They live in North Charleston or West of the Ashley or somewhere. You know, they don't live up there where we live, where we have to put up with the trailers and the people.

So I just want you guys to keep in mind that -- about them coming ever since 2002, and there's 12 TMS's that you guys have shot down about trailers, that we don't need any more in the Pine Vista area. Thank you, sir.

CHAIRMAN: Thank you.

BOARD MEMBER: Thank you.

CHAIRMAN: Auvo Kemppinen.

(The following is deleted from transcription due to agreement of counsel.)

BOARD MEMBER: Yes, Mr. Chairman, the committee on Land Use Development and Economic Development met on March the 13th, 2017, and earlier this evening, on recommendation of the committee, I move to deny an ordinance to modify the Official Zoning and Development Standards Map of Berkeley County, South Carolina, in regard to Bonnell W. Meese for 1.29 acres on a lot indicated with TMS No. 233-09-02-046, located on Royle Road near Farmington Road/I-26; from R-2, manufactured residential district to R-3, mobile home district, in County Council District 4.

CHAIRMAN: I have a motion to deny. Is there any discussion?

MR. STEVE DAVIS: Yeah, Mr. Chairman.

CHAIRMAN: Mr. Davis?

MR. STEVE DAVIS: Yes. I -- this is the one -- (inaudible), right?

CHAIRMAN: That's correct.

MR. STEVE DAVIS: I just want these fine citizens to know that I hear you. Um, some 35 years ago my wife and I, we moved back home and thank God for a mobile home. We bought a mobile home out of Columbia, and we had

someone move it to our community. And, um, we were in a different socioeconomic level at that time. And thanks be to God that we were able to live in a mobile home at that time.

And, um, I know some fine and decent folks -- and every one of you all here appear to be fine and decent folks.

(Inaudible comment from audience.)

MR. STEVE DAVIS: Yeah, yeah. And I just want you to know that eventually change is going to come, I want you to know. I -- I'm always leery of when the Planning Commission makes a decision and when staff makes a decision. And -- and I've always been guided by those principles, to be honest with you.

Sir, if you've been coming here from 2002, then you've heard the spiel over and over since 2002. Because, um, there's no question that it fits within our Comprehensive Zoning Plan that we passed. Um, unfortunately, you fine citizens find yourselves trapped in the dilemmas of it.

I try to be an individual that keeps my word. You know, I told Mr. Olds that I would

support it because it fits the overall Comprehensive Zoning Plan, and I just wanted you all folks to understand that I've consistently followed this pattern. Changes are hard stuff. It's difficult. And you all don't deserve all the things happening out there. But at the same time, the Comprehensive Zoning Plan was put in place for a specific reason. And maybe that's the lawyer part that comes in, the part that people don't like about lawyers.

But for me, this afternoon, I cannot in good conscience vote to defeat. But I'm just one individual.

MR. JACK H. SCHURLKNIGHT: Mr. Chairman?

CHAIRMAN: Yes, sir, Mr. Schurlknight.

MR. JACK H. SCHURLKNIGHT: Yes, sir. I have a lot of concerns about the effects that it's going to have on the individuals that live on Royle Road. You know, you've been there a long time; you've seen a lot. And I'm hearing that -- you know, you all have hosted a lot of development on that road. And it comes to a tipping point to where, you know, you've got a carrying capacity on the road.

You've got to look at the safety.

And that's the direction that I'm coming from totally. I understand that the Planning Commission denied, the staff recommended, but I think -- excuse me -- council has some leeway in some of this stuff, and I'd like to look at it on a case-by-case basis, as long as we're legal with that and we have that legal aid with it.

And I'll ask the attorney -- I don't know if you've had a chance to look at this situation or not, but if you could address the legality of it and if council is within its legal rights.

BERKELEY COUNTY ATTORNEY: Yeah, yeah. I've done -- performed some research on the topic, and I believe that council is justified in a vote in either direction.

MR. JACK H. SCHURLKNIGHT: Good. Thank you, sir. Um, 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.

And, again, I think you all have suffered enough when it comes to development and with you all's -- infringing on you all's quality of life. And it just concerns me, because when the dust has settled, you all are going to be there. You know, the developer is gone. You all will be there, and that causes me great concern.

So as chairman of the land use committee, I still totally agree with council on our original recommendation of denial. Thank you.

CHAIRMAN: I would like to add that, you know, I don't hear anybody saying mobile homes are a bad thing, because, you know, you live there. Okay? However, I do hear your concerns about traffic and safety of the residents and children and -- you know -- and, you know, obviously with overcrowding comes other issues that require the intervention by the police officers that sit back here, not saying anything bad about anybody. But that's

what I've heard tonight. So with that I have a --

MR. JOSHUA WHITLEY: Mr. Chairman, may I?

CHAIRMAN: Yes, sir, Mr. Whitley.

MR. JOSHUA WHITLEY: I was, I think, in the minority voting for approval at first reading, and I would send it at least to second or third reading, not committing to voting for the eventual rezoning. My -- I actually think, you know, I'm hesitant ever to vote for rezoning for a mobile home park unless it fits the character of the area. My understanding of this rezoning is it would actually change very little, maybe seven to ten overall units.

So I'm going to vote consistent with how I voted in committee, and I would send it to second reading.

CHAIRMAN: All righty. We have a motion. There has been discussion. All in favor of the motion to deny say aye.

(Answers for "aye.")

CHAIRMAN: Those opposed?

(Answers for "nay.")

CHAIRMAN: Let the record reflect that Mr. Whitley and Mr. Davis both voted in the negative, and I don't think anyone else did. All right.

BOARD MEMBER: Thank you.

CHAIRMAN: Thank you.

(End of recording.)

C E R T I F I C A T E

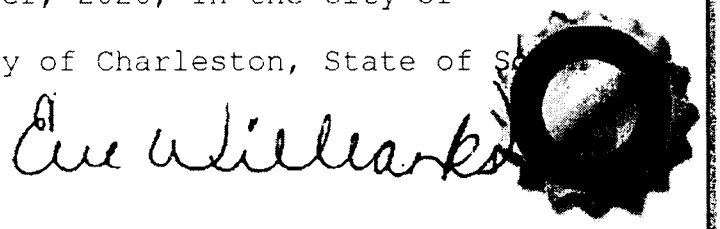
STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did stenographically transcribe the foregoing transcript; and that the transcript is a true record of the statements given by the parties to the best of my ability.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 3rd day of November, 2020, in the City of Charleston, County of Charleston, State of South Carolina.



Eve Wilbanks,
Registered Professional Reporter
and Notary Public

My commission expires:
November 18, 2024

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF BERKELEY
TODD OLDS,
Plaintiff,
vs. CASE NO. 2017-CP-08-1088
BERKELEY COUNTY AND BERKELEY PLANNING COMMISSION,
Defendants.

HEARING
BEFORE DAWES COOKES

DATE: December 10, 2019

TIME: 10:06 a.m.

LOCATION: Law Offices of
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street
Suite 200
Charleston, South Carolina

REPORTED BY: Braedon S. Thisse, Court Reporter

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ALSO PRESENT:

Todd Olds - Plaintiff
LeaAnn Adkins - Paralegal for Tommy Goldstein

(INDEX AT REAR OF TRANSCRIPT)

MR. COOKE: All right. So this is case -- County of Berkeley case number 2017-CP-08-1088. Todd Olds, Plaintiff, vs. Berkeley County and Berkeley County Planning Commission. I'm going to ask everyone -- go around the room and have everybody introduce themselves. Tommy, you're the Plaintiff so I'll let you start.

MR. GOLDSTEIN: Okay. Tommy Goldstein. I'm representing the Plaintiff -- appellant.

MS. ADKINS: LeaAnn Adkins. Paralegal working with Tommy Goldstein.

MR. GOLDSTEIN: To you.

MR. OLDS: Todd Olds, Plaintiff.

MR. WEST: I'm John West. I'm representing the defendants -- respondents.

MR. WILLIAMS: John Williams. Representing defendants -- respondents.

MR. COOKE:: I'm Dawes Cookes, C-O-O-K-E-S [sic.] You got my card there. And am I special circuit judge in this?

MR. GOLDSTEIN: Correct.

MR. COOKE:: Okay. So it's not an arbitration, it's a --

MR. GOLDSTEIN: You're a circuit judge.

MR. COOKE:: Okay. And who appointed me?

MR. WEST: Well, it was -- Circuit Court appointed you. They thought you had a consent order naming you as the special referee and you're appointed --

MR. COOKE:: Okay.

MR. WEST: -- special referee to enter a final judgment.

MR. COOKE:: Right. So just a couple of housekeeping things. Both sides have filed briefs. I've got a petitioner's brief, I've got a respondent's brief, I've got a petitioner's reply brief, and I've got supplemental briefs from both of you addressing the question that I asked. Which is whether the -- the comprehensive plan has force of law, and we'll talk about that as we go.

And you've been discussing the exhibits and my understanding is that you'll come up with an agreed set of exhibits and you'll -- you'll have a copy made for each of us including myself and --

MR. GOLDSTEIN: That's correct -- from the appellant.

MR. COOKE:: And there's a -- there's a --

MR. GOLDSTEIN: Yes.

MR. COOKE:: -- and one of the exhibits is a DVD which I already have a copy of. So there's no need to give me another one, unless you feel compelled to do that. Let me just make sure this -- yes, looks like it.

MR. WEST: And just for the record, Judge, the DVD had been certified by the clerk of the Berkeley County Counsel to be verbatim of excerpts from the video -- videos of the three relevant meetings. One being the planning commission, which was the first meeting; the second meeting of the Berkeley County Land Use Committee; and then the third meeting being that of the county counsel. And that's what that DVD consists of and nothing else.

MR. COOKE:: Okay. Good. All right. Well, out of respect for everyone's time and Tommy's voice, I will invite you to not feel compelled to read everything that's in your briefs, but I understand that you are each going to make a brief argument or at least a summary, or anything that you feel was not adequately covered in the briefs, feel free to bring that up. So, Tommy...

MR. GOLDSTEIN: I only need just a few

minutes. Thank you, your Honor. With regard to the DVDs let me -- you might find this helpful, that the testimony in the DVDs is summarized in the minutes prepared by Berkeley County. So while I think both sides are hopeful that you will view the DVDs, the salient testimony is already transcribed in an abbreviated form in the minutes. So you might find that to be a timesaver --

MR. COOKE:: Okay.

MR. GOLDSTEIN: -- when you evaluate the evidence. This matter -- first of all, thank you for agreeing to serve and we, you know -- I think it's a compliment to you that working together collaboratively we chose you, so we both --

MR. COOKE:: We'll see if you still agree by the time I'm done.

MR. GOLDSTEIN: No, we'll agree no matter what the outcome is. But very briefly, this case turns 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 forth 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.

One, it's consistent with the comprehensive plan which was a -- years of taking undertaking involving both 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 in the future land use map 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.

Now, Mr. Olds here is a very smart entrepreneur and he reviewed the future land use map and he detected an opportunity. So he decided to purchase the property, or at least take an option on it to purchase the property subject to it being rezoned. So when he made his application for rezoning, he knew that his application was consistent with the comprehensive plan. And of course, in evaluating his application the planning staff recommended -- and these are in the exhibits and they're in our briefs -- recommended approval of his request for the reasons that they identified, which are consistent with the comprehensive plan. That this -- this area's highly developed. It's on a major artery. It feeds -- Royal Road, feeds 78 and 26. I mean it's just -- there's nothing rural about the area anymore. It's changed. So Mr. Olds saw an opportunity.

Now, the staff also, in their staff summary -- they identified something else that's very, very important. Which is that the surrounding areas, even though they're zoned R-2, are all being used as mobile home parks as legal nonconforming uses. So Mr. Olds's proposed use was nothing more than to

use the property consistently with all of Royal Road. And ironically the neighbors who showed up in protest, that was one of the grounds of their objection -- is that there are to many mobile home parks on Royal Road.

Well, they don't realize that that statement benefits Mr. Olds, not them, because the use of the property is consistent with how the property is being used; not only brings it in conformity with the recommendations of the future land use map, but also solves critical affordable housing needs, and is consistent with how surrounding properties -- and his properties -- are bordered with a church on one side and mobile home parks on the other side. So there's nothing suburban or rural about the property, but when you hear -- when you view the videotapes or even just review the comments of the complaining neighbors, the complaining neighbors all identified subjective canards.

People in mobile homes are not worthy. They're second-class citizens. They -- they didn't come out and say that. They talked in code. And whenever you're discriminating against people you always talk in code. You don't come out and say people in mobile homes are crap. You know, you

always say, well, they don't look after their children, they don't put up skirting, they sell drugs.

One guy testified, well, you know, I saw a car go up and down the road looking for a particular trailer. Well, I mean, it's just ludicrous.

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 difference 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 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; it's in our brief -- that's a quote straight out of Austin vs. Taramouth --

MS. ADKINS: Board of Zoning Appeals.

MR. GOLDSTEIN: -- Board of Zoning Appeals.

So that's the entire case. You know, it's been well briefed. It's been well briefed by the respondents who have ably represented the local

government. But what we're asking you to do is to balance the deliberative legislative analysis that went into the adoption of the comprehensive plan and the future land use map and the recommendations of the planning staff versus the canards advocated by the neighbors. Which -- which relayed on that is the quintessential -- the quintessential arbitrary and capricious actions. An action is arbitrary and capricious when it's not based on reason or on identifiable, logical analysis.

And there's three cases directly -- there's actually more, I just hitched my wagon to three. Bouie vs. City of Columbia, Helicopter vs. Land, and Bear Enterprises vs. County North Augusta. Because those cases were exactly like this case. And there's others as well, but I just picked those three where -- and no disrespect to the citizens of Berkeley County, but when the mob shows up and when they advocate, you know -- and this mob sensibility has gotten much worse with social media. People really get stirred up on social media and they come there and they say these horrible things that once you shine a light on them are really scrupulous and not supported by reason or logic. That cannot outweigh the studied legislative decision of the

Berkeley County government in adopting the comprehensive plan.

So, you know, Mr. Olds owns the two lots that are side-by-side. The lot that's the subject of this is at R-2.

MR. COOKE:: Right.

MR. GOLDSTEIN: The one next door is zoned R-3. So his application wants to make them consistent because it's a common ownership.

MR. COOKE:: Right.

MR. GOLDSTEIN: Which would only allow ten additional homes. Which is not going to have a significant impact on Royal Road.

MR. OLDS: 12.

MR. GOLDSTEIN: 12. Sorry. 12. Yes.

MR. COOKE:: So -- and I think the idea was that once it's combined it would be more than two acres, which allows for that density.

MR. GOLDSTEIN: That's right. And then finally -- and this will be my last comment. The enabling act -- this is a quote. Do you remember Dana Sinkler's case? Do you remember that case?

MR. COOKE:: Which one was it?

MR. GOLDSTEIN: Sinkler vs. Charleston County. That --

MR. COOKE:: Yes.

MR. GOLDSTEIN: -- that Chief Justice Toal wrote the opinion and sort of made all the land use lawyers sit up and take notice. But a quote from that case -- it's in our brief, but it bears repeating. The enabling act, that's the Comprehensive Enabling Act, permits the governing body of a county, which in this case is Berkeley County, to adopt zoning ordinances to help implement a comprehensive plan.

So his application would implement the comprehensive plan. And the only reason it was turned down was because of the complaints. Subjective on -- on -- without any evidence. Subjective, unverifiable complaints of we don't want those kind of people in our neighborhood.

MR. COOKE:: Right. So sounds like you're not -- you're not taking the position that the comprehensive plan by itself requires it to be rezoned. And if they had shown up with traffic studies and, you know, good solid reasons, it wouldn't -- you -- you're agreeing that the county would still have the discretion to not rezone this property.

MR. GOLDSTEIN: I'm prepared to go 90

percent of the way with you, but not 100. I think your point is well taken, but if the neighbors would have shown up with evidentiary-based complaints; i.e. traffic study or police calls or something verifiable and objective, then I think that gives the county something to hang a hat on.

The reason why I say I'm not willing to go 100 percent of the way there with you is because they took all that into account when they passed their ordinance adopting the comprehensive plan, which has in it a future land use map, which identifies this property as being appropriately rezoned, R-3.

And so I'll answer your question -- one more sentence. For example, if the planning staff had -- had initiated this zoning change, I think the outcome would be different. The only reason the outcome was not different -- and when you see the video you can hear and see it -- the chairman -- Chairman Schurlknight says, well -- he says, well, I'm concerned about all this stuff going on out there. Well, stuff isn't a evidentiary-based rational to deny an otherwise valid application. And so yes, I agree with you.

MR. COOKE:: And somebody testified

that they encountered 313 --

MR. GOLDSTEIN: Right.

MR. COOKE:: -- units. And so this would have been 12 more.

MR. GOLDSTEIN: Yes, that's right.

MR. COOKE:: A 3 percent increase or something like that.

MR. GOLDSTEIN: Right.

MR. COOKE:: Yes.

MR. GOLDSTEIN: It's nonmaterial.

MR. COOKE:: Yes.

MR. GOLDSTEIN: Immaterial.

MR. COOKE:: All right. I got it. John.

MR. WEST: May it please the Court.

MR. COOKE:: Yes, it does.

MR. WEST: For the purpose of the record, John West for Berkeley County and Berkeley County Planning Comission.

