

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 Tracking Number: 2023-000370
Court of Appeals Opinion Number: 2022-UP-402

Todd Olds,

Petitioner,

vs.

Berkeley County, Berkeley County Planning Commission,

Respondents.

RESPONDENTS' RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. Petitioner cannot satisfy the high standard for this Court to grant his Petition for Writ of Certiorari.
- II. The Court of Appeals appropriately relied on rezoning precedent from the South Carolina Supreme Court and Court of Appeals to affirm the County Council's legislative decision to not rezone Petitioner's property.
 - A. Rezoning decisions are legislative matters presumptively valid. *Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 459 S.E.2d. 883 (Ct. App. 1995).
 - B. As a legislative matter, the County Council was not required to approve Petitioner's rezoning request merely because the rezoning would comply with goals in the Comprehensive Plan.
 - C. The Court of Appeals correctly ignored inapplicable variance and special exception case authority which reviewed local quasi-judicial decisions, not legislative determinations.
- III. The Court of Appeals appropriately determined that the rezoning decision was a "fairly debatable" legislative decision based on South Carolina rezoning precedent.
 - A. The County Council's rezoning decision was not an arbitrary and capricious exercise of its discretion to deny rezoning merely because the only opposition was neighbors' complaints based on their observations of increased traffic and reported decreased property values. *Id.*
 - B. The fair debate before the County Council established that Petitioner failed to sustain his burden that his constitutional rights were clearly violated to overcome the strong presumptive validity of the County Council's legislative decision. *Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E.2d. 639 (1991); *Bear Enters.*, 319 S.C. 137, 459 S.E.2d. 883.
- IV. The Court of Appeals correctly concluded that Petitioner's nonconsequential argument that the Comprehensive Plan was the "legislative act" at issue was not reviewable because he 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).

STATEMENT OF THE CASE

This is a rezoning case where Petitioner repeatedly debates whether the County Council made an appropriate legislative decision in denying his request to rezone his property so he can run a commercial mobile home park. The issues at hand were fairly debatable and were debated, including by Petitioner many times. Even though Petitioner maintains otherwise, the Court of Appeals affirmed and accepted all prior determinations that the County did not act arbitrarily or capriciously by denying the rezoning request after public discussion and input, and various county officials' questioning, over several hearings.

There are some references to the County's Comprehensive Plan and its connection with this rezoning decision. The County's Comprehensive Plan was adopted in 2011. There was also a review completed and changes made to the Plan in 2018. (Appendix, "App.", p. 134). There was a 2010 Future Land Use Recommendation of Low Density Suburban for the area, which seeks to include diverse housing choices which would also act as a transition from Constrained Growth Areas to higher density residential and commercial areas. (App. pp. 174, 180).

On January 24, 2017, Petitioner applied to Berkeley County to rezone a 1.29-acre parcel at 751 Royle Road from R-2 (residential mobile home) to R-3 (commercial mobile home) before he owned the property. (App. p. 5, Special Referee M. Dawes Cooke, Jr., Court of Common Pleas Order, p. 1, dated May 5, 2020, "Spec. Ref. Cooke Ord.") (App. p. 17, Application for Rezoning). Petitioner claimed some executory interest in the parcels. (App. p. 30, Petitioner's Amended Complaint, ¶ 7). Petitioner sought rezoning of 751 Royle Road lot to join with the adjoining 1.2-acre parcel at 749 Royle Road, which would enable to conform with R-3 zone's minimum 2-acre requirement. (App. p. 5, Spec. Ref. Cooke Ord. p. 1). He did not seek a special variance or exception. (*Id.* at p. 2). Bonnell W. Meese was the owner of the two lots at the time

of Petitioner's rezoning application and subsequent county hearings in 2017. (App. p. 170, Application for Rezoning) (App. p. 173, Land Use Committee, February 13, 2017; App. pp. 186-87; Planning Commission, February 28, 2017; App. pp. 190-91, Land Use & Economic Development Committee, March 13, 2017; App. pp. 198-99, County Council, March 17, 2017). Petitioner bought the two properties on July 20, 2017, despite the county's denial to rezone R-2 property. (*See* Petitioner's Petition for Certiorari, p. 1).

