

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

M. Dawes Cooke, Special Referee

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

RECEIVED

May 02 2023

S.C. SUPREME COURT

Todd Olds,

Petitioner,

vs.

Berkeley County, Berkeley County Planning Commission,

Respondents.

REPLY TO RESPONDENT'S RETURN TO
PETITION FOR A WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S STATEMENT OF CASE

In its well written, cogently argued Return to persuade this Court not to review the decision of the Court of Appeals, the County makes factual errors in its Statement of Case. For example, on page 3, the County mistakenly asserts that “that 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.” (Respondent’s Return at page 3) As the transcript of the hearings before the Planning Commission and County Council demonstrate (App. pages 220-281), the public participation comments characterizing mobile home residents as meth cooks, child neglecters, and slovenly is horrifying. The circuit court (special referee) diplomatically characterized such remarks as “intemperate and unsupported” (App. pg. 12) and “canards,” but turned away Petitioner because he determined Petitioner had not met his “high burden” (App. page 23) of demonstrating the “unconstitutionality” of the decision. In its “Statement of Case,” the County sets up the arguments that follow; to wit, that appellate courts cannot second guess legislative decisions. As discussed below in reply to the County’s legal arguments, such an assertion is both factually and legally incorrect.

Reply to Argument 1

The Petitioner meets no less than three of the grounds for issuing certiorari.

In Rule 242, *South Carolina Appellate Court Rules*, this Court identifies the five factors governing the Court’s issuance of a discretionary writ of certiorari, listed by The County on page 7 of its Return. Petitioner meets three of the five:

(1) and (3): Where there are novel questions of law, and Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. As to the first, this case presents a novel question of law because it represents the first time the Court is presented with an

opportunity to settle the question of local government enacting local codes overruled by public prejudice. This issue is precisely what Petitioner set out in his Petition for Certiorari by calling this case the mirror image of *Harbit*. *Harbit v. City of Charleston*, 319 S.C. 137, 459 S.E.2d 17 (1998) upheld the City’s refusing to put Harbit’s parcel in the Ashley River Overlay Zone because the City carefully delineated boundaries in setting up the overlay zone, and Harbit’s parcel fell outside the City’s Plan, which is why the City Planning Staff in *Harbit* recommended the City Council disallow the application. Here, as the record demonstrates, Berkeley County carefully adopted by ordinance a Comprehensive Plan, Future Land Use Map, after two years of deliberation including extensive public participation. However, the County Council disregarded its own ordinance and the recommendation of its own professional Planning Staff in favor of “intemperate and unsupported” “canards” of complaining neighbors. Thus the Court of Appeals’ decision under review is in direct conflict with not only the holdings of this Court, but also in direct conflict with its reasoning in *Harbit*. Thus, the application meets the criteria set forth in subsections 1 and 3 of Rule 242.

In addition, the right to use property to its highest and best use is a core constitutional precept. The Court of Appeals articulated this foundational principle at length in *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015), quoted in Petition for Certiorari at page 11.

Reply to Argument II

A. Legislative Decisions are presumptively valid, and appellate courts have the right to review them.

B. Local governments cannot ignore ordinances for political expediency.

The County argues an unchallenged proposition of law; to wit, that legislative bodies have discretion to enact ordinances. The County misses the point: Berkeley County did enact an

overarching comprehensive zoning decision; it is called the “Comprehensive Plan” and the “Future Land Use Map.” The novel issue here is whether the “intemperate and unsupported” objections of complaining neighbors is sufficient to overcome this legislative decision. That is the entire thrust of the appeal. The question is: Can the County turn its back on its own ordinance to appease a small number of vocal complainers who base their complaints on nothing more than pure prejudice? The County cites *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995) 13 times for the proposition that neither the Court of Appeals nor this Court can review a zoning decision. This is, of course, nonsense, as precedent, history and current events demonstrate. (*Bear Enterprises* recognizes this principle; see quotation below on page 5.) While the executive and legislative branches of government operate on popularity, the judicial branch operates on reason and precedent, or as a U.S.C. Constitutional Law professor was fond of saying: “if you’re popular, you don’t need a Constitution.” Of course, legislative decisions are presumptively valid, but here, Berkeley County jettisoned its “legislative decision” to placate the NIMBY complaints of a few vocal neighbors, which puts the Court of Appeals’ decision in direct conflict with both its own precedent as well as that of this Court.