I do think, Judge, that your review of the video is not only going to be helpful, I would suggest to you that it would be essential because the minutes -- the summary minutes, while they do generally capture the tone and the words that were spoken at the three meetings, there's just no

substitute for hearing what people say, both the members of the public, as well as the members of the planning commission, initially the land use committee, which is compromised entirely of members of county counsel. And then ultimately in the final meeting of the members of the county counsel hearing the actual realtime words, I think gives a significant perspective that the written word in the summary of the -- of the proceedings could not completely give. So I would encourage you strongly to look at the video. It's -- it's 30 minutes, but -- give or take. And it will be valid -- very, very instructive of the actual events as opposed to the events that are described by my dear friend, Tommy. Who -- who being a good advocate that he is, doesn't quite capture it in the same way as the actual proceedings do. So number one, I would encourage you to do that. It would be time well spent if you would.

Just a couple of random points, not in any particular order. And I do want to address the issue of the comp plan and the mandate. I'm not so sure that I see the distinction between your original question of the force of law and the mandate. That might be parsing it a little bit,

but I will address that in just a minute.

But, Judge, I think it's very important to make a fundamental distinction here that somehow on the other end of briefing, which I agree has been through and ample, and I commend Council for the excellent job that has been done in representing his client in the briefs and in his argument today, but there is a blurred line here in the -- in the appellant's story that I think needs to be clarified, and that is that all zoning matters are not the same.

And what we've got here very importantly, and I think it is the foundation of all analysis, is that we have a zoning change request opposed to a variance request.

And those -- those two paths forward were both available to Mr. Olds, he could have, but he opted not to -- he could have pursued a variance from the county. And in a variance you are not asking for the zoning to be changed. By definition you're asking for the use to be permitted; the use that he is pursuing which is to make a commercial use of this particular parcel for a mobile home park. He could have, but he opted not to seek a variance.

And had he sought a variance, Judge, the venue and the forum that that matter would have been considered -- would have been before the Board of Zoning Appeals and you'll see references in my brief to the BZA.

Of course, in the BZA we're referring to the Board of Zoning Appeals. And the significance of that is that the Board of Zoning Appeals, which is a quasi-judicial body of appointed -- not elected, but appointed members. Mr. Olds could have, but he again opted not to present his case to the Board of Zoning Appeals.

The Board of Zoning Appeals would then have had the opportunity to make findings of fact and conclusions of law, which is required by county ordinance and state law to do. There has to be a record, there has to be a basis, there has to be developed in a -- in an order of the Board of Zoning Appeals.

In the same way that we all know as lawyers that if we are going to have an order from any court that will be defensible and will withstand appellant scrutiny, you have to have findings of fact and conclusions of law -- that's elementary. We all know that.

Those of us that have had orders overturned in the past -- and I have -- have found that the development of the findings of fact and conclusions of law is the basis for having stainable order. And had Mr. Olds pursued a variance, he would have had that outcome.

And significantly, Judge, that the appeal of that order with findings of fact and conclusions of law would then be to the circuit court. And there would not be any other political -- quote quote political process that would intervene between the time of his application for a variance and the ruling or order of the BZA and the ultimate consideration on appeal, if necessary. There would be no political involvement of the members of county counsel.

I say that to simply just oppose that that path that was not chosen against the path that was chosen.

MR. COOKE:: What would be the standard of review in circuit court? In that order?

MR. WEST: In that order.

MR. COOKE:: Yes.

MR. WEST: Any evidence.

MR. COOKE:: Okay.

MR. WEST: That is my understanding.

MR. COOKE:: How is that different from arbitrary and capricious?

MR. WEST: Well, I'm not sure that there is a difference, Judge.

MR. COOKE:: Okay.

MR. WEST: In some of the cases that we cite in our brief, on the constitution elements of the claims by the appellant, there are cases in South Carolina that talk about any evidence -- any evidence then --

MR. COOKE:: So your main point is that it just -- it would have been a different venue, different process.

MR. WEST: A different venue and, this is where I was heading to that -- in addition to just putting some context around it -- is all of the cases cited by the appellant are BZA cases. There's no rezoning cases in his -- in his primary brief that are zoning change request cases.

And that's important because I think what we've got is we've got a lot of discussion about arbitrary and capricious and the failures on the part of counsel. Which are directed to orders of the BZA, which fail to have adequate findings of

fact and conclusions of law, which are not involved in this appeal. That's the point.

MR. COOKE:: But both -- I think both sides talk about the Bear Enterprises case. That's a zoning change case.

MR. WEST: It is, but that's the case I cite.

MR. COOKE:: Yes.

MR. WEST: And I cite that in reference to a point that I'm going to make in just a little bit. But I do think it's important and may be important only in my mind, but I make a point that we could have seen an outcome that was in fact based on findings of facts and conclusions of law if the appellant had pursued a variance.

Now, in the zoning request application, there is no law in South Carolina that addresses the issue of the requirements of a legislative body as it relates to its conclusions and decision-making. And that's an important -- I'm jumping off point to where I want to go with the series of cases that I have cited in our brief that goes to this question of the presumption of validity of the decisions of county counsel.

Bear in mind there's no requirement, and you

will not see it or hear it in the video because it does not exist. It is not there. We'll concede it's not there in terms of finding of fact and conclusions of law in a county counsel. And there is no law anywhere that says that there must be. A legislative function is a different function entirely than the quasi-judicial function. And that's why I started off with framing the discussion in those terms.

Think about it, Judge, in terms of the real world; the normal course of events. And by the way just as a parenthetical here, when you -- when you listen and view this video, you're going to see every other meeting of a public body that's ever been held anywhere. It's just the nature of the -- of the public process. I've had the great privilege over the last almost 40 years of representing public bodies. It's the same meeting over and over again. People come, they're worked up, they're exercised, they have a high-button issue. It's important to them. Most of the time, it is the not-in-my-backyard crowd that shows up to these meetings and I, you know, I've been through hundreds of them. I don't even know how many of these not-in-my-backyard meetings I've been to.

They all are the same. You've got people that come in -- they're all worked up, they say things and, you know, sometimes they are outrageous. Sometimes they are not politically correct. Sometimes they are offensive, but that's the public exercising under our system of government the right to be heard. And we wouldn't want it any other way, would we? We wouldn't want a system that discouraged people from coming and speaking their mind even if it's outrageous. But that does not -- that does not impute in any way to the decision makers -- the mere fact that somebody comes in here and says something that is off the wall. The -- I mean -- I don't want to get off on too much history. I've had people that had to be escorted out of the room because they got that outrageous, okay? It just happens. But it doesn't equal arbitrary and capricious unless, and this is the big unless here; I would concede the point that arbitrary and capricious can happen, but it's only when the legislative members of the governing body, in this case county counsel, embraces and adopts and articulates and joins in the same words that -- and the same attitude that the members of the public are expressing in their public comments.

And, Judge, this gets back -- circles back to the video. Not once in any of the three meetings has -- will you find any appointed or elected official saying anything about these -- admittedly offensive attitudes of some of the members of the public. Not once. So the record is devoid of anything that would suggest that any member of the elected county counsel agrees with what they are saying.

Now, it's also important to make this point as far as the legislative process; there is no requirement that any member of county counsel or even the planning commission has to explain their vote. Think about that, Judge. If we were reaching a point where the standard of review on the question of whether or not the legislative action is presumed to be valid or not -- that in order for it to not be presumed valid, you have to video everybody explaining their vote. Well, that's unworkable and it is not required. And can --

MR. COOKE:: There was that one case where the Supreme Court actually chastised the people for deposing the members of counsel.

MR. WEST: Well, that's the Bear case.

MR. COOKE:: Oh, okay.

MR. WEST: That is the Bear case. And in fact, in that case, and this is on a footnote in my primary brief which cites the Bear case, the Supreme Court said that the remedy is at the voting polls and not having a court supplant the decisions of a legislative body. And there's a long line of cases we cited in our brief. I'm not going to go back through that again affirming the well-settled lawyers in South Carolina that there is a presumption of validity. And the courts will not affere -- interfere with a local zoning decision.

And that's what we have here, a local zoning decision at the request of the applicant to rezone and not to seek a variance and whether what they're asking -- what the appellant is asking you to do is substitute your judgment for the judgment of the elected officials. And that according to a long line of cases, would be improper. And we would submit to you, Judge, respectfully, that you cannot and should not do that.

Now, I do want to touch on -- and I'm going to be wrapping up as well --

MR. COOKE:: Take your time.

MR. WEST: I do want to touch on a

couple of points beyond those that I've made. One I would cite on page four of your initial brief, the section that deals with the powers of the county. Now, the county can only act through its elected officials, okay? The county is not an entity of itself absent the elected officials. And so in South Carolina code 4-9-25, and this is on page four of the brief, I'm not going to read it, but it's very important to understand that the general assembly has determined that the -- and I'm going to quote now from the statute: The powers of a county must be liberally construed in favor of the county.

Now, when you read that declaration of law by the general assembly in combination with the case law, which speaks to the issue of the presumption of validity, then what that says in combination -- in addition to what the case law says standing alone, is that the courts will not interfere with the legislative decisions of, in this case, the county counsel. Those powers of the county must be liberally construed.

Now, I want to shift a little bit, Judge, to another section of our brief and that is on page five of the brief, which enumerates the purposes

and authorities of the Berkeley County zoning ordinance. Now this is important because it ties into this issue of the interplay between the comp plan and the decision-making that we're talking about here. And I would ask you to pay special attention to -- on page five of our primary brief which recites verbatim the purposes and authority of the zoning ordinance, because the zoning ordinance and the comp plan all are interconnected. And one of the purposes of the zoning ordinance, which by the way mirrors the enabling statute that talks about local governments having the authority to adopt zoning ordinances -- these statutes and ordinances mirror one another. They're not verbatim, but they're close -- but there is a long list of purposes and authorities that are laid out in the Berkeley County zoning ordinance, one of which is the implementation of the goals and polices outlined in the Berkeley County comprehensive plan. We're not running from that, Judge.

We're not suggesting that that is not a consideration by the governing body in making zoning decisions -- it is. It is a consideration, but it is not dispositive.

And here's why it's important to view it as one of the tools in the toolbox of decision-making because there are one, two, three, four, five, six other purposes that are articulated in 6-29-710 and the zoning ordinance itself, which speak to things like providing adequate light, air, and open space to prevent overcrowding.

Another example of a purpose and authority under the zoning ordinance: To facilitate the creation of convenient attractive in a harmonious community. To protect and preserve -- and it goes on and on.

And I won't -- won't read from the brief, but I would encourage you to look at that because Council talks about balancing and we would agree that it's all about balancing. But we would agree -- or we would submit that the balancing doesn't end with simply item A under the ordinance which is the implementation of the goals and polices of the comprehensive plan, but goes into a number of other considerations.

And I would submit to you that when you go back and you look at -- you listen to the video, the comments of the members of county counsel, speak to issues that are contained in the zoning

ordinance; in fact, a prominent part of the discussion.

Council wants to talk about discrimination and the, you know, saying unflattering things about people in mobile homes. There was some of that discussion, but there was a lot of discussion about traffic. There was a lot of discussion about safety, both of which are themes that are embedded in the zoning ordinance.

Now, I'm going to switch over to the comp plan. In our supplemental brief we have attempted to address the question of the court as it relates to whether or not -- I think another way to say it is whether or not the counsel is bound by the comp plan and nothing else -- that it stops right there. And I would submit to you, Judge, we laid it out, I think, pretty thoroughly in the supplemental brief which is a recitation of the preamble to the comp plan itself. And if you look at the -- our supplemental brief and specifically exhibit A to the supplemental brief, you'll see excerpts from the preamble. Well, the preamble talks about a variety of things.

In the introduction it talks about the comprehensive plan being a document that is used in

guiding -- uses the word guiding -- the growth and development of Berkeley County for the next 15 to 20 years.

And I would just, again as a parenthetical, I would agree that this was the product of a bunch of efforts. If you look at the whole document you'll see that this didn't just get generated overnight. This was a big piece of work. A lot of effort went into it.

And so when you look at the whole document though, you see a living document, Judge. You don't see a static calcified document that says you must follow this no matter what.

Which is -- of course is the appellant's position. You got to do it, you've got no choice. But if that were true, and it's not, then why would the very people that spent so much time in putting this document together use words like guiding growth; use words like a blueprint for the county's future. That doesn't sound like a mandate to me. I don't want to try to get inside the heads of the drafters. So I'll just take the plain words of the drafters' blueprint -- guiding.

Then it goes on to say under the purposes of the plan, that it is a snapshot. But what is a

snapshot? It is a -- it is a determination of a present situation as of the adoption of the plan. But of course by definition a snapshot means that it's evolving, it's changing and it is subject to further review.

It goes on in the purpose part of the plan to talk about setting forth goals for -- goals for future land use development. And then it goes on to say, and again I don't want to read the brief, but just to highlight the keywords here. This plan will guide decision makers when making decisions, policies, and laws regarding future development of land, provision of essential community facilities, et cetera, et cetera.

Then it goes on, still under the purpose of the plan, it talks again about goals. It talks about policies. It talks about a mechanism -- a mechanism for which future land use and development decisions can be made.

But who are the decisions going to be made by? Well, the decisions are going to be made by county counsel, that body and the only body with the legislative authority to make those changes. Unless, and this is the big unless -- unless there was a variance request, which there was not.

Now, we go on to the vision part of the preamble. Again it's an exhibit. I'll let you return to it and look at it and make sure I've captured it correctly. It talks about, in terms of the vision of the plan; the basic ideas are principles. And then again later on in the vision portion it talks about five guiding principles.

So this preamble, Judge, up to the point that I'm going to stop, is covered up with language that is purpose-driven. It is aspirational and it talks in terms of a guide, but it is not a mandate and there is nothing anywhere in the law to suggest that it is a mandate.

In fact, in the plan implementation part of the comprehensive plan, and this is in chapter three a little later in the document, it talks about the comprehensive plan is part of an ongoing process. This is right out of the preamble -- I mean right out of the plan. It's part of an ongoing process. The policies in this plan are intended to be building blocks. And it goes on from there. I will let you make specific reference to exhibit A and to that portion of the comp plan.

And then, Judge, finally, on this question of the mandate of the comp plan, I would ask the

Court as I have cited in my brief to look at South Carolina code 6-7-10. It talks about the declaration of purpose as it relates to these very issues. And the declaration of purpose speaks in terms of encouraging the local governments to plan for future development, to prepare, adopt, and from time to time revise a comprehensive plan. And what does State law say? To guide future local development -- to guide. So again the word in state law is to guide. If you look at the Comprehensive Planning Enabling Act itself, and its plain words, you will also find in 6-29-510 reference to guiding the development and redevelopment of areas within its jurisdiction. The same is true in a later section, 6-29-710, which talks about guiding development and promoting health -- public health, safety morals, convenient, et cetera, et cetera. And I'll ask the Court to take -- pay particular attention to that later provision of that particular title.

Judge, so sort of in wrapping up here, I'm going on longer than I intended to, which is not unusual.

The -- I think the big takeaway here is that the presumption of the validity of a legislative

decision is clear in the law. And the mere fact that there were members of the public who came forward and said some things -- now, let me stop myself right there, not everything they said was offensive, just some of the things they said were offensive.

You know, some of them had some very legitimate objective facts. Like on the -- like on the traffic. You know traffic's not subjective. If you see 300 cars and you say you see 300 cars, well, somebody may disagree with you, but that's an objective fact the person is testifying to.

Now, when you get into some of these other comments, you know, maybe those were -- were -- were offensive, and we would concede that somebody might find those offensive.

Now, I want to close by going to the record -- and the record is very, very important. And I want to cite a reference in the record to our former supervisor and lawyer friend of many of us, William Peabrook, who is no longer the supervisor, but was at the time of the hearing. And he sort of summarized, at the county counsel meeting -- I think it sort of captures the sentiment -- his sentiment for sure and the sentiment that was

expressed by some of the other member of county counsel.

And he said -- and this is on page four of our brief and in the video. I don't hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residences and children.

Now, that is not arbitrary. That is not capricious. That is not unreasonable for a pubically elected official to say. In fact, I think that sort of captures the whole sentiment of county counsel. With the exception -- and I really am going to close here -- with the exception of two dissenting members of county counsel.

Now, this is important, Judge, because it goes to the question of whether the decision was fairly debatable. Fairly debatable is a term that's used in a number of these cases. Some cited by me and some cited by Council. Fairly debatable. This matter was fairly debated.

We had two members of counsel interestingly pointed out in Council's brief -- both lawyers. Josh Whitney and Steve Davis, sitting members of county counsel. They -- you'll hear what they have to say when you listen to the video. They opposed

the motion to deny the request for rezoning. They were, in other words, in favor of the rezoning application.

So we had two members of counsel who had every opportunity to make their case to their fellow members of county counsel and they did. They made their best case. Both of them said it differently. You can imagine Josh Whitney and Steve Davis saying it differently, but they came essentially to the same point.

And they articulated that, and it's on the record, but they did not persuade their other members of counsel who voted in large majority to deny the request, on the issue of safety and traffic, predominantly.

But again they didn't have to say it. They didn't have to say it -- why they voted against it. And the mere fact that they didn't say it didn't make it arbitrary, but they're not required to give a reason.

But my point here is when you listen to -- particularly to county counsel, that last excerpt, you'll see that there was ample discussion. Everybody had -- everybody on counsel had a chance to say what they needed to say and wanted to say.

Some didn't say anything, but at the end of the day exercising their authority and duty to make a determination on the zoning application, they decided not to do it.

But that doesn't mean that it's suspect. It doesn't mean that under these facts and under the law that it was arbitrary or capricious or in any other way suspect. And we would ask the Court after reviewing the briefs and the record to make such a determination. Thank you.

MR. COOKE:: So let me -- I'll give you another chance, but let me summarize.

First of, Tommy's got some other theories. He's got substantive due process, procedural due process, Willowbrook, equal protection. Does all that boil down to arbitrary and capricious in the context of this case?