Upon their initial review, the County Planning Department staff recommended approval to rezone since they considered the request to be consistent with the County's Comprehensive Plan by providing for development of diversity of housing options. The staff also considered it compatible with the area concerned. (App. pp. 173-5, Staff Summary, Land Use Committee, February 13, 2017). However, the Planning Commission unanimously denied the request after discussing the matter and obtaining comments from members of the community in a public hearing. (App. pp. 182-88). "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." (App. p. 174). There is nothing in the record indicating that the public derogatively commented that mobile home park residents are all bad people or gave such other prejudicial remarks. Notably, one resident, Francis Gibson, provided a letter which listed ten other requests for rezoning of similar properties for commercial mobile home parks in the area which had been denied, likely due to the oversaturation of mobile homes in the area and identified problems to the community. (App. p. 181; Francis Gibson Letter to Office of Planning and Zoning Commission, dated February 28, 2017).

On March 13, 2017, the County Land Use and Economic Development Committee reviewed the request to rezone this parcel in an open hearing. (App. pp. 190-93). Petitioner

presented his case before the committee. Committee members questioned Petitioner about this mobile home park that he would run. (*Id.*) It is undisputed that there are multiple R-3 mobile home parks and multiple nonconforming R-2 mobile home parks in the area. (App. pp. 174, 181-82).

Additionally, the county's Planning and Zoning Director, Ms. Alison Simmons, testified regarding the Planning Department staff's approval and the subsequent Planning Commission's denial of the rezoning request. Committee members questioned Ms. Simmons about the impact of rezoning. (App. p. 191, Land Use and Economic Development Committee). Ms. Simmons noted that the rezoning would be consistent with the Comprehensive Plan. However, Ms. Simmons and County officials also recognized that maintaining R-2 zoning was also consistent with the Comprehensive Plan (*Id.*) Ms. Simmons also explained that this lot was grandfathered as an R-2 in part because the County Council determined that this was no longer the appropriate zoning for that area. (*Id.* at 192). Thus, there could be no more than two mobile homes on that lot unless it was rezoned to R-3 and then, up to 14 mobile homes would be allowed. (*Id.*) After reviewing the public comments and the requested change, the Committee voted to deny the rezoning request, 6 to 2. (*Id.* at 193).

Similarly, the County Council met on March 27, 2017, to review the rezoning request. (App. p. 195, County Council Minutes). Again, Petitioner spoke in support of his application. (*Id.*) Well aware of previous public opposition to the rezoning, Petitioner countered what he believed to be all speculative and prejudicial comments only. (*Id.*) Petitioner also presented statements of support from present mobile home residents. Numerous local residents expressed their opposition again in person or through signed petitions. Although some were emotional and seemingly pejorative statements, many local residents spoke about their personal experiences with problems in traffic, safety, decreased property value when trying to sell, increased crime

like trespassing and oversaturation of mobile home parks affecting the quality of life in the area. (*Id.* at pp. 195-96). Several of them have lived in the area for decades, so they could easily compare changes in the area. Oversaturation of mobile home parks was continually noted as a problem as a justification for denial of 11 or 12 rezoning requests for mobile home parks over the past twenty years. (App. p. 196; Council Minutes; App. pp. 266, 274, Council Hearing Transcript). Presumably, it may no longer be considered diversification of home options when an area becomes overwhelmed with one type. However, two Council members spoke in support of the rezoning request. (App. pp. 275-77, 280-81).

In the end, the Chairman acknowledged everyone's comments and concerns. He noted that he heard nothing that indicated that people were saying mobile homes are a bad thing per se. (App. p. 279, Council Hearing Transcript). Instead, the Chairman noted concerns about traffic, safety and overcrowding which leads to other issues requiring police intervention. (*Id.*) Soon thereafter, the Council voted to deny the rezoning request with two opposed. (*Id.* at pp. 280-81).

Petitioner filed a suit challenging the County's denial of his rezoning request in the Berkeley Court of Common Pleas. (App. pp. 28-34). By Consent Order of Reference with Finality, the parties agreed that M. Dawes Cooke, Jr., "Referee Cooke," would serve as Special Referee to consider and rule on the single issue of whether County's refusal to rezone Petitioner's property was arbitrary and capricious and contrary to South Carolina law. (App. pp. 25-27). Referee Cooke conducted a hearing on December 10, 2019. Based on the pleadings, proceedings, filings, arguments of counsel, and the joint record, Referee Cooke issued his decision and order on May 12, 2020, that the County Council's decision to deny Petitioner's request was and is a proper exercise of its legislative power. (App. pp. 5-24). Referee Cooke based this decision on his very extensive analysis of the matter as well as his factual findings.

