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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Greenville County
Greenville County Court of Common Pleas
Hon. Judge Alex Kinlaw, Jr.

2023-000025

George C. Hassiotis and Constantinon
Hassiotis,.....Appellants,

Versus

The City of Greenville, South
Carolina,.....Respondent.

INITIAL BRIEF OF APPELLANTS

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June 9, 2023

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in finding that the Appellants were not entitled to a jury trial on their equal protection claims against the City of Greenville, in which the Appellants alleged that the City's application of a 103-acre rezoning plan violated the Appellants' equal protection rights?
- II. Did the trial court err in finding that the City of Greenville did not violate the equal protection rights, and procedural and substantive due process rights, of the Appellants in their application of a 103-acre rezoning plan, and did the trial court err in ruling against the Appellants, and awarding fees and costs to the City?
- III. Were the Appellants entitled to an award of attorney's fees and costs in this matter pursuant to 42 U.S.C. § 1988 and S.C. Code § 15-77-300?

STATEMENT OF THE CASE

This matter is an appeal of an order of Judgment entered by Honorable Judge Alex Kinlaw, Jr. on September 14, 2022, following a non-jury trial held on August 29 and 30, 2022. (Judgment) The Appellants in this matter, George C. Hassiotis and Constantinon Hassiotis, are brothers and property owners in the City of Greenville. The Appellants filed a Summons and Complaint against the City of Greenville on April 11, 2019, requesting various points of relief, but specifically demanding a jury trial. (Complaint p. 1) The impetus for the lawsuit was action taken by the City of Greenville in re-zoning property housing a building owned by the Appellants located at 907 Pendleton Street in Greenville. At all times during the course of this litigation, the property and building were leased by a restaurant named O.J.'s Diner, a successful restaurant in the Pendleton Street area of downtown Greenville. During the entirety of the lease, O.J.'s Diner served customers through inside seating, and via a drive-thru window, which would become a key point of contention in the litigation. On or about June, 2018, the Appellants were served with notice by the City that their property at 907 Pendleton Street would be re-zoned pursuant to the City's application for rezoning, effecting a re-classification from a commercial use zone, C3 (one of the most expansive commercial districts in the City), to a much more restrictive classification of RDV which according to city officials represented a "middle ground" between a pure residential area and the pure commercial area. (Tr. Trans. p. 68, lines 7-12; p. 99, lines 19-25; Plaintiff's Exhibits 2 & 3.) The effect of the re-zoning, and the concern of the Appellants, was that the re-zoning created uncertainty for the Appellants' ability to secure tenants in the future, and overall diminished the value of the property. Although the Appellants were able to lease the property and building to O.J.'s Diner and use the drive-thru window "indefinitely" through a "grandfathered" allowance by the City, if the property in the future were

vacated with no tenants for a period of six (6) months or more, the “grandfathered” allowance would no longer be enforceable by the Appellants, and they would be required to obtain a restricted use permit by the City for any subsequent use pursuant to the RDV zoning. (Tr. Trans. p. 54, lines 14-20; lines 24-25; p. 55, lines 1-2; p. 109, lines 17-25; p. 110, lines 1-2.) Further, under the RDV zoning regime, the Appellants’ ability to remodel or add square footage to the building would be impacted if they were unable to stay open during the remodel. (Tr. Trans. p. 55, lines 3-15.) Lastly, the Appellants were concerned that the RDV zoning classification was invalid and arbitrary as applied to Appellants’ property, and thus violated their due process rights, because the classification allocated zoning responsibilities to City staff through “conditional uses” without specific standards guiding their decisions. Appellant Constantinon Hassiotis testified at trial that since 1993 the building had continuously been operated as a drive-thru restaurant. However, he also testified that there were times that the property sat vacant for a year or two in the late 1990’s without a tenant. (Tr. Trans. p. 139, lines 21-25; p. 140, lines 1-9.) Mr. Hassiotis also expressed a concern regarding the uncertainty of whether a drive-thru would be permitted under the new zoning plan. (Tr. Trans. p. 141, lines 9-16.)