MR. GOLDSTEIN: They do. But I think we have agreed, and Council can correct me if I'm wrong, is that the purpose of today's hearing or decision is to decide whether the county counsel did or did not err in refusing to grant the rezoning request. Because if the decision is reversed and goes back to counsel to make specific findings then those other issues are not right for

judicial determination.

MR. COOKE:: Okay.

MR. GOLDSTEIN: So I don't know that we're prepared to go forward on our other claims. And we had talked earlier about getting an order, which of course you can sign because you have full preliminary powers as a Circuit Court Judge to bifurcate those issues, because those other issues may become not ripe if the decision is that county counsel needs to make findings of fact to support its decision to deny rezoning.

MR. COOKE:: Okay.

MR. GOLDSTEIN: So I'm not sure we're there yet.

MR. COOKE:: Right. But if I don't find that, am I supposed to rule out all the questions --

MR. GOLDSTEIN: I think we have to come back --

MR. COOKE:: -- or do I do that later?

MR. GOLDSTEIN: -- and make my case.

MR. COOKE:: But I'm just dealing with your first argument now then?

MR. GOLDSTEIN: Right. I think we -- I think we had agreed the decision today was an

appeal up or down. Is that a fair statement?

MR. WEST: Yes. The issue is now to say -- the issue that Tommy described -- did the -- did the county counsel err in not granting the rezoning request.

MR: COOKE:: Okay.

MR. WEST: And I frame that issue a little bit differently than Tommy, but it ultimately gets to the same question. And I framed it in terms of, you know, the validity of the presumption.

MR. COOKE:: Yes.

MR. WEST: Eventually the presumption, but I agree we do not need today and in the near term to get to all of those others. I do think, Judge, they all revolve around arbitrary and capricious. But...

MR. COOKE:: Well, in different facts it could be a different standard, you know, the town of Willowbrook says you can have a class of one. So then you're really comparing disparate treatment, but in this case the disparate treatment is part of your argument on arbitrary and capricious and so --

MR. WEST: Right.

MR. COOKE:: -- so I get that. So let me -- let me kind of focus a little bit on, you know -- I think we all agree that the courts have a very differential attitude towards legislative action or inaction. Arbitrary and capricious is the standard that we're dealing with here.

So let's look at that for a minute. And here's kind of what I'm thinking about or concerned about from your perspective; that essentially the reason for denying this request was that it would have public safety and traffic concerns.

And you know, let's leave aside anything projared about the kind of people that live there, but obviously every time you increase density you're going to have higher traffic and more safety concerns.

But that's the rub for me. And that is -- that's always going to be the case, I mean that would always be a reason to deny any kind of increase in density. You're going to always increase incrementally the burden on police, fire, schools, traffic.

In this case, as I commented earlier, I mean it looks like to grant this would add 3.8 percent to the number of mobile homes in that area.

Incrementally the traffic would probably be even a tinier percentage because there are thousands of cars that drive by there every day and you'd be adding 12 cars to that load.

So and then you say yeah, but, you know, every little bit counts. So they were entitled to conclude that that was too much. But yet then you faced -- your comprehensive plan, which took that into -- presumably took all that into account. We understand that by rezoning this you're going to increase incrementally burdens on the public and so forth.

So why -- why isn't that arbitrary and capricious? I mean it seems like a tautology to say it's never arbitrary and capricious to deny a zoning request that increases density.

But in this case the -- the part that I want to hear you deal with is -- and in this case it would be -- it would have been consistent with the comprehensive plan to go ahead and make that choice here. So why isn't this arbitrary and capricious?

MR. WEST: Well, I would turn that question around on you, Judge. And why is it?

MR. COOKE:: Well, if it lacks a rational basis. I guess -- I guess that's a

rhetorical question. The argument would be -- I'll let Tommy make the argument himself. But the argument I think would be that you've already got a plan that accounts for some increase in density here. And all the ills that that brings with it, and it's a relatively small increase. And so why isn't it arbitrary to say we're not going to accept this increase that we've already baked into the comprehensive plan?

MR. WEST: Well, I don't know what was in the minds of every member of counsel. You don't know, I don't know, nobody knows other than as expressed in the record by some of the members of counsel.

Could I get back to the -- to the law that presumes the validity of a legislative action. And that's where we started today, Judge, is that we don't have to build a record. We don't have to have findings of fact and conclusions of law.

MR. COOKE:: I get that.

MR. WEST: We don't.

MR. COOKE:: Right.

MR. WEST: And so what your question begs is that the -- is the expectation on the part of every member of counsel to articulate why they

do not feel bound by the comprehensive plan. And I just think that's a bridge to far. And I don't believe the law requires that and I don't believe in the absence of that expression that that equals arbitrary and capricious --

MR. COOKE:: Right.

MR. WEST: -- which is sort of implied in your question.

MR. COOKE:: Well, no. I'll spot you that. I'm not really asking you subjectively what was their reason. And every time you have a judicial attack or a legal attack on a legislative action the rule's pretty much the same, we don't go into what was actually in the legislator's minds. The lawyers have a luxury of making up whatever reason they think --

MR. WEST: Yes.

MR. COOKE:: -- will prevail. And so that's what I'm inviting you to do. Tell me in the fullness of time using your best imagination, why is it -- why isn't it -- why is it not arbitrary and capricious to not allow a variance that has been -- or I mean a change of zoning that has been recommended after all this deliberate thought -- when the reason for denying it is what everybody

would know anyway, which is it's going to increase density and the count --

MR. WEST: There may be. To answer your questions directly, there may be other considerations. There may be all kinds of considerations. If you remember going back to the purposes of the zoning ordinance, there are a variety of purposes.

You can have a member of county counsel who sat there and in the privacy of his own thinking concluded that it was not just traffic, not just safety. It was all kinds of other reasons in his or her mind, but again that doesn't -- the silence of that particular member does not equal arbitrary and capricious.

It could be any of a variety of reasons, and that's why, Judge, that the Supreme Court has repeatedly said that they're not going to meddle in the decisions of the local governing body because that's a slippery slope that the courts recognize as just impossible to administer.

Now, let me answer it a different way. In order for it to be arbitrary and capricious there has to be something affirmative. There has to be -- for example, if the members of county counsel

voted the way they did and you have a member of county counsel saying I agree with you, those people over there -- you know, that's a bunch of bad folks that bring crime -- that do this.

If a member of county counsel had said that, or that became the sentiment of the counsel as a body that these are bad people, et cetera, et cetera, then to answer your question, that would be arbitrary and capricious.

But the mere silence -- or in the case of Jack Schurlknight and the case of William Peabrook it was articulated traffic and safety, but that's not spiralative of why.

MR. COOKE:: Could be -- could be.

MR. WEST: So if there was something affirmative and obvious that was the sentiment of a counsel member or the body that was -- was wrong, Then it's arbitrary and capricious. Otherwise the presumption of validity has to stand for the reasons that I've already articulated. And that's our position in a nutshell.

MR. COOKE:: I got it. Tommy.

MR. GOLDSTEIN: Thank you. I'll try to be brief. It was arbitrary and capricious, and the record demonstrates, that they stated -- and when

you read the minutes and when you see the video tape -- they articulate their reasons. They say, I'm not voting for this because of these neighbors and they live there and what they're going through.

That's what they say. They articulated just like verdid Council just told you they are required to do -- not necessarily required to do, but they did. They stated it, it's on the record, so there's no dispute about it. You can see it with your own eyes and hear it with your own ears.

And then the decision was affirmative and it was obvious. And the two lawyers on the board, Mr. Davis and Mr. Whitney -- they articulated the reasons why we're here today. They said, so wait a minute, our comprehensive plan and our future land use map has designated this property as being appropriate for this use through our two-year deliberative process.

So when Mr. West talks to you about you're required to give the county deference to their legislative decisions, I agree with him. And it's articulated through their comprehensive plan and through the comments of the planning staff who made recommendations to counsel, and the only thing that tipped the scale was the -- were comments of the

neighbors which were canards. And sure they said traffic and safety, but there was no evidence. There's no evidentiary-based rational behind it; that's just what they said.

Well, you know, we're dealing with that issue right now two blocks from here -- one block from here. College of Charleston has 56 students out with the mumps now because of anti-vaxxers -- don't want to vaccinate their children anymore because they read on the internet that vaccines cause autism.

So that's the same type of subjective, unsupported, unevidentiary-based assertions that permeates this record.

So I agree with Council. You should listen to the -- I hope you do listen to the video tape and read the summary.

Now, I disagree with verdid Council on whether or not they're required to make findings of fact because it's very interesting. The comprehensive code -- the -- 1994 Comprehensive Land Use Act specifically requires a counsel to make findings of fact and conclusions of law and publish them 30 days in advance before they approve any zoning change that is not in conformity with

the comprehensive plan. And that's in section 6-29-540.

MR. COOKE:: Yes. I'm having trouble understanding the grammar of that one because it sounded like you said they were published for the reasons why they are going to proceed that way.

MR. GOLDSTEIN: That's right.

MR. COOKE:: But --

MR. GOLDSTEIN: Yes.

MR. COOKE:: -- in this case they are not proceeding that way.

MR. GOLDSTEIN: That's right.

MR. COOKE:: It's a question of whether you're going to proceed that way.

MR. GOLDSTEIN: That's right.

MR. COOKE:: So I don't quite understand how that --

MR. GOLDSTEIN: That's right.

MR. COOKE:: -- statute reads.

MR. GOLDSTEIN: What it does is it places the burden on counsel to explain when it's going to take action at variance with its deliberative legislative decision, which is through the comprehensive plan.

And I forgot my other point. Well, I'll go

to another one -- oh, I know what -- I know what it was. Let's look at the definition of arbitrary and capricious. Now these are definitions we can all agree on -- when a decision is founded on prejudice or preference rather than on reason or fact.

Now that gets us back to your comment about where's the evidence that this is going to impact on traffic or safety. There isn't any, other than the statements of the neighbors. This type of decision is often termed arbitrary and capricious. Capricious, contrary to the evidence or established rules of law.

Well, the established rule of law is the comprehensive plan. And there is no evidence because as you point out, whenever you increase density there's always an increase in traffic, but it's immaterial.

Now, in talking about your deference to Council in this particular case, the legislative deference. You know, I call that the potted plant argument. Is that, you know, circuit courts, because that's where we are now. We're in Circuit Court, just in a different room.

Circuit courts are not potted plants. They do have the power and the obligation to right a

wrong, to do justice when a decision below is based on nothing more than prejudice and canards, which is what happened in this case.

Oh, and I know -- you know, opposing counsel takes exception to the three cases I cited. Bouie, Helicopter, and Wyndham as being zoning cases -- board of zoning appeal cases -- variance cases and not -- well, here's a zoning case that they cite and that every government lawyer always cites in every case.

MR. COOKE:: That's for a circuit case?

MR. GOLDSTEIN: Yes. Sylvia, because if you remember what Sylvia did and how we get back to Mr. West's question about why didn't y'all go get a variance -- why didn't you apply for a variance?

Well, if we applied for a variance, we would be waiving -- we have a legal position that we're taking here today, which I was not willing to do. And that was a legal strategy; right or wrong.

MR. COOKE:: But why is it -- why is that true? Why couldn't you do that first and then failing in that come back and --

MR. GOLDSTEIN: Because you have to show hardship to get a variance. It's a different

standard. The standard that we're proceeding under today is conformity with the deliberative legislative decision of Berkeley County as articulated through its comprehensive plan.

MR. COOKE:: I got you.

MR. GOLDSTEIN: Now, in Sylvia -- Sylvia is very interesting.

MR. COOKE:: Sylvia the Circuit Court actually reversed --

MR. GOLDSTEIN: That's right.

MR. COOKE:: -- the board.

MR. GOLDSTEIN: That's exactly right. So -- and that's what they said for Sylvia -- they said you don't need to come here because your state court already took care of it, because that's what they do.

MR. COOKE:: Right.

MR. GOLDSTEIN: All right. So that takes care of something. Now, I don't want to keep us any longer than we need to so let me just go back through here and -- oh, Mr. West says the comprehensive plan has no force of laws, it's just a mere blueprint. Well -- and I worked my way through college building houses and I can assure you, you can't build a house without a blueprint.

A blueprint is something more than a suggestion and if you think that's not the case, try building a house without a blueprint.

MR. COOKE:: I think I've seen some houses that look like they were built without a blueprint.

MR. GOLDSTEIN: So he also says that, you know, counsel articulated -- and I wrote down and I made -- and I hope I'm not misquoting him, but the record will reflect if I am. But what I wrote down is legitimate objective facts. Well, I agree. There were members of counsel that did identify legitimate objective facts, but it wasn't supported by any evidence.

And that gets us back to your comment about traffic and safety. Sure, traffic and safety are legitimate concerns, but there has to be some evidence. That's the Wyndham case. Wyndham North Augusta. Exactly what the court of appeals said there.

In the evidence of traffic and safety is not what the neighbors say. I agree the neighbors have a legitimate concern with traffic and safety, they do. But they have to have some evidence backing up their assertions. They can't just say, oh, 12 more

homes on this busy road. That's the cam- -- that's the straw that broke the camel's back. They have to have some evidence.

So this case is as Mr. West told you, this is a not-in-my-backyard case. Oh, the purpose of the comprehensive plan is adopted by Berkeley County counsel by ordinance. The purpose is in section 1-2 which states that the purpose of the comprehensive plan is to guide zoning decisions. That's what -- that's what section 1.2 says.

And I guess I'll end at the beginning. Mr. West pointed out that neighbors are concerned and they do have the right to be heard; they do. I'm all in favor of public participation and that's why we have Freedom of Information Act, so people can understand what their government is doing and have notice of when meetings are going to take place so that they can appear and be heard.

And when Mr. Olds applied for rezoning, you know, they go out and post signs so that the neighbors will know. And I support that, but as Justice Wallard pointed out in the Ion case, zoning cases are the most important cases because -- what he said in Ion is they quote, touch us where we live; they do.

And so I get the passion of the neighbors. I get it. And they have a right to be heard, but that doesn't mean their subjective concerns unsupported by any evidence is sufficient to tip the scales -- to tip the scales away from adherence to the deliberative legislative decision of Berkeley County. Which is articulated through its comprehensive plan and its future land use map. Which is why planning staff recommended approval. So...

MR. COOKE:: Well, that's going to be my dilemma. Is I understand negativism, we're all probably guilty of that to some extent. People don't show up at the zoning meeting to advocate change by large -- most of the population won't. So we have to filter that to some extent. But I'm going to have to sort of figure out -- I'll listen -- I want to listen to these recordings and see.

MR. GOLDSTEIN: Yes.

MR. COOKE:: Because at some point you have to differentiate between what's -- what's --

MR. GOLDSTEIN: Arbitrary.

MR. COOKE:: Well, what's the canard -- what's a bad canard versus what's good old American negativism.

MR. GOLDSTEIN: Yes.

MR. COOKE:: Because I think some of that is natural and, you know, the argument could be that's probably why you had elected counsel, because you had to listen to neighbors and if they don't articulate it perfectly they have to take that into consideration, but I think those are certainly good points. And I am concerned about the fact that this did involve the use that was consistent with the comprehensive plan. What about that statute that says they're supposed to make findings of fact if they're going to deviate from the --

MR. WEST: That's the screened reading. But if you go back to the statute it doesn't say -- but with all due respect to counsel, it doesn't say what he said. I'd invite you to look at the statute.

MR. COOKE:: Well, I read the way -- I didn't really understand it even as it was -- I have to admit, I didn't go back and read the statute. I read the excerpt from it that was in the brief but -- and I doesn't -- it doesn't -- it seems to talk about if the governing body is going to do something that is --

MR. WEST: That's right. That's what it says.

MR. COOKE:: Yes.

MR. WEST: Because if it were otherwise, Judge, the process would just bog down. It just would stop if the burden was on the leg -- on the county counsel as Council has described. It just doesn't happen. I mean that's not the way it works.

MR. COOKE:: Okay. All right. Well, you guys have given me some pretty good food for thought. Anything else that I --

MR. WEST: Final point. I do not view you as a potted plant, just for the record. You are not a potted plant.

MR. COOKE:: I like being a potted plant.

MR. WEST: All good questions. We appreciate you --

MR. COOKE:: Is somebody going to put together these exhibits for me?

MR. WEST: Yes.

MR. GOLDSTEIN: Right. And I would just point out that the reason I have that excerpt from the 6-29-540 -- the reason it's included in

the brief is it shows the power of the comprehensive plan and what is required in order to deviate from the comprehensive plan.

MR. COOKE:: Right.

MR. WEST: Judge, one other thing since we're talking about documents. Yesterday afternoon I sent the handbook for county officials.

MR. COOKE:: I've got that, yes.

MR. WEST: And I would encourage you as you are processing all of that -- it's a good summary of the planning process in chapter 13 of that document and I would encourage you to look at that.

MR. COOKE:: I did. I read that, yes. It's helpful. All right. LeaAnn, anything?

MS. ADKINS: No, thank you.

MR. COOKE:: All right. Thanks very much.

(The deposition was concluded at 11:22 AM.)

CERTIFICATE OF REPORTER

I, Braedon S. Thisse, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 10th day of December, 2019, at Pawleys Island, Georgetown County, South Carolina.

Braedon S. Thisse
Court Reporter
My Commission expires
October 04, 2029

SC Code § 4-9-25 (2013)

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

HISTORY: 1989 Act No. 139, Section 3, eff June 6, 1989.