Referee Cooke determined that Petitioner had failed to meet his burden of establishing that the Council's decision was arbitrary and capricious. In fact, the issues raised by Petitioner were fairly debated. Referee Cooke acknowledged that some public comments were too speculative or emotionally charged, but many were rooted in the local residents' personal experiences and observations, and even provided some specific examples. (App. pp. 8-10). Referee Cooke especially addressed the legislative function of the Council in zoning matters like this as well as its prerogative to vote against matters even if the rezoning may be consistent with the Comprehensive Plan. (App. pp. 18-23).

Referee Cooke heard arguments and reconsidered everything in the record again in response to Petitioner's Motion for Reconsideration. (App. pp. 1-4). Referee Cooke affirmed his earlier decision. (App. p. 4). Petitioner filed his appeal on August 7, 2020. (App. p. 131). On November 9, 2022, the Court of Appeals affirmed the decision of the Court of Common Pleas (App. p. 348) and denied a rehearing on February 10, 2023. (App. p. 351). The Court of Appeals opined that the rezoning decision was a legislative matter in which the court cannot interfere unless the citizen establishes that the government decision was arbitrary and capricious to overcome the presumption of its validity. (App. p. 349). The Court of Appeals stated that a zoning decision is not arbitrary and capricious if it was fairly debatable. (*Id.*) The answer in such legislative decisions is the same even if the only opposition to rezoning were the neighbors' unsupported complaints about increased traffic and decreased property values. The court also agreed that the Council had the prerogative to deny the request even though it complied with the County's Comprehensive Plan. (*Id.*) Arguments about the legislative decision of the Comprehensive Plan were disallowed since they were first raised in the reply brief. (*Id.*)

ARGUMENT

I. Petitioner Cannot Satisfy the High Standard for this Court to Grant His Petition for Writ of Certiorari.

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. Rule 242, SCACR; *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170, 170 (2008); *In re Exhaustion of State Remedies in Crim. & Postconviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990). Pursuant to Rule 242, the following are indicative of the character of such special and important reasons:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Accordingly, the Court must exercise this discretion with great care and sparingly. *See South Carolina Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236 (2020). It must be truly extraordinary. *State v. Lyles*, 381 S.C. 442, 443, 673 S.E.2d 811, 812 (2009); *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013).

This case is not extraordinary and there are no special reasons justifying the Supreme Court's review of this matter. Petitioner's first question under review asserts that the Court of Appeals failed to follow its own precedent in *Harbit v. City of Charleston*, 382 S.C. 383, 390, 675 S.E.2d 776, 780 (Ct. App. 2009). This is certainly not a novel question, nor are substantial

constitutional issues at stake in this controversy. In fact, there is not even any conflict between the *Harbit* decision and the case, *Bear Enters.*, primarily relied on by the Court of Appeals.

In *Harbit*, the Court of Appeals determined that the plaintiff did not establish that the government's denial of his rezoning request was arbitrary. The court found that the government had several reasonable reasons justifying the denial beyond emotional public opposition against the request, and that the request was consistent with the comprehensive plan. Petitioner asserts that since this case does not mirror that situation, it was error to deny the request under *Harbit*. However, there is no conflict. In *Harbit*, the court similarly applied presumptive validity to the government's legislative decision and then merely found that Harbit did not overcome his burden establishing that the government's decision was arbitrary or unreasonable because of the reasons provided in the case. Certainly, the Court of Appeals would have to directly state if rezoning decisions *required* more than public opinion based on personal experience of nearby neighbors. Additionally, the *Harbit* Court of Appeals would have had to overturn its decision in *Bear Enters.* It did not.

Secondly, Petitioner claims the Court of Appeals' decision conflicts with South Carolina Supreme Court precedent. However, again this is not unique and there is no conflict. The cases cited by Petitioner involve quasi-judicial decisions, as in reviewing special exception or variance requests. This case concerns Petitioner's rezoning request. The Court of Appeals relied on rezoning cases, which are legislative decisions carrying presumptive validity. No special or extraordinary reasons justify review here either.