The Appellants attended public hearings regarding the proposed re-zoning plan to express their concerns about the impact of the new zoning classification to their property. During the course of the hearings and pursuant to the Appellants’ receipt of information regarding the overall plan, the Appellants learned that at least two property owners similarly-situated as the Appellants in the Pendleton Street area had successfully petitioned for and received re-classification from the City’s new zoning plan which in turn added value to those properties. (Plaintiff’s Exhibit 4.) The “Enigma” property, located at the intersection of Pendleton Street and Academy Street in downtown Greenville, was originally proposed to be RDV, however the

designation was changed by the City to C3 purportedly pursuant to “mere tweaking” the plan – a term specifically designated by the City which in effect granted variations to the zoning plan pursuant to the demand of select property owners. (Tr. Trans. p. 87, lines 1-5; p. 108, lines 5-11; Plaintiff’s Exhibit 13.) Of note is that the Enigma property actually comprised four properties that touched Pendleton Street, across the street from O.J.’s Diner, with two properties that touched Academy Street. Further, the Enigma property has residential areas behind it just as does the diner. (Plaintiff’s Exhibit 13.) The City permitted Enigma to combine their four (4) properties to a C3 designation with more intensive use than originally zoned as RDV. Another entity on Pendleton Street, property owned by the Stone Family Trust and also across the street from O.J.’s Diner, originally was zoned for RM2, or residential multi-family zoning, but was changed by the City to RDV (a more intense use than RM2) at the demand of the property owners. (Tr. Trans. p. 93, lines 12-13.) The Court during trial testimony pointed out that there is also a Family Dollar store on the same side of the street as O.J.’s Diner, separated by a vacant lot, which fronts on Pendleton Street, which is zoned C3. (Tr. Trans. p. 96, lines 12-24.) The explanation for the difference was that Family Dollar was specifically omitted from the zoning map and was not included in the plan. However, the Appellants’ request for a zoning variance to keep their property as C3 was denied by the City – despite the fact that the justifications for the denial (i.e. residential property was close to the diner despite buffers of trees and bushes, and the concerns about the drive-thru’s noise and lighting) were present in other businesses who received accommodation for their demands. (Tr. Trans. p. 173, lines 24-25; p. 174, lines 1-4.) Ultimately, only two (2) active commercial businesses were affected by the rezoning process, which was the property of the Appellants, and a car wash across the street which was not then in business. (Tr. Trans. p. 144, lines 12-15.) Further, most of the residential properties near O.J.’s

Diner were built *after* the Appellants' Father built the building. (Tr. Trans. p. 142, lines 3-9.) Understandably, the Appellants were concerned that the City was not treating them equally to others similarly situated as them, and had taken action that adversely affected the use and value of their property in downtown Greenville.

The Appellants recalled at trial the fact that in the 1980s, their Father owned property in the City of Greenville on Coffee Street located at Pizazza Bergamo in the heart of the City's central business district. (Tr. Trans. p. 162, lines 18-20.) Appellant Constantinin Hassiotis testified that the City of Greenville exerted pressure and threats against his Father that the City would condemn the Coffee Street property. (Tr. Trans. p. 162, lines 20-21.) Due to the pressure that their Father felt by the City's actions, the Father sold the building to the City for \$190,000.00. (Tr. Trans. p. 162, lines 22-23.) The City never executed its Coffee Street plan and the building remains in downtown Greenville – having been sold in 2005 to a private company for \$1,100,000.00. (Tr. Trans. p. 163, lines 2-4.) Constantinin Hassiotis testified that his Father had a stroke during this time, and was not able to renew the balloon payment on the loan which forced them to sell their house to give to the bank to renew the loan. (Tr. Trans. p. 163, lines 7-13.) In the case at bar, the Appellants were concerned that the City was targeting them, given their history with the City, in refusing to permit an accommodation in keeping their Pendleton Street property as a C3 classification while treating others more favorably. The Appellants expressed their concerns about the zoning plan in comments to the City, as well as in the Greenville Journal. (Plaintiff's Exhibit 4, page 2; Tr. Trans. p. 162, lines 22-25.) Additionally, Constantinin Hassiotis testified of an instance where he and his brother were escorted out of one of the zoning meetings due to allegations they were too loud, which also caused police to escort his brother, Appellant George Hassiotis, into one of the meetings. (Tr.

Trans. p. 162, lines 14-21.) Therefore, the Appellants filed the present lawsuit against the City alleging various causes of action including seeking a declaratory judgment of deprivation of civil rights under multiple theories including violation of the due process and equal protection rights of the Appellants, seeking damages for deprivation of civil rights, and recovery of attorney's fees and costs. (Complaint) The City responded by filing an Answer and a Motion to Strike on June 11, 2019, seeking to strike any reference to the events involving the Appellants' Father and the Coffee Street property, as described *supra*. (Answer and Motion) On June 27, 2019, the Appellants filed an amended summons and complaint per the City's motion to strike. (Amended Complaint.) However, at the trial of this matter, the Appellants were permitted to testify regarding the events involving their Father and the Coffee Street Property, with Judge Kinlaw finding that the evidence was relevant to the equal protection and due process claims of the Appellants. On July 11, 2019, the City filed an Amended Answer. (Answer to Amended Complaint)