B. Local governments cannot ignore ordinances for political expediency.

Speaking of conflicts, the County asserts on page 13, two easily refutable propositions. The first is that the special referee determined that the Comprehensive Plan is “not intended to dictate the County’s zoning decisions for private property.” Of course it is! The main purpose of the Comprehensive Plan is to “guide” the County in land use decisions. As the special referee concluded: “The Comprehensive Plan does have the force of law since it was formerly adopted by ordinance.” (App. pg. 23) The other purpose is to take land use decisions out of the realm of NIMBY and into the realm of rational development: “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, free from undue political influence.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) Here, the County Council turned its back on its carefully crafted Future Land Use Map because they did not want to face a social media backlash that drives today’s politics. In short, County Council sacrificed Petitioner’s core constitutional rights on the altar of political expediency. Thus the County’s argument in II B that the County is obligated to rezone the Petitioner’s property is a straw man. Petitioner never made this assertion. Rather, as set forth above, he claimed he could rely on the County’s carefully enacted Comprehensive Plan and Future Land Use Map and the guidance of the Berkeley County Planning Department in identifying this tract as suitable for development to provide desperately needed affordable housing. The County never acknowledges the zoning in the immediate area is R-2, R-3, and OI—office institutional—and that R-2 parcel is already populated with multiple mobile homes. All of these factors make the R-2 designation out of character with the neighborhood, something even the complaining neighbors identified. In short, here is a summary of evidence in this case:

For Rezoning:

Comprehensive Plan
Future Land Use Map
Berkeley County Planning Dept. recommendation
Berkeley County Planning Director

Against rezoning:

Unsupported complaints of neighbors

Therefore, the County misstates the Petitioner’s legal argument. He never demanded that the County must bend to his will; rather, he demanded nothing more than the County adhere to its own carefully calculated ordinance. His application not only is consistent with the County’s ordinance, but also compatible with the established uses on Royle Road. The record demonstrates

the County turned him away only because a small number of vocal neighbors opposed him, voicing unsupported assertions.

Reply to Argument III

A. The County's decision is clearly to appease a small group of complaining neighbors and is at variance with its own legislative decision about future land development along Royle Road.

Respondent's Argument III supports the Petitioner's application for certiorari. On page 15 of its Return, the County says, quoting the special referee: "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 moral, the public safety or the public welfare in its property sense.'" This is exactly right! On the very next page, the County says: "the only opposition to rezoning were the neighbors' unsupported complaints about increased traffic and decreased property values." (Respondent's Return at page 16.) This too is exactly correct and demonstrates why the decision of the Court of Appeals should be reviewed because the Court of Appeals allowed unsupported, speculative, prejudicial canards about future manufactured home residents from a small group of vocal neighbors to outweigh and overcome the County's carefully crafted legislative decision. There is nothing in *Bear Enterprises* that either justifies this imbalanced reasoning or overrules the unbroken precedent that legislative decisions must be rational:

Moreover, a trial court has no authority to order rezoning. **The only power the court has is to review the decision of the legislative authority to determine whether that decision is so arbitrary or capricious as to deny constitutional rights.** [citation omitted] **Of course, if the court finds a violation of conditional rights, it may invalidate the ordinance.** A court may not, however, substitute its judgment for that of the local zoning authority. (emphasis added)

Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995)

The decision in this case turns *Bear Enterprises* on its head because here it is the Petitioner who is relying on the County being faithful to its legislative decision, and it is the County who chose the path of elevating canards over its legislative decision. This is a novel issue, and it is one that deserves a careful examination by the Supreme Court to evaluate the important legal issues raised in this case.

B. There was no “debate” before County Council; instead, it chose to promote unsupported complaints over its own legislative findings and enactments.