Thirdly, there is no special or extraordinary reason to review the County's application of the fairly debatable standard. The record on appeal clearly established that the issues were fairly debatable and fairly debated. The Special Referee's cogent and thorough factual findings and legal analysis provided substantial support for the Court of Appeals' decision here. Again, it is

not extraordinary situation. There is no need for the Court to use its discretion to review this issue either.

Lastly, it is inconsequential to this case whether or not the Court of Appeals should have reviewed Petitioner's argument that the application of the Comprehensive Plan was the legislative decision being reviewed. There was no dispute that the rezoning request was consistent with the Plan. Maintaining the status quo was also consistent. Thus, the issue was irrelevant; most certainly, not novel or extraordinary warranting Supreme Court's review.

II. The Court of Appeals Appropriately Relied on Rezoning Precedent from the South Carolina Supreme Court and Court of Appeals to Affirm the County Council's Legislative Decision to Deny Rezoning of Petitioner's Property.

A. Rezoning decisions are legislative matters presumptively valid.

As cited by the Court of Appeals: "Rezoning is a legislative matter, and [an appellate] court has no power to zone property." *Bear Enters.*, 319 S.C. at 140, 459 S.E.2d at 885. The reason for this rule is clear. "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." *Harbit*, 382 S.C. at 390, 675 S.E.2d at 780 (citing *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 530-31 (1965)). "As explained in *Lenardis*, '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.'" *Bear Enters.*, 319 S.C. at 140, 459 S.E.2d at 885 (citing *Lenardis v. City of Greenville*, 316 S.C. 471, 472, 450 S.E.2d 597, 598 (Ct. App. 1994)). "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from the municipal action." *Knowles*, 305 S.C. at 222, 407 S.E.2d at 642 (App. p. 11, Referee Cooke's Order).

Obviously, this does not mean that courts must act like “potted plants” and let anything pass through without any judicial review. Rather, the Court of Appeals recognized that in the scheme of our country’s, and state’s, divided branches of government, the courts must not interject itself into such political matters which may sometimes involve heated, and emotional debates, unless government actors cross a certain line prescribed by the court or a statute. *See Harbit*, 382 S.C. at 391-92, 675 S.E.2d at 780 (citing *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 that it is a zoning official's responsibility to mediate disputes between developers and local residents)).

It is well-established South Carolina law that the line in rezoning matters is crossed when the legislative board acts arbitrarily, capriciously, or unreasonably, thereby clearly violating a citizen’s constitutional rights. *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642. In light of this standard, the courts begin any analysis with a presumption that the legislative board acted appropriately so that the petitioner has the burden of proving otherwise. *Bear Enters.* 319 S.C. at 141, 459 S.E.2d at 886. The petitioner must meet his burden by clear and convincing evidence. *Id.* (citing *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991) (per curiam)) (See also App. p. 2, Referee Cooke’s Order). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." *South Carolina Dep't of Soc. Servs. v. Smith*, No. 2016-UP-328, 2016 S.C. App. Unpub. LEXIS 365, at *3, 2016 WL 3470020 (S.C. Ct. App. June 20, 2016) (citing *Loe v. Mother, Father, & Berkeley Cnty. Dep't of Soc. Servs.*, 382 S.C. 457, 465, 675 S.E.2d 807, 811

(Ct. App. 2009) (quoting *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 374 n.2, 496 S.E.2d 17, 18 n.2 (1998)); *In re Dickey*, 395 S.C. 336, 354, 718 S.E.2d 739 (2011) (citing *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 265 n.4, 478 S.E.2d 282, 284 n.4 (1996) (citation omitted)). No doubt this must be considered a high burden.

Petitioner agrees that the standard is an arbitrary and unreasonable or capricious one: “simply because local governments possess power to zone, that power does not exempt them from judicial review when they act arbitrarily.” (Petitioner’s Petition, p. 4). Apparently, Petitioner just disagrees with the County’s, the Referee’s, and the court’s application of the standard and quite frankly, the law granting a presumption of validity and placing the burden on him. The record before this Court clearly shows this is because Petitioner did not meet his burden of proof to establish by clear and convincing evidence that the County acted arbitrarily and capriciously by denying his request. Essentially, it is similar to a prosecutor having to prove a defendant committed a crime—albeit the prosecutor is held to the standard of beyond a reasonable doubt. In other words, Petitioner must prove that the County acted arbitrarily, not the other way around. The County does not need to establish that it acted appropriately.