This matter proceeded to trial on August 29 and 30, 2022. At the outset of the trial, trial counsel for the Appellants informed the Court that his clients were entitled to a jury trial on the claim that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Tr. Trans. p. 12 lines 15-25; p. 13, lines 1-12.) Counsel for the City disagreed and urged the Court to proceed with a bifurcated trial in which the Court would determine as a matter of law if any legal claims of the Appellants had merit, and then if and only if the Court determined there were meritorious claims that the matter would be submitted to the jury on the issue of damages and fees. (Tr. Trans. p. 13, lines 13-25; p. 14, lines 1-25; p. 15, lines 1-2.) Judge Kinlaw agreed with the City, and held a non-jury trial on all issues raised in the Appellants' Complaint and Amended Complaint, over the objection of Appellants. A jury was

impaneled prior to the inception of the trial and prior to receipt of testimony and evidence. The jury was instructed to return the next morning, however the jury was never impaneled to hear any aspect of this case.

The Appellants called three witnesses at trial to support their claims against the City, and introduced multiple exhibits. Jason Tankersley, a commercial developer who worked on the City's planning commission for approximately seven (7) years, was called as a witness by Appellants at trial. (Tr. Trans. p. 49, et seq.) Mr. Tankersley served as the chairman of the planning commission at the time when the Pendleton Street rezoning was introduced. (Tr. Trans. p 50, lines 2-4.) Mr. Tankersley testified that as a developer it is preferable to have zoning "exactly like you want it," because that streamlines the process of getting building permits, which saves time and money. (Tr. Trans. p. 50, lines 5-10.) Mr. Tankersley testified that the classification of C3 is the most intense City of Greenville commercial district. In contrast, Tankersley testified that the RDV classification allows for "conditional uses," in which there is an application to staff of the City of Greenville to make a determination on their vision of the use, which then goes to the planning commission with a full vote in front of the public, with the public being able to weigh in on how they feel about the conditional use or special exception. (Tr. Trans. p. 53, lines 12-19.) Given the procedure pursuant to a RDV classification, the Appellants were concerned about the uncertainty whether a conditional use would be approved in the future, thus affecting the overall value of the property. The Appellants were also concerned due to the fact that the special exceptions were not voted upon by the City Council. (Tr. Trans. p. 53, lines 20-22.) Ultimately, Mr. Tankersley said that he had concerns about the proposed re-zoning in the Pendleton Street area partly due to the size of the project – 103 acres – and did not vote to approve the plan. (Tr. Trans. p. 58, lines 9-24.) Mr. Tankersley testified

regarding an email exchange post-workshop expressing his personal views regarding the project, and wondered “who” was really pushing this re-zone, which was never answered. (Plaintiff’s Exhibit 10.) Mr. Tankersley was concerned about the position of the C3 owners, because the commission had not heard from them. (Tr. Trans. p. 60, lines 20-24.) At a meeting on December 20, 2018 at 4:00 p.m., Mr. Tankersley testified that concerns were raised about the new rezoning “cherry picking” for various zoning designations, and that he may have been quoted in the media saying that. (Tr. Trans. p. 63, lines 24-25; p. 64, lines 1-10.)

Virginia Stroud, Community Development Manager of the City of Greenville for a little over nineteen (19) years, also testified at trial in the Appellants’ case-in-chief. Ms. Stroud testified that a letter was mailed to all the property owners in the study area (which area was determined by City of Greenville staff) notifying them of open house meetings that were planned for April 30th and May 1st, 2018, which included a map of existing zoning for the area, and the City’s proposed changes to the zoning. (Plaintiff’s Exhibit 2; Tr. Trans. p. 100, lines 3-13.) Notably, Stroud testified that the Family Dollar Store, separated by a parcel next to the Appellants’ property and also fronting on Pendleton Street, was omitted from the re-zoning study and was allowed to remain as a C3 designation. (Tr. Trans. p. 101, lines 23-25; p. 102, lines 1-9.) Ms. Stroud testified that the Appellants made comments and expressed concern regarding the re-zoning. (Tr. Trans. p. 105, lines 8-15; Plaintiff’s Exhibit 4.) However, Ms. Stroud testified that changes to the zoning plan were made for multiple property owners on Pendleton Street based on their individual concerns about the plan, including Upstate Family Funeral Services (who was changed to a RDV), the Michael Talley Law Firm (changed to an OD – Office and Institutional District), Mr. Stone (who was changed to a RDV status), and the Enigma Corporation (which was changed to a C3). However, when the Appellants expressed concern