SC Code § 6-29-710 (2017)

(A) Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable:

(1) to provide for adequate light, air, and open space;

(2) to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;

(3) to facilitate the creation of a convenient, attractive, and harmonious community;

(4) to protect and preserve scenic, historic, or ecologically sensitive areas;

(5) to regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes;

(6) to facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements. "Other public requirements" which the local governing body intends to address by a particular ordinance or action must be specified in the preamble or some other part of the ordinance or action;

(7) to secure safety from fire, flood, and other dangers; and

(8) to further the public welfare in any other regard specified by a local governing body.

HISTORY: 1994 Act No. 355, Section 1

1.2. - Purpose.

It is the purpose of this ordinance to:

A. Implement the goals and policies outlined in the Berkeley County comprehensive plan;
B. Provide for adequate light, air, and open space;
C. Prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;
D. Facilitate the creation of a convenient, attractive, and harmonious community; to protect and preserve scenic, historic, or ecologically sensitive areas;
E. Regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, and public activities;
F. Facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, and disaster evacuation;
G. Distribution of population and traffic that will tend to create conditions favorable to health, safety, convenience, appearance, prosperity, morals, order, and the general welfare of the county.

Certificate of Counsel

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

March 24, 2021

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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 Tracking Number 2020-001118

Todd Olds, Appellant

vs.

Berkeley County and Berkeley County Planning Commission, Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief and the Final Reply Brief along with the Record on Appeal on the Respondent, Berkeley County and Berkeley County Planning Commission by depositing a copy of it in the United States mail, postage prepaid on April 13th, 2021, addressed to their attorney of record, John West, 207 Carolina Boulevard, Moncks Corner, South Carolina 29461 and also by providing a copy by electronic means.

March 18, 2021

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Todd Olds, Appellant,

v.

Berkeley County and Berkeley County Planning Commission, Respondents.

Appellate Case No. 2020-001118

Appeal From Berkeley County
M. Dawes Cooke, Jr., Special Referee

Unpublished Opinion No. 2022-UP-402
Submitted October 1, 2022 – Filed November 9, 2022

AFFIRMED

Thomas R. Goldstein, of Belk Cobb Infinger & Goldstein, PA, of Charleston, for Appellant.

John Samuel West, of West Law Firm, LLC, of Moncks Corner, for Respondents.

PER CURIAM: In this zoning case, Todd Olds appeals a special referee's order, arguing the special referee erred by finding the Berkeley County Council's denial of Olds's rezoning application was not arbitrary and capricious. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *See Bear Enters.*

v. Cnty. of Greenville, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) ("Rezoning is a legislative matter, and [an appellate] court has no power to zone property."); *id.* ("The decision of the legislative body is presumptively valid, and the property owner has the burden of proving otherwise."); *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991) ("Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights."); *id.* ("In order to successfully assault a . . . zoning decision, a citizen must establish that the decision was arbitrary and unreasonable."); *id.* (stating a zoning decision "should not be overturned by a court so long as the decision is 'fairly debatable'"); *Bear*, 319 S.C. at 140, 459 S.E.2d at 885 (finding a county council's decision to deny a property owner's rezoning application was "fairly debatable" and not "so unreasonable as to impair or destroy [the property owner]'s constitutional rights," even though the only opposition to rezoning were the neighbors' unsupported complaints about increased traffic and decreased property values).

We also hold 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. Olds conceded at the hearing before the special referee that despite the existence of the comprehensive plan, the County Council "still ha[d] the discretion not to rezone [his] property."

Additionally, we hold Olds'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. *See McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) ("It is axiomatic that an issue cannot be raised for the first time in a reply brief.").

AFFIRMED.[1]

GEATHERS, MCDONALD, and HILL, JJ. concur.

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

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February 10, 2023

Mr. Thomas R. Goldstein, Esquire
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Re: Todd Olds v. Berkeley County
Appellate Case No. 2020-001118

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen

CLERK

cc: John Samuel West, Esquire
M. Dawes Cooke, Jr., Esquire

The South Carolina Court of Appeals

Todd Olds, Appellant,

v.

Berkeley County and Berkeley County Planning Commission, Respondents.

Appellate Case No. 2020-001118

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

FILED
Feb 10 2023

cc:
Thomas R. Goldstein, Esquire
John Samuel West, Esquire
M. Dawes Cooke, Jr., Esquire

RECEIVED
Nov 17 2022
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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Argument 2. The Court overlooks that Petitioner raised the Comprehensive Plan as the County's "legislative act" throughout its original appeal to the circuit court and to this Court. Petitioner's initial brief included the issue in its Statement of Issue on Appeal thus:

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? (emphasis added) 9

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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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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

MOTION FOR REHEARING *EN BANC*

November 17, 2022

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Pursuant to Rule 219 of the *South Carolina Appellate Court Rules*, the Appellant requests that the above case be scheduled for reconsideration, including being set for oral argument, by the entire Court of Appeals. This motion is based on the following grounds.

Rule 219 states that the entire Court of Appeals will consider cases "when consideration by the full court is necessary to secure or maintain uniformity of its decisions." As set forth in Argument 3 of the companion petition for rehearing, this Court issued its published opinion, *Harbit v. City of Charleston*, 382 S.C. 383, 674 S.E.2d 776 (2009) upholding the City of Charleston's refusal to rezone Harbit's property because it was not part of the "Ashley Bridge District" overlay zone adopted by the City of Charleston. In this case, a three-member panel of the Court upheld Berkeley County's refusal to rezone Old's property even though the County designated the Olds' property as properly reclassified to R-3 as part of its detailed fact-finding leading to the adoption of the Comprehensive Plan (and Future Land Use Map), which the County adopted by ordinance. The County reached this legislative decision to reclassify Appellant's property as R-3 to become consistent with the County's Comprehensive Plan and consistent with surrounding uses, and to address the County's critical housing shortage and the current uses of surrounding parcels. However, because of unsupported canards of neighbors—and for no other reason—who voiced opinions about residents of mobile homes as second-class citizens who do not look after their children and cook meth, *etc.*, the County allowed the prejudices of a handful of complaining neighbors to overrule the County's legislative decision reached in its Comprehensive Plan. Based on these unsupported and vague allegations, and only upon these unsupported and vague allegations, the County disregarded its own legislative findings and decision adopted by ordinance and disregarded its own staff's recommendations, and turned down the application. This arbitrary decision is in conflict with the *Harbit* holding, and therefore, in an effort to maintain uniformity

of decisions on identical legal issues involving land use, the Appellant respectfully requests that the matter be re-heard and set for oral argument before the entire Court of Appeals.

Respectfully submitted,

November 17, 2022

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Nov 17 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
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Case No. 2017-CP-08-01088
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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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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 Tracking Number 2020-001118

Todd Olds, Appellant

vs.

Berkeley County, Berkeley County Planning Commission, Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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?

STATEMENT OF CASE

In 2011, Berkeley County passed its Comprehensive Plan in accordance with § 6-29-510, S. C. Code, ann. In accordance with this Plan, the County evaluated its inventory of property and adopted a Future Land Use Map to govern zoning and development. (Record on Appeal pages 173, 200, and 215 [joint exhibits 3, 8 and 9]. On July 20, 2017, the Appellant purchased two parcels of real estate commonly referred to as 749 and 751 Royle Road. Royle Road is a South Carolina state highway, S-8-535, and a major traffic artery that connects U. S. Highway 78 to U.S. Highway 17-A, crossing over Interstate 26. (See satellite map at pages 178 - 179 of the Record on Appeal [packet pages 21-23, Joint Exhibit 3].) The appellant's property is approximately a thousand feet from Royle Road and Interstate 26. At the time the appellant began investigating the property for purchase, he was aware that the 749 parcel was zoned R-2, mobile home residential, and that the 751 parcel was zoned R-3, mobile home commercial. (Standing on Royle Road and facing the property, the left-hand (south) parcel is the one zoned R-2, and the right-hand (north) parcel is zoned R-3, and appellant will use the designation of "left hand parcel" and "right hand parcel" to simplify the distinction. The classification matrix of the surrounding properties is found in the Record on Appeal 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, the plaintiff was also aware that the County's 2010 Comprehensive Plan had 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 reclassify the left-hand parcel to R-3 to be consistent with the adjoining parcel and consistent to

the County's Future Land Use Map. (R.O.A. page 170 [application]) In accordance with its normal procedure, the Berkeley County Planning Department conducted a site investigation and reported its findings and recommendation to the County 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 R3 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.
>
> R.O.A. 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, Appellant appeared before the Berkeley County Planning Commission, which voted unanimously to deny recommending approval. Then Appellant appeared before the County Council twice, 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 members, so, for purposes of this brief, Appellant treats them as the same. Moreover, 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 Committee that because the property was in his district, it

was his decision to make, and he had already decided without hearing the evidence. R.O.A. 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 anyone said a word. R.O.A. page 256 [tr. P. 37]) Thus, the Planning Commission voted unanimously to overrule the Planning Department staff and recommend disapproval, and the *County Council Land Use Committee* voted 6-2 and the Council voted 5-2 to deny the request to rezone to R-3. To promote judicial economy, Appellant treats all three meetings as a single cumulative denial because the subject matter, the participants, the objections and the analysis (or lack of analysis) in each meeting are indistinguishable. In other words, the same complaining neighbors advanced the same subjective and speculative complaints at each meeting and all three denials are grounded on the same unsupported allegations of complaining residents. Here is how Councilman Schulknight summed it up: ". . . 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." (R.O.A. page 278 – 279 [tr. page 59, line 20—page 60, line 3, Councilmember Schurlknight]) Therefore the three meetings can be safely treated in a single analysis. (It may be worthwhile to mention that the two members of County Council who voted to grant the request are the only two members who have formal legal training.) The Minutes and the votes of these three meetings are found in the Record on Appeal at pages 185, 189, and 194.

On April 28, 2017, the appellant filed an appeal with the Berkeley County Court of Common Pleas. (R.O.A. page 28) The complaint alleges that the decision to deny rezoning is arbitrary and capricious. The complaint also sought damages; however, the parties agreed that any

application for damages is premature, and for that reason, on March 29, 2019, the parties agreed to refer 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 a single issue; to wit whether the County's denial of the appellant's application was or was not arbitrary and capricious. (Prior to referring the case to the Special Referee, Appellant moved for summary judgment, which the Court denied by Order dated October 2, 2018, R.O.A. page 26.

The parties briefed the issue to the Special Referee, and on December 10, 2019, the Special Referee scheduled oral argument. Following oral argument, the Special Referee entered an Order on May 12, 2020, upholding the County Council's decision to deny the rezoning. R.O.A. page 5. The appellant filed a motion for reconsideration on May 21, 2020, and on July 23, 2020, the Special Referee denied reconsideration. R.O.A. pages 110 and 1. This appeal followed on August 7, 2020. (R.O.A. page 131)

FACTS

The facts are undisputed and set forth in the Statement of Case. Two facts not summarized in the Statement of Case are that (1) The County's Comprehensive Plan is the County's legislative decision as enacted by ordinance, and (2) the Royle Road residents' complaints are not based on anything objective. Rather, every concern they identified is grounded upon nothing more than their prejudicial opinions about residents of mobile homes and that 14 more mobile homes on Royle Road would adversely affect their property interests and their safety. As set forth above, these subjective and speculative concerns were summarized by Councilman Schurlknight as the "stuff" going on out there on Royle Road, but in deciding against the Appellant's request for rezoning, the County Council disregarded the findings of its own Comprehensive Plan. The

residents' complaints are occasionally hard to read because they express brazen prejudice and stereotyping. Consider this representative testimony the Headden's:

> And I am really against another mobile home park coming in there. And I have seen so many things go on with the one right next door to me, where I've had to go to many court cases for animals that were abused, animals left, um, unattended that come over to my property. There is no restriction on how well they keep these homes up.
>
> **And, you know, I hate to stereotype, but it is what it is**, and we've got problems with too many mobile home parks there now. And if you were to come into my home and sit down to watch television with the door open, which I have a full glass storm door, which we like sit there with the door open, and you look outside, you're looking straight at a mobile home that has had a porch that is—I don't know how the people walk up on it—air-conditioners sitting out in the yard with a burn barrel next to it, and the grass gets cut maybe three times out of the summer.
>
> And I just don't want to see another mobile home park coming in there. And not only that, the traffic has got to a point to where if any of you were to travel Royle Road in the middle of the day during the school time, you couldn't get through. You have to stop. The cars are parked on the side of the road.
>
> This is going to cause more kids to come in, which is going to make that situation even worse. So I am against the mobile home park.

Then Mrs. Headden followed up with this canard:

> And if you all had to live beside the one that I live beside and across from the one that this gentleman is talking about, you wouldn't want to see another trailer pulled in anywhere. Because we see Berkeley County—it's on a daily thing. We smell meth being cooked. My husband was a fireman for 30 years.
>
> MR. RAYMOND HADDEN: I am trained in clandestine drug labs, so I know what it smells like.
>
> R.O.A. pages 246 248 [tr. Page 27, line 16 through 29, line 24] (emphasis added)

The minimal probing from the Planning Commission yielded further clarifications from the Headden's that demonstrate the lack of foundation for their beliefs. According to them, the police could not locate any "meth labs" because "these guys are pros at what they're doing. They know when they're [the police] coming, and they know what to do to avoid their appearance." (R.O.A. page 249 [tr. Page 30, lines 12-14]). The Special Referee erred when he found that completely unsupported assertions from complaining residents were "barely sufficient'' concerns

about traffic and safety are enough to prevent the County's denial from being arbitrary and capricious:

> It would be unfair to judge the County's legislative decision because of public comments—however pejorative, uninformed, and speculative—that were made in that same vein. Further neighbors' fears about increased housing density and its attendant aggravation of traffic congestion and increased burden on infrastructure are fairly debatable. Certainly, Plaintiff's proposed addition to these social problems would be minimal in comparison to the existing business. However, evidence in the record suggests that the residents of that area had for years consistently opposed more mobile homes and the County had consistently denied applications for them. Arguably, the County would be hard-pressed to deny future similar rezoning applications if it granted Plaintiff's application, so Council could reasonably believe that approving Plaintiff's application would lead them down a slippery slope." (R.O.A. page 17 [May 12, 2020 Order at page 13])

Thus, the one fact that merits emphasis in the Statement of Facts is this: the purely subjective complaints identified by Royle Road residents, typified by the Headden's, are not based on facts but are grounded entirely on unsupported, subjective opinions, and under the Court's slippery slope logic, no property owner is permitted the highest and best use of his or her property without the approval of neighbors. (Rather than lengthen the brief unnecessarily, Appellant directs the Court to the summary of complaints tallied in the Record on Appeal at pages 41 – 42 [affidavit of Todd Olds]. Therefore the most important fact in this case is the **absence** of facts before the County Council and the conclusion that flows from the absence of objective criteria: that Council based its decision on nothing more than hyperbole, speculation, or as Councilmember Schurlknight described it: the "stuff going on out there." (R.O.A. pages 198 and 278 – 279 [Minutes of March 27, 2017 County Council meeting, tr. Page 59, l. 19-page 60, l. 15]) The only objective criteria in the record are the findings of the County when it adopted its Comprehensive Plan and Future Land Use Map by ordinance. In other words, despite the enormous amount of work—including public participation—put into adopting its Comprehensive Plan, the Council ignored its own legislative findings to appease complaining residents.

Arguments

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

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.

C. The opposing neighbors presented nothing in opposition to the request for rezoning other than their legally insufficient unsupported prejudice.
1) *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999)
2) *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012)
3) *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

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

The parties and the circuit court stand on common ground with the proposition 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." (R.O.A. page 23 [Order at page 19]) There are several material errors in this conclusion that require reversal.

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.

Also perplexing is the Special Referee's reliance on complaining neighbors' assertions that because the area was already supporting numerous mobile homes, therefore no more should be allowed. See the testimony of Raymond Hedden: "There are 13 trailer parks presently on Royle Road that I personally counted from I-26 overpass northeast to Highway 17-A." R.O.A. page 266 [tr. Page 47, lines 12-14]. This "saturation" testimony, which runs through the testimony of all the complaining residents, turns both logic and the law of zoning on their heads. By this crazy logic, mobile homes are only allowed where they are not allowed. On the one hand, Berkeley County, through its exhaustive planning process, determined that Royle Road is the proper location for mobile home parks, but on the other hand, the same governmental entity that adopted its Comprehensive Plan and Future Land Use Plan allowed complaining residents to veto it. The logical absurdism leaps out because if mobile homes are not allowed where the County allows them, then they are not allowed anywhere. Appellant had low expectations that the County Council would recognize this self-refuting proposition because logic in politics does not carry the same force as it does in law. The circuit court erred in allowing this absurdity to serve as a basis for supporting a conclusion that the debate is "fairly" debatable.

Moreover, the Special Referee's conclusion that he was required to yield to the concerns of complaining residents is an abdication of judicial responsibility. (The circuit court touched on this concern in footnote 2 on page 2 of its May 12, 2020 Order. R.O.A. page 6. Because a denial of substantive due process = arbitrary and capricious, an analysis of one is equally valid for the other. 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))

The issue raised by this case is what role does the court play in evaluating legislative actions, a role that has been widely discussed in recent months. Few events in American history have drawn as much attention to the critical importance of an independent judiciary as much as the recent election challenges raised in state and federal courts. This is not to say that the Courts are infallible—Courts do make mistakes even at the highest level as cases such as *Plessy v. Ferguson* have demonstrated, but what distinguishes political assaults on justice from serious judicial errors is that Courts, unlike politicians, are always striving to get it right by employing the pillars of justice: logic, reason, and precedent. In other words, the purpose of judicial review. In exercising judicial review, there is no doubt that courts are deferential to legislative decisions, but from *Marbury v. Madison* right through to *Village of Willowbrook v. Olech* to *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (2004), courts have never failed to protect a citizen's legal rights against arbitrary governmental actions. As may be seen by reference to any of the specific cases discussed in Section C below, the South Carolina courts have never hesitated to correct "legislative decisions" when those decisions are arbitrary or capricious.