Contrary to Petitioner’s assertions, the Supreme Court’s decision or analysis in *Harbit* does not change that burden in this case. In fact, the *Harbit* decision reinforces the lower courts’ decision here. In *Harbit*, the Court of Appeals emphasized that there was a strong presumption in favor of the city’s application of its zoning ordinance when it denied rezoning of Harbit’s residential property to limited commercial for an attorney’s office. 382 S.C. at 391, 675 S.E.2d at 780. To overcome that presumption, Harbit needed to establish that the City Council acted arbitrarily or unreasonably. *Id.* Harbit had not met that burden. In fact, public comment, as in the present case, served as one of the bases for the City Council’s decision: “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.” *Id.* at 391, 675 S.E.2d at 780 (internal citation omitted). This is exactly the same case here.

Notably, Petitioner bought this property after the rezoning denial and sought rezoning instead of a variance or exception. He took these actions even though the Council had previously denied eleven or more such requests since 2002. He repeatedly tried to persuade the County’s planning committee, the Council, a court’s Special Referee, and the Court of Appeals, but failed. He took a large gamble that somehow he was right and simply lost the debate. *See Lenardis*, 316 S.C. at 472, 450 S.E.2d at 598 (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).

B. As a legislative matter, the County Council was not required to approve Petitioner’s rezoning request merely because the rezoning would comply with goals in the Comprehensive Plan.

As set forth in its Introduction, Purpose and Vision provisions, Berkeley County’s Comprehensive Plan provides goals and guideposts in planning for the county’s land development. (*See App. pp. 18-20*). “The Comprehensive Plan is part of an on-going process.” (*See App. p. 20*, citing Plan Implementation section of Plan). Section 6-7-10 of the South Carolina Code supports local counties using their comprehensive plan as a *guide* and *aide* not as a noose tying the hands of local officials in or to prejudge zoning decisions. *Id.*

In fact, many local and state laws govern Berkeley County’s decisions in zoning matters and land development beyond the County’s Comprehensive Plan. For example, section 4-9-25 of the South Carolina Code vests the County Council with broad authority to enact

ordinances and resolutions which are necessary and proper for health, safety, security, peace, order, and preserving good government, as long as they are not inconsistent with general state law or the constitution. Moreover, section 6-29-710 of the South Carolina Code mandates that zoning ordinances be adopted for the general 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.

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 mandates certain procedures when the county proposes building infrastructure which *conflicts* with their Comprehensive Plan. S.C. Code Ann. § 6-29-540. Accordingly, these proposals undergo a substantial statutory process which includes comments and findings by the Planning Commission prior to approval. As noted by Referee Cooke, no such provision exists for private lands. (App. p. 22). “This omission strongly suggests that the Comprehensive Plan is not intended to dictate the County’s zoning decisions for private property.” (*Id.*) Even if it did, no one in the process stated that maintaining Petitioner’s lot as R-2 conflicted with the Comprehensive Plan. Either situation was compatible.

Lastly, and most relevant to these proceedings, Berkeley County adopted a county-wide zoning ordinance in 2001 which listed implementing the Comprehensive Plan’s goals and purposes as only one of many stated purposes for zoning decisions. (App. p. 14). Other purposes included preventing overcrowding and congestion in streets, regulating density and distribution of populations and managing traffic conditions favorable to health, safety and general welfare of the county. (*Id.*) These provisions are not mutually exclusive. Nor do any of these provisions require that the County Council and the Planning Commission adopt their Planning Department’s staff’s recommendations on a particular zoning.

Special Referee Cooke acknowledged in his findings that the Comprehensive Plan did not control outcome in all zoning decisions, since it did not expressly mandate certain zoning for particular properties . (*Id.*) Regardless, the record showed that maintaining R-2 zoning was also compatible with the Comprehensive Plan. Accordingly, this claim fails based on its main premise. These facts and legal analysis were part of the record which formed the basis of the Court of Appeals' decision. There is no error.

C. The Court of Appeals correctly ignored inapplicable variance and special exception case authority which reviewed local quasi-judicial decisions, not legislative determinations.