about their property being rezoned to a RDV due to the fact that a drive-thru window would be a conditional use, they were kept at RDV by the City. Ms. Stroud testified that the potential concerns about a drive-thru window were that the property is near a residential area behind the restaurant that could be affected by the speaker noise and the lighting. (Tr. Trans. p. 109, lines 5-14.) Ms. Stroud testified that the use of a drive-thru on the Appellants' property could have been approved as a "permitted" use, but it wasn't. (Tr. Trans. p. 110, lines 23-25; p. 111, line 1.) Additionally, Ms. Stroud testified that the ordinance required that if the City Council chose to consider rezoning an area larger than requested *or for a more intense zoning district*, the matter shall be referred to the Planning Commission for public hearing and recommendation consistent with provisions of this Chapter. (Tr. Trans. p. 121, lines 21-25; p. 122, lines 1-2.) However, Ms. Stroud admitted that the Stone Family Trust property, which was ultimately zoned for a more intense zoning district than originally designated under the new zoning plan, was not sent back to the Planning Commission pursuant to the ordinance, in violation of the ordinance. (Tr. Trans. p. 122, lines 13-22.) Of note is that prior to the re-classification of the Stone property, David Stone sent an email to city planners threatening to take "other measures to protect the value of our property" if the City did not change the zoning designation. (Plaintiff's Exhibit 5.) Ms. Stroud was also questioned by counsel for the Appellants at trial regarding an email exchange with Council Member Lillian Flemming in which Ms. Flemming accused the eleven (11) commercial businesses objecting to the zoning plan of "holding RDV zoning hostage, but the residents of the communities affected do not seem to matter." (Plaintiff's Exhibit 15.)

Appellant Constantinon Hassiotis also testified at trial that the importance of the drive-thru to the business is that they did not sell alcohol at the Pendleton Street location (as they had at the Coffee Street location), and the drive-thru was meant to make-up for the loss of the alcohol

revenue. (Tr. Trans. p. 139, lines 24-25; p. 140, lines 1-9.) Mr. Hassiotis testified that the drive-thru constituted approximately one-third of the traffic incurred by the business. Additionally, Mr. Hassiotis testified that they had been offered \$600,000.00 after rezoning for the land as the potential buyer had no use for the building due to the conditional use. (Tr. Trans. p. 146, lines 21-25; p. 147, line 1.) Mr. Hassiotis testified that if the property were zoned C3 the value of the property could be at 1.5 million dollars (\$1,500,000.). (Tr. Trans. p. 147, lines 5-13.) Mr. Hassiotis testified that the City targeted his property due to the drive-thru speaker, with lights on and smells. However, he testified that the drive-thru closes at 5 p.m. with no noise, lights nor smells affecting nearby residential areas after 5 p.m. (Tr. Trans. p. 150, line 25; p. 151, lines 1-7.) Mr. Hassiotis also testified that he did not “wait” to see the impact of the conditional use ordinance because his family has history with the City, as described above. (Tr. Trans. p. 151, lines 11-13; p. 162, lines 18-25;)

Subsequently, following the receipt of testimony and evidence, Judge Kinlaw issued a Judgment finding that the Appellants had not met their burden of proof on any of their causes of action, and entered judgment for the City, including an award of fees and costs in favor of the City. (Judgment) The Appellants filed a Notice of Motion and Motion for New Trial or to Alter and Amend Judgment (New Trial Motion). On December 6, 2022, Judge Kinlaw issued an Order denying the Appellants’ motion for new trial. (Order on New Trial Motion). The Appellants filed a timely appeal on January 4, 2023.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried without a jury, the trial judge's factual findings will not be disturbed on appeal unless they are not reasonably supported by the evidence. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E. 2d 773, 774 (1976). In a law case tried by the judge without a jury, the appellate court also reviews the trial record for errors of law. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975).

A trial court's ruling on a party's request for a jury trial will not be reversed on appeal absent an abuse of discretion. See *King v. Shorter*, 291 S.C. 501, 502-03, 354 S.E.2d 402, 403 (Ct. App. 1987) (applying abuse of discretion standard to Rule 38(b) motion). See also *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 541-42 (Ct. App. 2002) (applying abuse of discretion standard to Rule 39 motion). *Ray v. The Caroline Collection Inc.* (S.C. App. 2006)

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C.Code Ann. § 14-3-320 and -330 (1976 & Supp. 2005), and S.C.Code Ann § 14-8-200 (Supp.2005)); *Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same). *Ex Parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464 (S.C. 2006).