Since specific South Carolina authority as relates to weighing the subjective concerns of complaining residents is digested in Section C below, Appellant ends Section A by addressing the Special Referee's error in failing to apply traditional notions of arbitrary and 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). There, a property owner sought permission to develop his parcel into a single family development called "Blue Dolphin Estates," and the residents 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. The landowner succeeded in this application, and the County issued the building permit. However, the landowner then brought a second lawsuit in which he alleged he had suffered damages resulting from the 11-month delay he incurred in obtaining a court order to reverse the County's initial denial, which it based on the same type of unsupported neighbor complaints involved here. Even though the court turned away the plaintiff's claim for damages, it analyzed whether County boards could make "fairly debatable" legislative decisions based entirely upon unsupported complaints of residents:

> 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 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.

Here, the case is much stronger for it is the County's statutorily enacted Comprehensive Plan that 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. As will be discussed in Section C below, the South Carolina appellate courts have consistently decided that legislative decisions grounded solely on NIMBY complaints are the very definition of arbitrary.

Finally, the Special Referee's decision to hold appellant to an evidentiary standard of "extremely high burden" is erroneous. Appellant concedes that courts give deference to legislative bodies on legislative decisions, but when a governmental body takes up a citizen's request for relief from arbitrary or capricious government treatment, the burden of showing the decision is controlled by an error of law is no different from any other appeal. Not to put too fine a point on this subject, but courts are not potted plants. In *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (2004), Judge (now Justice) Kittredge writing for the Court, took up the issue of the appropriate standard of review on cases being reviewed from the Board of Zoning Appeals. There, he noted that "[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.*" Thus, while an appellant's burden in challenging local governmental action on land use may be

high, the Special Referee erred in applying an "extremely high burden" on the appellant because a court has a duty to prevent a citizen's fundamental property rights from being curtailed by arbitrary or capricious action. While appellant concedes that he cannot turn the Court of Appeals into a supervisory County Council, 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 Special Referee's basis for affirming Council is based on no fixed rules or standards, but entirely upon unsupported assertions. The County's "fixed rules or standards" are those expressed in its Comprehensive Plan, which the Special Referee found to be a mere suggestion. As discussed more fully below, each time a local governing body ignored its own ordinances and denied landowners' requests to use property to its highest and best use by relying upon unsupported complaints of neighbors, the Courts have never failed to protect property rights from erosion.

Appellant submits one more example demonstrating that the appellant's burden in such a case may be high, it is erroneous to characterize it as "extremely" high. In a powerful work of legal analysis that focused on whether the State of South Carolina has the authority to require a convicted felon to submit to lifetime electronic monitoring after her release from the Department of Corrections after serving her sentence, the Supreme Court took up the question as to whether such legislative decision 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, 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 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 the appellant must carry the burden of proof, it is not correct to characterize it as being "extremely high," and the standard of review is not "toothless." Even the lower standard of review requires that a legislative decision be "rationally based," but the Special Referee affirmed the

County Council by imposing an impossibly high standard of review on the appellant and by erroneously equating legislative findings of the Comprehensive Plan with unsupported speculation of complaining residents.

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

As discussed above, the Special Referee determined that the County's legislative discretion was properly exercised even though it was at variance with its own ordinance and based only on speculation of complaining neighbors. The Special Referee concluded that the concerns of the complaining residents was sufficient to justify its decision to deny rezoning. The parties agree that the decision of the Council must be affirmed if it is at least "fairly debatable." If Council's decision to deny Plaintiff's rezoning request is "fairly debatable," then the circuit court's conclusion is correct, and Appellant cannot prevail. However, if the decision is not "fairly debatable," then the Court's May 12, 2020, Order is based not only on an incorrect application of South Carolina law, but also on an erroneous finding of fact. The question then is whether the record contains any evidence to support the Court's conclusion that the Council's decision is "fairly debatable," and it is here that the Court errs.

First, 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 our inquiry because if everything is debatable than nothing is debatable. (The U.S.S. Yorktown became stranded in the Caribbean Sea when its computer

operated system shut down because a coding error attempted to divide by zero, demonstrating that ignoring logic can have real world consequences.) Our inquiry is not whether the subject of this action is debatable; our inquiry is whether the subject is "fairly" debatable.

An examination of the trial court's application of the adverb, "fairly," requires careful attention and which, when analyzed, reveals the error of the Order under review 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) (The undersigned was appellant's lawyer.) *Harbit* is the exact opposite of the present case. 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." In *Harbit*, the City argued that his property was a necessary buffer between the development taking place along Wesley Drive and the residential neighborhood behind him. (An unpublicized irony of the *Harbit* case is that the City offered his predecessor in title the opportunity to come into the overlay district and she declined. Then when Harbit asked to come in, the City said no.) As a result, 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 as expressed through its Comprehensive Plan that the Appellant's property **is** properly reclassified as R-3—see Staff recommendation set forth above on page 5. Here, Appellant 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 complaining residents

at variance with its own ordinance. Thus, the Court makes a mistake on page 13 (R.O.A. page 17) when it concludes 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[1] and the County consistently denied applications for them." 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 would monitor their children or abuse their pets or cook meth was pure speculation typified by the Headden's testimony quoted above and 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 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 second-class citizens.

As discussed above, everything is subject to debate, even existence itself, but when faced with the issue of whether a governmental action is or is not arbitrary and capricious, Courts have focused on whether the legislative debate is fair or unfair. (See definition of "fairly above on page 19.) Even

[1] As the video and transcript of record of the meetings depict, the complaining neighbors consistently emphasized the proposed homes as "trailers." Their emphasis on this pejorative term reveals prejudice. Councilmember Davis spoke up on behalf of residents of mobile homes, informing the Council that he and his wife's first home was a mobile home. (R.O.A. page 275 [tr. page 56] Appellant's lawyer is a part time resident of a mobile home.

the Special Referee correctly noted on page 7 of its order (R.O.A. 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.'" (R.O.A. page 11 [Order page 7]) Thus a zoning decision is arbitrary if it is unsupported by **evidence** of a "substantial relation to public health." Courts express the distinction between a substantial relation and arbitrary relation by voiding legislative decisions determined to be "arbitrary" or "capricious." Expressed logically or mathematically, this formula is: "fairly debatable" = "not arbitrary" or "not capricious." A legislative decision that is "fairly debatable" cannot be simultaneously "arbitrary or capricious." By the commutative operation (a + b = b + a), if a decision is arbitrary and capricious, then it is not "fairly debatable." Either formulation allows the proposition to be put through the syllogistic rules of logic, which logicians call "*Modus Tollens*" [by denying denies]:

If p then q.	If fairly debatable then not arbitrary or capricious.
Not q.	Arbitrary and Capricious (*i.e.* "without a rational basis, based on one's will and not upon any course of reasoning and exercise of judgment, made at pleasure, without adequate determining principles, or governed by no fixed rules or standards." *Deese v. S. C. State Board of Dentistry*, 286 S.C. 1882, 332 S.E.2d 539 (Ct. App. 1985))
Therefore not p.	Therefore, not fairly debatable

Thus, the circuit court reached the correct conclusion if, and only if, the legislative decision to deny the landowner's request for rezoning is not arbitrary or capricious, and this requires the Court to apply the well-established legal definitions of arbitrary and capricious in South Carolina law to the record.

As this circuit court said on page 12 of its Order (R.O.A. 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 summarized the lack of evidence by stating he was basing his decision on the fact that he has been down Royle Road and is concerned about the "stuff" going on out there. The only indication of "stuff" is the testimony of residents that people who live in mobile homes will not look after their pets, their children and they will cook meth. Councilmember Schulknight's explanation is not supported by 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. Instead, unlike *Harbit*, here, the only "facts" in the record on which the Council could rely are those put forth by the Planning Department and the Council's own Comprehensive Plan, both which support the application. By stating that the decision is based on unsupported "stuff," and the putative devaluation of property values, the County Council conceded it was making an arbitrary decision based on prejudice. Remember, as discussed above, Councilmember Newell made a motion to deny the application **before he heard it**! He also claimed it was his decision 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)[2] the Court of Appeals said:

> Under the scope of review established in the APA, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003); *Long Cove Home Owners' Ass'n. v. Beaufort County Tax Equalization Bd.*, 327 S.C. 135, 488 S.E.2d 857 (1997). 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 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 brief, 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 only "debatable" if, and only if, they require no evidence. This error, as discussed

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[2] 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.)

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.

Therefore, this record demonstrates that there is not a scintilla of evidence that can support a conclusion that the application for rezoning to bring the property in conformity with the County's legislative decision as adopted by ordinance in its Comprehensive Plan was supported by the baseless claims of complaining residents.

C. The Council's decision to deny rezoning was based on nothing more than unsupported speculation of opposing residents.

1) *Bannum v. City of Columbia,* 335 S.C. 202, 516 S.E.2d 439 (1999)
2) *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012)
3) *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

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 overruled by the unbridled and

unsupported speculation of complaining property owners. While there are any of dozens of cases standing for this proposition, Appellant cites the following three as representative:

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

In *Bannum*, a property owner sought to obtain a permit to construct a "halfway house" in a residential neighborhood. In a fact pattern identical to this case, residents turned out in force and argued against the issuance of the permit—which required a special exception from the Board of Zoning Appeals—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.* These grounds and this rationale is precisely the same grounds and rationale as here.

On review, the Supreme Court reversed because it found the refusal to grant the permit to be "arbitrary." The Supreme 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:

> 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 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.

2. *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 objective facts as the minimum 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. In a scenario identical to this case, the 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. The Court of Appeals' analysis there controls the outcome here, which can be demonstrated by substituting "mobile homes" for "fireworks" in the Court'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) (reversing the denial of an injunction based upon a restrictive covenant and stating "Myrtle Beach Farms based its decision to withhold approval mainly on its opinion, which it was competent to make *as the owner of the surrounding property*, that the use of the subject property as a site for a helicopter ride service would have an adverse impact on the future marketability or desirability of the surrounding property" (emphasis added)).
>
> Additionally, none of the residents properly explained why Appellants' [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)

At oral argument before the circuit court, the County attempted to distinguish this line of cases on the ground that they involved appeals from Boards of Zoning Appeals, quasi-judicial bodies, while this case involves a County Council's "legislative decision." The implication of this argument is concerning because the County seems to be arguing that while Boards of Zoning Appeals must be rational, elected officials can be irrational. If this were a correct statement, then courts would be reduced to so much office furniture. The opposite is true; the judiciary is the most important branch of the tripartite system of government: "Laws are a dead letter without courts to expound and define their true meaning and operation." Alexander Hamilton, *The Federalist* No. 22.

There are no policies, regulations, statutes, or caselaw justifying a lower degree of reason for a legislative body. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995); *Purdy v. Moise*, S.C. 223 S.C 298, 75 S.E.2d 605 (1953) (City ordered to grant building permit for "tourist

court" in area zoned for "hotel.") Second, reason applies universally, whether the subject is law, medicine, or carpentry. Thus, as set forth above, while it may be a tautology to state that the issue—any issue—can be "debated," the question put before this Court on these facts is whether this record contains enough evidence to support the legislative decision as a rational conclusion, *i.e.* "fairly debatable." To be rational requires more than pure speculation. Monty Python, Jonathan Swift, Lewis Carroll, and ten thousand others have had a blast aping the form of rigid logical formalities rendering arguments to hilarity and holding a mirror of plausible sounding irrationality before us. (Q. How do you know she is a witch? A. She looks like one.) If the premise of complaining residents is a legally sufficient basis, "she looks like one," for the Council's refusal to rezone Appellant's parcel to be consistent with his adjoining R-3 parcel and with the County's Future Land Use Map, then the Comprehensive Plan and the County's Future Land Use Plan are subject to veto by any unhappy resident. Rather than turning the Court into a supervisory Zoning Board, the County goes the other direction and promotes disgruntled residents to a supervisory Zoning Board, and they make decisions without supporting facts or evidence. Then the question raised here as to whether the application for rezoning was "fairly debated" becomes a mere rhetorical question and an echo of Dick the Butcher's exhortation to his friends: "The first thing we do, let's kill all the lawyers." *2 Henry VI*, Act IV, Sc. 2, lines 76-77. As Dick the Butcher's friend, Jack Cade acknowledges: "Is not this a lamentable thing, . . . that parchment, being so scribbled over, should undo a man?" lines 78-81 Here, the complaining neighbors, with no evidence, undid the parchment, and by ignoring the legislative decision codified in the Comprehensive Plan and the Future Land Use Plan, the circuit court placed its imprimatur upon prejudice as a substitute for rationally based legislative decisions.

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

The Supreme 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 issue in another zoning case in Myrtle Beach with the same legal issue. Or, as the Court of Appeals said in *Wyndham*, decisions that are "not supported by competent, substantial, and material evidence, [but] was 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, this Court 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.

In order to evaluate whether such "evidence" was sufficient, the Court of Appeals relied on *Bannum*, and pointed out that while residents are entitled to be heard and entitled to express their opinions, statements to the Board about traffic or safety or property values must be based on something more than subjective, unsupported statements:

> 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.

Thus, this Court reached the same conclusion for the same reasons expressed by it in 2012 and the Supreme Court in 1999, when complaining residents in Myrtle Beach protested the reclassification of the property owner's property to allow him to provide airborne tours. Like the neighbors in this case, and like the neighbors in *Bannum*, and in *Wyndham*, Hinde contended, **without evidence**, that the operation of the helicopter business injured him by diminishing his property values. He had nothing to support his opinion, which is the common link through all these cases with the case now before the Court. 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.
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> *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

Throughout this case the Respondent has asserted that no citizen has the right to demand a particular zoning. This is only partially true—every citizen has the right to demand to be treated rationally and fairly, but more importantly, Respondent's assertion is a mischaracterization of the appellant's case, a straw man. Appellant has never asked anything more than his two parcels be treated alike and in conformity with the County's legislative decision as expressed through its Comprehensive Plan, which it adopted after undertaking a thorough and rational examination of the area, which included an evaluation of traffic and safety. In other words, Appellant is demanding the County do nothing more than enforce its own ordinance. The holdings running through all these cases, including the cases cited in the quoted passages is 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 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 summary 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 enacted in its Comprehensive Plan and Future Land Use Plan. In fact, the record reflects that Councilmember Newell not only insisted that he make the decision because the property is in his district, but also he made the motion to deny before anyone said a word. See Record on Appeal at page 255 [tr. Page 36] The circuit court's May 12, 2020 Order jettisons the Appellant's property rights in favor of appeasing barely disguised canards of complaining neighbors. It is the sole province of the Court to protect citizens' fundamental rights, and for this reason, the Appellant respectfully requests that the Court of Appeals examine the record and reverse the lower court's decision that the issue is "fairly debatable."

Conclusion

Based on the foregoing, Appellant respectfully submits that the Court of Appeals reverse the Order under review and order the County to grant the Appellant's application to make his two parcels subject to the uniform classification of R-3, or, in the alternative, remand to the County Council with instructions to make specific findings of fact regarding the impact of the Appellant's request on traffic, safety, and any impact on property values.

Respectfully submitted,

/s/ Thomas R. Goldstein

April 23, 2021

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I certify that this Final Brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.

April 23, 2021

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

M. Dawes Cooke, Jr., Special Referee

Case No. 2017-CP-08-01088

Appellate Case No. 2020-001118

Todd Olds, Appellant

vs.

Berkeley County and Berkeley County Planning Commission, Respondents

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BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

THE SPECIAL REFEREE PROPERLY RULED THAT THE DECISION OF COUNTY COUNCIL TO DENY PLAINTIFF/APPELLANT'S REZONING REQUEST WAS A PROPER EXERCISE OF ITS LEGISLATIVE PREROGATIVE.

THE SPECIAL REFEREE PROPERLY RULED THAT THE MATTER BEFORE COUNTY COUNCIL WAS FAIRLY DEBATABLE AND FAIRLY DEBATED.

STATEMENT OF CASE

This is a rezoning case. This matter began on January 24, 2017, when the Plaintiff/Appellant applied to Berkeley County to rezone a 1.1 acre parcel at 751 Royle Road from R-2 (residential mobile home) to R-3 (commercial mobile home).

At the time of his application, Mr. Olds had fifteen mobile homes on 749 Royle Road, a R-3 lot, and three (the record in some places says two) on 751 Royle Road, a R-2 lot. He sought to have both lots zoned R-3, which, if approved, would allow him to combine the two lots and have a total of twenty-seven mobile homes on them.

The County Planning Department considered the application and staff recommended approval of the rezoning request. The Planning Commission, after holding a public hearing, voted to recommend denial of the request. County Council, also after public hearings, subsequently voted to deny the request. The County Council votes were not unanimous.

Plaintiff/Appellant then filed the instant appeal to the Berkeley County Court of Common Pleas challenging the legality of County Council's refusal to rezone his property.

By Consent Order of Reference with Finality, the parties consented and agreed that M. Dawes Cooke, Jr. would serve as Special Referee to consider and rule on the single issue of whether the County's refusal to rezone Plaintiff/Appellant's property was arbitrary and capricious and contrary to South Carolina law.

From the pleadings, proceedings, filings, arguments of counsel and upon a joint record and following a hearing conducted on December 10, 2019, Special Referee Cooke issued his Order dated May 5, 2020, filed May 12, 2020 denying Mr. Olds' appeal. R.O.A. pages 5-24.