The Court of Appeals correctly disregarded the three inapplicable variance, special exception, and nonconforming land-use cases proposed by Petitioner. This is not an appeal from the Board of Zoning Appeals which renders quasi-judicial decisions like in variance and special exception cases. Unlike legislative rezoning decisions, quasi-judicial determinations necessitate, by statute, fact-finding and recordkeeping to establish the rationale for their decisions. Berkeley County Ordinance 21.6, titled Decisions of the board of zoning appeals, provides: "All findings of facts 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." (*See App. p. 15*).

On the other hand, the County Council is the controlling and governing authority to render legislative decisions on rezoning after considering many facts and factors, including recommendations of staff and committees as well as the public. However, there is no law requiring that the County Council make findings of fact or setting forth the legal basis when making such legislative decisions as in zoning. If the public does not like their decisions, local citizens are supposed to use the ballot box to contest, unless there is clear evidence of discriminatory intent against a particular landowner which establishes arbitrariness or illegal government behavior. *See Bear Enters.*, 319 S.C. at 139 n.1, 459 S.E.2d at 885 n.1.

As appropriately quoted by Referee Cooke: “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 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.’” (App. p. 17) (citing *Knowles* [also cited by Court of Appeals], 305 S.C. 219, 407 S.E.2d 639) (internal citations omitted). Similarly here, the court must exercise judicial restraint and not supplant its judgment for the local government’s judgment. See *Lenardis*, 316 S.C. at 472, 450 S.E.2d at 598.

III. The Court of Appeals Appropriately Determined That the Rezoning Decision Was a “Fairly Debatable” Legislative Decision Based on South Carolina Rezoning Precedent.

A. The County Council’s rezoning decision was not an arbitrary and capricious exercise of its discretion to deny rezoning merely because the only opposition was neighbors’ complaints based on their observations of increased traffic and reported decreased property values.

“We have long recognized the principal that the power to zone is exclusively for the legislature and that zoning decisions will not be interfered with when made in the exercise of the governing body's police power to accomplish the desired end unless there is a plain violation of citizens' constitutional rights.” *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642 (citing Adv. Sht. Opinion No. 23363 filed March 11, 1991 (citing *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952))). As affirmed by Referee Cooke, “in the context of a zoning action involving property, it must be clear that the state’s action ‘has no foundation in reason and 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.’” (App. p. 11)

(citing *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 827 (4th Cir. 1995) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 187-88, 48 S. Ct. 447 (1928))).

The appellate court agreed with the Referee that that was not the situation here. The court held that a County Council's decision is 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. (App. p. 349) (citing *Bear Enters.*, 319 S.C. at 140, 459 S.E.2d at 885). In essence, the appellate court held that the propriety of this County Council's decision was fairly debatable based on those comments, so the court could not intervene. At the center of Petitioner's claim lies the accusation that the appellate court erred because there was a plain violation of Petitioner's constitutional rights since the county's denial was arbitrary or unreasonable. More specifically, it allegedly erred because it failed to follow the court in the *Harbit* decision (rather than *Bear Enters.* opinion) which found the record established more than public comments for a decision to be fairly debated or fairly debatable, and thus, not arbitrary.

As already noted in Section II, *supra*, the law regarding presumption of validity of legislative decision, and burden on property owner to prove arbitrariness, remains the same even though in *Harbit*, the City Council provided other reasons for its denial, including the fact that rezoning in *Harbit* would be inconsistent with a recent plan for the area. *Id.* at 391-92, 675 S.E.2d at 780. The petitioner still bears the burden of establishing that the County Council acted arbitrarily or unreasonably in its decision by clear and convincing evidence as presented in this case. This is what harmonizes the court opinions in *Bear* and *Harbit*. Instead, Petitioner seeks to impose his reading of *Harbit* in the absence of the court's opinion in *Bear Enters.*. In short, Petitioner wants to impose an affirmative burden on the County Council to establish the legitimacy of its reasons for its legislative decision which is contrary to South Carolina law.

See Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals, No. 28151, 2023 S.C. LEXIS 81, *21, 2023 WL 2996979 (S.C. Apr. 19, 2023) (city did not need to submit anything affirmatively proving its policy decision was correct) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)).

Petitioner stretches his charges against the county even further by brazenly asserting that not only did the County Council not *fairly* debate the issues, but the county council closed any debate allegedly because one Council Member stated that the question was to be determined solely by the Council Member in whose district the subject property is situated. (Petitioner's Questions Presented.) The transcript record shows that Petitioner's accusation not only mischaracterizes the County Council's handling of the request, but it is also completely false.