ARGUMENT

I. The trial court erred in finding that the Appellants were not entitled to a jury trial on their equal protection claims against the City of Greenville, in which the Appellants alleged that the City's application of a 103-acre rezoning plan violated the Appellants' equal protection rights.

The Appellants were entitled to a jury trial on their Equal Protection claims, and the trial judge erred in denying their demand for a jury trial. At the outset of the hearing, counsel for the City of Greenville moved to bifurcate the matter wherein the trial court would first decide whether the Appellants' constitutional rights have been deprived (including the Equal Protection claims), and then, if the trial court decided a constitutional deprivation had occurred, the jury would decide what damages would be afforded the Appellants resulting from the City's unconstitutional actions. Appellants stipulated that this was the proper procedure for trial of the Due Process violations as alleged in their Complaint, but objected to Appellants being denied a jury trial on their Equal Protection claims. (Tr. Trans. pp. 12-13.) Appellants' trial counsel argued that the Equal Protection claims require factual findings for a jury regarding how the Appellants were treated differently from others similarly situated. Further, Appellants' trial counsel pointed out that for the sake of judicial economy, the jury should be impaneled to hear the matter from the outset to avoid calling witnesses multiple times. (Tr. Trans. p. 13, lines 1-12.) Counsel for the City argued that the matter was in part controlled by the case of *McMaster v. Columbia Board of Zoning Appeals*, 395 S.C. 499 (S.C. 2011); however, the S.C. Supreme Court did not rule on the Equal Protection claims of the plaintiff in that case. See *McMaster*, Footnote 3; (Trial Tr. pp. 10-11). Additionally, counsel for the City argued that the case of *Bear*

Enterprises v. County of Greenville, et al., 459 S.E.2d 883 (Ct. App. 1996) was relevant to the issue, however the matter in *Bear* was decided on Bear’s motion for summary judgment pre-trial, which was granted in its favor without reaching a trial. The court in *Bear* never reaches the issue of a jury trial for Equal Protection claims. Additionally, counsel for the City in this case argued that two other cases were relevant to the inquiry – *Harbit v. City of Charleston*, 675 S.E. 2d 776 (S.C. App. 2009) and *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280 (S.C. 2013). However both of these latter cases were decided in the summary judgment stage prior to a trial on the merits. In the case at bar, the trial court agreed with the City, and ruled that the case would be bifurcated as requested by the City, denying to the Appellants a jury trial on Equal Protection claims. However, in Judge Kinlaw’s Final Judgment, the court does not rule upon the Appellants’ demand for a jury trial – but rather the matter was addressed by the Appellants in their Notice of Motion and Motion for New Trial or to Alter or Amend Judgment. (Motion) Judge Kinlaw denied the demand of Appellants for a jury trial on their Equal Protection claims in the court’s Order. (Order on New Trial Motion)

In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), the city repeatedly denied the petitioner’s proposals to develop its property. *Id.* at 693. The developer brought suit pursuant to 42 U.S.C. § 1983 alleging that the city effected a regulatory taking or otherwise injured the property by unlawful acts that violated the developer’s due process and equal protection rights. *Id.* at 693-94; see also *id.* at 698 (The developer “commenced suit against the city . . . under 42 U.S.C. § 1983, alleging, inter alia, that denial of the final development proposal was a violation of the Due Process and Equal Protection provisions of the Fourteenth Amendment . . .”). Affirming the decision that the developer was entitled to a jury trial, the United States Supreme Court reasoned as follows:

*“The Seventh Amendment provides that ‘in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved’ Consistent with the textual mandate that the jury right be preserved, our interpretation of the Amendment has been guided by historical analysis comprising two principal inquiries. ‘We ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.’ Markman v. Westview Instruments, Inc., 517 U.S. 370, 376, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996). ‘If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.’ *Ibid.**

*“With respect to the first inquiry, we have recognized that ‘suits at common law’ include ‘not merely suits, which the common law recognized among its old and settled proceedings, but [also] suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.’ Parsons v. Bedford, 3 Peters 433, 447 (1830). The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action ‘analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.’ *Feltner, supra*, at 348 (quoting Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 42, 106 L. Ed. 2d 26, 109 S. Ct. 2782 (1989)); accord *Curtis, supra*, at 193. [The developer] brought this suit pursuant to § 1983 to vindicate its constitutional rights. We hold that a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment. City of Monterey, 526 U.S. at 708-09 (1999).”*

Numerous cases outside of the property regulation context also support the conclusion that violations of the Equal Protection clause sound in law, and thus, plaintiffs alleging such violations are entitled to a jury trial. See, e.g., Campbell v. Galloway, 483 F.3d 258 (4th Cir. 2007); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988); Yatvin v. Madison Metropolitan School Dist., 840 F.2d 412 (7th Cir. 1988).