His analysis and his findings of facts are fully articulated in his Order and his conclusions of law are set forth therein as follows:

1. This court is possessed of jurisdiction over the parties and the subject matter;
2. Venue is proper;
3. Plaintiff has failed to meet his burden of proving that the legislative decision of County Council in denying his rezoning request was arbitrary and capricious or unreasonable;
4. While members of County Council are not required to announce the reasons for their votes, and the standards applicable to a vote by County Council are not governed by the same requirements as the BZA, there is sufficient evidence in the record of expressed concerns by members of Council about traffic, safety and quality of life which are legitimate and statutorily sanctioned legislative considerations;
5. While there are statements in the record made by members of the public in open session which were highly charged and emotionally based, there is no evidence in the record suggesting that any member of Council adopted, embraced, approved or sanctioned those comments or that the comments formed a basis for his/her vote;
6. There are statements in the record by members of the public in open session which are based on their personal observations and experiences and are directed to traffic, safety and quality of life concerns;
7. The Comprehensive Plan, while legislatively adopted, does not supplant the County zoning ordinances or preempt County Council's future legislative zoning decisions;
8. The matter before County Council was fairly debatable and was fairly debated;
9. County Council's decision to deny Plaintiff's rezoning request was and is a proper exercise of its legislative prerogative; and
10. The legislative decision by public vote of Council should not be upset or set aside; and
11. The parties have agreed that the Plaintiff's constitutional arguments are not before the undersigned for decision. Accordingly, I make no findings as to any constitutional issue, unless and except to the extent that constitutional issues are necessarily implicated in finding that County Council's legislative decision was not arbitrary or capricious. R.O.A. pages 23, 24.

Upon Plaintiff/Appellant's motion for reconsideration, Special Referee Cooke heard arguments of counsel, considered Plaintiff/Appellant's memorandum, Defendants' memorandum in opposition to the motion and Plaintiff/Appellant's reply. He denied Plaintiff/Appellant's motion by his Order on Motion For Reconsideration dated July 22, 2020 and filed July 23, 2020. R.O.A. pages 1-4.

STANDARD OF REVIEW

In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. *Smith v. Auto-Owners Ins. Co.*, 377 S.C. 512, 660 S.E.2d 271 (S.C. Ct. App. 2008). The Court of Appeals will not disturb the trial court's findings of fact in an action at law tried without a jury, unless those findings are wholly unsupported by the evidence or controlled by an erroneous conception or application of the law. *Knox v. Bogan*, 472 S.E. 2d 43, (S.C. Ct. App. 1996), *Revis v. Barrett*, 321 S.C. 206, 467 S.E. 2d 460 (S.C. Ct. App. 1996).

The fact that the parties referred an action at law to special referee did not change the scope of review, when referee entered final judgment. *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 455 S.E.2d 194 (S.C. App. 1995). In action at law tried by special referee, appellate review was limited to determination of whether there was any evidence reasonably tending to support special referee's findings. *Willms Trucking Co., Inc. v. JW Const. Co. Inc.*, 314 S.C. 170, 442 S.E.2d 197 (S.C. App. 1994).

FACTS

The facts in this case are straightforward, clear and largely undisputed. There was a rezoning request by Plaintiff/Appellant to County Council. He did not seek a variance through the Board of Zoning Appeals (BZA).

There was a process which took place at Berkeley County to consider his rezoning application. Multiple public hearings were conducted. People came out and spoke. Plaintiff/Appellant was the only citizen proponent of the zoning change. R.O.A pages 220-281.

In her presentation before the Land Use & Economic Development Committee of County Council on March 13, 2017, Planning and Zoning Director Alison Simmons testified as follows:

"... Planning Commission recommended denial in a unanimous vote after reviewing the requested change and hearing from many community stakeholders in opposition to the request. Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area and the diminution of property values and quality of life..." R.O.A. page 8, page 79.

Special Referee Cooke reported in his Order excerpts of testimony and comments from the public meetings which include *inter alia*:

- Plaintiff/applicant spoke in support of his application. He stated that he intended to put a quality mobile home park on the property. He did not intend to put "trash" there. He would place security lighting, require vinyl siding, and improve the access road. He said he intended to own the mobile homes in the park except those that are already there. He stated that this would not be a "thug park." He would "vet" the people applying to live there and would have strict leases. He would allow the Sheriff to have full access. He stated that there is no crime in his North Charleston mobile home park. He intended this to be a quality park and provide affordable housing in accordance with the County's Comprehensive plan. R.O.A. page 9.
- There is an overabundance of mobile homes in the area. The property is too small for twenty-four mobile homes. He is concerned about children playing in the road. R.O.A. page 9.
- The area is saturated with mobile home parks. He is concerned about drug problems, traffic and children having no place to play. R.O.A. page 9.
- He does not want lights and trailers. Kids have come onto his property from the existing mobile home park and gotten into his swimming pool. R.O.A. page 9.
- She has had problems with kids in the mobile home park partying and coming across the fence onto her property. R.O.A. page 9.
- His property will not appraise for what it is worth because of the mobile homes nearby. Animals are neglected at the park. His wife stated that they have smelled meth being cooked there. R.O.A. page 9.
- In a couple of those (pictures) you will see it is high traffic on this road at certain times of day... And yes, I can say that I have put my house up for sale twice and was told by the real estate agent that because of the trailers next door and around in my area that the value of my real estate, I could not get what it would really be worth because it has depreciated ... There is a two and a half mile stretch from 17A to 78. It takes approximately twenty to twenty-two minutes to travel both ways or one way in heavy traffic time. We are posed with a major problem with the safety factor of those emergency vehicles going to and from. One person being trapped in a fire, losing one minute can cost him his life. R.O.A. page 9.
- Residents have been coming to the Planning Commission for years to protest applications to add more mobile homes, and the Planning Commission has consistently denied those applications. R.O.A. page 9.

- From the four way stop to my house is probably 800 yards, roughly, and it backs up every day. And I've got video standing on my front porch where they're stopped in the road waiting to get through. R.O.A. page 10.
- Traffic and everything on there around Sangaree School. You can't get there in the afternoons or in the mornings for people dropping or picking up kids there. They even park in the highway. You got to sit there and wait for them to get through before you can get through that intersection there around the school. Y'all need to come around there in the afternoons and see what kind of traffic we got on the road. R.O.A. page 10.
- My concern is about traffic, safety and children... That's a big concern right there... It comes to a tipping point to where you know you got carrying capacity on the road. You got to look at the safety. And that's the direction I'm coming from. Totally. He also stated that he has been down Royle Road many times. He has seen a "lot of stuff" going on in the area. It does devalue the property. R.O.A. page 10.
- I don't hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residents and children. R.O.A. page 10.
- One resident stated that he had counted thirteen mobile home parks on Royle Road, containing 316 mobile homes. He also stated that eleven applications to add mobile homes had been denied since 2002. He also stated that he had put his house up for sale twice but his real estate agent told him that he can't get what the house is worth because of the mobile homes next to his property. He also complained about constant traffic and drug activity in the area. He complained about traffic safety, saying that he had seen someone hit by a car. R.O.A. page 10.
- One resident presented a petition signed by other neighbors opposing the application. R.O.A. page 10.

Plaintiff/Appellant and Respondents disagree on the meaning and consequence of the public statements. Plaintiff/Appellant attributes the propriety and best possible implications to his own words and the worst possible implications to those speaking in opposition. Respondents attribute the words of citizens spoken in a public forum as information, opinion, personal observations and general expressions of neighborhood sentiment, all received in the ordinary course by the public officials acting in their legislative capacity.

ARGUMENTS

I. BECAUSE THE SPECIAL REFEREE DETERMINED THAT A DECISION OF COUNTY COUNCIL TO DENY PLAINTIFF/APPELLANT'S REZONING REQUEST WAS A PROPER EXERCISE OF ITS LEGISLATIVE PREROGATIVE, HE PROPERLY DENIED THE APPEAL.

Special Referee Cooke correctly summarized in his Order well-settled law in South Carolina..."Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and capricious. *Byrd, et al v. City of North Augusta*, 261 S.C. 591, 201 S.E. 2d 744 (1974), *Knowles v. City of Aiken,* 305 S.C. 219, 407 S.E. 2d 639 (S.C. 1991)". R.O.A. page 10.

"The governing bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon these matters than are courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens." *Harbit v. City of Charleston,* 382 S.C. 383, 675 S. E. 2d 776 (S.C. Ct. App. 2009). Mr. Cooke went further in his Order:

> Citing *Knowles,* "Courts cannot become city planners, but can only correct injustices when they are clearly shown to result from municipal action."
>
> "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. *Sylvia Dev. Corp. v. Calvert County*, 48 F. 3d 810, 827 (4th Cir. 1995) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 187-88, 48 S. Ct. 447, 73 L. Ed. 842 (1928))." *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 737 S.E. 2d 601 (S.C. 2013).

After a thorough and detailed analysis and summary of the arguments of the parties and based upon his findings of fact, Mr. Cooke observed in his Order:

> "My conclusion is best summarized by the following statement: "While the landowner here...do[es] not embrace this choice of zoning, other residents in close proximity applaud this zoning. **While the landowner may not agree and may be able to convince this Court not to agree with the City's [County's] zoning choice, that is not the issue before [me]. I cannot insinuate [my] judgment into a review of the City's [County's] decision... Based on the foregoing considerations, I find that Plaintiff has not met his burden of proving that the Defendants' legislative action was arbitrary and capricious...**" (emphasis added) R.O.A. page 17.

In other words, zoning and rezoning is up to the local legislative body. Courts should avoid second-guessing the legislative decisions of the local elected officials. A footnote in *Bear*

Enterprises v. Greenville County, 319 S.C. 137, 459 S.E. 2d 883 (1995) sums up this key point well:

> "We note that Bear deposed Council members and presented their testimony as evidence to support Bear's argument that Council's decision was arbitrary. We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. **If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts.** Although we feel it was inappropriate to examine Council members in this manner, the County did not object to the procedure in this case." (Emphasis added).

In his argument before the Special Referee, Plaintiff/Appellant relied, and in his Brief he continues to rely heavily on three cases, each of which is an appeal from a decision of the local Board of Zoning Appeals or its equivalent, *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 516 S.E. 2d 439 (1999), *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 735 S.E. 2d 659 (Ct. App. 2012) and *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 776 S.E. 2d 753 (Ct. App. 2015).

Plaintiff/Appellant persists in his mistaken insistence that the cited cases, all from a local BZA decision, pertain to Mr. Cooke's orders and this appeal[1]. He is comparing "apples and oranges". Respondents forcefully argued that an understanding and application of the distinction is essential to the trial court's consideration of the merits of the case and it continues to be essential in review of his decision by this Court. R.O.A. pages 299-341.

It is true, that if this was an appeal from a Berkeley County Board of Zoning Appeals, which it is not, then just as in the three cited cases above, the county's ordinance regarding

[1] It is telling that in the Conclusion to his Brief, Plaintiff/Appellant asks this Court to reverse Mr. Cooke's Order and ... "remand to the County Council with instructions to make specific findings of fact regarding the impact of the Appellant's request on traffic, safety and any impact on property values."

decisions of the board of zoning appeals would govern. The applicable Berkeley County BZA ordinance reads:

> "Berkeley County Zoning Ordinance 21.6. - Decisions of the board of zoning appeals. All final decisions and orders of the board must be in writing and be permanently filed as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board, which must be delivered to parties of interest by certified mail." R.O.A. page 15, footnote 3.

The County's ordinance recognizes the quasi-judicial nature of the BZA proceedings (thus the necessity of writing out its findings of facts and conclusions of law) versus legislative proceedings conducted by County Council for which there is no corresponding requirement in law or in practice. It would be untenable to hold a legislative body to such a standard.

Special Referee Cooke recognized the distinction and its materiality. He specifically addressed the difference in his Order:

> "I agree that there is a distinction between judicial appellate review of an administrative decision and judicial scrutiny of a legislative decision. A legislative body is not expected to make an evidentiary record or to articulate the bases for its decisions as would stand up to judicial appellate review. Rather—as the above-cited case law holds—legislative actions must be upheld if there is even a fairly debatable basis to support them." R.O.A. page 16.

II. BECAUSE THERE IS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE SPECIAL REFEREE'S CONCLUSION THAT THE MATTER WAS FAIRLY DEBATABLE AND FAIRLY DEBATED, HIS DECISION SHOULD NOT BE DISTURBED.

The "**fairly debatable**" test has long been the measure in South Carolina as to whether a local government's zoning decision will withstand a challenge as arbitrary and capricious. There is a long line of reported cases establishing and affirming the test.

In *Bear Enterprises v. Greenville County*, 319 S.C. 137, 459 S.E. 2d 883 (1995), our Supreme Court chose not to invalidate Greenville County's refusal to rezone Bear's property

from residential-suburban to resident-mobile home park concluding that the County's decision was "fairly debatable".

"It is not the prerogative of the courts to pass upon the wisdom of County Council's decision; rather, the controlling inquiry is whether County Council's refusal to change the zoning of Bear's property is so unreasonable as to impair or destroy Bear's constitutional rights. If the propriety of the Council's decision is even 'fairly debatable' we cannot inject our judgment into a review of their decision, but must leave that decision undisturbed". *Rushing v. City of Greenville,* 265 S.C. 285, 217 S.E.2d 797 (1975) (the action of a municipality regarding the rezoning of property will not be overturned by a court if the municipality's decision is "fairly debatable" because the municipality's action is presumed to have been validly exercised, and because it is not the court's prerogative to pass upon the wisdom of the municipality's decision). Only where the municipality's action is "so unreasonable as to impair or destroy constitutional rights," *Rush v. City of Greenville,* 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965), will the courts declare the municipality's action unconstitutional." The burden of proving the invalidity of a zoning ordinance is on the party attacking it; thus, it is incumbent upon Bear to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance. *Town of Scranton v. Willoughby,* 306 S.C. 421, 412 S.E.2d 424 (1991).

We find the Council's decision to deny Bear the right to place 211, as opposed to 30 to 35 mobile homes, on its property "fairly debatable." Bear has not demonstrated by clear and convincing evidence that Council acted arbitrarily or capriciously. Moreover, there was no taking, as Bear acknowledges its property still has a beneficial use to which it can be put. 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. *Hampton v. Richland County,* 292 S.C. 500, 357 S.E.2d 463 (Ct.App.1987) (a property owner is not entitled to have his property zoned for its

most profitable use); *Ohoopee Land Dev. Corp. v. Mayor & Council of Wrightsville,* 248 Ga. 96, 281 S.E.2d 529 (1981) (a zoning classification is not unconstitutional simply because a developer is deprived of a more profitable use of his property).

Lenardis v. City of Greenville, 316 S.C. 471, 450 S. E. 2d 597 (Ct. App. 1994) was another rezoning case. Pursuant to an order of reference for final judgment with direct appeal, the master ordered the defendant city to rezone the plaintiff's property from office use to commercial use.

Reversing the master, this Court held: "Rezoning is a legislative matter. The decision of the legislative body is presumptively valid, and the property owner bears the burden of proving otherwise. *Rushing v. City of Greenville,* 265 S.C. 285, 217 S.E.2d 797 (1975); *Rush v. City of Greenville,* 246 S.C. 268, 143 S.E.2d 527 (1965). The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the courts and they will not be interfered with unless there is a plain violation of the constitutional rights of citizens. *Rush,* 143 S.E.2d at 531. It is not the prerogative of the court to pass upon the wisdom of the decision. *Rushing,* 217 S.E.2d at 799. The controlling inquiry is whether City Council's refusal to change the zoning of the owner's property is so unreasonable as to impair or destroy the owner's constitutional rights. *Rushing,* 217 S.E.2d at 799. We cannot insinuate our judgment into a review of the City Council's decision, but must leave that decision undisturbed if the propriety of that decision is even "fairly debatable." *Knowles v. City of Aiken,* 305 S.C. 219, 407 S.E.2d 639 (1991). We find that City Council's decision to hold the line on commercial development in the area and protect its residential nature was fairly debatable and was not unreasonable.

In *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E. 2d 776, (Ct. App. 2009), Mr. Harbit, an owner of property located at 7 Wesley Drive, applied for rezoning of the property based on its location within the Savannah Highway Overlay Zone. The Zone was created as a result of a

comprehensive study of land surrounding the Ashley River Bridge in Charleston. 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 the owner's side of Wesley Drive within the Zone had been rezoned for limited commercial use.

The City of Charleston Planning Commission reviewed the owner's application, at which time the owner's counsel presented his position for rezoning the Wesley Drive property. The Planning Commission, however, voted to recommend denying the rezoning application. Charleston City Council received the Planning Commission's recommendation and held a public hearing to address Harbit's application. City Council denied Harbit's request.

After City Council's denial of his application, Harbit appealed the zoning decision to the circuit court and asserted additional grounds for relief, including causes of action for due process and equal protection violations. The City filed a motion for summary judgment on all claims, which the circuit court granted. Harbit appealed. The Court of Appeals was not persuaded by Harbit's assertion that City Council's refusal to rezone Harbit's property was so unreasonable that the appellate Court should invalidate City Council's decision. The Court affirmed the lower court and restated well-settled law in South Carolina: "We find that City Council's decision is fairly debatable....While all of the residents' concerns might not be well-founded, City Council's response to public opposition does not rise to the level of a constitutional violation. *See Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 329 (4th Cir.2005) (in finding the state court of appeals' decision was not res judicata of the developers' § 1983 due process and equal protection claims, the Fourth Circuit Court of Appeals determined the city council's

improper denial of the zoning application in response to public opposition did not rise to the level of a constitutional violation because "matters of zoning are inherently political, and it is a zoning official's responsibility to mediate disputes between developers and local residents").