On March 13, 2017, the Land Use and Economic Development Committee called for consideration of Petitioner's request for rezoning of his parcel on Royle Road. (App. p. 255). Councilman Steve Davis immediately moved for approval. (*Id.*) The representative from that district, Councilman Newell interrupted to merely state that he should have the right to say approval or denial since he represents the district. (*Id.*) Another councilman asked where that was in the rules and Councilman Davis stated it was a newly adopted rule. Obviously, this was merely a procedural issue or matter of decorum in proceeding forward on the matter. (*Id.*) Councilman Newell was not stating that the Committee has no "say" in the matter; he merely thought that he should be the one to make the motion. Accordingly, Councilman Davis withdrew his motion and Councilman Newell moved for denial. (*Id.* at 256).

Substantial discussion followed the motion. Ms. Simmons explained how and why Planning Department staff supported and why, after public input, the Planning Commission unanimously denied the request. (*Id.*). Councilman Whitley questioned Ms. Simmons about the classification of the mobile homes, and the legal and practical impact of rezoning to R-3.

Councilman Davis and Cox also made comments. (*Id.* at 256-261). The Chairman asked if there was any further discussion, but no one had any further questions or comments, so the committee voted. (*Id.* at 261). The majority voted to deny the request. (*Id.*) Plain and simple. Nothing nefarious. The issue did not even arise at the hearing before the County Council. In fact, the County Council members listened, questioned, and discussed the matter thoroughly, as will be seen below. (App. pp. 262-281).

B. The fair debate before the County Council established that Petitioner failed to sustain his burden that his constitutional rights were clearly violated to overcome the strong presumptive validity of the County Council’s legislative decision.

Furthermore, the matter was fairly and fully debated. Petitioner simply did not meet his burden. The County Council meeting began with Petitioner arguing for support of his rezoning request. (App. pp. 262-5). Petitioner presented signatures of support from mobile home residents, a GIS aerial view of the area, and the Planning Director’s statement supporting rezoning. (*Id.* at 262-63). He noted that this was a mobile home community where 42 out of 66 parcels that abut Royle Road are mobile home parks. (*Id.* at 263). He argued that the R-3 rezoning would be consistent with the County’s Comprehensive Plan and Land Use Plan so it should be approved. (*Id.*) Petitioner spent considerable time claiming that any public opposition to be presented was non-factual and prejudiced against mobile home residents. (*Id.* at 264-65). He presented no safety, traffic, or crime statistics of the area. However, Councilman Davis and Whitley spoke in favor of the project.¹ (App. pp. 275-77, 280-81).

¹ Petitioner has asserted that the decision was arbitrary in part since two councilmen supported rezoning because it was in compliance with the Comprehensive Plan and Land Use Plan. Please note that this is not determinative: In footnote 1 to the *Bear Enters.* 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.”

Public opposition was substantial, with some emotionally charged and speculative comments previously submitted in the record. Petitioner admitted that a majority of residents in the area, other than mobile homeowners or renters, were adamantly opposed to the rezoning. (*Id.* at 263). These long-term residents opposed the request due to safety, traffic, property devaluation, and quality of life issues based on their personal experiences. One speaker at the hearing, Mr. Raymond Headden, lives on Royle Road near Petitioner's property. (*Id.* at 265-66). Mr. Headden is also a National Fire Academy Instructor who is certified to teach emergency vehicle driving so he has to be well-acquainted with traffic issues. (*Id.* at 269). He presented ground level views of the area to show traffic problems. Critically, he even saw a little child from one of the mobile homes get hit by a car once. (*Id.* at 268). He discussed the saturation of mobile home parks in the area and commented about the council's previous 11 denials of such requests due to such saturation. (*Id.* at 265-67).

Mr. Headden noted that he tried to sell his home twice and the realtor told him that his house has been devalued due to saturation of mobile home parks in the area. (*Id.* at 267). Mr. Headden also noted how many of the mobile homes were obviously falling part, old cars without license plates were left parked at homes and no private fencing blocked the area. (*Id.* at 268). When brought for a vote, the Chairman noted that no one from the public specifically said that mobile homes are bad thing per se. Even when Councilman Schurlknight stated, "I've seen a lot of stuff going on over there" over the last 40 years, (*Id.* at 278), he immediately followed that with "all the development in that area." (*Id.*) There can be no ambiguity that "stuff" was obviously referring to the development. As the Chairman stated, "I do hear your concerns about traffic and safety of the residents and children and—you—and, you know, obviously with overcrowding

comes other issues that require the intervention by the police officers that sit back here.” (*Id.* at 279). Due deliberation over the facts and issues indeed.