Appellants alleged that they were denied equal protection under the law as they were treated differently than similarly situated property owners within the rezoning district. Further, the Appellants’ complaint raised the issue that the actions of the City did not pass the “rational basis/legitimate interest” test, discussed *infra*. While the City granted other property owners in

the district changes to their zoning classification and other accommodations as is discussed *supra*, including changing the zoning designations for multiple property owners on Pendleton Street, the City denied any accommodation to Appellants. This state action made the Appellants' property the only non-conforming use within the rezoned district. As such, pursuant to the Seventh Amendment, Appellants were entitled to a jury trial on their equal protection claims. Therefore, the Trial Court erred in denying to the Appellants a jury trial, and this matter should be remanded for a new trial.

II. The trial court erred in finding that the City of Greenville did not violate the equal protection rights, and procedural and substantive due process rights, of the Appellants in their application of a 103-acre rezoning plan, and the trial court erred in ruling against the Appellants, and awarding fees and costs to the City.

The trial court erred in finding that the City of Greenville did not violate the equal protection rights, and procedural and substantive due process rights of the Appellants, and the trial court's Judgment is not reasonably supported by the evidence presented at trial. Although the City of Greenville flagrantly treated the Appellants disparately and differently from others similarly situated as described above, the trial judge erroneously finds that the changes the city made in favor of others appeared to be mere "tweaks" to the plan, accepting the characterization of city officials. (Judgment p. 4) It is difficult for the Appellants to accept this assertion on its face, particularly when city officials admitted at trial that the Appellants could have been granted a "permitted" use of their drive-thru, which is actually more akin to a "tweak," but were denied in their request. It is also difficult to accept the trial judge's erroneous assertion that the Appellants' request for accommodation was not consistent with the overall purpose of the

rezoning, when on at least one occasion a property owner on Pendleton (Stone) was granted an up-zone without the City following its own requirements of its ordinance. The two cannot be compared (i.e. requesting a permitted use of a drive-thru versus requesting an up-zone for entire property), which is why Stone hired counsel and challenged the ordinance, and threatened action against the City if the zoning designation were not changed. Stone also had concerns about the constitutionality of the ordinance, as expressed through counsel, and the City altered its plan to meet Stone's demands. Further, the City rejected the use of comparables by the Appellants, while accepting the application of such by other property owners in the Pendleton Street area. Lastly, although the trial judge ultimately entered Judgment against the Appellants, Judge Kinlaw clearly saw the inherent inequity and fundamental unfairness to the Appellants (not recognized by the City in their statements to the Court during argument at trial), in the following question posed to the City's counsel:

The Court: So you are talking about equal protection and fundamental fairness. I am just questioning that OJ's interest, entrance to OJ's faces Pendleton Street. Family Dollar's entrance faces Pendleton Street. Neither one of these businesses abut Academy. One is zoned RDV and the other one is zoned C3.....My question is and I think Mr. Tankersley, he was one of the persons that voted against this and he gave his perspective from that of being a development. I mean, he was in the developer mode, at least is my understanding as to why he voted that way. But apparently he saw an issue as well. Am I right? (Tr. Trans. p. 187, lines 8-24.)

The trial court has erred in its finding that the City of Greenville did not violate the constitutional rights of the Appellants, and for the reasons cited below, the Judgment must be reversed by this Honorable Court.

A. The RDV zoning classification is invalid and its application to the Appellants violates their substantive and procedural due process rights.

The RDV zoning classification is invalid and arbitrary as applied to Appellants' property because it allocates zoning responsibilities to City staff through "conditional uses" without specific standards guiding their decisions, and therefore violates the due process rights of the Appellants. The trial court did not rule upon this issue in its Judgment, however it was addressed in the Appellants' complaint and post-trial motion for new trial or to alter and amend judgment, which was denied by the trial court. (Order on Post-Trial Motion) "Conditional uses" allows unelected officials to essentially make zoning decisions that should be left to elected officials, as described in the testimony of Ms. Stroud. Instead, the City has given that ability to the Planning Commission to effectively decide who is allowed to have a drive-thru restaurant based on the judgment of the individual considering the application – which alone would justify overturning the RDV zoning classification as unconstitutional. Through the troublesome RDV zoning classification, the City of Greenville has given away their executive function to an unelected official to make a final decision regarding use of property. Therefore, the zoning ordinance violates Appellants' substantive due process rights. Pursuant to *Harbit*, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in State law. The City must also show that there is a rational basis for the ordinance rationally related to a legitimate state interest. The designation of the zone and how it was drawn was clearly arbitrary as described in the testimony of Ms. Stroud – there was no explanation for why the Family Dollar property, for example, was not included in the re-zoning. Ms. Stroud testified that the rezoning could have included the entirety of Pendleton Street, but it was designated to include certain properties on Pendleton Street to the exclusion of others.