Additionally, City Council specifically cited the unique location of Harbit's property as opposed to other properties on Wesley Drive that were zoned for limited commercial use, noting that two of its sides are situated on the interior of the neighborhood. Moreover, because it is a corner lot, the property effectively serves as a buffer between the heavier-traveled Wesley Drive and the purely residential Stocker Drive. *See* *Hampton v. Richland County*, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct. App.1987) (finding the city council's refusal to rezone property from an office and industrial classification to a general commercial classification was "fairly debatable" because the property lay between commercial and residential properties thus creating a buffer between the two zones).

While other similarly situated properties on Wesley Drive are zoned for limited commercial use, the record does not indicate that Harbit was the subject of purposeful, invidious discrimination. *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 825 (4th Cir.1995) (internal citations omitted) ("If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim.").

"Based on the evidence in the record, the City properly denied Harbit's rezoning application in an effort to hold the line on commercial development in the area and protect its residential nature. We will not invalidate City Council's decision as its propriety is at least "fairly debatable" based on the facts and is not "so unreasonable as to impair or destroy constitutional rights." *See* *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642. As such, it is not this

Court's function to pass upon the wisdom or expediency of City Council's decision. *See* Bob Jones Univ., Inc., 243 S.C. at 360, 133 S.E.2d at 847.

Special Referee Cooke properly applied the "fairly debatable" test in his Order:

> "I find that the Plaintiff made a compelling argument to the County in favor of his rezoning application and the Planning staff agreed with his argument. Plaintiff credibly promised to improve the overall character of the properties, which already contain mobile homes. The number of mobile homes that he proposed to add was very small compared to the number of mobile homes already on Royle Road. Plaintiff correctly pointed out that his proposal to increase availability of affordable housing was consistent with the County's Comprehensive Plan. On the other hand, not all reasons advanced in opposition to Plaintiff's application can be labeled unsupported, pejorative speculation. To be sure, some of the public comments made in opposition to Plaintiff's application were intemperate and unsupported by empirical evidence. Yet, legislative action or inaction must not be judged by the least compelling arguments advanced to support it. Plaintiff himself told the Planning Commission that the proposed mobile home park would not be "trash" or a "thug park". It would be unfair to Judge the County's legislative decision because of public comments—however pejorative, uninformed and speculative—that were made in that same vein. Further, neighbors' fear about increased housing density and its attendant aggravation of traffic congestion and increased burden on infrastructure are fairly debatable. Certainly Plaintiff's proposed addition to those social problems would be minimal in comparison to existing burdens. **However, evidence in the record suggests that the residents in the area had for years consistently opposed more mobile homes and the County had consistently denied applications for them. Arguably, the County would be hard-pressed to deny future similar rezoning applications if it granted Plaintiff's application, so Council could reasonably believe that approving Plaintiff's application would lead them down a slippery slope... I cannot insinuate my judgment into a review of the City's [County's] decision. Rather I must leave the City's [County's] decision undisturbed if the propriety of that decision is even 'fairly debatable'".** (Emphasis added). R.O.A. pages 16.17.

Mr. Cooke found and concluded on the matter of the County's Comprehensive Plan:

> "The Comprehensive Plan does have the force of law, since it was formally adopted by Ordinance. Nevertheless, nothing in the Plan suggests that it was intended to dictate future zoning classifications for specific parcels of property. Indeed, the Plan itself is subject to review and revision every five years, so it cannot have been intended to decide all future zoning questions. 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 a least fairly debatable."** (Emphasis added). R.O.A. page 23.

Special Referee Cooke addressed again the "fairly debatable" test again as applied to the matter before him on motion for reconsideration:

> "To be sure, substantial evidence supported by Plaintiff's application to rezone 751 Royle Road and some of the reasons that citizens advanced in opposition to the request were canards. However, as I stated in my original Order it would be unfair to judge a legislative decision by the least persuasive arguments advanced to support it. Some of those who spoke against the measure expressed genuine and rational concerns about the negative effects that rezoning the property would have. Councilman Jack Schurlknight said, "My concern is about traffic, safety and children"... "That's a big concern right there." He also said, " It comes to a tipping pint to where you know you got carrying capacity on the road. You got to look at safety. And that's the direction I'm coming from. Totally." Council Chairman William Peagler said, "I don't hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residents and children." **Considering the record as a whole, I am compelled to conclude that it is at least fairly debatable whether increasing density of mobile homes on Plaintiff's parcel would increase traffic congestion, endanger children or lower property values--- particularly if this became a precedent for similar requests in that area."** (emphasis added) R.O.A. page 3, 4.

There can be no serious contention based on the full and ample record before the Special Referee that the matter before County Council was not fairly debatable and fairly debated.

CONCLUSION

Based upon the foregoing, the Orders of Special Referee Cooke should be **AFFIRMED.**

Respectfully submitted,

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May 27, 2021

CERTIFICATE OF COUNSEL

I CERTIFY THAT THIS Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules.

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May 27, 2021

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

M. Dawes Cooke, Jr., Special Referee

Case No. 2017-CP-08-01088

Appellate Case No. 2020-001118

Todd Olds, Appellant

vs.

Berkeley County and Berkeley County Planning Commission, Respondents

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PROOF OF SERVICE

I certify that I have served the Respondents' Brief on the Appellant, Todd Olds, by depositing a copy of it in the United States mail, postage prepaid on May 27, 2021, addressed to his attorney of Record, Thomas R. Goldstein, Esq., PO Box 71121, North Charleston, SC 29415 and by e-mail.

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Appellate Tracking Number 2020-001118

Todd Olds, Appellant

vs.

Berkeley County, Berkeley County Planning Commission, Respondent.

REPLY BRIEF OF APPELLANT

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REPLY TO RESPONDENT'S STATEMENT OF CASE

The Respondent erroneously mischaracterizes the situation on the ground by overstating the number of presently existing homes, and this inadvertent mischaracterization leads to confusion. The Respondent is correct: Appellant owns two adjoining parcels on Royle Road. They are known as 749 and 751 Royle Road, and they share a boundary. However, at the present time, there is only one mobile home on the R-3 lot and two on the R-2 lot that is the subject of this action (See R.O.A. at page 172, 177, 178, 179 for a map [Exhibit 2]). What the Respondent meant to say is that under the **current** zoning, Berkeley County allows up to 11 mobile homes on the R-3 lot because each home requires a minimum of 4,000 square feet in addition to extra setbacks and buffers. This dispute arose when Appellant sought to have his R-2 lot rezoned to conform to his adjoining R-3 lot, and the case becomes less confusing when these facts are properly summarized. The following matrix lays out the combinations:

	AS IS	**AS ALLOWED UNDER CURRENT ZONING**	**AS REQUESTED (OR AS ALLOWED UNDER 2015 COMP. PLAN LAND USE)**
749 Royle R-3	1 home	11 homes	11 homes
751 Royle R-2	2 homes	2 homes	11-13 homes
TOTAL	3 homes	13 homes	22-24 homes

Therefore, at the time of the Appellant's application and today, there were, and are, only 3 mobile homes on the two lots. The legal issue of compatible zoning comes into sharper focus with this corrected identification of the facts and distills the dispute down to a simple question of whether it makes sense for a property owner with two contiguous parcels to be zoned differently

or whether they should be uniformly zoned consistently with the County's "legislative decision" as expressed through its adopted Comprehensive Plan.

The remainder of Respondent's "Statement of Case" is a repetition of the complaints of the Royle Road neighbors, which will be addressed in Reply Argument 2.

REPLY ARGUMENT 1

THE COUNTY'S "LEGISLATIVE DECISION" IS EXPRESSED THROUGH ITS COMPREHENSIVE PLAN, AND ZONING IS A STATUTORY PROVISION INTENDED TO "IMPLEMENT" THE COMPREHENSIVE PLAN, WHICH SUPPORTS THE APPELLANT'S APPLICATION FOR REZONING.

The Respondent cites a general principle of law with which the Appellant agrees; to wit, that legislative acts are entitled to deference by the courts. Here, the Respondent argues the Court must exhibit "deference" to the County's decision on Appellant's zoning request while simultaneously ignoring the County's "legislative decision" expressed in its Comprehensive Plan. Deference, of course, never means either obsequiousness or inconsistency, and courts have never hesitated to strike down legislative decisions that are based on mere speculation and prejudice, which is, as set forth in Appellant's initial brief, the definition of "arbitrary" and "capricious." More importantly, the Respondent asserts an inconsistent position: on the one hand that this Court has no business second guessing County Council decisions, while on the other hand avoiding any acknowledgment of the County's legislative decision expressed through enacting its Comprehensive Plan. See Berkeley County Ordinance 1.2: "It is the purpose of this Zoning Ordinance to: Implement the goals and policies outlined in the Berkeley County Comprehensive Plan." (R.O.A. page 345) The force and import of the Comprehensive Plan demonstrates why Respondent's reliance on cases such as *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009) is so misplaced. As discussed in more detail in Appellant's Initial Brief at page

19, Harbit was swimming against the current in seeking a rezoning that was at variance with the City's goals in its Comprehensive Plan (Ashley River Overlay Zone), which the Court of Appeals noted this way: "the City proffered several **reasonable** grounds" why Harbit's application was not consistent with the City's Ashley River Overlay District Plan. (emphasis added) In other words, unlike the Appellant, Harbit's application was in contravention of the Comprehensive Plan while Appellant's is a request to comply and conform to the Comprehensive Plan. Here, and this is a fact the Respondent avoids like a third rail, there are two legislative decisions being examined in this case: 1) the county's Comprehensive Plan adopted after years of careful study, consultation, and frequent public hearing participation vs. 2) a non-compliant zoning decision reached without study or analysis based on "stuff" to appease a group of complaining neighbors. So, when the Respondent argues on page 12 of its brief that "zoning and rezoning is up to the local legislative body," (Respondent's brief on page 12, citing *Bear Enterprises v. Greenville County*, 319 S.C. 137, 459 S.E.2d 883 (1995)), the Appellant agrees. However, in this case, it is the Respondent who is acting at variance with its Plan, and it is the County—not the Appellant—who misapplies the zoning code, which identifies its function to "implement" the County's Comprehensive Plan. This is the County's legislative decision that requires deference. The generic concerns expressed by the complaining neighbors: traffic, safety, density, are unsupported by any objective criteria, and include concerns evaluated by the County in enacting its Comprehensive Plan. The complaining neighbors identified nothing more than their subjective and prejudicial concerns, and the lower court erred in promoting their speculative and unsupported concerns over the careful analysis evaluated and formulated in the expression of the Council's legislative decision called the Comprehensive Plan. It is demonstrable error to conclude otherwise. The Comprehensive Plan is a not a legislative decision that can be ignored to mollify a few unhappy neighbors. The Enabling

Act intends to place a duty on the Planning Commission—importantly, an appointed body of public officials—by requiring that non-political body to affirm and recommend to Council a Comprehensive Plan to be presented to the governing body for adoption. Only after a recommendation by this nonpolitical body may Council adopt a Comprehensive Plan. Our Supreme Court emphasized the General Assembly's intent that careful and rational land use decisions be made as free as possible from the push and pull of political advocacy: "Similarly, the comprehensive and detailed nature of the Title 6 provisions briefly outlined above reveals out Legislature's intent that zoning decisions should be made by a cross-section of unbiased officials after careful deliberation." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 576 S.E.2d 716 (2000)

The zoning decision reached by a "cross section of unbiased officials after careful deliberation" is expressed through the duly enacted Berkeley County Comprehensive Plan, including the Future Land Use Map. The General Assembly leaves no doubt about the relationship between the Comprehensive Plan and zoning ordinances:

> (A) When the local planning commission has prepared and recommended and the governing body has adopted at least the land use element of the comprehensive plan as set forth in this chapter, the governing body of a municipality or county may adopt a zoning ordinance **to help implement the comprehensive plan**.
>
> § 6-29-720(A), S. C. Code, Ann. (emphasis added)

Similarly, the Berkeley County zoning ordinances, § 1-2, R.O.A. page345, themselves emphasize that zoning decisions must "implement" the Comprehensive Plan. This is the only rational use of zoning, which the legislature intended to be careful, deliberative, and free from "undue political influence." *I'On, L.L.C. v. Town of Mt. Pleasant, op cit.* Yet here, bias and influence won the day when the County Council ignored its carefully enacted "legislative decision" and failed to

"implement" the carefully deliberated strategies of the Comprehensive Plan without a reasonable justification for doing so.

According to the Comprehensive Plan, the Future Land Use Map, and the recommendation of the Planning Department staff, the Appellant's parcel is properly rezoned to R-3, not only to conform to the plan, but also to match up with the zoning on the adjoining parcel and to be compatible with the character of the neighborhood. As the Record demonstrates, Appellant's R-2 parcel is bordered by R-3 to the North (Appellant's parcel), R-2 to the South and East, and OI (Office/Industrial) to the West (R.O.A. page 54, 174), but the R-2 parcels nearby are all being utilized as legal non-conforming mobile home parks. In other words, the neighboring R-2 parcels might be zoned R-2, but they are being used as R-3. The two parcels to the South and East are R-2, but they are both currently utilized as "Commercial/Mobile Home Park." (R.O.A. page 174 [Exhibit 3, page 2]).

Appellant understands why the Respondent avoids discussion of the Comprehensive Plan because it dissolves Respondent's argument. By statute, the Comprehensive Plans carries the force of law, and deviation from a Comprehensive Plan requires a rigorous statutory process for applications that propose to deviate from Plan. See § 6-29-540, S. C. Code, Ann. which requires any application in conflict with the Comprehensive Plan to: (1) appear before the Planning Commission, (2) advertise and publicize the intent to construct at variance with the Plan, and (3) secure Planning Commission approval. When asked to evaluate the effect of the Comprehensive Plan on zoning ordinances, the Supreme Court made clear that both the primacy of the Comprehensive Plan and that fact that zoning exists to **implement** the requirements of the Plan are the controlling factors. (See Berkeley County Ordinance 1-2 quoted above on page 5.) In *Sinkler v. Charleston County*, 387 S.C. 67, 690 S.E.2d 777 (2010), when a property owner sought

rezoning from AG-15 to Planned Unit Development outside the parameters of the County's Comprehensive Plan, the Supreme Court said:

> The Enabling Act permits the governing body of a county to adopt zoning ordinances to help implement a Comprehensive Plan. S. C. Code 6-29 720 (2004 and Supp. 2009). Then Charleston County Council enacted the Charleston County Zoning and Land Development Regulations (the ZLDR) in 2001 to implement its Comprehensive Plan.

The landowner in *Sinkler* asked for and received a rezoning of his parcel, which the circuit court reversed because it was inconsistent with the Comprehensive Plan. The Court of Appeals reversed the trial court, and the Supreme Court reversed the Court of Appeals because the landowner's application failed to contain the enabling Comprehensive Plan's requirement for "mixed uses":

> Respondents alternatively asserted that they did not have to meet the parameters of a PD under the Enabling Act because County Council was free to employ other zoning techniques, citing the prefatory language of section 6-29-720(C) governing zoning methods, which allows County Council to use one of the enumerated techniques or other techniques. We agree with the circuit court that County Council clearly chose to employ the PD process for the Walpoles' property and, once having invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act, and we reverse the Court of Appeals' determination on this point.

As *Sinkler* makes clear, the legislature intended that the County's Comprehensive Plan have practical application and force of law, and Respondent would implement the plan through its adopted zoning code. Therefore, it is implausible that the legislature intended Berkeley County can make legislative decision expressed in its Plan and then ignore its data-driven Comprehensive Plan, relying entirely on anecdotal "evidence" for contrary, non-compliant zoning decisions. (While not controlling on the issue before the Court, it does warrant mention that the only two lawyers on County Council both appreciated and articulated that they were voting to support the

rezoning precisely because the application met the goals and conclusions of the Comprehensive Plan. One of them also mentioned that as a young lawyer starting out on his career, his family relied on the affordability of a mobile home to provide housing. See Record on Appeal pages 275-276 [tr. March 27, 2017, Page 56-57])

In reversing the Court of Appeals, the Supreme Court rejected the identical argument Berkeley County asserts here; to wit, that County Council has the discretion to reach a particular zoning decision that is at variance with its findings and conclusions of its Comprehensive Plan. This brings us back to *Harbit*, and why that case supports the Appellant because in *Harbit*, as the landowner was arguing **against** the legislative decision expressed in the Ashely River Overlay Zone, where here, the County is arguing **against** its own Comprehensive Plan, and the Appellant is arguing **for** the Comprehensive Plan. When comparing *Harbit* to the present case, it is logically impossible for two landowners to be on opposite sides of the same issue and both be wrong! In short, in order to provide "deference" to the legislative prerogative of Berkeley County on this record, the Court must ignore the legislative decision expressed through the Comprehensive Plan. To do this, the Court must elevate the unreasoned and unsupported opinions of unhappy neighbors and promote them as sufficient to overrule the County's legislative decision expressed through the objective, carefully calculated and vetted conclusions of the Comprehensive Plan.