The Court of Common Pleas’ Special Referee noted that Petitioner made some compelling arguments, and countered some of the public’s concerns. (App. p. 16). Petitioner acknowledged at two of the hearings that “He did not intend to put ‘trash’ here.” (App. p. 9). He stated that he would vet the renters, put security lighting, require vinyl siding, improve the access road, and make sure it does not become a “thug” park. (*Id.*) These, of course, were future promises which could not be verified. Regardless, these facts only made the propriety of the County’s decision fairly debatable, not invalid as a matter of law. The Referee also noted that “not all of the reasons advanced in opposition to Plaintiff’s (Petitioner’s) application can be labeled unsupported, pejorative speculation.” (*Id.*) In fact, the county’s legislative decision “cannot be judged by the least compelling arguments against it.” (*Id.* at pp. 16-17). Referee Cooke laid out several of these comments in his order. (App. p. 9). No doubt the main concerns were oversaturation of mobile homes in the area, safety and security and traffic. (*Id.*) Offering diverse options does not necessarily mean establishing a large mobile home park area. In sum, the County would be hard-pressed to deny any future request if it approves this one after repeatedly denying such requests for years, especially with repeated and substantial public opposition from local property owners. (*Id.* at p. 17). The fear of a “domino effect” was certainly real and justified. The court must not intervene in this clear legislative decision by resolving that the Council should have decided differently. The County Council’s decision was not arbitrary or unreasonable. The appellate court did not err by failing to reverse it.

IV. The Court of Appeals Correctly Concluded That Petitioner’s Nonconsequential Argument That the Comprehensive Plan Was the “Legislative Act” at Issue Was Not Reviewable Because He Raised It for the First Time in His Reply Brief.

“It is axiomatic that an issue cannot be raised for the first time in a reply brief.” *McClurg*, 395 S.C. at 87 n.2, 716 S.E.2d at 888 n.2 (citing *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 413 S.E.2d 827 (1992)). Although, at the Court of Appeals, Petitioner argued that the denial of his rezoning request conflicted with the also legislatively adopted Comprehensive Plan from the beginning of his appeal, Petitioner did not challenge the legislative decision to adopt and apply the Comprehensive Plan until his reply brief: “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.’” (App. p. 432); *see also Cont’l Ins. Co. v. Shives*, 328 S.C. 470, 474 n.2, 492 S.E.2d 808, 811 n.2 (Ct. App. 1997) (“An appellant may not... use the reply brief to argue issues not argued in the initial brief.”).

In effect, Petitioner is asking the court to intervene and tell the County Council which legislative decision and policies it must apply to the rezoning request, even though the ordinance does not mandate the Comprehensive Plan’s terms in every rezoning decision. See discussion in Section II.B. *supra*. The Comprehensive Plan is clearly part of an on-going process as the Comprehensive Plan mandates updates and reviews to adjust for changes in land use, practices, and policies.(See App. p. 20, Referee citing Implementation section of Comprehensive Plan) Regardless, the question here is not whether the R-3 rezoning request would have been compatible with the Comprehensive Plan. The County did not dispute that R-3 zoning was compatible with the Comprehensive Plan. If they had, and their denial was based on that nonconformance, then the background of, and evidence supporting, the legislative process

adopting that plan may have been important. Even more importantly, the resolution of this issue is inconsequential because keeping the property zoned as R-2 did not conflict with the Comprehensive Plan either. Moreover, there were many nonconforming R-2 mobile home lots in the area as well. Therefore, R-2 or R-3 zoning was merely the County Council's legislative policy choice. The appellate court did not err here since the court had no authority to overturn that choice.

CONCLUSION

Based on the foregoing, Respondents request that this Court deny Petitioner's Writ of Certiorari to review the decision of the Court of Appeals, affirming the lower court's and the County Council's decision to deny Petitioner's rezoning request.

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Respectfully Submitted,



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