The ordinance further violates the substantive due process rights of the Appellants because the plan does not serve the general welfare and the outcome of the zoning does not further the interests stated in the overall plan. In reviewing substantive due process challenges to municipal ordinances, a court must consider whether the ordinance bears a reasonable relationship to any legitimate interest of government. *McMaster; Dunes West Golf Club, LLC*. A statute will be declared unconstitutional when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. *Id.* In order to prove a denial of substantive due process, a party must show that they were arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *McMaster* The alleged community goals of the ordinance in the case at bar and new zoning plan were to increase residential use of the re-zoned area, and to permit walkability to the commercial district. The City actually took action contrary to that interest in rezoning the Stone Family Trust property to RDV, and allowing Enigma Corporation to remain a C3 at the corner of Academy and Pendleton Streets – which would have an outcome of increasing the traffic rather than decreasing the traffic. Further, given the fact that the only businesses that were affected by the RDV zoning were the car wash and the property of Appellants (with other businesses similarly-situated receiving accommodation for their demands to be re-zoned), it is difficult to understand how the re-zoning would further the overall stated plan of the City.

Additionally, the application of the ordinance violates the procedural due process rights of the Appellants. In *Harbit*, the fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice and opportunity to be heard in a meaningful way, in judicial review. As an illustration, the treatment of the City of the demand for a variance by the Stone Family Trust violates due process because Stone was

allowed to “up-zone” their property to a more intense use without following the dictate of the ordinance in submitting the change to the planning commission and receive public input from a public hearing, as described by Ms. Stroud. The record of this case clearly illustrates that the City did not follow its own promulgated procedures in implementing the re-zoning plan.

Therefore, the zoning ordinance violates Appellants’ substantive and procedural due process rights. The Judgment of Judge Kinlaw holds that the City did not violate the due process rights of Appellants, but it does not include a finding as to whether the use of conditional uses within the RDV zoning classification is constitutional. The latter issue was addressed in the Appellants’ Notice of Motion and Motion for New Trial or to Alter and Amend Judgment, however the motion was denied by the trial court. Appellants proved, and the City did not dispute, that the conditional use framework allows unelected staff to make zoning decisions about individual properties. These decisions are necessarily arbitrary as the staff are not provided with any framework or standards to guide their decisions other than what they believe will “fit” with the community. The City’s former Community Development Manager, Ms. Stroud, testified that they made these decisions mainly based on who was applying on a case-by-case basis. Further, the only concerns Ms. Stroud expressed for determining whether a drive-thru restaurant would be allowed in the neighborhood were the impact of the lights and the noise level of the speaker. These unregulated decisions allow unelected officials to impose unknown conditions on Appellants’ property or disallow certain purchases of said property based on arbitrary factors. As such, conditional uses are per se unconstitutional because they necessarily involve completely arbitrary decisions by unelected staff.

Therefore, the trial judge erred and this Honorable Court should amend the findings of Judge Kinlaw to include a finding that the RDV zoning classification is unconstitutional for the reasons stated above, that the substantive and procedural due process rights of the Appellants were violated, and that the issue of damages should be submitted to a jury.

B. The City's actions violated Plaintiffs' Equal Protection Clause rights

The Appellants urge this Court to find that they were entitled to a jury trial on their equal protection claims, as discussed *supra*. However, even if this Honorable Court decides that Appellants were not entitled to a jury trial on their Equal Protection claims, Appellants submit that the trial judge erred in finding no equal protection violation by the City of Greenville in this case. The City's enactment and enforcement of the Ordinance at issue in this case violated the Equal Protection Clause of the Fourteenth Amendment because it intentionally treated Appellants differently from others similarly situated under state and local law without any rational basis for this difference in treatment, and the City's unconstitutional conduct caused Appellants to sustain damages. Under the rational basis test for equal protection claims the court must determine (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. *Dunes West Golf Club, LLC* The Court in *Dunes* found that in order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable. Further, 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 public health, the public morals, the public safety or the public welfare in its proper