The County asserts on page 18 that the issue before County Council was “fairly and fully debated.” As recent events demonstrate, what is “fairly and fully debated” depends on whose ox is being gored. It is neither a secret nor surprising that the two lawyers on County Council saw the error in what was unfolding because lawyers, after all, are trained to think like lawyers. While there were a lawyer or two who stormed the United States Capitol on January 6, 2022, to disrupt the Congressional certification of a federal election, it is hardly a controversial statement to assert that most lawyers viewed the storming of the Capitol with horror whether the “stolen” election was “fairly debatable” or not. As set forth in the brief to the Court of Appeals and in the Petition for Certiorari, everything is debatable—even existence. Any fair and impartial reader who examines the transcript of the comments made by the complaining neighbors, such as Mr. and Mrs. Headden, will be appalled at the bald prejudice they expressed:

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 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 HEADDEN: 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) (When Chairman Shurlknight asked the Headden’s if they notified the police, they responded they had, but the police found nothing because people cooking meth are “too smart” for the police.)¹

Thus, when the County writes, again, on page 18: “[Petitioner] presented no safety, traffic, or crime statistics of the area,” the County continues to invert the standard (as well as suggests Petitioner could prove a negative—that future unknown residents will **not** cook meth, **not** leave animals unattended, or **not** let their children wander unsupervised). The Petitioner relies on the County’s findings—he is not challenging them! The County’s findings are expressed in its Comprehensive Plan and Future Land Use Map as set forth by the County’s Planning Department’s written staff report contained at page 45 of the Appendix. In drafting and adopting its Comprehensive Plan, Berkeley County evaluated safety, traffic, crime, and a host of other factors to decide where multi-family manufactured housing is appropriate. Respondent not only compounds this logical and legal error asserting Petitioner had a duty to prove a negative, but also demonstrates tone deaf chutzpah in holding up Mr. Headden as an expert because Mr. Headden claimed to be “a National Fire academy Instructor who is certified to teach emergency vehicle driving.” (Respondent’s Return at page 19) Maybe he is an expert in “emergency vehicle driving,” but Mr. and Mrs. Headden demonstrated a high degree of prejudice in their comments about people who live in manufactured homes, and recent events (footnote 1 below) illuminate his unreliability

¹ Mr. Headden also told Council on March 13, 2017, that he could not sell his house “because of the trailers next door and around in my area.” App. page 267. On December 28, 2021, the title owner of the home, Dolly Headden, sold the property for \$305,000.00 at Deed Book RB 4107 at Page 658. Because it occurred after the hearing, this transaction is not part of the record, but if this Court grants *certiorari* to review the Court of Appeals’ decision, Petitioner will file a motion to supplement the record since the sale undercuts Mr. Headden’s testimony on both ownership and value.

about selling 760 Royle Road. However this Court chooses to characterize their testimony, it is insufficient to overcome the findings and conclusions of the Berkeley County Comprehensive Plan, and therefore when the County asserts that—based on such spurious testimony—Chairman Schurlknight’s comment about “stuff” on Royle Road contains no “ambiguity,” that assertion casts doubt on the County’s entire legal position. (For example, if someone says to a Jewish lawyer: “I want a Jewish lawyer because Jews can smell money,” would the County view such a “complement” as “ambiguous,” or is it a clear insult? Or to an African-American job applicant: “I think you will be a good employee because you all are so athletic.” Is that comment “ambiguous,” or is it a clear insult? Or to a female candidate for a legislative position: “I am not sure you would be a good fit because women are sensitive.” Is that comment “ambiguous,” or is it a clear insult? As Mr. Headden testified: “I hate to stereotype, but it is what it is.” (App. page 246) There is nothing “ambiguous” about the complaining neighbors’ testimony, and while some of the complaining neighbors’ comments were not as bad and some were worse than these examples, no one can read the transcript and come away believing the complaining neighbors comments about manufactured housing were either “ambiguous” or relevant. The neighbors are clear that people who live in manufactured homes are second class. The special referee noted their calumny in his Order, App. page 16, but still found such comments not so offensive as to tip the scale in favor of Petitioner. This is legal error based on the holding of this Court in *Bannum* and its progeny.