In a 2009 case, *Mikell v. County of Charleston*, decided the year before *Sinkler*, the Supreme Court also weighed the force of a Comprehensive Plan against a specific zoning decision, and laid the groundwork for its emphasis in *Sinkler* that the Comprehensive Plan controls. The Respondent here adopts Justice Cooper's reasoning in *Mikell v. County of Charleston*, 386 S.C. 153, 687 S.E.2d 326 (2009) that a County Council is more or less free to act any way it sees fit so long as its action does not fatally offend constitutionally guaranteed minimums. This is the same

conclusion reached by the Special Referee in this case; to wit, that despite the Appellant making an application consistent with the County's Comprehensive Plan, it just is not appropriate for a court to interfere in a County Council decision no matter how incongruent. Period. This was the conclusion expressed by Justice Cooper in his dissent in which the four judge majority, expressed by Justice Waller, held the opposite; that Charleston County could **not** deviate from its Comprehensive Plan:

> Petitioners instituted this declaratory judgment action, contending the ordinance conflicted with County's Comprehensive Plan and the ZLDR [Zoning and Land Development Regulations]. Petitioners' motion for summary judgment was granted by the Master. The Master held Ordinance # 1300 conflicted with the clear, unambiguous requirements of § 4.5.3(B) of the ZLDR limiting the density in an AG-10 district to a maximum of one dwelling per five acres. The Master found § 4.5.3 was, at best, inconsistent with § 3.5.7 of the ZLDR, such that the more specific regulation, § 4.5.3, controlled.
>
> The Court of Appeals reversed. *Mikell v. County of Charleston*, 375 S.C. 552, 654 S.E.2d 92 (Ct. App. 2007). It held County Council's decision to allow the PD was at least fairly debatable, and was neither arbitrary nor unreasonable. It found § 3.5.2 and § 3.5.7 of the ZLDR authorized County's exercise of discretion in approving a PD with a higher density than base zoning districts would have allowed. The Court of Appeals found no conflict existed between §§ 3.5.2, 3.5.7 and § 4.5.3(B). We reverse.

The reason the Supreme Court reversed the Court of Appeals and reinstated summary judgement was because, consistent with its decision in *Sinkler*, the zoning application to increase density in *Mikell* conflicted with the Comprehensive Plan. Here, the Appellant's application seeks to bring his property into conformity with the Comprehensive Plan. In *Mikell,* the Supreme Court pointed out that the question on appeal was not a dispute over facts—and neither is the dispute here—but rather a dispute over the meaning and application of the County's Comprehensive Plan as it applied to the application before it. The Supreme Court pointed out appellate review in such cases is different, "broader," because it involves a question of law, not fact:

Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, "a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *Id.* at 568, 666 S.E.2d at 894 citing *Charleston County Parks & Recreation Comm'n. v. Somers*, 319 S.C. 65,67, 459 S.E.2d 841, 843 (1995). The determination of legislative intent is a matter of law. *Id*

Applying this "broader and more independent review" resulted in the Supreme Court's decision that it had to reinstate the Master-in-Equity's grant of summary judgment because the application for rezoning was in conflict with the Comprehensive Plan. The same reasoning applies with equal force here because, as pointed out several times, the purpose of the Berkeley County Zoning Ordinances is to "implement" the Comprehensive Plan. See Berkeley County Ordnance 1-2, R.O.A. page 345.

Finally, the Respondent asserts that Appellant confuses some standard between quasi-judicial decisions of the Board of Zoning Appeals and legislative decisions of County Council. (The failure of "evidence" on which the Council decided the issue is discussed below in Reply Argument 2.) Appellant agrees County Councils are not quasi-judicial bodies. This concession does not authorize Councils to be arbitrary. The casebooks overflow with legal decisions overturning government action for a myriad of reasons. In 1967, the U.S. Supreme Court handed down *Loving v. Virginia*, 388 U.S. 1, 875 S.Ct. 1817 (1967), and 40 years later law students still experience anguish that a democratic government could be so gratuitously cruel. The point is that both the Virginia General Assembly and the Virginia Supreme Court thought criminalizing racially mixed marriages was both "fairly debatable" and proper expressions of a "legislative decision" that demanded judicial deference. The lesson of *Loving* and the 18,000 cases citing it is that we are lucky to have a judicial branch where arbitrary "legislative decisions" can be examined in a non-partisan forum. Recent events have emphasized the importance of the judicial branch. The point is that it is a hard sell for any lawyer, and Respondent's lawyers are bright and shining

examples radiating the best tradition of the Bar, to assert that the courts of this nation are potted plants not permitted to examine arbitrary government action. Yet, this "hand's off" conclusion is the conclusion reached by the trial court, and it is an error of law.

REPLY ARGUMENT 2
FOR A DECISION TO BE "FAIRLY DEBATABLE," IT MUST BE SUPPORTED BY SOMETHING MORE THAN MERE CONJECTURE.

The Respondent's second argument is the heart of the case. The Respondent asserts in both arguments that this Court must keep its hands off the decision below because there is sufficient evidence to support the lower court's finding that the issue is "fairly debatable."

A.
Fairly Debatable

As legal standards go, "fairly debatable" is a low standard. This is because: (1) courts traditionally avoid second guessing legislative decisions to avoid offending the separation of powers, and (2) courts, like well-behaved children, do not speak unless spoken to:

> South Carolina is an "exception state." This means the South Carolina Supreme Court and this court are "confined to a disposition of appeals upon the exceptions taken. . . ." *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 197 S.E. 97, 106 (1938); *Evans v. Bruce*, 245 S.C. 42, 138 S.E. (2d) 643 (1964); *Bartles v. Livingston*, S.C. 319 S.E. (2d) 707 (S.C. App. 1984); *Ellison v. Heritage Dodge, Inc.*, S.C. 320 S.E. (2d) 716 (S.C. App. 1984). More simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.
>
> *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (1984) (The Supreme Court quashed this decision, abrogating contributory negligence, at 286 S.C. 85, 332 S.E.2d 100 (1985) on the ground that the appellant lacked authority to argue against precedent.)

As the record demonstrates, there is no "evidence" for denying Appellant's application unless the court degrades the definition of "evidence" to mere "speculation." When faced with what weight to give to complaining neighbors asserting unsupported allegations, the appellate courts have been unanimous in rejecting such unsupported opinions. *Bannum v. City of Columbia*,

335 S.C. 302, 516 S.E.2d 39 (1999); *Wyndham Enterp. v. City of N. Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012); *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015) As these three cases make clear, complaining neighbors must identify something more than prejudice and speculation on which to ground land use decisions. (See *I'On v. Town of Mt. Pleasant, op. cit.* quoted on page 13.) The quality of such testimony appears often in public forums concerning land use. The history of zoning teaches us that the function of zoning is to segregate populations. See Richard Rothstein, *The Color of Law*, (W. W. Norton, 2017). Before zoning, courts across the land were called upon to enforce restrictive covenants to prevent property sales to unpopular groups: "As early as the 19th Century, deeds in Brookline, Massachusetts, forbade resale of property to 'any negro or native of Ireland.'" Rothstein, *The Color of Law*, page 78. Even after the Supreme Court declared such restrictions unenforceable (but not illegal) in 1948, in *Shelley v. Kramer*, 348 U.S. 1, 68 S.Ct. 836 (1948), three of the justices had to step aside because their property was subject to racial restrictions. The point—and it is a significant one—is that the soul of zoning in America was forged upon the smithy of prejudice, and the undercurrent of prejudice continues right through to the present day in the comments of the Royle Road residents. There is something about zoning that arouses the passion of citizens and liberates them to exhibit the raw prejudice demonstrated here. Writing for the Supreme Court of South Carolina in 2000, Justice Waller diplomatically commented on this phenomenon in *I'On v. Town of Mt. Pleasant*: 338 S.C. 406, 576 S.E.2d 716 (2000):

> 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.

It is the tension between "intense public interest" on the one hand and "rational development of land use, free from undue political influence" on the other hand that is the heart of the present case, and it is insignificant that the decision here is "legislative" as opposed to "quasi-judicial." It is legally insufficient to deny Appellant the right to use his property to its highest and best use because the decision is "fairly debatable." Property rights are more substantial than such gossamer. The "fairly debatable" standard not one that is defined by the number of debaters; otherwise, it is like asking two wolves and a lamb to vote on what is for lunch. (Benjamin Franklin) When the issue is property rights, especially where as here—unlike every case cited by the Respondent—the Appellant seeks only a zoning change to "implement" the County's carefully calibrated legislative decision. In logic, law, and philosophy, anything and everything is "fairly debatable," and courts have never conditioned fundamental property rights on whether the highest and best use is "fairly debatable." As the Respondent correctly notes on page 15 of its brief, a landowner is not entitled to demand zoning to generate a "more profitable" use of his property. If that straw man were Appellant's assertion, he would deserve to lose. At the risk of being maddeningly repetitive, the issue here is that Appellant's contention is that his property should be rezoned to **conform** to the County's legislative decision reached in its publicly noticed and duly adopted Comprehensive Plan. The Comprehensive Plan is a legislative decision that deserves deference, but the lower court errs in elevating the County's expedient decision taken to mollify complaining neighbors as a decision that is unreviewable while simultaneously ignoring the legislative decision reached through its Comprehensive Plan. Interestingly, this fairly debatable argument is similar to the argument the Supreme Court of South Carolina grounded its decision upon in upholding the Beachfront Management Act's regulations on two lots on Isle of Palms. In *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), the South Carolina Supreme

Court found that Lucas could do lots of things with his property—just not what he wanted to do. That is the County's argument here: Appellant can have two mobile homes, but no more. However, the U. S. Supreme Court reversed because it found that the Beachfront Management Act curtailed so much of Lucas' use through regulation that it deprived him of meaningful economic use of his property. That analysis has applicability here, because: (1) the Appellant's request is to conform to the County's Plan, which is its legislative decision, (2) the entire area is being used as mobile home parks even though they are zoned R-2, making Appellant's property unfit for any use but that use compatible with the neighborhood, and (3) the Appellant's adjoining parcel is already zoned R-3 and it is illogical to divide zoning on commonly owned parcels. Rather, the test, as set forth fully in Appellant's initial brief at pages 10 - 18 is whether government's denial is either rational on one hand or arbitrary and capricious on the other, and since the County expressed its rational conclusion after years of careful study, it is error to conclude that the County's legislative decision reached in its Comprehensive Plan is entitled to no legislative deference while an *ad hoc* decision to mollify neighbors is unreviewable because it is a legislative decision. Since the Order under review found that a decision that is "not fairly debatable" is equivalent to arbitrary or capricious, a conclusion not challenged on appeal, the issue is whether the County's turning its back on its own Comprehensive Plan to mollify complaining neighbors is arbitrary or capricious.

B.
The lack of evidence

Since the not fairly debatable standard is equivalent to arbitrary and capricious in this case, we can turn to the Respondent's final argument, which is that the County's decision in refusing to rezone the parcel is supported by sufficient "evidence." As Respondent says: "The burden of proving the invalidity of a zoning ordinance is on the party attacking it; thus, it is incumbent upon

[Appellant] to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance." Respondent's brief at page 14, citing *Town of Scranton v. Willoughby*, 306 S.C.421, 412 S.E.2d 424 (1991) In *Town of Scranton*, a mobile homeowner moved his mobile home into a zone that prohibited them. By contrast, here the clear and convincing evidence is found in the fact that the complaining neighbors not only established that the Appellant's proposed use is compatible with the area as it exists, but also they identified no objective concern, relying instead on nothing more than their prejudice and speculation to assert without proof that "mobile homes would destroy traffic, safety, and property values."

As set forth in the Appellant's initial brief and above, the Appellant's application for rezoning here **conforms to the County's legislatively adopted Comprehensive Plan**. It is not much of a burden to point out to the County that the application is consistent with its ordinance and the County's decision under review is in conflict with its own ordinance. This indisputable fact makes this case different from every case relied upon by the Respondent. Take *Town of Scranton*, for example. There the Town adopted a zoning ordinance that set up zones for mobile homes, and when the property owner moved a mobile home into an area where the ordinance prohibited it, it is not surprising that the Town told her to move it. Here, the County's Comprehensive Plan has designated the Appellant's parcel as appropriate for R-3, and he asked only that the map be amended to conform to the County's Plan because the Comprehensive Plan is designed to guide and implement zoning. Instead of adhering to its own legislative findings—findings it adopted after years of study and consultation as well as findings that included substantial public participation—the County chose to give greater weight to the putative concerns of a few disgruntled neighbors and restate them as the reasons to deny Appellant's application.

The Respondent's brief helpfully summarizes the assertions of the complaining neighbors, but there is not a *scienter* of evidence that can be identified as supporting their opinions or identifying an objective fact. Everything they identified as being of concern was either: (1) canards based on prejudice, or (2) generic comments applicable to change everywhere. The special circuit judge erred when he misapplied his own reasoning to provide cover for the County Council who did exactly what the special circuit judge erroneously concluded they did not do. In his Order sustaining the denial, the special circuit judge found: "It would be unfair to judge the County's legislative decision because of public comments—however pejorative, uninformed and speculative—that were made in the same vein." (R.O.A. page 17 [Order at page 13] Yet, these comments, summarized on pages 9-10, are either irrelevant, offensive, self-refuting, or all three:

Raymond Headden: There is high traffic on Royle Road. It is a 2-lane road. There are 13 trailer parks on Royle Road. There are 316 "trailers" on Royle Road. Someone told him his house depreciated because of the mobile homes. He sees cars, trucks, and mopeds, which is "a common red flag to predict high drug trafficking." He has seen "suspicious people" sitting in his driveway. He has seen "strange vehicles." He has seen trailers "falling apart" or "missing skirting." He saw a boy get hit.

James Jackson: He bought his property 50 years ago when it was rural and it is not rural anymore. The road is blocked when Sangaree School lets out.

Francis Gibson: He has lived there since 1978 and they do not need any more trailers. The area has transformed from acreage to trailers.

Record on Appeal pages 195 – 196 [Exhibit 6]

This is the putative "evidence" which the lower court found sufficient to overcome the County's legislative expression of "rational development of land use, free from undue political

influence" expressed through its legislative decision of the Comprehensive Plan. See Order under review at page 3 (R.O.A. page 3): "Considering the record as a whole, I am compelled to conclude that it is at least fairly debatable whether increasing the density of mobile homes on Plaintiff's parcel would increase traffic congestion, endanger children, or lower property values—particularly if this became a precedent for future similar requests in that area." The legal error is that the County's legislative decision as expressed through its Comprehensive Plan is that the Plaintiff's parcel is exactly where the County legislatively decided should be developed to provide the critically needed affordable housing. (See Goals and Policies, Comprehensive Plan, R.O.A. page 159 [Exhibit 1, Attachment B]) As to the area being saturated with "trailers," this is the strongest evidence of the appropriateness of Appellant's request for rezoning because it demonstrates compatibility with surrounding uses. Obviously, the County is not going to permit mobile homes in areas that are zoned otherwise. This is the lesson of *Town of Scranton v. Willoughby, op cit.* Thus if additional mobile homes are not permitted where mobile homes are permitted, then the strategies and goals of the Comprehensive Plan for greater densities and affordability cannot be met. Council's adopted 2015 Plan intended incentives that would "provide affordable housing in close proximity to existing and future employment centers," including Appellant's parcel. Appellant stepped forward with a compatible application that would help the County achieve its goals; however, Council voted against its own well-reasoned and "relevant" Plan for addressing housing needs from changing conditions in Berkeley County. The County's Plan intended to incentivize the very development Appellant proposed. Here, the County says Appellant is limited to build single family homes on a parcel that, as Mr. Headden helpfully testified, is surrounded by 316 mobile homes. It does not require an expert to comprehend that such a project is economically doomed. Under this view, the Appellant is denied any **reasonable** investment back expectation

for his property. When limitations such as these become so onerous as to deprive an owner of reasonable use of property, the courts have struck them down. *Lucas, op. cit., Helicopter Solutions, op. cit.* Because the area is, as the complaining neighbors testified, saturated with mobile homes and mobile home parks, their testimony reinforces the County's Comprehensive Plan legislative decision to designate the area of Royle Road as appropriate for mobile homes to meet the County's critical need for affordable housing. Thus the circuit court's entire conclusion about "rational concerns" (R.O.A. page 3 [Order on Reconsideration page 3]) is based upon a self-refuting principle. And lest there be any doubt that the County's reasons to abandon its own legislative findings as expressed in its Comprehensive Plan, the County announced on the record that its decision was based on: (1) the complaints of the neighbors, and (2) the "stuff" that's been going on out there: "Council Member Schurlknight stated that he has a lot of concerns about the effects it is going to have on the individuals that live on Royle Road. They've been there a long time, and have seen a lot. He is hearing that they have hosted a lot of development on the road, and it comes to a tipping point to where you must look at the capacity of the road, and safety. . . . Council Member Schurlknight stated that with that in mind, he has been down Royle Road many times. He has seen a lot of stuff going on in the area. It does devalue the property. . . ." (R.O.A. page 198, 278 [Exhibit 6, page 6] It is painfully obvious that there is not a shred of evidence in this record to support any of these conclusions. Because there is no evidence to support Council's denial of the request for rezoning, the circuit court erred in upholding it when it is wholly unsupported by anything objective and so obviously at variance with its legislative decision expressed through its Comprehensive Plan. The County's two decisions are inconsistent, and only its adoption of the Comprehensive Plan demonstrates studied reasoning. Unsupported reasons to deny zoning—increased traffic, endangering children, lowering property values—lack any

objective evidence. The two contradictory decisions cause the question of rezoning to be "not fairly debatable," absent any objective concerns worth overcoming the adopted Plan. As the lower court found, "not fairly debatable" equals arbitrary. Council's vote to deny rezoning is proved arbitrary when contrasted with Council's well-reasoned adoption of its Comprehensive Plan. Unless or until Council amends its Plan, Appellant's application to comply with the Comprehensive Plan and its strategies is straightforward and denial is not "fairly debatable." In short, the decision is demonstrably arbitrary and capricious.

Conclusion

Based on the foregoing, Appellant respectfully submits that the Court of Appeals reverse the Order under review and order the County to grant the Appellant's application to make his two parcels subject to the uniform classification of R-3 in conformance with the County's Comprehensive Plan, or, in the alternative, remand to the County Council with instructions to identify which objective facts they are relying on to overrule the legislative decision reached in its Comprehensive Plan.

Respectfully submitted,

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I certify this Final Brief complies with Rule 211(b), *South Carolina Appellate Court Rules.*

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