sense. *Id.* Pursuant to *Harbit*, the Equal Protection Clause requires that the state applies each law within its scope, equally to persons similarly situated, and that any differences or applications must be justified by the law's purpose. The Equal Protection Clause does not prohibit different treatment of people in different circumstances under the law – however, the classification must be reasonable, not arbitrary and must have a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. The “rational basis” scrutiny applies to the case at bar. The Appellants were not protected equally under the law as the other businesses surrounding them in close proximity on Pendleton Street. The Appellants were not treated the same as Family Dollar, which is zoned as C3, as Family Dollar was specifically excluded from the re-zoning despite their location at the corner of Pendleton and Academy Streets. The Appellants were not treated the same as the Enigma Corporation, who expressed the same concern as the Appellants about finding tenants under RDV and were allowed a C3 designation. The Appellants also were not treated the same as the Stone Family Trust, as they sought and received a variance to be rezoned to an RDV designation. The goals of the rezoning plan would have been consistent with granting to the Appellants an accommodation to keep their property zoned at C3, as the excuses offered by the City for the denial of such were pretextual. The Appellants were rightly concerned about Council Member Flemming's characterization in email of business owners holding a zoning plan “hostage,” vilifying the claimant rather than the claim. The City also targeted the Appellants after they went to the press and spoke publicly regarding the rezoning, and had issues with their family which is not a rational basis for making a decision regarding zoning of the Appellants' property.

Appellants were denied equal protection under the law to other similarly situated property owners within the rezoning district. Appellants presented substantial evidence that, while the

City granted other property owners in the district changes to their zoning classification and other accommodations, the City denied any accommodation to Appellants. This denial made the Appellants' property the only non-conforming use within the rezoned district. Appellant Constantinon Hassiotis testified at trial that the importance of the drive-thru to the business is that they did not sell alcohol as the Pendleton Street location (as they had at the Coffee Street location), and the drive-thru was meant to make up for the loss of the alcohol revenue. (Tr. Trans. p. 139, lines 24-25; p. 140, lines 1-9.) Mr. Hassiotis testified that the drive-thru constituted approximately one-third of the traffic incurred by the business. Additionally, Mr. Hassiotis testified that they had been offered \$600,000.00 after rezoning for the land as the potential buyer had no use for the building due to the conditional use. (Tr. Trans. p. 146, lines 21-25; p. 147, line 1.) Mr. Hassiotis testified that if the property were zoned C3 the value of the property could be at 1.5 million dollars (\$1,500,000.). (Tr. Trans. p. 147, lines 5-13.) Mr. Hassiotis testified that the City targeted his property due to the drive-thru speaker, with lights on and smells. However, he testified that the drive-thru closed at 5 p.m. with no noise, lights nor smells affecting nearby residential areas after 5 p.m. (Tr. Trans. p. 150, line 25; p. 151, lines 1-7.) It is difficult for the City to justify denying to the Appellants accommodation under the circumstances as described by Mr. Hassiotis, when every other business that demanded accommodation was approved by the City. In addition, the Appellants have incurred damages through the actions of the City of Greenville. Appellants' ability to sell their property, either to the current tenant or others, has been chilled because the property is subject to the arbitrary decisions of staff about how it can be used, as discussed *supra*. Further, Appellants cannot expand their building or allow it to remain without a tenant for six (6) months without losing the

property's "grandfathered" status as a drive-thru restaurant. There is simply no rational basis for the City's actions that have significantly affected the property of the Appellants.

Therefore, if this Honorable Court does not determine that the Appellants are entitled to a jury trial on their equal protection claims, Appellants respectfully request that the Judgment of Judge Kinlaw be amended to include a finding that Plaintiffs have been deprived of their constitutional rights pursuant to the Equal Protection clause and that the issue of damages be remanded and submitted to a jury.

III. The Appellants were entitled to an award of attorney's fees and costs in this matter pursuant to 42 U.S.C. § 1988 and S.C. Code § 15-77-300.

Finally, based on the foregoing, Appellants are entitled to be reimbursed for their costs, fees, and expenses associated with the defense of their civil rights, including attorney's fees and costs, pursuant to 42 U.S.C. § 1988 and S.C. Code § 15-77-300, et seq. The issue of damages should be remanded to the trial court for further proceedings before a jury.

CONCLUSION

The Appellants George C. Hassiotis and Constantinon Hassiotis respectfully pray that this Honorable Court will reverse the order of Honorable Judge Alex Kinlaw entering Judgment against the Appellants on all of their causes of action, awarding fees and costs to the City of Greenville, denying to Appellants the right to a jury trial on their equal protection claims, and for any further relief that this Court deems necessary and appropriate.

Respectfully Submitted,

s/Scarlet B. Moore

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June 9, 2023.