The County’s final argument in this section is the “slippery slope” argument: “The fear of a ‘domino effect’ was certainly real and justified.” (Respondent’s Return at page 20) It is not. It is neither a fear nor real because zoning classifications are designed to prevent such fear. And it is not justified because here it is the R-2 parcel that is the outlier, being surrounded by R-3 and OI

zoning. One of the principal reasons the County found Royle Road to be appropriate for higher density manufactured home placement is exactly because, as the complaining neighbors attested, the area already contains manufactured housing. See Appendix at page 266: “There are 13 trailer parks presently on Royle Road.” It is more than farfetched to think that the County would allow manufactured homes in zones classified industrial, commercial, or single family, so if manufactured homes cannot be located in the areas where they already exist, then they cannot be located anywhere. The General Assembly has already determined that mobile homes provide an important component to meet demands for affordable housing by passing an Act to set minimum standards for their construction and to protect them. See § 40-29-5, *et. seq.*, S. C. Code, ann. All of these undisputed facts make the County Council’s decision an exercise in unbridled discretion based on nothing but prejudice that is both arbitrary and capricious.

Reply to Argument IV

The Petitioner raised the Comprehensive Plan as the County’s legislative decision before the special referee and before the Court of Appeals in Petitioner’s “Statement of Issues on Appeal” and as Argument 1(B) of his initial brief.

In his appeal from the County Council, the Petitioner specifically plead in ¶ 16 of his appeal to circuit court that the County violated its own legislative act. (App. page 32, quoted in full in Petition for Writ of Certiorari at page 24) Petitioner made it a central portion of his appeal to the Court of Appeals, setting forth the argument his brief as a separate “statement of issues on appeal,” and in a standalone Argument 1(B) entitled: “Argument 1(B): **“The County’s decision was at variance with its legislative findings as expressed through the Comprehensive Plan and Future Land Use Map.”**” (App. page 385) When the parties were before the special referee, the Petitioner engaged the special referee in a long colloquy on this precise issue. (App. pages 291-298) Even the Special Referee agreed that the Petitioner asserted that the County’s decision was

at variance with the Comprehensive Plan. See Special Referee’s Order at page 18 of Appendix. The Petitioner is at a loss to explain how or why the Court of Appeals thought the issue first arose in Petitioner’s Reply Brief or why the County continues to assert a demonstrably incorrect fact. In addition, the County continues to push a straw man argument mischaracterizing Petitioner’s argument as being one in which he insists he is entitled to demand a particular zoning. This phantom demand has never been Petitioner’s claim. Petitioner’s claim is that the unsupported, pejorative canards of a few vocal neighbors are insufficient to overcome the legislative findings contained in the County’s land use plan and the factual findings and recommendations of its Planning Department. In short, zoning decisions are not delegated to complaining neighbors who possess veto power over the use of property. See *I’On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). (Town cannot delegate zoning decisions to referendum.)

Conclusion

Recent events demonstrate how important the courts are as guardrails against “fairly debatable” legislative initiatives. It has become common for legislators—from Congress to school boards—to advance conspiracy fantasies, some of which are adopted. The history of the twentieth century is a lesson in what happens when courts give way, and while the zoning of a single parcel in Berkeley County may seem inconsequential in a world of nearly 8 billion people, small cases often establish important constitutional principles. See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), as case that came down about the same time as *I’On v. Town of Mt. Pleasant*. The Village of Willowbrook mistreated Ms. Olech over a 15-foot easement right-of-way, and yet a unanimous Supreme Court checked the Village, and that case has become an important bulwark against arbitrary government conduct in land use. So was *I’On*. The Petitioner acquired the Royle Road parcel because he did his due diligence and noticed that the County identified the R-2 zoning

as appropriate for change because Berkeley County designated that area as appropriate for expansion of multi-family manufactured housing. However, based solely upon unsupported complaints of neighbors, County Council deprived him of the use of his property by allowing a small, vociferous band of complaining neighbors to overrule the County's Plan. The Court of Appeals gave the case a cursory look even though it raises an important and novel question just like Grace Olech did. The case deserves a closer inspection, and this Court should grant certiorari to review the Court of Appeals' Opinion under review.

Respectfully submitted,

May 2, 2023

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